U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

October 12, 2000

MEMORANDUM FOR WILLIAM P. MARSHALL
DEPUTY COUNSEL TO THE PRESIDENT

FROM: Randolph D. Moss RDM
Assistant Attorney General

RE: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000"

This memorandum responds to your request for guidance on certain questions concerning the interplay between title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1994), and section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000," which would confirm and codify the eligibility of religious organizations to receive Substance Abuse and Mental Health Services Administration ("SAMHSA") funds directly from SAMHSA or from a state government for the purpose of carrying out programs to prevent or treat substance abuse.

You have asked us to address several, related constitutional questions. First, would the Establishment Clause of the First Amendment invariably prohibit a government from providing SAMHSA funds directly to a religious organization to enable the organization to provide substance-abuse treatment or prevention services, where that organization is eligible to invoke section 702(a) of title VII, 42 U.S.C. § 2000e-1(a), which exempts certain religious organizations from title VII liability for preferring employees "of a particular religion"? Second, would the Establishment Clause categorically prohibit such direct aid to a religious organization that does, in fact, give preferences to employees "of a particular religion"? Third, assuming the answer to the first two questions is "no" — i.e., that there is no such categorical funding prohibition with respect to organizations that are eligible for or that act in accord with the section 702(a) exemption — would such aid be unconstitutional when the employment discrimination occurs within the funded substance-abuse program itself and where, therefore, the private religious organization in effect uses the government aid to hire employees pursuant to a religious test? Finally, is section 702(a), which exempts certain religious organizations from title VII coverage

for employment discrimination in favor of coreligionists, itself an unconstitutional religious preference as applied to the employees who work within a particular substance-abuse program that receives direct SAMHSA aid?

We conclude that, although some organizations that are eligible for title VII's section 702(a) exemption relating to a preference for employees of "a particular religion" may be constitutionally ineligible for the receipt of direct funding for substance-abuse programs, the Establishment Clause does not categorically prohibit direct funding to all such organizations. That is to say, there may be certain organizations that are statutorily eligible for the section 702(a) exemption and yet remain constitutionally eligible for the receipt of direct SAMHSA funds. We further conclude, however, that the constitutional question is far more difficult, and unresolved, with respect to organizations that discriminate in favor of coreligionists in a substance-abuse program that directly receives SAMHSA funds. Funding provided to such programs may under certain circumstances be unconstitutional, where a reasonable observer would conclude that the government entity providing the funds endorses the private organization's religious discrimination. Moreover, although the Supreme Court already has held that the section 702(a) exemption from title VII is generally constitutional as applied to qualifying nonprofit religious organizations, the application of that exemption to employees in SAMHSA-funded programs, who may not engage in specifically religious activities, raises very difficult and unresolved constitutional questions, the resolution of which may well depend on circumstances relating to particular organizations and specific funding mechanisms and arrangements.

You also have asked us to address the statutory question whether section 702(a) exempts qualifying religious organizations from title VII's prohibitions on employment discrimination on grounds other than religion, where such discrimination is religiously motivated. We conclude that section 702(a) does not exempt qualifying religious organizations from title VII liability for any form of discrimination other than a preference for employees "of a particular religion" and, in particular, does not permit an employer to escape title VII's proscriptions against race and sex discrimination, even where the employer may be religiously motivated to engage in such forms of employment discrimination.

STATUTORY BACKGROUND

In order to answer the questions you have posed, we must provide some background on the "charitable choice" provision of H.R. 4923, and on the provision in section 702(a) of title VII that exempts certain employers from title VII liability for employment discrimination in favor of coreligionists, i.e., "individuals of a particular religion."

Section 704 of H.R. 4923

On July 25, 2000, the House of Representatives passed H.R. 4923, the "Community Renewal and New Markets Act of 2000." See 146 Cong. Rec. H6840-41 (daily ed. July 25, 2000). Section 704 of that bill would amend title V of the Public Health Service Act ("PHSA"), 42 U.S.C. §§ 290aa–290gg (1994), to add a new "Part G," to be entitled "Services Provided Through Religious Organizations." Part G would expressly prohibit governments from discriminating against religious organizations in all "discretionary and formula grant programs" administered by the Substance Abuse and Mental Health Services Administration that "make awards of financial assistance to public or private entities for the purpose of carrying out activities to prevent or treat substance abuse." Proposed PHSA section 581(a).

The prohibition on governmental discrimination against religious organizations would apply in two distinct types of SAMHSA grant programs. The first category includes those programs in which SAMHSA itself provides discretionary grants or awards to, inter alia, private, nonprofit organizations. SAMHSA officials have informed us that SAMHSA makes numerous such grants under its general authority contained in 42 U.S.C. § 290aa (1994), and that it has the authority to issue specific grants relating to substance-abuse prevention and treatment under several other statutory provisions, such as 42 U.S.C. §§ 290aa-5, 290bb-1–290bb-5, and 290bb-21–290bb-24 (1994). The second category of covered programs consists of grants that SAMHSA makes to the States, including "formula" grants awarded to the States pursuant to 42 U.S.C. §§ 300x-21–300x35 (1994 & Supp. 1998), to enable the States to achieve certain substance-abuse treatment and prevention goals. See also id. § 300y (1994) (discretionary grants to States). The statutory provisions establishing the formula-grant regime in several places indicate that a State may use SAMHSA funds to make its own grants or awards to, or contracts with, private nonprofit organizations, so that such private organizations may provide the substance-abuse services for which the State received the SAMHSA grant.[1] SAMHSA officials inform us that there is an array of mechanisms (prescribed by state law) by which the various States provide SAMHSA formula-grant funds to private organizations, and that most, if not all, such mechanisms involve discretionary decisions by State and local officials regarding the allocation of limited SAMHSA funds to competing private organizations.

