LEGISLATIVE BRIEFING PACKET

The "Charitable Choice" Provisions in the Welfare Bill:

A Burden on State Governments and Individual Religious Freedom

The Working Group for Religious Freedom in Social Services

The "Charitable Choice" Provisions in the Welfare Bill:
A Burden on State Governments and Individual Religious Freedom

EXECUTIVE SUMMARY

The "Charitable Choice" provisions were signed into law as part of the Welfare Reform legislation passed by the 104th Congress. These provisions pose particular problems for state governments and the religious liberty rights of taxpayers and social service beneficiaries.

The "Charitable Choice" provisions would force state governments to enter into contracts to provide taxpayer-funded social services with, and engage in government oversight of, "pervasively sectarian" religious institutions – activity that the U.S. Constitution and many state constitutions forbid. States would be forced to enter into such contracts under threat of lawsuit. If a state chooses to abide by the Constitution and refuse to fund a certain religious institution, "Charitable Choice" provides the religious institution with a statutory lawsuit against the state. If the state chooses to fund the institution, it would open itself up to constitutional challenges. Therefore, a state would be subject to litigation no matter what its decision.

The delicate balance between church and state devised by the Founders and embodied in the First Amendment would be greatly disrupted by the "Charitable Choice" provisions. The Establishment Clause of the Constitution was intended to protect the religious liberty of all Americans and allow religion to operate free from government coercion or control. Thus, the Supreme Court has ruled that the government cannot fund or entangle itself with pervasively sectarian religious institutions or programs. In direct contradiction to this caselaw, "Charitable Choice" would authorize any religious institution to claim "discrimination" if the institution is denied government funds because of its pervasively sectarian nature.

"Charitable Choice" also permits religious institutions to discriminate in employment against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Congress should not authorize such government-funded religious discrimination. Beneficiaries of government health or social service programs would also suffer violations of their religious liberty rights. "Charitable Choice" fails to provide beneficiaries with any notice of their right to object to their assigned religious provider.

Finally, "Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to become dependent on government dollars and subject to government oversight and regulation. For these reasons, many religious individuals and denominations have spoken out in opposition to "Charitable Choice."

The "Charitable Choice" Provisions in the Welfare Bill:
A Burden on State Governments and Individual Religious Freedom

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The Working Group for Religious Freedom in Social Services

Member Organizations:

American Baptist Churches USA ι American Civil Liberties Union ι American Council on Education
American Humanist Association ι American Jewish Committee ι Americans for Democratic Action
Americans for Religious Liberty ι Americans United for Separation of Church and State
Anti-Defamation League ι B'nai B'rith ι Baptist Joint Committee on Public Affairs
Church of the Brethren ι People for the American Way ι Presbyterian Church USA
The Rabbinical Assembly ι Religious Action Center of Reform Judaism
Unitarian Universalist Association ι Women's American ORT

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SECTION
A

A BURDEN ON STATES

The Federal "Charitable Choice" Scheme:

A Burden on States

The "Charitable Choice" provisions in the Welfare Reform bill will entangle state governments in a web of litigation and override state constitutional protections of religious liberty. The "Charitable Choice" provisions accomplish this by creating a new cause of action that religious institutions can bring against state governments for "discriminating" or denying an institution government funding based on its "religious character." However, under the U.S. and many state constitutions, state governments *must* consider an institution's "religious character" when deciding whether or not to provide funding.

The Supreme Court has ruled, in a series of decisions, that government funding and oversight of "pervasively sectarian" institutions, such as houses of worship, would violate the Establishment Clause of the First Amendment.[1] In addition, numerous state constitutions specifically prohibit such funding in order to protect the religious liberty rights of taxpayers and the fiscal autonomy religious institutions.[2] For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."[3]

"Charitable Choice" will clog state courts with a litigation explosion against state governments. The legislation presents state governments with a "Hobson's Choice" in deciding whether to contract with pervasively sectarian religious organizations to provide government-funded social services. With Charitable Choice in place, the state will be subject to a lawsuit no matter its decision. If a state government declines to contract with pervasively sectarian religious institutions because it determines that the funding of such entities would violate the Establishment Clause, then it will face a multitude of lawsuits from these institutions claiming "religious discrimination" under the "Charitable Choice" provisions. If a state decides to contract with pervasively sectarian institutions to avoid these "Charitable Choice" statutory causes of action, then the state will be sued over the Constitutional violation.

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[1] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[2] For a complete list of these state constitutional provisions, see "State Constitutional Provisions Violated by Charitable Choice" in this section.

[3] Missouri Constitution, Article I, Section 7.

Despite an apparent "non-preemption" clause, many state constitutional provisions that protect religious liberty will be preempted by the Federal "Charitable Choice" scheme. The Charitable Choice provisions contain the following section:

> (k) PREEMPTION: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of *State* funds in or by religious organizations.

(Emphasis Added). The key word in this preemption clause is the word "State" on the third line. Therefore, the only state constitutions that will not be preempted are those that restrict the diversion of *state funds* to sectarian institutions. This raises two issues: 1) the block-granted welfare funds will likely be considered *federal* -- not state -- funds; and 2) most of the state constitutional provisions that contain a funding prohibition restrict any "public" funds – including federal funds – from being diverted to sectarian institutions. Thus, *meaningless* state constitutional provisions will not be preempted, but those that will impact the Charitable Choice scheme could be – and would be under the "actual conflict" doctrine of inferred federal preemption.[4]

The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." State governments would be unable to ensure that beneficiaries of assistance, who in many cases will not be the same religion as the institutions providing services, are not subject to undue proselytization by religious institutions that contract to provide services. The "Charitable Choice" provisions explicitly prevent state governments from ensuring that government-funded social services are provided in areas that do not have excessive sectarian "art, icons, scripture" and "other symbols" on the wall. Furthermore, although section (j) of the provisions ostensibly prohibit the use of government funds for "sectarian worship, instruction, or proselytization," this section is unenforceable, because the government is not permitted to monitor the religious messages of pervasively sectarian institutions.[5]

"Charitable Choice" also renders states powerless to stop religious institutions from engaging in religious employment discrimination against workers who are paid with government funds and are exclusively working on government-funded social service programs. Although states may have law or constitutional provisions that prohibited government-funded religious employment discrimination, the "Charitable Choice" scheme overtly extends the Title VII employment discrimination exemption for private religious institutions to *government-funded* religious institutions and employees paid with taxpayer funds.

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[4] The state constitutional provisions will likely be found to "frustrate the purposes" of the federal Charitable Choice scheme. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78 (1987); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

[5] *Aguilar v. Felton*, 473 US 402, 412-13 (1985).

State Constitutional Provisions Violated by "Charitable Choice"

The "Charitable Choice" scheme would violate the following state constitutional provisions that protect the religious liberty rights of taxpayers and the fiscal autonomy of religious institutions. The Federal "Charitable Choice" legislation will preempt many of these state constitutional protections:

Arizona Constitution: Art. II, § 2, "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

Art. IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

California Constitution: Art. XVI, § 5, "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination. . . ."

Colorado Constitution: Art. V, § 34: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to . . . any denominational or sectarian institution or association."

Florida Constitution: Art. I, § 3: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

Georgia Constitution: Art. I, § 2, p. VII: "No money shall ever be taken from the public treasury directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."

Hawaii Constitution: Art. VII, § 4: "No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of [the Establishment Clause] of this constitution."

Idaho Constitution: Art. IX, § 5: "Neither the legislature, nor any county, city, town, township, school district, or other public corporation, shall ever make an appropriation, or pay from any public fund or moneys whatever, anything in aid of

any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian, or religious denomination whatsoever . . . provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, liens, or other transactions."

Illinois Constitution: Art. X, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or any other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian denomination whatever."

Indiana Constitution: Art. I, § 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

Massachusetts Constitution: Art. XLVI, § 2: ". . . no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

Michigan Constitution: Art. I, § 4: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary . . . ."

Minnesota Constitution: Art. I, § 16:"[No] money [shall] be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries."

Missouri Constitution: Art. I, § 7: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such . . . ."

Art. IX, § 5: "Neither the general assembly nor any county, city, town, township, school district, or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose. . . ."

Montana Constitution: Art. X, § 6: "(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose, or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to nonpublic education."

Nevada Constitution: Art. II, § 10: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes."

New Hampshire Constitution: Bill of Rights, Art. 83: "[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."

Oklahoma Constitution: Art. II, § 5: "No public money or property shall ever be appropriated, applied, donated, or used directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

Oregon Constitution: Art. I, § 5: "No money shall be drawn from the Treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly."

Pennsylvania Constitution: Art. III, § 29: "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association: Provided, that appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards an for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology."

South Dakota Constitution: Art. VI, § 3: "No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

Art. VII, § 16: "[T]he state or any county or municipality within the state [shall not] accept and grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes . . . ."

Texas Constitution: Art. I, § 7: "No money shall be appropriated or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes."

Utah Constitution: Art. I, § 4: "There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or

property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

Virginia Constitution: Art. I, § 16: "And the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax . . . for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please."

Art. IV, § 16, "The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association."

