

joined by Breyer, J.) (requiring proof of “actual diversion of public support to religious uses”). Accordingly, the Department (like Congress) does not believe that the Constitution requires exclusion of organizations that are governed by religious organizations or whose facilities contain religious symbols.

Employment Practices. (Sec. 54.6 and 54a.6)

The NPRM restated the SAMHSA’s Charitable Choice provisions, which provide that a religious organization’s exemption provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program. To the extent that 42 U.S.C. 300x–57(a)(2) or 42 U.S.C. 290cc–33(a)(2) imposes religious nondiscrimination requirements on the employment practices of program participants, the NPRM clarifies that such requirements do not apply to program participants that demonstrate that these requirements would substantially burden their exercise of religion.

Comments: Numerous comments were received dealing with the employment practices provisions in the proposed rule. Nineteen out of 23 comments made about this provision supported the removal of the provision from the final rule. Many commenters felt that the Religious Freedom Restoration Act (RFRA) was an inappropriate basis for the regulation and did not provide the statutory authority to overrule the broad anti-discrimination provision in SAMHSA’s authorizing legislation for the Substance Abuse Prevention and Treatment (SAPT) block grant in the Public Health Service Act. They argued that religious groups would not be substantially burdened by having to comply with these requirements, and that, in any event, the government had a compelling interest in imposing the requirements.

Response: The Department does not agree with the comments. We believe that, in addition to being a reasonable construction of the SAMHSA Charitable Choice provision, the inapplicability of the discrimination provisions of the SAPT block grant program and the PATH program, 42 U.S.C. 300x–57(a)(2) and 42 U.S.C. 290cc–33(a)(2), to religious organizations that demonstrate a substantial burden on their exercise of religion follows from RFRA. Under RFRA, the government may not impose legal requirements that substantially burden a grantee’s exercise of religion unless doing so is the least restrictive

means of furthering a compelling government interest. 42 U.S.C. 2000bb–1(b). Accordingly, where a religious entity establishes that its exercise of religion would be substantially burdened by the religious nondiscrimination provisions cited above, RFRA supercedes those statutory requirements, thus exempting the religious entity therefrom, unless the Department has a compelling interest in enforcing them.

The Department’s rationale in this regard is set out in the NPRM. See 67 FR 77350, 77351–77352 (Dec. 17, 2002). Several points, however, merit elaboration. First, the Department recognizes that not all religious organizations that might receive funding under the SAPT block grant and PATH programs would be substantially burdened by the application of the religious nondiscrimination requirements of 42 U.S.C. 300x–57(a)(2) and 42 U.S.C. 290cc–33(a)(2). For example, some religious organizations are concerned only with their employees’ commitment to providing social services, not with any profession of faith, and thus do not consider religion in hiring people to perform such services. Such groups would not likely be burdened by having to comply with a religious nondiscrimination requirement. Many other religious organizations, however, consider religious faith critical to all of their employees’ activities, including those that involve providing government-funded social services to the public. For these groups, imposition of a religious nondiscrimination requirement can impose a particularly harsh burden. As Justice Brennan explained: “Determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is * * * a means by which a religious community defines itself.” *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). For groups that deem religious faith an important part of their self-definition, having to make employment decisions without regard to their faith would substantially alter the charter of their organization.

In recognition that the religious nondiscrimination requirements of 42 U.S.C. 300x–57(a)(2) and 42 U.S.C. 290cc–33(a)(2) would substantially burden some but not other grantees, the RFRA exemption is limited to those organizations that are able to certify that: (1) They sincerely believe that employing individuals of a particular religion is important to the definition and maintenance of their religious

identity, autonomy, and/or communal religious exercise; (2) they make employment decisions on a religious basis in analogous programs; (3) the grant in question would materially affect their ability to provide the type of services in question; and (4) providing the services in question is expressive of their values or mission. We disagree, however, with some commenters’ assertion that no religious organization would be substantially burdened by having to make hiring decisions without regard to their faith while participating in the SAMHSA program.

Second, the fact that SAMHSA is a funding program does not mean that the Federal government necessarily possesses a “compelling interest” in imposing religious nondiscrimination provisions upon the employment practices of participating religious organizations. To begin with, religious organizations’ exemption from the religious nondiscrimination requirements of Title VII (the availability of that exemption is expressly clarified by the SAMHSA Charitable Choice law, 42 U.S.C. 290kk–1(e), 300x–65(d)(2)) reflects Congress’s judgment that employment decisions are an important component of religious organizations’ autonomy, and that the government has a much stronger interest in applying a religious nondiscrimination requirement to secular organizations than to religious organizations’ many of whose existence depends upon their ability to define themselves on a religious basis. Moreover, many federal funding programs—including the discretionary grant programs administered by the Secretary under Title V of the Public Health Service Act—do not impose a religious nondiscrimination requirement upon the employment practices of grantees. Rather, Congress’s application of religious nondiscrimination requirements in the employment context is quite selective, which makes it difficult to regard the government as having a compelling interest in imposing such a requirement in this particular context. Finally, secular entities that administer federally funded social programs generally are not barred from considering their ideologies in making employment decisions. In this respect, allowing faith-based grantees to consider religious motivation in hiring simply levels the playing field, allowing them to consider ideology on the same basis as other organizations.

Comment: Several commenters agreed that the proposed rule regarding the Title VII exemption reflects a proper understanding of civil rights law. When