Section 704 of H.R. 4923 would amend the Public Health Service Act to provide expressly that "[n]otwithstanding any other provision of law, a [nonprofit] religious organization, on the same basis as any other nonprofit private provider . . . (1) may receive financial assistance under a designated program; and (2) may be a provider of services under a designated program." PHSA section 582(c), in turn, would prescribe with more particularity the contours of this nondiscrimination rule:

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[1] See, e.g., 42 U.S.C. § 300x-31(a)(1)(E) (1994) (imposing requirement that States agree not to expend the SAMHSA grant "to provide financial assistance to any entity other than a public or nonprofit private entity"); see also, e.g., id. §§ 300x-22(c)(3), 300x-24(a)(1)(A), 300x-25(a)(1), 300x-62(b).

(c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS-

(1) ELIGIBILITY AS PROGRAM PARTICIPANTS- Religious organizations are eligible to be program participants on the same basis as any other nonprofit private organization as long as the programs are implemented consistent with the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution.[2] Nothing in this Act shall be construed to restrict the ability of the Federal Government, or a State or local government receiving funds under such programs, to apply to religious organizations the same eligibility conditions in designated programs as are applied to any other nonprofit private organization.

(2) NONDISCRIMINATION- Neither the Federal Government nor a State or local government receiving funds under designated programs shall discriminate against an organization that is or applies to be a program participant on the basis that the organization has a religious character.

These provisions, which are similar to "charitable choice" provisions in two other recently enacted laws,[3] would, if enacted, manifest "Congress' considered judgment that religious organizations can help solve the problems," Bowen v. Kendrick, 487 U.S. 589, 606-07 (1988), to which the SAMHSA grant programs are addressed. These provisions would not give religious organizations any special entitlement to receive SAMHSA funds; they simply would require governments to treat such organizations on an equal footing with other nonprofit organizations.

H.R. 4923 would impose certain restrictions on participating private organizations (including religious organizations). Most importantly, proposed PHSA section 583 would provide that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."[4] In addition, proposed PHSA section 582(f)(4) would prohibit a participating religious organization from engaging in religious discrimination against the ultimate beneficiaries of a program (i.e., the individuals receiving the substance-abuse

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[2] PHSA section 581(c)(4) would define "program participant" to mean "a public or private entity that has received financial assistance under a designated program." Section 581(c)(6) would define "religious organization" to mean a "nonprofit religious organization."

[3] See section 104(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 604a(c) (Supp. II 1996); section 679(a) of the Community Services Block Grant Act ("CSBGA"), 42 U.S.C. § 9920(a) (Supp. IV 1998).

[4] This is similar to restrictions imposed in other charitable choice statutes. See PRWORA section 104(j), 42 U.S.C. § 604a(j) (Supp. II 1996); CSBGA section 679(c), 42 U.S.C. § 9920(c) (Supp. IV. 1998); see also, e.g., 42 U.S.C. § 9858k(a) (1994) ("No financial assistance [for child-care services and related activities] provided under this subchapter . . . shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

services): "A religious organization that is a program participant shall not in providing program services or engaging in outreach activities under designated programs discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief."[5] Furthermore, the statute would require governments that administer the designated programs to ensure that if an individual who is a program beneficiary (or prospective beneficiary) objects to the religious character of a provider organization, such individual will be referred to an accessible alternative service provider. Proposed PHSA section 582(f)(1)-(3).

Notably, however, nothing in H.R. 4923 would independently prohibit a participating private organization from engaging in religious discrimination against its employees. Instead, PHSA section 582(e) would provide as follows:

> Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment. 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.[6]

Thus, the proposed amendment to the PHSA would, by its terms, leave the law of employment discrimination in SAMHSA-funded programs in exactly the same place that it currently stands. In particular, the bill would emphasize that if an organization is otherwise entitled to the exemption provided in section 702(a) of title VII, 42 U.S.C. § 2000e-1(a), that organization's receipt of funds pursuant to a SAMHSA substance-abuse program will not affect the organization's eligibility for the section 702(a) exemption.[7] We turn now to a brief description of the section 702(a) exemption to title VII.

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[5] This restriction, too, would be similar to a provision found in the PRWORA. See 42 U.S.C. § 604a(g) (Supp. II 1996).

[6] See also PRWORA § 104(f), 42 U.S.C. § 604a(f) (Supp. II 1996); CSBGA § 679(b)(3), 42 U.S.C. § 9920(b)(3) (Supp. IV 1998).

[7] With respect to certain SAMHSA programs, title VII is not the only existing statute that restricts employment discrimination. In particular, as explained infra at 8-9, a separate statutory provision, 42 U.S.C. § 300x-57(a)(2) (1994), prohibits religious discrimination under "any program or activity funded in whole or in part with funds made available" under the SAMHSA program providing "formula grants" to the States. Nothing in H.R. 4923 would affect that preexisting antidiscrimination provision. Indeed, proposed PHSA section 582(e) would expressly reaffirm that the new provisions in PHSA section 582 involving religious organizations would not modify or affect the provisions of any other law relating to discrimination in employment.

Title VII

Section 703(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994), generally prohibits employers from engaging in employment discrimination on the basis of race, color, religion, sex, or national origin. That section provides:

> It shall be an unlawful employment practice for an employer -
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
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> or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[8]

One of several exemptions to title VII's prohibitions is found in section 702(a), 42 U.S.C. § 2000e-1(a) (1994), which provides as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

As first enacted in 1964, the section 702 exemption for religious discrimination extended only to persons employed to perform work "connected with the carrying on by such [religious] corporation, association, or society of its religious activities." Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964). In 1972, Congress amended section 702 in pertinent part to delete the word "religious" modifying "activities," so that the exemption applies to persons employed to perform work "connected with the carrying on by such [religious] corporation, association, or society of its activities." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972).[9] Accordingly, title VII presently does not prohibit qualifying employers from

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[8] In addition, section 704 of title VII, 42 U.S.C. § 2000e-3, prohibits certain forms of retaliation against employees who raise claims or questions concerning alleged title VII violations. See infra note 64.