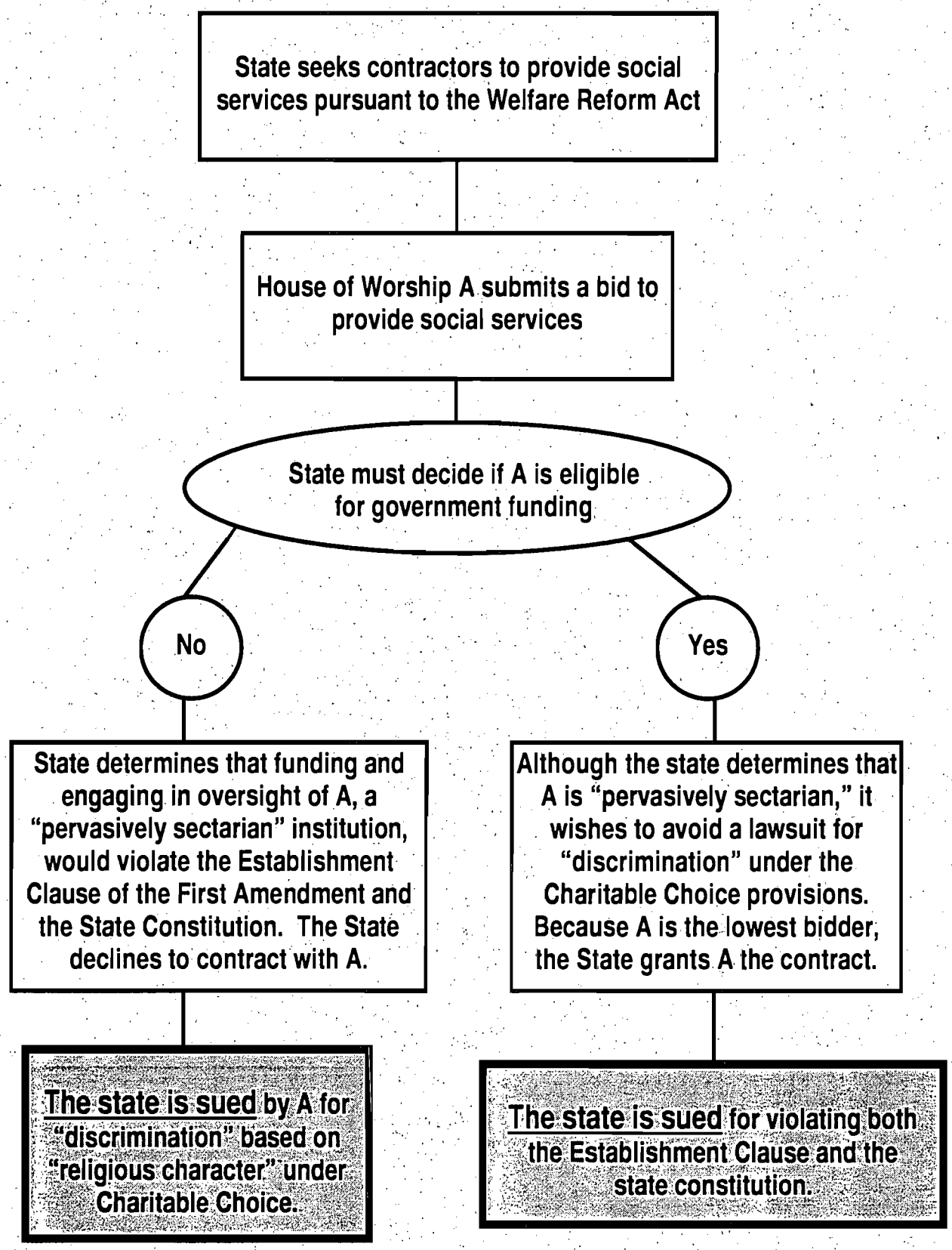
Washington Constitution: Art. I, § 11: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . ."

West Virginia Constitution: Art. III, § 15: "[T]he Legislature shall not . . . confer any peculiar privileges or advantages of [sic] any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax . . . for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please."

Wisconsin Constitution: Art. I, § 18: "[No] money [shall] be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Wyoming Constitution: Art. 1, § 19: "No money of the state shall ever be given or appropriated to any sectarian or religious society or institution."

ANATOMY OF A LAWSUIT:
The Charitable Choice Provisions in Operation



SECTION
B

GROUPS OPPOSING THE "CHARITABLE CHOICE" PROVISIONS AND LETTERS FROM RELIGIOUS LEADERS

Religious, Educational, Health, and Civil Liberties Organizations that oppose the "Charitable Choice" provisions

American Baptist Churches USA
American Civil Liberties Union
The American Ethical Union
American Federation of State, County and Municipal Employees
American Jewish Committee
American Jewish Congress
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Children's Healthcare is a Legal Duty (CHILD, Inc.)
Church of the Brethren, Washington Office
General Board of Church and Society, The United Methodist Church
Hadassah, W.Z.O.A.
National Black Women's Health Project
National Council of Jewish Women
National Education Association
NOW Legal Defense and Education Fund
People for the American Way Action Fund
Presbyterian Church USA
Union of American Hebrew Congregations
Unitarian Universalist Association, Washington Office
United Church of Christ, Office for Church in Society
Wider Opportunities for Women
The Women and Poverty Project of Wider Opportunities for Women
Women of Reform Judaism, The Federation of Temple Sisterhoods
Women's American ORT
Women's International League for Peace and Freedom
The Workmen's Circle / Arbeter Ring
Youth Law Center

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J. Brent Walker
General Counsel

April 1, 1996

Dear Senator:

The Baptist Joint Committee strongly opposes the inclusion of Senator Ashcroft's "Charitable Choice" provisions in any kind of legislative vehicle.

The so-called "Charitable Choice" provisions are a frontal assault on the First Amendment's Establishment Clause which would provide direct, public funding to pervasively sectarian institutions. As you may know, the Supreme Court has approved government funding of religiously affiliated organizations, such as Catholic Charities, so long as tax dollars do not pay for proselytizing service beneficiaries (*Bowen v. Kendrick*, 487 U.S. 589 (1988)). The Ashcroft language would allow state-funded social services to be provided in houses of worship, the display of religious icons where services are provided, and religious discrimination in the employment of social workers.

The potential for harm to the Constitution is apparent, but the Ashcroft language would hurt churches as well. By accepting government funds, sectarian service providers will be open to government audits and whatever other meddling the state can get away with on threat of cancelling funding. Religious institutions will also suffer when they find that their new dependence on public money compromises their ability to criticize the government. How supportive of the civil rights movement would churches have been if they had been afraid of losing their funding?

As Baptists, we have a long history of defending religious liberty and freedom of conscience. Religion is a voluntary, personal matter which must not be coerced. These provisions would force some individuals to expose themselves to proselytizing influences in order to obtain social services. No mechanism is included to inform beneficiaries of their right to an alternate provider, and no redress is guaranteed to a service recipient who is discriminated against on the basis of religion.

In short, Ashcroft's legislation is less about providing the best social services than it is about funnelling public money to inappropriate uses. This we oppose.

Sincerely,

J. Brent Walker

JBW:pk

Alliance of Baptists
American Baptist Churches in the U.S.A.
Baptist General Conference
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
Seventh Day Baptist General Conference
Southern Baptist state conventions & churches

Church of the Brethren Washington Office

110 Maryland Avenue, N.E. Box 50 Washington, D.C. 20002 202 546 3202

March 28, 1996

Dear Senator:

On behalf of the Church of the Brethren, I write to urge you to oppose the "Charitable Choice" provisions which are expected to be offered by Senator John Ashcroft in his effort to provide federal assistance to religious social service agencies.

The proposed provisions would very likely result in competitive and divisive disputes among religious organizations competing for federal funding for community social service programs. If this approach were adopted, essential funding would be directed toward religious organizations with the strongest social and political influence in a given community. Dependence on federal funding for religious missions would have an extremely adverse effect upon these much-needed social programs.

In addition to this troublesome aspect of Senator Ashcroft's proposal, we are also quite concerned about the manner in which the provisions would violate the Constitution's establishment clause. Sen. Ashcroft's proposal would relocate government-funded social service programs to pervasively sectarian religious institutions, such as houses of worship. If this were the case, federal funds could be used in a religious settings in which religious symbols were prominently displayed and where religious proselytizing could take place.

In 1989, the Church of the Brethren Annual Conference—the highest authoritative body in our denomination—adopted the statement, "No Force in Religion: Religious Liberty at the 21st Century." In this important policy statement our church declared, "We believe it essential to avoid government sponsorship of a particular religious body and to assure sensitivity to those who are religious minorities. Cooperation between the state and religious bodies should not involve official recognition or confer special status upon a particular religious body."

I urge you to carefully consider the manner in which Sen. Ashcroft's proposed provisions would seriously jeopardize the essential separation of church and state and would have a devastating effect upon many cherished principles of our American tradition of religious liberty.

Thank you for considering our views on this important and timely concern.

Sincerely yours,

Timothy A. McElwee

Rev. Dr. Timothy A. McElwee
Director

38 Fifth Avenue, New York, NY 10021-7064
212 650-4050, Fax 212 650-4059

Women of
Reform Judaism
The Federation of Temple Sisterhoods

Ellen Y. Rosenberg
Executive Director

April 1, 1996

Dear Senator:

I am writing in behalf of Women of Reform Judaism, the Federation of Temple Sisterhoods, comprised of over 100,000 women in 600 affiliated groups nationwide, in opposition to Senator Ashcroft's "Charitable Choice" provisions. We oppose the "Charitable Choice" provisions because they present many problems of constitutionality and impracticability.

The "Charitable Choice" provisions fly in the face of the Establishment Clause of the First Amendment of the Constitution because they would direct government funds to "pervasively sectarian" religious institutions (such as houses of worship) for social service programs. By allowing the furnishing of social services in houses of worship, with the right to display religious symbols in areas where the government-funded services are provided, the "Charitable Choice" provisions enable these institutions to expose beneficiaries to religious activities and missionizing. This legislation would also grant all religious institutions the right to be eligible to contract with a state to deliver social services and would prevent states from requiring them to do so in a religion-free milieu.

We are also distressed by the explicit discrimination permitted by the "Charitable Choice" language. The exemption from the prohibition on religious discrimination in hiring granted to religious institutions in Title VII of the federal civil rights law should not be expanded to include employees hired to work on social service programs funded by the government. This bill would expand the exemption to include such employees and would moreover permit religious organizations to require that employees follow the religion of the institution.

In many communities religious institutions already provide social services with private funds. Indeed, our local Sisterhoods are active in community food programs, at shelters for homeless people and those for battered women and in countless community education programs. The autonomy and freedom of the churches, synagogues and mosques involved in social service programming could well be harmed by dependence on federal funding.

Deeply rooted in the religious values and prophetic mandate of our tradition, Women of Reform Judaism takes this opportunity to speak out in defense of the

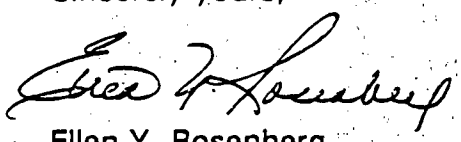
Founded January 21, 1913

15 Countries, 600 Sisterhoods, [illegible] Women

Women of Reform Judaism is an affiliate of the Union of American Hebrew Congregations, the World Union for Progressive Judaism, works on behalf of the Hebrew Union College-Jewish Institute of Religion, and is the founder of the Jewish Braille Institute of America, Inc.

Constitution and of religious liberty. We urge you not to undermine America's unique and valued religious freedoms - we urge you to oppose the "Charitable Choice" provisions.

Sincerely yours,



Ellen Y. Rosenberg
Executive Director

WASHINGTON OFFICE
NATIONAL MINISTRIES DIVISION
PRESBYTERIAN CHURCH (USA)

Dear Senator, May 3, 1996

The "Charitable Choice" provision as introduced by Senator Ashcroft, would harm religion; the religious liberty of taxpayers; social service beneficiaries; and States' rights. The General Assembly of the Presbyterian Church (USA) has historically supported the religious liberty of all Americans and the right of religion to operate free from government coercion or control.