[9] That amendment also added "religious . . . educational institutions" to the list of exempt religious organizations in section 702, while deleting a broader, separate "educational institution" exemption that originally

discriminating in favor of employees "of a particular religion" — a form of discrimination "because of [an] individual's . . . religion" that section 703(a) otherwise would prohibit.[10]

It is important for present purposes to emphasize that the section 702(a) exemption does not apply to all employers that would, for religious reasons, prefer to hire and retain coreligionist employees. See EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989). Nor can the exemption be construed to cover every organization or employer with some tie to an organized religious denomination or church. See id. at 617-18; EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir.), cert. denied, 510 U.S. 963 (1993).[11] The only employers entitled to the exemption are "religious corporation[s], association[s], educational institution[s], [and] societ[ies]." Title VII does not further define these terms, and there has been limited litigation contesting their meaning. The courts of appeals that have addressed the issue have concluded that whether a particular religious or religiously affiliated organization is entitled to the exemption will depend upon "[a]ll significant religious and secular characteristics" of the organization, that "each case must turn on its own facts," and that the ultimate inquiry is whether the organization's purpose and character are "primarily religious." Townley Eng'g & Mfg., 859 F.2d at 618; accord Kamehameha, 990 F.2d at 460; Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000). The Department of Justice, on behalf of the Equal Employment Opportunity Commission, has defended that understanding of the scope of the exemption.[12] We have no occasion here to question this prevailing interpretation of § 702(a), and for purposes of the analysis that follows we therefore

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had appeared in section 702 as enacted in 1964.

[10] The Equal Employment Opportunity Commission construes the section 702(a) exemption to apply only to decisions concerning hiring, discharge and promotion, and not to exempt religious organizations from liability under title VII for discriminating on the basis of religion in compensation, terms, conditions, or privileges of employment. See 2 EEOC Compliance Manual (CCH) ¶ 2183, App. 605-I (1998) (Policy Statement on "Religious Organization Exception"). We are not aware of any reported decisions directly addressing that distinction; and we do not address it here. In section II of our Analysis, infra at 29-32, we discuss further the substantive meaning of the phrase "of a particular religion," and the effect of the section 702(a) exemption on other forms of discrimination (such as race and sex discrimination) that title VII prohibits.

[11] Such a broad reading would threaten to render redundant another title VII exemption, found in section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (1994), which provides that title VII does not prohibit an educational institution from hiring employees of a particular religion if that institution is wholly or partly supported "by a particular religion or by a particular religious corporation, association, or society." When Congress enacted title VII, it included this additional exemption because it understood that not all such educational institutions would be able to take advantage of the "religious corporation, association or society" exemption then found in section 702 (or of the additional "educational institution" exemption that initially was included in section 702). See Townley Eng'g & Mfg., 859 F.2d at 617 (discussing legislative history).

[12] See Brief for the Equal Employment Opportunity Comm'n in Opposition [to Petition for Certiorari] at 10, Kamehameha Schs./Bishop Estate v. EEOC, 510 U.S. 963 (1993) (No. 93-171) ("The court of appeals' approach of weighing the organization's religious and secular characteristics in order to determine its primary 'purpose and character' is eminently sensible. Petitioner itself suggests no more appropriate methodology, and none occurs to us.").

will assume that the correct test for coverage under section 702(a) is whether an organization's purpose and character are "primarily religious."

Thus, not all religious organizations receiving funds under a SAMHSA grant program would be entitled to title VII's section 702(a) exemption. The proposed new PHSA section 582(e) in H.R. 4923 would provide simply that an organization's section 702 exemption "shall not be affected by its participation in, or receipt of funds from, a designated program." Neither section 582(e) nor any other provision of H.R. 4923 would purport to extend the section 702(a) exemption to any organization not otherwise eligible for it. Accordingly, an organization receiving SAMHSA funding will be eligible for the section 702(a) exemption only if its purpose and character are "primarily religious."[13]

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Before turning to the constitutional questions involving application of title VII to SAMHSA funding recipients, we should note that, just as H.R. 4923's proposed amendment to the PHSA would not affect the operation of title VII, so, too, that amendment to the PHSA would not modify any other antidiscrimination obligation by which a participating organization must abide. See proposed PHSA section 582(e) ("Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment."). In particular, H.R. 4923 would not alter the operation of a separate antidiscrimination provision, 42 U.S.C. § 300x-57(a)(2) (1994), which reads as follows:

> No person shall on the ground of sex (including, in the case of a woman, on the ground that the woman is pregnant), or on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under section 300x or 300x-21 of this title.

Section 300x-57(a)(2) prohibits religious discrimination under "any program or activity funded in whole or in part with funds made available under" SAMHSA's formula-grant provisions.[14]

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[13] There are very few reported decisions concerning whether particular organizations involved in providing social or charitable services are entitled to the section 702(a) exemption. Compare, e.g., McClure v. Salvation Army, 323 F. Supp. 1100, 1104 (N.D. Ga. 1971) (Salvation Army is a "religious corporation" for purposes of section 702 exemption), aff'd on other grounds, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), with Fike v. United Methodist Children's Home, 547 F. Supp. 286, 290 (E.D. Va. 1982) (United Methodist Children's Home not a "religious corporation" entitled to section 702 exemption), aff'd on other grounds, 709 F.2d 284 (4th Cir. 1983). As explained in the text, the particular characteristics of each organization would have to be examined to determine whether it is entitled to the exemption.

[14] Section 300x-21, to which this provision refers, is the SAMHSA program providing "formula grants" to the States. See supra at 3.

Such a prohibition has been in place since the inception of the SAMHSA formula-grant statute.[15] It appears that this prohibition, like analogous antidiscrimination provisions relating to federal funding recipients, imposes restrictions on, inter alia, employment discrimination in the covered programs and activities.[16] Thus, it always has been the case that a private organization receiving formula-grant SAMHSA funds from a State could not engage in religious discrimination in employment in the SAMHSA "program or activity,"[17] even if the organization otherwise were entitled to the section 702(a) exemption for purposes of title VII liability. H.R. 4923 would not affect this longstanding PHSA antidiscrimination requirement, even as to organizations that are entitled to the exemption in section 702(a) of title VII.[18] Section 300x-57(a)(2) does not, however, apply to those statutory provisions pursuant to which SAMHSA itself provides grants directly to private organizations. See supra at 3.[19] Therefore, the existence of the prohibition on religious employment discrimination in § 300x-57(a)(2) does not render moot the questions you have asked us to consider with respect to title VII and SAMHSA grant programs.

ANALYSIS

I. Constitutional Questions

You have asked us to consider several constitutional questions concerning employment discrimination by religious organizations that receive SAMHSA aid under certain substance-abuse grant programs. As noted above, the "charitable choice" provisions in proposed PHSA

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[15] See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. IX, § 901, 95 Stat. 551 (1981); ADAMHA Reorganization Act, Pub. L. No. 102-321, tit. II, § 203(a), 106 Stat. 407 (1992).

[16] Cf., e.g., Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-33 & n.13 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-22, 530 (1982); United States v. City of Chicago, 395 F. Supp. 329, 343-44 (N.D. Ill.), aff'd mem., 525 F.2d 695 (7th Cir. 1975).

[17] The prohibition plainly is intended to extend not only to the States themselves but also to "an entity that has received a payment pursuant to section 300x or 300x-21 of this title." 42 U.S.C. § 300x-57(b)(1). Cf. also, e.g., Frazier v. Board of Trustees, 765 F.2d 1278, 1288-91 (5th Cir.), opinion amended in other respects, 777 F.2d 329 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429, 433 (N.D. Ill. 1985).

[18] Enforcement of the § 300x-57(a)(2) prohibition would not necessarily be the same as title VII enforcement. If the chief executive officer of a State does not secure compliance with § 300x-57(a)(2) within 60 days after notification by the Secretary of Health and Human Services of a violation, the Secretary may refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. 42 U.S.C. § 300x-57(b)(1)(A) (1994). When such a matter is referred to the Attorney General, or "whenever the Attorney General has reason to believe that a State or an entity is engaged in a pattern or practice in violation of . . . subsection (a)(2)," the Attorney General may bring a civil action in any appropriate district court of the United States "for such relief as may be appropriate, including injunctive relief." Id. § 300x-57(b)(2).

[19] Nor would it apply to any private organizations using funds that SAMHSA provides to the States pursuant to the discretionary grant program described in 42 U.S.C. § 300y (1994).

Part G would apply to all "discretionary and formula grant programs administered by the Substance Abuse and Mental Health Services Administration that make awards of financial assistance to public or private entities for the purpose of carrying out activities to prevent or treat substance abuse." H.R. 4923, § 704 (proposed PHSA section 581(a)). We are not familiar with the details of each of the affected SAMHSA programs. Accordingly, our analysis necessarily is general in nature and might be altered by, or inapposite to, the specific characteristics of certain SAMHSA programs. You have asked us to focus our attention on a particular category of programs — namely, programs under which a governmental entity (either SAMHSA itself or a State or local government disbursing SAMHSA funds) uses its discretionary authority to provide financial aid directly to one or more religiously affiliated organizations, as part of a broader program of discretionary allocation of SAMHSA funds to private organizations to enable such organizations, in a nongovernmental capacity, to provide substance-abuse services.[20]

There are four distinct constitutional questions that might arise in this context. The first three questions all concern, in somewhat different forms, whether it would be constitutionally permissible for a government to provide SAMHSA aid directly to an organization that discriminates in favor of coreligionists pursuant to the section 702(a) exemption — and, in particular, whether such funding would be constitutional where the religious employment discrimination occurs in the very program that receives SAMHSA funds. The final question is, in effect, the flip side of those questions, namely, whether the title VII section 702(a) exemption itself is constitutional as applied to employees who work within a substance-abuse program subsidized by direct SAMHSA funds and who must, accordingly, refrain from religious activity within the program that receives direct government funding.[21]

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[20] Thus, as explained below, see infra note 21, this memorandum does not address programs pursuant to which a government provides funds to individuals in need of substance-abuse assistance, who then can choose to use such aid for treatment at organizations of their choosing. Nor does this memorandum address any programs pursuant to which a private organization might contract with a government to act as an agent or representative of the government itself, subject to the government's supervisory control.

[21] Our references in the text to "direct aid" are intended to refer both to aid that SAMHSA itself provides to private organizations to enable such organizations to provide substance-abuse services, and to SAMHSA aid that state and local governments provide to such private entities for similar purposes. By contrast, our use of the term "direct aid" is not intended to refer to statutes and programs pursuant to which a government instead provides aid to the ultimate individual beneficiaries and permits such persons to use the aid for services at substance-abuse-service organizations of their choosing. The constitutional analysis that applies when individuals choose to use such "indirect" aid at religious organizations can vary significantly from the analysis applicable to the sort of "direct" governmental aid to religious organizations that is the subject of this memorandum. Cf. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-10 (1993); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 486-88 (1986); Mueller v. Allen, 463 U.S. 388, 398-99 (1983). As Justice O'Connor recently explained:

> [W]e decided Witters and Zobrest on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use. . . . Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Witters, [474 U.S.] at 487 . . . . This characteristic of both

The four questions are as follows:

A. Does the Establishment Clause principle that government aid provided directly to a private religious organization may not be used to advance "specifically religious activit[ies] in an otherwise substantially secular setting," Kendrick, 487 U.S. at 621 (internal quotation omitted), invariably preclude a government from providing SAMHSA funds directly to an organization that is eligible for the section 702(a) exemption, by virtue of the fact that such an organization must, in order to be eligible for the section 702(a) exemption, have a purpose and character that are "primarily religious"? In other words, is it possible for an organization to be both sufficiently religious to be statutorily eligible for the section 702(a) exemption and sufficiently secular to be constitutionally eligible to receive direct SAMHSA aid?

B. Does an organization's decision to invoke the section 702(a) exemption and to discriminate in employment in favor of coreligionists inevitably render the organization so "pervasively sectarian" that there is a constitutionally impermissible risk that government aid provided directly to the organization will be used to advance "specifically religious activit[ies] in an otherwise substantially secular setting"?

C. If an organization engages in religious employment discrimination within the very substance-abuse program that receives SAMHSA funds directly from a government, does the government's decision to provide such direct aid to that organization constitute a preference for, or "endorsement" of, that religious discrimination that would violate the Establishment Clause?