In a 1988 policy statement entitled, **"God Alone Is Lord of the Conscience"**, the General Assembly noted that under the Free Exercise clause the church should be free of both government interference and government regulation in ordering its life and activity, except where truly compelling government interests are at stake. When government appropriates funds for a constitutionally permitted social service to citizens and structures in such a way that private agencies are permitted to act as agents for government in the delivery of the service, we believe that churches should be eligible to receive such funds, but with significant conditions that do not jeopardize the right of the church to control its religious affairs or impose its own doctrine on others from the general public who may come to it for such services.

When public funds come to the church, the area of permissible government regulation of the church's activity is widened; and the church's right to structure its activity to reflect its religious character and purpose is narrowed. Public funds require public accountability and may not be used in ways that advance or support religion, whether or not in the context of charitable service.

The church is not obligated to accept public funds to support its works of humanitarian service and indeed may deem the necessary conditions too harsh to meet. There is no constitutional right to receive such public funds; their denial in order to avoid palpable infringement of the establishment prohibition does not itself constitute a burden on the free exercise of religion. The church may initiate service ministries and operate service agencies, either for its own adherents or for the public, without governmental intervention and regulation when it uses its own resources to do so. When it wishes to use public funds for serving public needs, the church should understand that it gives implied consent to necessary and proper governmental regulation and supervision, and to the civil compact concerning the organic relationship between church and state.

"Charitable Choice" will harm religion's historic autonomy from government. The provisions will cause religious institutions to be subject to government oversight and regulation. The Charitable Choice provision should be defeated.

Sincerely,

Eleanora Giddings Ivory

Rev. Eleanora Giddings Ivory
Director, Washington Office
Presbyterian Church (USA)

110 Maryland Avenue, N.E. • Washington, DC • 20002 • (202) 543-1126

Unitarian Universalist Association of Congregations

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Washington Office
for Social Justice

May 7, 1996

Dear Senator:

I write to express the opposition of the Unitarian Universalist Association to Senator John Ashcroft's "Charitable Choice" provisions to any public health or social service bill.

The Unitarian Universalist Association stands firmly behind the First Amendment. Senator Ashcroft's "Charitable Choice" provisions would undermine that amendment in several disturbing ways. It would also cause a great deal of trouble if it were implemented in a local community.

For instance, the provisions would permit government social services to be provided in houses of worship. This would mean the government's choosing to fund some religious institutions in a community, and not others--sending funds, for instance, to the local Baptist congregation but not to the Presbyterian one. This would inevitably lead to tensions between church leaders and legislators, and result as well in tensions between various religious groups. It would also cheapen the faith of every religious congregation, by necessitating that some people live out the mandate to feed the poor and clothe the naked by giving generously from their own resources, while others could sit back and let the government provide services under the apparent auspices of the congregation.

Equally disturbingly, the provisions would grant an explicit right for contractors to display religious symbols in areas where government services were provided. This might lead recipients of services to feel discomfort or to feel religiously devalued. If, for instance, a Christian recipient received services in a Hindu shrine, she or he might feel uncomfortable with the unfamiliar imagery and icons.

Also of grave concern is the fact that the provisions allow religious contractors to discriminate in all areas of employment, including the off-the-job conduct of employees. If, for instance, a Muslim House of Worship were funded to provide services, that Mosque could demand that a Christian employee pray to Allah five times per day. Needless to say, the Christian might very likely feel that such enforced prayer was a violation of his or her religious and civil liberties.

On behalf of Unitarian Universalists across the country, I urge you to refuse to support Senator Ashcroft's "Charitable Choice" provisions on any bill.

With warmest wishes.

Meg A. Riley

The Rev. Meg A. Riley
Director, Washington Office for Faith In Action

Nan Rich
National President

April 1, 1996

Dear Senator:

On behalf of the 90,000 members of the National Council of Jewish Women (NCJW), I am writing to urge you to oppose the inclusion of Sen. John Ashcroft's (R-MO) "Charitable Choice" provisions in any public health or social services legislation. These provisions, which would permit states to contract government-funded social services to pervasively sectarian religious institutions, are in clear violation of the First Amendment's Establishment Clause. These "Charitable Choice" provisions would pose a direct threat to our nation's longstanding commitment to the separation of religion and state and the preservation of religious liberty.

NCJW believes that the "Charitable Choice" provisions would promote religious discrimination and the infringement of religious liberty. These provisions explicitly grant a right to religious contractors to provide government services in a house of worship while allowing them to display religious "art, icons, scripture" and "other symbols" where the government-funded services are provided. As a result, beneficiaries of government services would be exposed, often unwillingly, to a church or synagogue's religious beliefs, directly imposing on the individual's religious liberty. These provisions would also allow contractors to engage in religious discrimination against employees who are paid by government funds. Although religious organizations are currently granted a religious discrimination exemption under Title VII of the federal civil rights law, such an exemption should not apply to employees paid through government contracts or funds.

One intent of the "Charitable Choice" provisions is to encourage religious institutions to provide social services in their communities. Many churches and synagogues already provide these services with private funds. NCJW believes that contracting with religious institutions to provide government services with public funds would create the dangerous precedent of government funding of religion and government-sanctioned infringement of religious liberty.

The National Council of Jewish Women strongly believes that religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in our democratic society. As such, we urge you to oppose Sen. Ashcroft's "Charitable Choice" provisions.

Sincerely,

Nan Rich
National President

National Council of Jewish Women • 53 West 23rd Street, 6th Fl. • New York, NY • 10010 • (212) 645-4048 • Fax (212) 645-7466

General Board of Church and Society of The United Methodist Church
100 Maryland Avenue, N.E., Washington, D.C. 20002 • (202) 488-5600

May 10, 1996

Dear Senator:

Senator John Ashcroft has tried to attach the "Charitable Choice" provisions to various public health and social service bills. We believe that, if signed into law, such provisions would threaten the taxpayers' religious freedom and would set a precedent by promoting a specific religion with the use of tax dollars.

The United Methodist Church clearly states its stance on the use of public funds for churches in ***The Book of Resolutions***, p. 469. It states that churches "should not expect all taxpayers, including those who adhere to other religious belief systems, to provide funds to teach religious views with which they do not agree."

The Ashcroft proposal would disrupt the balance between church and state as embodied in the First Amendment. The "Charitable Choice" provisions would permit religious institutions to discriminate against workers, who will be paid with taxpayer funds, based on their religious beliefs or practices. Further, the proposal does not provide adequate protection for the religious liberty of social service beneficiaries. We believe that the "Charitable Choice" provisions would place at risk the freedom and autonomy that religion has enjoyed in the United States.

As people of faith and freedom, we urge you to oppose any attempts that are antithetical to the American ideal of religious liberty.

Sincerely,

Dr. Thom White Wolf Fassett
General Secretary

TWWF/eyr

SECTION
C

CONSTITUTIONAL AND POLICY ANALYSIS

The Working Group for
Religious Freedom in Social Services

Constitutional and Policy Analysis of the "Charitable Choice" Provisions

The "Charitable Choice" provisions, which were passed as Section 104 of H.R. 3734, the welfare reform bill, present many constitutional and policy problems. This memorandum will outline the dangers the provisions pose to state governments, the religious liberty rights of beneficiaries of assistance, and the mission of religious faiths.

Voices from across the political spectrum have criticized these provisions for the policy problems they present. Organizations ranging from the American Civil Liberties Union to the Institute for Justice have questioned the constitutionality of "Charitable Choice."

The "Charitable Choice" Provisions Violate the Constitution's Establishment Clause

The Charitable Choice provisions create a new federal right that religious institutions will be able to enforce in state court. The provisions authorize religious institutions to sue a state government (or the federal government) for "discrimination" if the state denies the institution a contract to provide social services because of the institution's "religious character." However, as will be explained below, both the U.S. Constitution and many state constitutions require governmental entities to examine the religious character of an institution before declaring it eligible for government funding. Under Charitable Choice, such compliance with constitutional law will now subject states to litigation.

Current law permits "religiously affiliated" organizations, such as Catholic Charities, to provide social services with government funds. These "religiously affiliated" organizations receive government grants for social work because they are not "pervasively sectarian," and thus government funding and oversight of such organizations does not *per se* raise an Establishment Clause violation. However, the Supreme Court has ruled that "pervasively sectarian" institutions, such as houses of worship, cannot receive taxpayer dollars because government funding and monitoring of these institutions would violate the Establishment Clause.[1] The "Charitable Choice"

[1] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988). The *Bowen* Court explained that "[o]nly in the context of

provisions throw off this careful balance of current law, by granting *any* religious institution a statutory *right* to receive funding from the government – whether "pervasively sectarian" or not.

It is clear from the language of the Charitable Choice provisions that it will result in unconstitutional government funding and monitoring of houses of worship and other "pervasively sectarian" institutions. In various cases, the Supreme Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission.[2]

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where government-funded services are provided; 3) allow religious contractors to discriminate against employees based on their religious beliefs -- including employees paid with government funds who work on taxpayer-funded programs.

Furthermore, Section (j), "Limitation on Use of Funds for Certain Purposes," which purports to prohibit the use of government contract funds for "sectarian worship, instruction, or proselytization" is absolutely *unenforceable*. The Supreme Court has made it clear that the government may not monitor the internal religious messages of pervasively sectarian institutions.[3] Such monitoring and oversight would violate religion's autonomy from government and constitute excessive entanglement.

Another entanglement problem with the "Charitable Choice" provisions is that it explicitly subjects religious institutions to government audits and financial regulations. Such regulatory intrusion by the government into a pervasively sectarian institution's financial books would violate the Constitution.[4]

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aid to 'pervasively sectarian' institutions have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would knowingly or unknowingly, result in indoctrination." *Id. See also Grand Rapids School District v. Ball*, 473 U.S. 373, 384 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[2] *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids*, 473 U.S. at 384 n.6; *Hunt*, 413 U.S. at 743; *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

[3] *Aguilar v. Felton*, 473 U.S. 402, 412-13 (1985).

[4] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Additionally, the "Charitable Choice" provisions raise the constitutional issue of religion acting in the place of government. For example, a state could contract with a religious denomination for the administration of AFDC benefits in a certain geographical area. Thus, the religion could evaluate and determine welfare eligibility and administer and distribute cash assistance – essentially acting as an arm of government. The Supreme Court has held that even the *appearance* of such joint authority by religion and the state is unconstitutional.[5]

The Provisions Authorize Employment Discrimination Based on Religion

The "Charitable Choice" provisions would allow a religious organization to engage in religious discrimination against employees who are being paid with taxpayer funds. Although religious organizations are currently granted an exemption from the prohibition on religious employment discrimination in Title VII of the federal civil rights law, this exemption should not extend to employees who are hired to work on, and are paid through, government grants or contracts.