D. As applied to employees of a program that receives direct SAMHSA aid, whose functions within that program must be secular, is the exemption in section 702(a) of title VII for certain religious organizations a violation of the Establishment Clause as an impermissible preference for religion, or is it instead a permissible religious accommodation?

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programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.

Mitchell v. Helms, 120 S. Ct. 2530, 2558 (2000) (O'Connor, J., concurring in the judgment) (some citations omitted); see also id. at 2559 (explaining that "the distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies," and that the "Court has 'recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions'") (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)). In this memorandum, our discussion is limited to programs pursuant to which a government, rather than private individuals, chooses the organizations that will receive SAMHSA funds.

Before we address each of these questions, we must first provide some detailed background describing the constitutional limitations the Establishment Clause imposes on a government's provision of funds directly to religious organizations.

Bowen v. Kendrick and other cases establish that an organization's religious affiliations do not constitutionally disqualify it from participating equally in a governmental program that provides grants to religious and nonreligious entities alike on a neutral basis.[22] A government may not, however, choose to fund a particular organization because it is religious in character or because of its religious affiliations. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) (it is a "principle at the heart of the Establishment Clause" that government "should not prefer . . . religion to irreligion").[23] Accordingly, a government providing funds to private organizations to perform social services may not limit its aid to religious organizations, and must not otherwise prefer such organizations over others, e.g., by setting aside a particular portion of funds for them. The criteria for funding should be neutral and secular.[24] For instance, a government may make a SAMHSA grant to a particular religiously affiliated organization because of that organization's effectiveness in providing substance abuse treatment and/or prevention services, but not because the government supports or prefers the organization's religious tenets, activities or affiliations.[25] Moreover, a government may not prefer certain religious denominations or organizations over others for funding, except on the

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[22] See Kendrick, 487 U.S. at 608-11 (holding that Adolescent Family Life Act grants to be used to help individuals avoid unwanted pregnancies may be awarded to religious institutions in light of the availability of such grants to a fairly "wide spectrum of public and private organizations"); see also, e.g., Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding grant program for colleges and universities as applied to schools with religious affiliations); Bradfield v. Roberts, 175 U.S. 291, 298 (1899) (permitting appropriation of public funds for financing of hospital buildings to be operated "under the influence or patronage" of the Roman Catholic Church).

[23] See also, e.g., id. at 703-05; Kendrick, 487 U.S. at 607-09 (stressing the "neutrality" of the government aid to private organizations — in particular, that "nothing on the face of the Act suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"); cf. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination).").

[24] Moreover, the government must not "convey[] or attempt[] to convey a message that religion or a particular religious belief is favored or preferred." Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).

[25] See Kendrick, 487 U.S. at 605 n.9 ("'Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents.'") (quoting S. Rep. No. 97-161, at 16 (1981)); Bradfield, 175 U.S. at 298 (religious affiliation of publicly funded hospital "is not of the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into"); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 696-97 (1970) (Harlan, J.).

basis of secular criteria unrelated to the organizations' religious affiliations or tenets. See Larson v. Valente, 456 U.S. 228, 244-47 (1982); see also Kiryas Joel, 512 U.S. at 706-07.

Although religious organizations may receive federal funds to provide social services or to engage in social-welfare activities, such organizations must not use aid they receive directly from a government to advance "'specifically religious activit[ies] in an otherwise substantially secular setting.'" Kendrick, 487 U.S. at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).[26] This holding reflects what Justice O'Connor has characterized as a "bedrock principle[]" of Establishment Clause doctrine, namely, that "direct state funding of religious activities" is impermissible. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The Court's decisions permitting the government to fund some secular functions performed by sectarian organizations "provide no precedent for the use of public funds to finance religious activities." Id.[27] Thus it would be impermissible for a

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[26] In Kendrick, all nine Justices accepted the principle that the use of government funds for religious activities would be impermissible. 487 U.S. at 611-12 (Establishment Clause would be violated if public monies were used to fund "'indoctrination into the beliefs of a particular religious faith'") (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)); id. at 621 (in assessing constitutionality of funding a particular program it would be relevant to determine, for example, "whether the Secretary has permitted [Adolescent Family Life Act] grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith"); id. at 623 (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause."); id. at 624 (Kennedy, J., concurring) (reasoning that the Establishment Clause would be violated if funds "are in fact being used to further religion"); id. at 634-48 (Blackmun, J., dissenting) (opining that government aid may not be used to advance religion, even if aid were intended for secular purposes). This conclusion was consistent with position that the Government advanced in the Kendrick litigation. See Brief for the [Federal] Appellant at 34-38, Bowen v. Kendrick, 487 U.S. 589 (1988) (Nos. 87-253, 87-431, 87-462) ("U.S. Kendrick Brief").

[27] The Court has, for example, applied the no-direct-funding-of-religious-activity principle in a line of cases involving assistance for building construction and repair. Thus, in Tilton v. Richardson, 403 U.S. 672 (1971), the Court upheld aid to religious schools insofar as the program in question expressly excluded the construction of "'any facility used or to be used for sectarian instruction or as a place for religious worship,'" id. at 675 (plurality opinion) (citation omitted), but unanimously invalidated the program insofar as it permitted funding for construction of buildings that were ever to be used for religious activities, see id. at 683 (plurality opinion) (concluding that the 20-year limitation on the statutory prohibition on the use of the buildings for religious activities violated the Establishment Clause, because "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion"); id. at 692 (Douglas, J., dissenting in part, joined by Black and Marshall, JJ.); Lemon v. Kurtzman, 403 U.S. 602, 659-61 (1971) (separate opinion of Brennan, J., concurring in the judgment in part in Tilton); id. at 665 & n.1 (White, J., concurring in the judgment in Tilton, and "accept[ing] the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years"). Compare also Hunt v. McNair, 413 U.S. 734, 744-45 (1973) (upholding construction of religiously affiliated college and university facilities financed by state issuance of bonds (repayable upon more favorable interest terms than otherwise would have been available), where such aid was subject to the restriction that the facilities not be used for "religious purposes"), with Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) (invalidating state maintenance and repair grants for nonpublic elementary and secondary schools (on the same day as the decision in Hunt) because it was not possible to "restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes").

government to provide SAMHSA financial assistance to a private organization to finance a program in which the recipient engages in religious worship, religious instruction, or proselytizing. See, e.g., Kendrick, 487 U.S. at 621 (constitutionality of providing funds to a particular organization would depend in part on whether the grantee "use[s] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith").[28] And such a prohibition applies even where, as in Kendrick, the government funds are distributed on a neutral, nondiscriminatory basis, to religious and nonreligious groups alike, for a secular purpose. See, e.g., Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion) ("The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity.").[29]

In accord with these authorities, this Office in 1988 issued an opinion to the Department of Housing and Urban Development ("HUD") in which it concluded that, "[a]lthough it is clear beyond peradventure that the government cannot subsidize religious counseling by the Salvation Army, there is nothing precluding HUD from subsidizing the [Salvation] Army's secular program for the homeless (food and shelter) if it can be meaningfully and reasonably separated from the Army's sectarian program (religious counseling)." Department of Housing and Urban Development Restrictions on Grants to Religious Organizations That Provide Secular Social Services, 12 Op. O.L.C. 190, 199 (1988) ("Kmiec Opinion") (emphasis added). That opinion went on to explain in further detail:

> [A]s a constitutional matter the Salvation Army cannot undertake religious counseling with public funds; however, it can accept public funds to provide food and shelter. If the facility used for the shelter program was not constructed, renovated, or maintained with public funds, it is theoretically possible for a portion of the facility to be used exclusively for the publicly-funded secular purpose of food and shelter and another portion to be used for the non-publicly funded sectarian purpose of religious counseling. Beyond this physical separation, HUD need only ensure that the Army's privately-funded religious activities are not offered as part of its shelter program and that the shelter program is not used as a device to involve the homeless in religious activities.

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[28] The prohibition on the use of government funds for "specifically religious activities" is not contravened, however, simply by virtue of the fact that the organization uses government funds to convey a secular message that happens to coincide with the organization's religious views or beliefs. Id. at 612-13, 621.

[29] As noted above at 4, proposed PHSA section 583 in H.R. 4923 also would establish a statutory prohibition that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."

Id. (emphasis added; footnote omitted); see also id. at 201 ("Kendrick does not in any way establish that religious organizations may use public funds in connection with promotion of religious views or practices").[30]

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[30] Neither the Court in Kendrick nor this Office in its 1988 opinion addressed in detail the degree to which, and the means by which, organizations must keep separate their religious activities from their government-funded secular activities. As this Office explained in its 1988 opinion, however, "[i]t is clear . . . that at least some of the religious grantees [receiving grants under the Adolescent Family Life Act ("AFLA") at issue in Kendrick] did not maintain the constitutionally required separation between their religious mission and their secular function under AFLA." Kmiec Opinion, 12 Op. O.L.C. at 201. In the Kendrick litigation, the Government conceded that there were "departures from proper constitutional practice" in cases where AFLA recipients proposed to include spiritual counseling in its AFLA program, used curricula that included explicitly religious materials, and included religious discussions at the conclusion of otherwise secular AFLA programs. U.S. Kendrick Brief at 41; see also Kendrick v. Bowen, 657 F. Supp. 1547, 1566 (D.D.C. 1987); Kmiec Opinion, 12 Op. O.L.C. at 201 & n.21. The Court in Kendrick, presumably referring to these incidents, noted that "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." 487 U.S. at 620; see also id. at 622 (O'Connor, J., concurring) ("I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the Government program at issue here."). The one specific thing the Court indicated in this regard is that it would be relevant to the as-applied challenge to determine on remand whether the government had permitted AFLA grantees to "use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." Id. at 621.

Accordingly, while it is difficult to provide categorical guidance with respect to the manner in which an organization's secular and sectarian activities must be segregated, we agree with the conclusion in the 1988 opinion that an organization's federally funded secular program must be "meaningfully and reasonably separated from" the organization's sectarian program, and that the government must ensure that the organization's privately funded religious activities "are not offered as part of its [federally funded] program and that the . . . program is not used as a device to involve the [beneficiaries] in religious activities." Kmiec Opinion, 12 Op. O.L.C. at 199. Furthermore, the 1988 opinion also was correct in concluding that "Kendrick does not suggest that the Court would be amenable to relaxing the degree [recognized in prior cases] to which [religious] organizations must separate their religious functions from their government-funded secular activities," id. at 201, in a case involving direct monetary aid to religious organizations. Thus, for example, it is constitutionally insufficient for a government agency to calculate what "percentage" of a program is secular and simply to ensure that the federal funds are not used to pay more than that "secular" percentage of the program's operating costs. Funds are fungible, and thus, without further segregation, SAMHSA aid must be presumed to subsidize all of the "parts" of a funded program. See Nyquist, 413 U.S. at 777-79. Moreover, the secular and religious functions must be sufficiently segregated such that any government inspection and evaluation of a organization's financial records to determine which expenditures are religious will not of necessity be so intrusive as to establish "an intimate and continuing relationship between church and state." Lemon, 403 U.S. at 621-22. With respect to this concern, the Court in Kendrick indicated that a program must be conducted in such a way that the governmental monitoring necessary to ensure the program operates in a constitutional manner does not result in excessive entanglement. 487 U.S. at 616-17.