"Charitable Choice" explicitly extends the Title VII exemption to religious institutions and programs that are funded with taxpayer dollars. Such government-funded religious employment discrimination would raise violations of both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

"Charitable Choice" Does Not Protect Beneficiaries' Religious Liberty Rights

The "Charitable Choice" provisions do not provide adequate protection for the religious liberty of social service beneficiaries. Under the legislation, a state could completely shift government-funded social services for a certain geographic area or a specific social service to a religious denomination. This, of course, would lead to innumerable violations of the religious liberty rights of beneficiaries who are assigned to religious organizations to receive social service benefits and services -- especially those beneficiaries whose religious beliefs will be different than that of the provider.

Despite these obvious problems, the legislation does not provide for notice to be given to beneficiaries informing them of their right to request an alternative provider of services. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits. Furthermore, as noted above, state governments will be constitutionally prohibited from enforcing the prohibition on the use of

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[5] *Larkin v. Grendel's Den*, 459 U.S. 119 (1982).

funds for "sectarian worship, instruction, or proselytization."[6]

The Federal "Charitable Choice" Provisions Trump State Constitutional Rights

Despite an apparent "non-preemption" clause, many state constitutional provisions that protect religious liberty will be preempted by the Federal "Charitable Choice" scheme. The Charitable Choice provisions contain the following section:

> (k) **PREEMPTION**: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of *State* funds in or by religious organizations.[7]

The key word in this preemption clause is the word "State" on the third line. Therefore, the only state constitutions that will not be preempted are those that restrict the diversion of *state funds* to sectarian institutions. This raises two issues: 1) the block-granted welfare funds will likely be considered *federal* -- note state -- funds; and 2) most of the state constitutional provisions that contain a funding prohibition restrict any "public" funds – including federal funds – from being diverted to sectarian institutions. Thus, *meaningless* state constitutional provisions will not be preempted, but those that will impact the Charitable Choice scheme could be – and would be under the "actual conflict" doctrine of inferred federal preemption.[8]

The Provisions Will Have an Adverse Effect on Religious Mission

The "Charitable Choice" language will adversely effect the religious mission of many houses of worship. Part of the rationale for Charitable Choice is to encourage religious institutions to provide social services to their communities. In fact, many churches, synagogues and mosques already provide these benefits to their communities, and do so very well with *private* funds. Dependence on federal funding, and the oversight and regulations that come with it, will severely undermine the constitutionally-based autonomy that religious institutions enjoy.

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[6] *See* Note 3 and accompanying text.

[7] H.R. 3734, 104th Cong., 2d Sess. § 104(k) (1996) *(emphasis added)*.

[8] The state constitutional provisions will likely be found to "frustrate the purposes" of the federal Charitable Choice scheme. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78 (1987); *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

Timothy Lamer, an Evangelical Christian critical of the "Charitable Choice" provisions, wrote in *The Weekly Standard* that

> Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.[9]

Mr. Lamer went on to state that

> a basic tenet of [religious liberty] is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars... Whichever sects have the most influence in each state will get the coveted funds.[10]

Marvin Olasky, author of *The Tragedy of American Compassion*, wrote in *USA Today* that the "Charitable Choice" provisions would lead "religious groups into temptation."[11] Olasky explained that Ashcroft's provisions "miss[] an important point" - that "Christian efforts take a bite out of poverty because of Christ," and unless religious groups "cheated by sliding money from one category to another" they would violate the prohibition on the direct use of government funds for sectarian worship or instruction.

If the government begins funding services traditionally funded by the church community, a likely result will be a drop in participation in such activity by church members and increased dependence on government funding. The influence of federal dollars and oversight will surely undermine the mission of religious institutions.

Conclusion

The "Charitable Choice" provisions violate the Constitution and are antithetical to the American ideal of religious liberty. The legislation puts state governments in an impossible position, and will only subject states to an avalanche of litigation. "Charitable Choice" presents both the problem of government funding of religion *and* religion acting in the place of government. Congress would do

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[9] Timothy Lamer, *I Gave at Church*, The Weekly Standard, January 15, 1996, at 13-14.

[10] *Id.*

[11] Marvin Olasky, *Holes in the Soul Matter as Much as Dollars*, USA Today, February 15, 1996, at 12A.

taxpayers and religion greater justice by leaving houses of worship free of federal interference and the influence of government dollars. Religious institutions already provide religious social services -- with parishioners' *private* contributions. Congress should not undermine this tradition by inviting "Big Government" into our nation's houses of worship.

SECTION
D

RESPONSE TO SENATOR ASHCROFT'S TALKING POINTS

POINT-BY-POINT RESPONSE TO SENATOR ASHCROFT'S DOCUMENT ENTITLED:

"CONSTITUTIONAL ARGUMENTS REGARDING THE 'CHARITABLE CHOICE' CLAUSE"

In the Fall of 1995, Senator Ashcroft distributed a document defending the constitutionality of the Charitable Choice provisions. The Ashcroft document was written specifically to support an amendment to the Older Americans Act. This document responds to Senator Ashcroft's document. It is organized consistent with, and bears the same section headings as, the Ashcroft document.

1. The Establishment Clause would be violated if we allowed religious organizations to receive government funds to provide services to older Americans.

What Senator Ashcroft's document does not mention: Religiously-affiliated organizations, such as Catholic Charities, are already eligible to receive government funds to provide non-sectarian social services to government beneficiaries. What the "Charitable Choice" provisions would do is give "pervasively sectarian" religious institutions, such as a house of worship, a statutory "right" to provide government-funded social services.

Senator Ashcroft's document correctly states that the Supreme Court has not permitted the funding of religious institutions that are "pervasively sectarian" because it would violate the Establishment Clause. *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988). However, the document *incorrectly* states that "nothing in the text of the Charitable Choice clause indicates that money will flow to such organizations."

A quick reading of the "Charitable Choice" provisions reveals that it is solely aimed at funding institutions that the Supreme Court has characterized as "pervasively sectarian." In various cases, the Court listed among the factors to be used to determine if an institution is "pervasively sectarian": 1) location near a house of worship; 2) an abundance of religious symbols on the premises; 3) religious discrimination in the institution's hiring practices; 4) the presence of religious activities; and 5) the purposeful articulation of a religious mission. *See Wolman v. Walter*, 433 U.S. 229, 234 (1977); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 n.6 (1985); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 755 (1976).

The "Charitable Choice" provisions would: 1) permit the provision of government social services *in*, not merely *near*, a house of worship; 2) explicitly grant a *right* to religious contractors to display religious "art, icons, scripture" and "other symbols" in any abundance in areas where government-funded services are provided; 3) allow religious contractors engage in religious employment discrimination. Additionally, any services provided in a house of worship would

undoubtedly expose beneficiaries to religious activities and expression of the sanctuary's religious mission. Thus, it is very likely that "pervasively sectarian" institutions will receive government contracts under "Charitable Choice."

2. There is no precedent for allowing religious organizations to receive federal funds to provide services to Older Americans.

What Senator Ashcroft's document does not mention: Although the Supreme Court approved the facial constitutionality of the Adolescent Family Life Act (AFLA), that statute, while allowing religious organizations to participate, did not contain provisions similar to the "Charitable Choice" language. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

The "Charitable Choice" language differs from the AFLA statute in the following ways:

* Unlike AFLA, it would give *all* religious institutions the "right" to be eligible for government funding.

* Unlike AFLA, it would explicitly authorize religious institutions to engage in religious employment discrimination against workers who will be paid with taxpayer dollars.

* Unlike AFLA, it would allow government vouchers and certificates to be used for "sectarian worship, instruction, or proselytization."

* Unlike AFLA, it would explicitly preempt state constitutional provisions that protect the religious liberty rights of state citizens.

* Unlike AFLA, it would explicitly prevent states from ensuring that government funded social services are provided in an environment free of proselytizing symbols and expression.

* Unlike AFLA, it would clog state courts with a new cause of action against the state by religious institutions that were not granted contracts for services.

* Unlike AFLA, it would foster excessive government entanglement with religion by authorizing wide-ranging financial audits of religious institutions that receive, but do not segregate, federal funds under the Older Americans Act.

Additionally, the institutions receiving federal funds under AFLA do so by way of federal *grants*. The "Charitable Choice" provisions do not authorize grants to religious institutions; rather it calls for *contracts* between the government and religious institutions. This is significant because as a contractor, a religious institutions will not simply be funded by the government, but also acting *in place* of the government.

Such activity, in which religious institutions would act as an arm of the state with respect to

social service programs, would violate the Supreme Court's ruling in *Larkin v. Grendel's Den*, 459 U.S 119 (1982), in which the Court overturned a zoning statute that allowed churches to participate "in the exercise of substantial government powers" in violation of the Establishment Clause. The "Charitable Choice" scheme would create the same appearance of joint authority by church and state that the *Larkin* case found to be unconstitutional.

Furthermore, all of the religious groups cited in Senator Ashcroft's document that participate in federal refugee resettlement activities are religiously-affiliated organizations, not pervasively sectarian institutions. These groups are currently eligible to, and do, participate in federally funded social service programs, even without the "Charitable Choice" provisions. The Ashcroft provisions are therefore an intentional departure from the already inclusive current law.

3. Beneficiaries should not be able to redeem vouchers with religious service providers.

What Senator Ashcroft's document does not mention: No court has ever upheld the use of government dollars for vouchers to be redeemed for religious worship or instruction (as the "Charitable Choice" provisions would explicitly allow.) *See PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

The cases cited by Senator Ashcroft involve facts in which only an "attenuated financial benefit" flowed to a sectarian organization. In fact, in one of the cases cited, *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state tax deduction for parents for expenses incurred in providing tuition, textbooks and transportation for their children attending public and private schools, including religious schools. However, the Supreme Court ruled that unlike the actual transfer of funds, the tax deduction for parents provided merely an "attenuated financial benefit" to the religious schools. *Id.* at 399. The Court went on to explain that "the direct transmission of assistance from the State to the [religious institution] themselves" would be unconstitutional. *Id.*

Most recently, the Supreme Court reaffirmed this principle in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ___, 132 L.Ed.2d 700 (1995). The majority decision in *Rosenberger* stated very clearly that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 725.

4. Subsection (j) provides that taxpayer dollars made available under certain titles and programs may be expended for "sectarian worship or instruction" in patent violation of the Establishment Clause.

What Senator Ashcroft's document does not mention: Subsection (j) explicitly allows government vouchers or certificates to be redeemed for sectarian worship or instruction. Senator Ashcroft's document defends this use of funds by explaining that "when beneficiaries exercise personal choice in the use of their benefit at similarly situated institutions, whether public, private nonsectarian, or religious, there is no Establishment Clause violation."