We should note, in this regard, that proposed PHSA section 582(d), as added by H.R. 4923, would provide that "[e]xcept as provided in this section, any religious organization that is a program participant shall retain its independence from Federal, State, and local government, including such organization's control over the definition, development, practice, and expression of its religious beliefs," section 582(d)(1), and that "[n]either the Federal Government nor a State shall require a religious organization to . . . alter its form of internal governance," section 582(d)(2)(A). We would not construe PHSA section 582(d) to restrict the ability of a federal or state governmental agency to ensure that recipient religious organizations abide by statutory and constitutional conditions on the use of SAMHSA funds, such as those we discuss in this footnote. If the language were read to prohibit a government from

Those 1988 conclusions continue to reflect governing Establishment Clause doctrine. In particular, the Supreme Court's recent decision in Mitchell v. Helms, 120 S. Ct. 2520 (2000), permitting a local school district to provide educational and instructional materials directly to religiously affiliated primary and secondary schools, does not call into question those 1988 conclusions. To be sure, the rationale of the plurality opinion in Mitchell, if it were to be adopted by the Court, would undermine some of the legal principles underlying the "no direct aid" rule. See, e.g. id. at 2544-52 (plurality opinion). But Justice O'Connor's controlling opinion in Mitchell[31] (joined by Justice Breyer) emphasized that the Court's "decisions 'provide no precedent for the use of public funds to finance religious activities,'" id. at 2558 (O'Connor, J., concurring in the judgment) (quoting Rosenberger, 515 U.S. at 847 (O'Connor, concurring)), and that, in particular, the Court's decision in Kendrick "demonstrates" that where a government has given aid directly to a religious institution, "diversion of secular government aid to religious indoctrination" is "constitutionally impermissible," id. Thus, as Justice O'Connor explained, even where a government provides aid to a school on a nondiscretionary, per-capita basis, if the recipient "uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement." Id. at 2559.[32] Largely for this reason, Justice O'Connor concluded that the principle she articulated in Kendrick — that "'any use of public funds to promote religious doctrines violates the Establishment Clause,'" id. at 2571 (quoting 487 U.S. at 623 (O'Connor, J., concurring)) (emphasis in Kendrick and in Mitchell) — "of course remains good law," id., and that if plaintiffs were to prove "that the aid in question actually is, or has been, used for religious purposes," they would "establish a First Amendment violation," id. at 2567. Moreover, Justice O'Connor emphasized that the constitutional concern that direct aid might be impermissibly diverted to religious activities is especially pronounced when the aid is in the form of direct monetary subsidies. Id. at 2559-60.[33]

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ensuring that federal funds are used in a constitutional manner, then section 582(d) would itself present serious constitutional problems.

[31] See Marks v. United States, 430 U.S. 188, 193 (1977); Romano v. Oklahoma, 512 U.S. 1, 9 (1994).

[32] Of course, the constitutional concerns are even more pronounced where, as under the SAMHSA programs at issue, government decisionmakers selectively allocate aid among competing applicants, on the basis of subjective and discretionary criteria. In such a case it is even more reasonable to presume that the government endorses the manner in which the organization uses the aid. We further discuss this distinction infra at 22-25. See also Mitchell, 120 S. Ct. at 2541 (plurality opinion) (acknowledging that where aid is not awarded on the basis of neutral, nondiscretionary criteria, a government can more "easily[] grant special favors that might lead to a religious establishment").

[33] It is notable, in this regard, that Justice O'Connor's opinion in Mitchell reaffirmed the Court's decision, and her own concurrence, invalidating the "Community Education" program at issue in School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). Under the "Community Education" program, a public school district hired teachers to teach supplementary classes, at the conclusion of the regular school day, in subjects such as Arts & Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts & Crafts, Drama, Newspaper, Humanities, Chess, Model Building and Nature Appreciation. Id. at 376-77. The program was run by public authorities, and the classes were available in public as well as private schools. The constitutional question was raised by the fact that virtually every course taught on the facilities of a private religious school had an

With this constitutional framework in place, we can now address the four constitutional questions described above at 11.[34]

A. The first question is whether, if a government were to provide direct aid to an organization that is entitled to title VII's section 702(a) exemption, such funding would inevitably violate the constitutional no-direct-funding-of-religious-activities principle discussed above by virtue of the fact that such an organization's purpose and character must (in order to qualify for the exemption) be "primarily religious." See supra at 7-8.

The Supreme Court has explained that, because government funds provided directly to religious organizations may not be used to promote religious doctrine or otherwise to advance "specifically religious activit[ies] in an otherwise substantially secular setting," Kendrick, 487 U.S. at 621 (internal quotation omitted), it follows that the government may not provide such aid directly to organizations in which "secular activities cannot be separated from sectarian ones," Roemer, 426 U.S. at 755 (plurality opinion). This is so because, where secular and sectarian activities are "inextricably intertwined," Kendrick, 487 U.S. at 620 n.16, the provision of direct financial aid invariably will support religious activity.[35] As this Office concluded in 1988, this

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instructor employed full time by that private school, id. at 377, teaching "the same parochial school students who attend their regular parochial school classes," id. at 399 (O'Connor, J., concurring in the judgment in pertinent part). Even though "[n]ot one instance of attempted religious inculcation exist[ed] in the record[]," id. at 401 (Rehnquist, J., dissenting), the Court nevertheless invalidated the payment of teacher salaries, id. at 386-87 (majority opinion), reasoning that "there is a substantial risk that, overtly or subtly, the religious message [the religious school teachers] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school," id. at 387 (majority opinion); see also id. at 398 (Burger, C.J., concurring in the judgment in pertinent part); id. at 399-400 (O'Connor, J., concurring in the judgment in pertinent part). In Mitchell, Justice O'Connor explained that, in the context of the after-school classes in Ball, "I was willing to presume that the religious-school teacher who works throughout the day to advance the school's religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day," and that "[b]ecause the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government." 120 S. Ct. at 2568 (O'Connor, J., concurring in the judgment).

[34] In its 1988 Opinion, this Office concluded "that the Constitution not only permits the granting of an exemption [under section 702(a)] to religious organizations from otherwise applicable prohibitions on religious discrimination . . . , but also that it permits government financial assistance to the organizations so exempted." Kmiec Opinion, 12 Op. O.L.C. at 195. That Opinion, however, considered only the second of the four constitutional questions that we have identified. While we basically concur with the analysis of the 1988 Opinion on that particular question, see infra at 19, we conclude that the constitutional analysis is more difficult and uncertain with respect to the third and fourth questions, which the 1988 Opinion did not address.