However, the Supreme Court has disagreed with this interpretation of Constitutional law. The Supreme Court has found that disbursing benefits through vouchers has the same effect on funding the sectarian activities as aiding the pervasively sectarian institution directly. According to the Court, the government funds merely pass through the voucher recipient to the religious institution in a "legalistic minuet." *PEARL v. Nyquist*, 413 U.S. 756, 790 (1973).

Furthermore, Section (j), which purports to prohibit the use of government contract funds for sectarian worship, instruction, or proselytization is absolutely *unenforceable*. The Supreme Court has made it clear that the government may not monitor the internal religious messages of pervasively sectarian institutions. *Aguilar v. Felton*, 473 U.S. 402, 412-13 (1985). Such monitoring and oversight would violate religion's autonomy from government and constitute excessive entanglement.

5. Religious organizations should not be able to discriminate in their hiring practices if they receive government funds.

What Senator Ashcroft's document does not mention: Title VII's exemption that allows religious institutions to discriminate in hiring based on an applicant's religion does not contemplate a government-supported religious institution's ability to engage in discrimination with *taxpayer funds*.

Senator Ashcroft's document states that: "The Supreme Court has never ruled on this issue, so for the time being, Congress should err on the side of allowing as much freedom as possible." How is "freedom" equivalent to discriminating against people based on their religious beliefs and practices? Doesn't "religious freedom" dictate that Americans should be free to practice the religion of their choice, without fear of being fired from government-funded employment?

6. The Charitable Choice provision would violate the religious liberty of aid recipients.

What Senator Ashcroft's document does not mention: Although the legislation states that a voucher for an alternative provider may be given to a beneficiary who objects to a religious provider he or she is assigned to, the "Charitable Choice" language does not require that beneficiaries receive *notice* of their right to object to a religious provider. Thus, a beneficiary might assume that they have no option but to go to the assigned religious institution or forgo their benefits.

7. Subsection (d) specifically allows funding to religious institutions, even if they place sectarian symbols and messages in areas in which they provide government services to clients.

What Senator Ashcroft's document does not mention: The Supreme Court has ruled that one of the factors in determining whether a religious institution is pervasively sectarian, and therefore ineligible to receive government funding, is whether an abundance of religious symbols appear on the institution's premises. *Wolman v. Walter*, 433 U.S. 229, 234 (1977). The

"Charitable Choice" clause explicitly prevents states from ensuring that government benefits are provided in a environment without an undo amount of "religious art, icons, scripture, or other symbols."

Senator Ashcroft's document cites *Otero v. State Election Bd. of Oklahoma*, 975 F.2d 738, 740-41 (10th Cir. 1992), in which the held Tenth Circuit held that the use of church property as a polling place did not violate the Establishment Clause. However, the court relied on the fact that the election activity would likely occur at some "nonconsecrated portion of the church building which can be used as a polling place." *Id.* at 741. Under the "Charitable Choice" provisions, however, religious institutions would not only be permitted to provide government-funded services in a consecrated and heavily sectarian environment, but state governments would be *prevented* from requiring that government services be provided in nonconsecrated areas or environments free of heavy proselytizing expression and symbolism.

8. Subsection (g) fosters excessive government entanglement with religion by apparently authorizing wide-ranging financial audits of any religious institution that receives, but does not segregate, federal funding under the Older Americans Act reauthorization bill.

What Senator Ashcroft's document does not mention: The audit provision only protects the religious institution *if* it chooses to segregate the funds. Since the provisions do not require the funds to be segregated, the religious institution may commingle its own private funds with the government funds. If such commingling does occur, it would either: (1) subject the institution to government oversight of its entire books; or (2) prohibit government accountability over any of the money, including the taxpayer funds.

By instructing religious institutions on how to keep their financial books, the "Charitable Choice" provisions further entangle government in the business of religious institutions. Furthermore, the "nondiscrimination" concept would work both ways, as the government would apply to religious institutions the same oversight and investigatory practices it employs with nonsectarian organizations and businesses it contracts with.

9. Subsection (h) gives religious institutions receiving or desiring federal funding a special right to sue the government, while denying a similar right of legal action to beneficiaries to seek relief from religious discrimination by organizations providing services.

What Senator Ashcroft's document does not mention: The "Charitable Choice" federal directives bind the hands of state governments under the guise of "nondiscrimination against religious organizations." As explained in Point #1, the Supreme Court has ruled that "pervasively sectarian" organizations cannot receive government funding, and state governments, in order to avoid a violation of the U.S. Constitution, are required to examine the sectarian nature of an institution before it provides funds to it.

Under the Ashcroft language, if a state government denies contracts because it determines

that the funding of certain "pervasively sectarian" religious entities would violate the Establishment Clause, then it will face a multitude of lawsuits from any number of such religious institutions claiming "discrimination" under the "Charitable Choice" cause of action. This would leave states with a court-clogging "Hobson's Choice" - if funds are distributed to "pervasively sectarian" institutions they would face a Constitutional lawsuit, and if funds are withheld they would face a statutory cause of action under "Charitable Choice."

Furthermore, the federal "Charitable Choice" legislation would likely preempt numerous state constitutions that contain provisions designed to protect the religious liberty of its citizens. For example, the Constitution of the state of Missouri contains the following provision: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..." Missouri Constitution, Article I, Section 7. Over half of the states have such a constitutional provision.

10. <u>There is a danger that a religious organization would be the only available service provider in certain areas</u>.

What Senator Ashcroft's document does not mention: While acknowledging that this is a "conceivable hypothetical problem," Senator Ashcroft states that "beneficiaries who object to receiving services from a religious provider have a right to receive services from the state through an alternative provider." However, the legislation does not provide notice to the beneficiary of his or her right to object. Without such notice, a beneficiary might choose to forgo benefits rather than suffer a violation of religious liberty.

SECTION
E

PRESS CLIPPINGS

I GAVE AT CHURCH

by Timothy Lamer

THERE'S AN EMERGING CONSENSUS on the right that religious charities do a better job of helping the poor than does government. Sen. John Ashcroft of Missouri has thus proposed to allow states to funnel federal welfare dollars to churches and other overtly religious organizations so they can provide federal services and federal cash to the poor. But Christian conservatives, instead of leading the charge for Ashcroft's proposal, should be the first to recognize how problematic it is. If the money doesn't go toward proselytizing, it will be ineffective. But if it does, even indirectly, it will seriously violate both conservative and basic American principles.

Ashcroft's proposal is an amendment to the welfare reform bill. It would allow states to distribute their federal welfare block grants to charitable and other private groups, including religious organizations. Although churches and religious charities would not have to alter their religious character to get the federal money, the amendment says: "No funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization."

If so, the good senator's proposal is a waste of money. The thing to keep in mind is why Christian charities work so much better than social services provided by government.

Are believers just more effective bureaucrats than non-believers? No, Christian charities do so well because Christ changes lives. When a Christian charity lifts someone out of poverty or drug abuse, the improvement in the person's circumstances or behavior is merely the outward manifestation of a change within the person; it is new fruit from a regenerated tree.

The gospel is the essential agent, the root of the spiritual change. Without proselytizing, then, Christian charities will be no more effective than government or any other charity.

Of course, one could argue that money is fungible. It's a familiar conservative point, and it's true. When the government gives money to the Sierra Club to run a wildlife refuge, it frees up funds that can be used for lobbying, fundraising, and so forth. If it's true for the Sierra Club, it's true for the Southern Baptist Convention. Tax dollars given for "secular" use at Christian charities will free up church funds for proselytizing.

But that should concern all those, including evangelicals, who value religious liberty, a basic tenet of which is that citizens should not be taxed to support religions with which they disagree. Evangelicals in particular should remember that under the Ashcroft proposal, state governments will decide which charities get the federal dollars. In other words, raw political power will prevail. Whichever sects have the most influence in each state will get the coveted funds. Imagine the backlash when evangelicals realize that their money is going to support the Mormon Church in Utah and the Roman Catholic Church in Massachusetts. Or when Mormons and Catholics realize that their tax dollars are supporting the Southern Baptists in Tennessee.

If money really is fungible, then government support of Mormon charities means the Mormon Church can send more missionaries to, say, the South. And the Southern Baptists can do more evangelism in, say, Utah. There's no better way to start a real religious war in America than to coerce the faithful of any church into subsidizing what they view as a false religion.

Conservatives also need to think hard about what Ashcroft's proposal will mean for the future of welfare reform. What happens if a future Congress decides to reduce the amount of money given to states in welfare block grants? Will Christian charities and churches be willing to give up their subsidies when that happens?

It won't be easy. Federal funding is a narcotic. Once addicted, recipients find it hard to live without. As Art Smith of Volunteers of America told the *American Spectator*, government aid "impairs your impetus to go out and raise funds. That's a real danger all nonprofits face—just sitting back and figuring the government will take care of you." Once Christian charities get used to collecting the subsidy, they will develop programs and goals premised on receiving government aid. The threat of losing such aid will be genuinely terrifying. They will surely fight such cuts and thus become what conservatives detest—recipients of federal grants lobbying for "more." Are Christian conservatives prepared for the sight of Christian charities lobbying to keep their place at the federal trough?

Of all people, conservatives should know that federal funding always has unintended consequences. This proposal is no different. The ACLU and other opponents of Senator Ashcroft's amendment are—this time—on the side of the angels.

Timothy Lamer is director of the Free Enterprise & Media Institute of the Media Research Center in Alexandria, Virginia.

TRB

FROM WASHINGTON

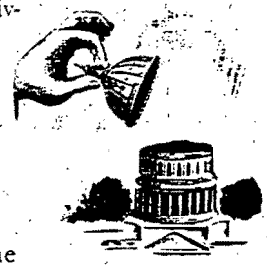
Big church

A few weeks ago, Bob Dole struck a fearless blow for the separation of church and state. He denounced the Department of Housing and Urban Development for using federal funds to hire the Nation of Islam Security Agency to patrol public housing projects in Baltimore. Dole was especially concerned that the Nation of Islam might be violating federal anti-discrimination laws by hiring only African Americans; he also worried that federal taxes were being used to subsidize religious proselytizing. Stung by Dole's criticisms, HUD canceled the contract on November 9.

But Dole's posturing as a defender of Jeffersonian ideals was absurd. His own welfare reform bill would authorize churches to administer federal welfare programs on a grand scale—and would exempt them from anti-discrimination laws in the process. A little-noticed amendment proposed by Senator John Ashcroft of Missouri, and backed by Dole, would prohibit states from discriminating against "religious organizations" if they decide to contract out certain welfare programs to private charities. In other words, states would be free to delegate programs like child care, pregnancy prevention or even cash assistance to the Nation of Islam, which could require the needy to listen to uplifting numerological sermons while cheerfully discriminating against Jewish employees.

If Dole and Ashcroft really cared about religious neutrality, they could have drafted a sane welfare bill while avoiding the Dickensian tangle of constitutional challenges that this scheme is sure to provoke. The basic impulse behind the bill makes sense: in an age where social services are being massively privatized, religiously affiliated charities *should* be tapped to deliver social services to the poor, since they do it better than almost anyone else. New York state, for example, relies heavily on Catholic and Jewish charities to provide publicly funded foster care. And, as Sallie Tisdale has argued in these pages, the Salvation Army is a model of cost efficiency, spending eighty-seven cents of every donated dollar on its service programs. (See "Good Soldiers," TNR, January 3, 1994.) But because the Salvation Army balks at the idea of separating its religious mission from its charity work, as federal law requires, it has been increasingly reluctant to accept federal funds, which now comprise less than 1 percent of its budget.

Senator Ashcroft, however, wants to solve that problem by allowing churches to administer public welfare programs in an openly sectarian way. His tough-love model evokes the welfare program in *Time Bandits*, where John Cleese as Robin Hood hands out coins to a line of dottering old ladies and then, to emphasize the value of work, has his merry men hit them in the stomach. The bill stresses that a church receiving public funds can't be forced to "remove religious art, icons, scripture, or other symbols" while handing out federal money. Direct grants (as opposed to vouchers) can't be used for religious education or proselytizing, but the bill doesn't say explicitly that benefits have to be distributed in a secular manner. If a recipient objects to the religious character of a welfare program, the state has to set up an alternative.



The relevant Supreme Court decisions are a little opaque—they hinge, as usual, on the conflicted impulses of Sandra Day O'Connor—but five justices seem to agree that if religious charities want to administer public welfare programs, they have to do so in a secular way. O'Connor emphasized in the 1988 *Bowen* case that "any use of public funds to promote religious doctrine violates the Establishment Clause." And in *Bowen*, the Court held that religiously affiliated charities can receive government grants to advocate chastity, but "pervasively sectarian" institutions, such as parochial schools, *can't* be directly funded, because of the fear that public funds will be used to advance religion.

The employment discrimination provisions of the bill are also shaky. Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law, contains an exemption for religious organizations; but a Mississippi judge held in January 1989 that exemption doesn't apply when a religious group is administering public funds; therefore, he held, the Salvation Army couldn't fire an employee in its federally funded domestic-violence shelter after learning she was a witch. Senator Ashcroft was furious when he heard about the case. In a meeting with Julie Segal of Americans United for Separation of Church and State, one of his staffers objected to the idea that "with government sheckles come governmental shackles." Accordingly, the Ashcroft amendment says that the religious exemption from Title VII still holds even where public funds are involved.

Unfortunately, the constitutional questions weren't aired in Congress. That's because Ashcroft has quietly decided to tack his amendment onto a slew of social service reform bills—including the recent substance abuse bill—without public hearings or debate. So the courts will have the final say. Rather than waiting for Justice O'Connor to make up her mind, Representative Henry Hyde took matters into his own hands last week by introducing the Religious Equality Amendment to the Constitution: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity." But the Hyde Amendment would also permit direct government funding of religious schools and, therefore, would violate a presumption against direct taxation for the benefit of religion that stretches back to the nineteenth century.

Constitutional worries aside, the Ashcroft-Dole scheme seems like bad policy for churches; it tempts them to become agents of the welfare state in ways that can only compromise their religious autonomy. Unlike Newt Gingrich's libertarian guru, Marvin Olasky, who wants to dismantle the welfare state entirely so that churches can step voluntarily into the breach, the Dole bill is a statist nightmare that would open up church coffers to federal audits if they fail to segregate public and private funds.

Maybe these nightmare scenarios won't materialize; maybe all the churches deputized under the Ashcroft scheme will conduct themselves like those mild-mannered curates in Victorian novels who dispense tea and sympathy to the deserving poor without alarming them by mentioning the Divine. In that case the bill might pass constitutional muster. But the dangers of the Ashcroft scheme could have been avoided. All Dole had to do was to require churches to set up non-sectarian affiliates as a condition of receiving public funds and to prohibit them from proselytizing, or engaging in religious discrimination, while performing state functions. Don't the Grand Rebbe and Louis Farrakhan deserve to be held to the same standards?

JEFFREY ROSEN

Holes in the soul matter as much as dollars

Since faith can be key to changing lives, real welfare reform will include tax credits to help religious groups spread their beliefs.

By Marvin Olasky

Last year's congressional welfare debate centered on the role of dollars in fighting poverty.

This year's should focus on the role of God.

The historical and contemporary research I've done shows that some people are poor through no fault of their own, but others are impoverished because of spiritual problems that manifest themselves in addiction, alcoholism, family abandonment, promiscuity, laziness or crime.

Those troubled poor have holes in their souls that only God can fill.

It's not that the rich have fewer spiritual holes than the poor, but rather that the former are better able to plug those holes with putty, temporarily.

Rich alcoholics eventually become poor, but for a long time their fall is hidden, while the problems of a homeless man with a bottle of Mad Dog are evident to all.

Recognition of spiritual need should not lead the better-off to scorn the troubled poor, but rather to offer effective compassion that is challenging, personal and spiritual — "CPS" for short.

I have seen in inner cities across the country that just as CPR can revive a dying body, so CPS can help to revive a soul sunk into fatalistic defeatism.

Instead of embracing CPS, Congress from 1965 through 1994 passed bills that embodied entitlement, bureaucracy and an attempt to banish God.

But that tide ebbed last year, and leaders from Newt Gingrich on down expressed interest in CPS, including the role of churches, synagogues and other religious organizations in fighting poverty.

Two different paths to bring God back into the equation emerged, but they received little publicity.

Sen. John Ashcroft, R-Mo., and others proposed that Washington distribute grants to religious as well as to secular organizations; church groups would accept federal dollars for anti-poverty work as other providers do, with effectiveness in getting people off drugs or out of poverty the relevant question.

But there was a catch: Government grants could not be "expended for sectarian worship, instruction or proselytization."

Therein lies the rub.

That gag rule forbidding the most serious types of religious expression in government-funded projects was politically necessary, because without it the American Civil Liberties Union and its political allies would not only have opposed the measure, as they did, but also gone thermonuclear.

Shrewd politics, however, makes for ineffective anti-poverty work.

The proposal, which became part of the Republican welfare-reform bill now vetoed by President Clinton, missed an important point.

Christian efforts take a bite out of poverty because of Christ.

Other serious religious groups also attribute their effectiveness not to niceness but to spiritual transformation brought about by worship, teaching and theological advocacy — the very functions that the proposal would disallow.

Furthermore, the proposal did not affect all religious groups equally.

Churches that have become political or social clubs could readily accept government money because they already have lost their salt and become government look-alikes.

But Christian, Jewish and Islamic groups that have remained theologically tough would either turn down the money and the accompanying gag rule, or go soft also — unless they cheated by sliding money from one category to another.

Ashcroft deserves credit for shining a spotlight on current discrimination in funding.

But his proposal, if enacted, would have led religious groups into temptation.

There is a better way, and Ashcroft himself — along with Sens. Dan Coats, R-Ind., and Rick Santorum, R-Pa. — has proposed it for congressional action in 1996: tax credits that would allow individuals to send more money directly to any poverty-fighting organization, religious or secular.

Currently, individual taxpayers can itemize the contributions they make and deduct the sum from their tax payments, generally at a marginal rate of 15%, 28% or 31%.

That is good but not good enough, if the goal is to reinvigorate more Americans' bodies and souls.

Under a 100% tax-credit proposal introduced by Coats, a single taxpayer could send $500, or a couple $1,000, to a local poverty-fighting group and take that amount right off tax payments, sending $500 or $1,000 less to Washington.

The goal of such an approach is to remove power from Washington while promoting local charities and supporting religious liberty. Individuals would fund groups with which they were in theological agreement; religious people would not be forced to fund programs embodying some other faith.

Many different religious and secular groups could compete to create effective programs without the government giving preference to any.

Now that it's back to the drawing board on welfare reform, Congress should move swiftly to adopt a tax-credit proposal.

The concept promotes challenging, personal and spiritual help while doing away with the problem of centralized government bureaucrats deciding among various religious claimants.

The better-off would have the joy of providing effective help, and those in spiritual as well as material need would receive new life.

Marvin Olasky is a senior fellow at the Progress and Freedom Foundation and the author of The Tragedy of American Compassion. *He recently co-founded the Center for Effective Compassion.*

Go to Church for Your Check

SEN. DOLE'S welfare reform bill, the latest version of which was dropped in the hopper just as the legislators were leaving town, is a minefield of explosive issues ranging from such subjects as efforts to discourage teenage pregnancy to the treatment of immigrants in need. It will become the order of business on Sept. 6 when the House returns, and though it deserves a searching review and considerable debate, the pressure is on to pass it quickly.

Because the bill contains so many potential revisions in the welfare laws, less obvious changes may be accepted almost inadvertently. An example is a provision added only in this most recent draft of the bill that would alter the role of religious groups as benefit providers. Under current law, religiously affiliated organizations like Catholic Charities, for example, or Jewish hospitals, provide certain services that are paid for by the federal government. These entities are not essentially religious in nature, but have been set up by religious groups to perform a social service function in the community. Whether supported by parish contributions or public funds, they serve people of all faiths. When federal money is involved, they must observe certain guidelines aimed at preserving the nonsectarian nature of their work.

The bill would go beyond this practice by allowing churches themselves to act as service providers. This means that large blocks of public funds could be given directly to religious organizations who would have the responsibility for delivering the services. Presumably, the Bishop of Topeka, the leading Orthodox rabbi in Brooklyn or the Elders of the Mormon Church could become providers of the services taxpayers fund. Benefits could be disbursed inside churches, and temples and recipients who objected would have to ask to be reassigned to some other provider. Since no explanation of this provision was offered when the bill was introduced, and the text is not entirely clear, the number of government programs involved is uncertain. The American Civil Liberties Union believes that "at a minimum this section will apply to cash assistance benefits" like AFDC. Sen. John Ashcroft, who originated the proposal, expects its application to be much broader, extending to feeding programs, job training, drug rehabilitation and a host of other services.

There is no doubt that churches are exemplary social service providers. Many have been engaged in the enterprise for years, raising and spending their own money without the aid of the state. But in this country at least, they are not an arm of government. The potential for confusion about the real source of benefits received is great. The possibility of state favoritism among religious groups is real. The likelihood of subtle proselytizing—even though forbidden in the law—cannot be dismissed. In sum, this kind of entanglement of church and state is simply wrong and probably unconstitutional as well.

The Washington Post

Editorial, p. A-20

August 21, 1995

Welfare idea bad mix of church and state

DEREK H. DAVIS

GUEST COLUMN

Nineteenth-century German chancellor Otto von Bismarck once jealously remarked that "a strange providence protects fools, drunks and the USA." America surely needs some protection from its occasional blunders, but a good alternative is to do the smart thing from the outset and avoid the need for divine overrule.

This wisdom seems to apply to a misdirected provision in a Republican reform package that would channel public subsidies to churches to run social programs. Sponsored by Sen. Bob Dole, R-Kan., and Sen. John Ashcroft, R-Mo., the provision appears in a welfare reform bill recently passed by the Senate.

If the measure becomes law, it would radically alter the way churches and religious organizations provide day care, substance rehabilitation and meal assistance.

Current law allows religious groups to receive government money to administer social programs, but only if the money is not used to advance a religious message. Thus, a church may receive government funds to run a soup kitchen, but it must refrain from proselytizing in the process.

The proposed law, however, would permit churches to require those standing in line for a meal to hear a sermon before they get to eat. Advocates of the new law argue that churches are more effective than secular agencies in running social welfare programs. This may be so, but funneling taxpayer dollars to churches to administer the programs without appropriate limitations on advancing religion is a threat to religious freedom in three basic ways.

First, it threatens the religious freedom of the churches themselves. In administering social programs, churches *should* be permitted to integrate their message with their outreach. But accepting government money inevitably destroys that privilege. The lesson of political history is that, despite promises to the contrary, controls always — and appropriately so — follow the trail of government money.

Second, the religious freedom of the beneficiary is threatened. Someone who comes to a church to receive treatment for substance abuse should not be required to listen to a religious testimony or sermon which violates his or her own religious beliefs. The option to visit the drug abuse program of another organization may not be available, since the government funds are sure to go to the biggest, best and most efficient churches.

Third, the Dole-Ashcroft proposal threatens the religious freedom of all Americans, whose tax dollars would be used to advance religion in ways that would violate their own religious convictions.

When government involves itself in religion, it unavoidably prefers some religions over others, divides citizens along religious lines and entangles itself in sacred matters about which it has little competence. Moreover, the Dole-Ashcroft proposal would cause churches and other religious organizations to become dependent upon government and subject to audits and other regulatory procedures.

For churches that cannot adequately fund social programs through private, voluntary means, current law provides another option. They may receive federal funds to administer social programs, provided they create separate affiliate organizations that do not proselytize, discriminate on religious grounds or otherwise advance their own religious tenets. This allows churches to cooperate with government in delivering social services without forfeiting their own religious freedom or denying it to those whom they serve.

The Dole-Ashcroft proposal mixes church and state in ways that make a mockery of the First Amendment. Americans should reject it as a denial of their first and most revered protection: religious liberty. And in the process, maybe we can prove that, contrary to what Bismarck believed, America is sometimes capable of looking out for herself.

Derek H. Davis is director of the J.M. Dawson Institute of Church-State Studies at Baylor University in Waco.

Separating Church and State

By J. Brent Walker

WASHINGTON

Congress should fix the welfare system, not add new flaws. But flawed is a fitting description of an obscure provision in a Senate Republican reform package that would funnel public subsidies to churches to provide welfare benefits. Such financial linkage between church and state is most likely unconstitutional and would actually harm religion.

Sponsored by Bob Dole, the Senate majority leader, and Senator John Ashcroft of Missouri, this provision would radically change how religious organizations provide day care, hot meals and emergency shelter.

Under current law, religious groups can get Federal money to provide welfare benefits, but such money may not be used to advance religion. For example, a Baptist hospital may spend public funds to care for patients, but not to proselytize.

But under the proposed law, churches could wield taxpayers' money as theological ladles in their soup kitchens. Churches would receive the money directly and could require people to listen to a sermon as they wait in line for a sandwich.

Senators Dole and Ashcroft may be correct when they argue that churches are more effective than Federal agencies in housing the homeless and feeding the hungry.

But Americans should not have to sacrifice religious freedom on the altar of welfare reform. The first 16 words of the Bill of Rights enshrine religious liberty as our "first freedom" and erect a wall of separation between church and state to protect that freedom — a wall that Sen. William Cohen, a Maine Republican, recognized yesterday in his successful amendment to insure that the programs are carried out consistent with the Constitution. But calling it constitutional does not make it so.

> Welfare services should not be tied to religion.

Senator Cohen relied on the 1988 Supreme Court ruling in Bowen v. Kendrick that held that religiously affiliated groups may use tax funds to fight teen-age pregnancy. But the Court went on to say that it would not tolerate such funds going to a "pervasively sectarian" organization, like a church or synagogue.

Yet the Ashcroft-Dole proposal would do just that. It would permit states to give tax dollars to religious organizations that display religious messages in areas where people receive Government services.

The proposal would allow for "sectarian worship and instruction" in the course of delivering welfare benefits, and would enable churches to use Federal funds to discriminate against employees who fail to adhere to their religious tenets.

When government gets involved in advancing religion, it inevitably becomes entangled with religious practice, divides citizens along religious lines and prefers some religions over others. It is hard to imagine a Mormon church winning a welfare grant in Biloxi, Miss. — or a Southern Baptist church winning one in Salt Lake City.

The likelihood of unhealthful competition and burdensome regulation, including invasive audits, explains why many religious groups — Baptists, Catholics, Presbyterians, Methodists and many Jewish organizations — strongly oppose this provision.

There is a place for religious organizations in delivering welfare. But it should be done through separately incorporated affiliates that do not engage in religious education, proselytizing or discrimination.

That way, religious groups can preserve their theological purity and organizational autonomy, while cooperating with the Government to deliver services to those who need them.

The Ashcroft-Dole proposal flouts the First Amendment, further taints the welfare system and threatens our first and most precious liberty.□

J. Brent Walker is general counsel of the Baptist Joint Committee.

The New York Times

Op-Ed, p. A27

September 14, 1995

COMMENTARY

And now, welfare for churches

ROBYN E. BLUMNER

While most foes of the recently passed welfare reform legislation were lamenting its impact on poor children, an obscure provision sneaked through. It is a provision that could divert welfare money in an entirely new direction — into the coffers of religious organizations.

The "Charitable Choice" provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 gives religious organizations the right to compete for social service money even if their programs are distinctly sectarian. Sponsored by John Ashcroft of Missouri and supported by Bob Dole when he was the Senate's majority leader, the law would allow states to distribute welfare money to churches, mosques and synagogues to provide welfare services as long as it is not spent for "sectarian worship, instruction or proselytization."

This would mean that federal funds could go to a church day care program, even if children spend time in the sanctuary where religious icons and scripture bedeck the walls. It also means that recipients of public money would be permitted to hire staff on the basis of a religious test.

Ironically, Bob Dole was the senator who vociferously objected to a contract between the Department of Housing and Urban Development and the Nation of Islam Security Agency to provide security services for public housing projects. Dole was particularly concerned about the discriminatory hiring practices of the Nation of Islam and that federal money might be going to subsidize a religious group. Yet this is precisely the situation the new welfare bill has wrought.

Before the new law, religious organizations could receive government subsidies for providing social services, but the programs themselves, their settings and staff had to be distinctly non-religious. The U.S. Supreme Court had said such restrictions protected the church-state separation. But those limits created situations that angered some conservative legislators, including Ashcroft.

For example, in 1989, a Mississippi judge ruled that the Salvation Army couldn't fire an employee in its federally-funded domestic abuse shelter because she practiced the Wiccan religion. The Salvation Army had a choice: Either accept government money and evaluate employees based on job performance without regard to religious affiliation, or reject government money and discriminate at will.

Now, thanks to Ashcroft's changes, the new law lets religious groups have it both ways: They can restrict hiring "to their own kind," and get paid by the government to do so.

Charitable choice is not only unfair to job applicants, but it will disrupt the delicate harmony of America's religious pluralism. It opens the tax bank to religious groups and will lead to skirmishes for federal dollars. In Utah, the Mormons will be the big recipient of government money; in Boston, the Catholic Church will win the prize; and in Manhattan, the largest chunk will go to Jewish charities. The favored religion will get the biggest piece of the taxpayer pie. Resentment by the unfavored is inevitable.

Advocates of the separation of church and state are horrified by this specter, but so are many religious groups that know the government money will bring government strings and oversight. The Methodists, Unitarians, Presbyterians, Jewish groups and the Baptist Joint Committee have all written to the Senate in opposition to charitable choice. They see danger to religious freedom in having the government scrutinize each welfare program to see if there was any "proselytizing."

Marvin Olasky, Newt Gingrich's intellectual guru, wrote in *USA Today* that he rejects the charitable choice law because it will strip religious groups of their power to truly minister to the poor. He believes "Christian efforts take a bite out of poverty because of Christ." And church-run charities are successful because "those troubled poor have holes in their souls that only God can fill." Since the new law forbids teaching religious doctrine through social services, only those churches "that have become political or social clubs could readily accept government money."

Whether you agree with his reasoning or not, he is right that religious integrity is easily compromised by money with conditions attached. When government and religion entangle, it can only be bad for religion. State bureaucrats charged with regulating and accounting for the welfare funds sent to churches will have little regard for the nuances of religious freedom. And it will be hard for religious organizations to resist the temptation of all those federal dollars available to underwrite services they are already providing — even if they have to change their program a bit to fit federal strictures.

Peel away the religion-friendly appearance of charitable choice and you're left with a rotten core — one that damages church-state separation and religious autonomy. Instead of living with the fallout of this faulty experiment, better to add charitable choice to the list of "needs fixing" items on President Clinton's welfare reform list.

■ Robyn Blumner is a columnist, lawyer and director of the Florida ACLU. The opinions she expresses are not necessarily those of the American Civil Liberties Union. ■

SECTION
F

LEGISLATIVE LANGUAGE IN THE WELFARE REFORM BILL

CONFERENCE REPORT ON H.R. 3734, PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (House of Representatives - July 30, 1996)

SEC. 104. SERVICES PROVIDED BY CHARITABLE, RELIGIOUS, OR PRIVATE ORGANIZATIONS.

(a) **In General**:

(1) **State options**: A State may--

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) **Programs described**: The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title IV of the Social Security Act (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that--

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) **Religious Organizations**: The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) **Nondiscrimination Against Religious Organizations**: In the event a State exercises its authority under subsection (a), religious organizations are

eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) **Religious Character and Freedom**:

(1) **Religious organizations**: A religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) **Additional safeguards**: Neither the Federal Government nor a State shall require a religious organization to--

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) **Rights of Beneficiaries of Assistance**:

(1) **In general**: If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) **Individual described**: An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance

under a program described in subsection (a)(2).

(f) **Employment Practices**: A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1a) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2).

(g) **Nondiscrimination Against Beneficiaries**: Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) **Fiscal Accountability**:

(1) **In general**: Except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of such funds provided under such programs.

(2) **Limited audit**: If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit.

(i) **Compliance**: Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) **Limitations on Use of Funds for Certain Purposes**: No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

(k) **Preemption**: Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

1 section (b) of this section may use the amount in accordance
2 with section 404(d).
3 "(e) MAINTENANCE OF EFFORT.—The ceiling amount
4 with respect to a territory shall be reduced for a fiscal year by
5 an amount equal to the amount (if any) by which—
6 "(1) the total amount expended by the territory under
7 all programs of the territory operated pursuant to the pro-
8 visions of law specified in subsection (a) (as such provisions
9 were in effect for fiscal year 1995) for fiscal year 1995; ex-
10 ceeds
11 "(2) the total amount expended by the territory under
12 all programs of the territory that are funded under the pro-
13 visions of law specified in subsection (a) for the fiscal year
14 that immediately precedes the fiscal year referred to in the
15 matter preceding paragraph (1).".
16 (c) ELIMINATION OF CHILD CARE PROGRAMS UNDER THE
17 SOCIAL SECURITY ACT.—
18 (1) AFDC AND TRANSITIONAL CHILD CARE PRO-
19 GRAMS.—Section 402 (42 U.S.C. 602) is amended by strik-
20 ing subsection (g).
21 (2) AT-RISK CHILD CARE PROGRAM.—
22 (A) AUTHORIZATION.—Section 402 (42 U.S.C.
23 602) is amended by striking subsection (i).
24 (B) FUNDING PROVISIONS.—Section 403 (42
25 U.S.C. 603) is amended by striking subsection (n).
26 **SEC. 104. SERVICES PROVIDED BY CHARITABLE, RELI-**
27 **GIOUS, OR PRIVATE ORGANIZATIONS.**
28 (a) IN GENERAL.—
29 (1) STATE OPTIONS.—A State may—
30 (A) administer and provide services under the pro-
31 grams described in subparagraphs (A) and (B)(i) of
32 paragraph (2) through contracts with charitable, reli-
33 gious, or private organizations; and
34 (B) provide beneficiaries of assistance under the
35 programs described in subparagraphs (A) and (B)(ii) of
36 paragraph (2) with certificates, vouchers, or other

1 forms of disbursement which are redeemable with such
2 organizations.
3 (2) PROGRAMS DESCRIBED.—The programs described
4 in this paragraph are the following programs:
5 (A) A State program funded under part A of title
6 IV of the Social Security Act (as amended by section
7 103(a) of this Act).
8 (B) Any other program established or modified
9 under title I or II of this Act, that—
10 (i) permits contracts with organizations; or
11 (ii) permits certificates, vouchers, or other
12 forms of disbursement to be provided to bene-
13 ficiaries, as a means of providing assistance.
14 (b) RELIGIOUS ORGANIZATIONS.—The purpose of this sec-
15 tion is to allow States to contract with religious organizations,
16 or to allow religious organizations to accept certificates, vouch-
17 ers, or other forms of disbursement under any program de-
18 scribed in subsection (a)(2), on the same basis as any other
19 nongovernmental provider without impairing the religious char-
20 acter of such organizations, and without diminishing the reli-
21 gious freedom of beneficiaries of assistance funded under such
22 program.
23 (c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZA-
24 TIONS.—In the event a State exercises its authority under sub-
25 section (a), religious organizations are eligible, on the same
26 basis as any other private organization, as contractors to pro-
27 vide assistance, or to accept certificates, vouchers, or other
28 forms of disbursement, under any program described in sub-
29 section (a)(2) so long as the programs are implemented consist-
30 ent with the Establishment Clause of the United States Con-
31 stitution. Except as provided in subsection (k), neither the Fed-
32 eral Government nor a State receiving funds under such pro-
33 grams shall discriminate against an organization which is or
34 applies to be a contractor to provide assistance, or which ac-
35 cepts certificates, vouchers, or other forms of disbursement, on
36 the basis that the organization has a religious character.

1 (d) RELIGIOUS CHARACTER AND FREEDOM.—
2 (1) RELIGIOUS ORGANIZATIONS.—A religious organi-
3 zation with a contract described in subsection (a)(1)(A), or
4 which accepts certificates, vouchers, or other forms of dis-
5 bursement under subsection (a)(1)(B), shall retain its inde-
6 pendence from Federal, State, and local governments, in-
7 cluding such organization's control over the definition, de-
8 velopment, practice, and expression of its religious beliefs.
9 (2) ADDITIONAL SAFEGUARDS.—Neither the Federal
10 Government nor a State shall require a religious organiza-
11 tion to—
12 (A) alter its form of internal governance; or
13 (B) remove religious art, icons, scripture, or other
14 symbols;
15 in order to be eligible to contract to provide assistance, or
16 to accept certificates, vouchers, or other forms of disburse-
17 ment, funded under a program described in subsection
18 (a)(2).
19 (e) RIGHTS OF BENEFICIARIES OF ASSISTANCE.—
20 (1) IN GENERAL.—If an individual described in para-
21 graph (2) has an objection to the religious character of the
22 organization or institution from which the individual re-
23 ceives, or would receive, assistance funded under any pro-
24 gram described in subsection (a)(2), the State in which the
25 individual resides shall provide such individual (if otherwise
26 eligible for such assistance) within a reasonable period of
27 time after the date of such objection with assistance from
28 an alternative provider that is accessible to the individual
29 and the value of which is not less than the value of the as-
30 sistance which the individual would have received from such
31 organization.
32 (2) INDIVIDUAL DESCRIBED.—An individual described
33 in this paragraph is an individual who receives, applies for,
34 or requests to apply for, assistance under a program de-
35 scribed in subsection (a)(2).

1 (f) EMPLOYMENT PRACTICES.—A religious organization's
2 exemption provided under section 702 of the Civil Rights Act
3 of 1964 (42 U.S.C. 2000e–1a) regarding employment practices
4 shall not be affected by its participation in, or receipt of funds
5 from, programs described in subsection (a)(2).
6 (g) NONDISCRIMINATION AGAINST BENEFICIARIES.—Ex-
7 cept as otherwise provided in law, a religious organization shall
8 not discriminate against an individual in regard to rendering
9 assistance funded under any program described in subsection
10 (a)(2) on the basis of religion, a religious belief, or refusal to
11 actively participate in a religious practice.
12 (h) FISCAL ACCOUNTABILITY.—
13 (1) IN GENERAL.—Except as provided in paragraph
14 (2), any religious organization contracting to provide assist-
15 ance funded under any program described in subsection
16 (a)(2) shall be subject to the same regulations as other con-
17 tractors to account in accord with generally accepted audit-
18 ing principles for the use of such funds provided under
19 such programs.
20 (2) LIMITED AUDIT.—If such organization segregates
21 Federal funds provided under such programs into separate
22 accounts, then only the financial assistance provided with
23 such funds shall be subject to audit.
24 (i) COMPLIANCE.—Any party which seeks to enforce its
25 rights under this section may assert a civil action for injunctive
26 relief exclusively in an appropriate State court against the en-
27 tity or agency that allegedly commits such violation.
28 (j) LIMITATIONS ON USE OF FUNDS FOR CERTAIN PUR-
29 POSES.—No funds provided directly to institutions or organiza-
30 tions to provide services and administer programs under sub-
31 section (a)(1)(A) shall be expended for sectarian worship, in-
32 struction, or proselytization.
33 (k) PREEMPTION.—Nothing in this section shall be con-
34 strued to preempt any provision of a State constitution or State
35 statute that prohibits or restricts the expenditure of State
36 funds in or by religious organizations.

deleted, we would recommend deletion of item (3), as in the following proposed amendment.

Proposed amendment:

( ) ELIMINATION OF THIRD MAINTENANCE OF EFFORT REQUIREMENT FOR TERRITORIES.--Section 1108(e) is repealed.

Sec. 104: services provided by charitable, religious, or private organizations:

1. CLARIFICATIONS CONCERNING RELIGIOUSLY AFFILIATED PROVIDERS.

Problem: The Supreme Court has held that the Constitution does not preclude most organizations with religious affiliations from participating equally with other private organizations in public welfare programs, as long as such organizations do not engage in religious activities in using public funds. However, the Court has held that the government may not enlist pervasively sectarian organizations in administering welfare programs paid for with public funds.

Sec. 104(c) explicitly provides that TANF programs provided through religious organizations must be implemented in a manner consistent with the Establishment Clause of the Constitution. However, other provisions of sec. 104 and its legislative history could be read to be inconsistent with the constitutional limits. We recommend amending sec. 104 to clarify that it does not compel or allow States to provide TANF benefits through pervasively sectarian organizations, either directly or through vouchers redeemable with these organizations. In addition, we suggest an amendment to clarify that State funds received by an organization for the purposes of providing TANF services and benefits may not be used for sectarian purposes.

Proposed amendments:

( ) CLARIFICATIONS CONCERNING RELIGIOUSLY AFFILIATED PROVIDERS.--Section 104 of PRWORA is amended--

(1) in the heading, by striking "**RELIGIOUS**" and inserting "**RELIGIOUSLY AFFILIATED**";

(2) in subsection (a)(1)(A), by striking "religious" and inserting "religiously affiliated";

(3) in subsection (b)--

(A) by striking "to contract with religious organizations, or to allow religious organizations to accept" and inserting "to contract with religious organizations that are not pervasively sectarian, or to allow such religious organizations to accept; and

(B) by striking "religious character" and inserting "religious affiliation";

(4) in subsection (c)--

(A) by striking "religious organizations are eligible" and inserting "religious organizations that are not pervasively sectarian are eligible"; and

(B) by striking "religious character" and inserting "religious affiliation";

(5) in subsection (d)(1)--

(A) by striking "A religious organization" and inserting "A non-pervasively sectarian religious organization"; and

(B) by striking "the definition, development, practice, and expression of its religious beliefs" and inserting "its religious affiliation";

(6) in subsection (d)(2)--

(A) in the matter preceding subparagraph (A)--

(i) by striking "Neither" and inserting "To the extent such organization is not pervasively sectarian and complies with the limitation described in subsection (j), neither"; and

(ii) by striking "a religious organization" and inserting "such organization"; and

(B) in subparagraph (B), by inserting "all" before "religious";

(7) in subsection (e)(1), by striking "religious character" and inserting "religious affiliation";

(8) in subsection (f), by striking "its participation in, or receipt of funds from" and inserting "the participation of a non-pervasively sectarian affiliate in, or the receipt by such affiliate of funds from";

(9) in subsection (g), by striking "a religious organization" and inserting "an institution or organization";

(10) in subsection (h)(1), by inserting "described in subsection (b)" after "religious organization"; and

(11) in subsection (j), by striking "shall be expended for sectarian worship" and inserting "shall be used or expended for any sectarian activity, including sectarian worship".