[35] See also id. at 621 (suggesting that plaintiffs could prevail in an as-applied challenge if they could show that aid flowed to grantees that were "pervasively sectarian religious institutions"); Columbia Union College v. Clarke, 159 F.3d 151, 157-62 (4th Cir. 1998), cert. denied, 527 U.S. 1013 (1999); U.S. Kendrick Brief at 27-41; see generally Memorandum for John J. Knapp, General Counsel, Department of Housing and Urban Development, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: First Amendment Issues Implicated in Section 202 Loans and the Community Development Block Grant Program (July 1, 1983) ("Olson Opinion").

"[c]onstitutional difficulty only arises when the secular component [of the funded program] is inseparable from the sectarian component to permit government assistance." Kmiec Opinion, 12 Op. O.L.C. at 199; see also, e.g., Statement of the President on Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998, II Pub. Papers of William J. Clinton 1882-83 (Oct. 27, 1998). The Supreme Court's recent decision in Mitchell v. Helms — in particular, Justice O'Connor's controlling concurrence — is consistent with that conclusion.[36]

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[36] In a series of cases preceding Mitchell that involved aid to primary and secondary schools, the Supreme Court drew a sharp distinction between religious institutions that are "pervasively sectarian" and those that are not, and held that direct aid to "pervasively sectarian" institutions is unconstitutional where the aid can be used to further the instructional operations of such schools. See Mitchell, 120 S. Ct. at 2582-83 & n.7 (Souter, J., dissenting) (collecting cases). Courts have struggled over the years to identify the various factors that are germane to the question whether an institution is "pervasively sectarian." See, e.g., Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694, 708-15 & n.3 (D. Minn. 1990) (discussing 36 factors that might be relevant to the question). In Mitchell, four Justices advocated that the Court abandon any effort to draw legal distinctions on the basis of the "pervasively sectarian" category. 120 S. Ct. at 2550-52 (plurality opinion). Justices O'Connor and Breyer did not join this call for abandonment of the "pervasively sectarian" legal construct; but the rationale of Justice O'Connor's opinion indicates that, in her view, certain forms of nonmonetary aid can be provided directly to certain schools that might previously have been considered pervasively sectarian, so long as adequate mechanisms are in place to ensure that recipients will abide by prohibitions on the diversion of such aid to religious activities. Id. at 2568 (O'Connor, J., concurring in the judgment) (rejecting the legal presumption that religious school instructors will not abide by legal requirement that any religious teaching be done without the instructional aids provided by the government). (Notably, even the dissenters in Mitchell did not assert that aid to pervasively sectarian schools should be categorically prohibited. They went only so far as to say that in a pervasively sectarian school, "where religious indoctrination pervades school activities of children and adolescents, it takes great care to be able to aid the school without supporting the doctrinal effort." Id. at 2597 (Souter, J., dissenting).) We think that in light of the various opinions in Mitchell it is fair to conclude that when direct nonmonetary aid is at issue, the most pertinent constitutional question is simply whether, under the specific facts and circumstances of a particular case, there is an impermissible risk that an organization's secular and religious activities are so "'inextricably intertwined,'" Kendrick, 487 U.S. at 620 n.16, that the organization will be unable to segregate its religious activities from the secular activities that are supported by the particular direct government aid in question.

However, when the aid in question is in the form of direct funding, the constitutional question remains somewhat more uncertain. Indeed, in her controlling opinion in Mitchell, Justice O'Connor suggests that a more categorical rule might apply with respect to financial grants to certain religious institutions. In that opinion, Justice O'Connor noted that there are "special dangers associated with direct money grants to religious institutions," and that the "concern with direct monetary aid is based on more than just diversion [of the aid to religious activities]." 120 S. Ct. at 2566; see also id. at 2559-60; Agostini v. Felton, 521 U.S. 203, 228 (1997) (emphasizing that "[n]o Title I funds ever reach the coffers of religious schools"); Mitchell, 120 S. Ct. at 2546-47 (plurality opinion) (acknowledging that "[o]f course, we have seen 'special Establishment Clause dangers,' Rosenberger, 515 U.S., at 842, when money [as opposed to nonmonetary aid] is given to religious schools or entities directly") (emphasis in original). "In fact," Justice O'Connor cautioned, "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." Id. at 2566 (O'Connor, J., concurring in the judgment). Thus, while Kendrick holds that the government can provide direct monetary aid to certain religious organizations, and while Mitchell holds that direct nonmonetary aid can be provided directly to institutions that might previously have been considered "pervasively sectarian" where there is not a substantial risk that such aid will be diverted to religious activities, it remains unresolved after Mitchell whether there are some sorts of religious institutions, such as churches, to which a

If an organization's secular activities cannot be separated from its sectarian activities (including in its substance-abuse program) — thus rendering the organization's substance-abuse program constitutionally ineligible for direct government funding — then chances are that such organization's purpose and character are primarily religious, and thus that the organization will be eligible for the section 702(a) exemption to title VII. But the converse does not necessarily follow. While some organizations entitled to the section 702(a) exemption might not choose, or be able, to segregate their secular and religious activities, it is possible that a particular organization's overall purpose and character could be "primarily religious" (thus making it eligible for the section 702(a) exemption), but that it could nevertheless assure that its "privately funded religious activities are not offered as part of its [government-funded] program." Kmiec Opinion, 12 Op. O.L.C. at 199 (emphasis added).[37] We cannot say, in the abstract, what percentage of organizations eligible for the section 702(a) exemption would be able and willing to forego any specifically religious activities in the programs receiving SAMHSA grants. But we see no reason to presume that the requisite segregation between secular and religious activities would be categorically impossible within substance-abuse programs run by organizations entitled to invoke title VII's section 702(a) exemption.[38]

B. The next question is a related one — namely, whether an organization's religious discrimination in employment pursuant to the section 702(a) exemption would itself invariably render the organization ineligible to receive direct government funding because of the risk that such aid will be used to subsidize religious activities. Courts occasionally have suggested that whether an organization engages in such employment discrimination is a relevant factor in determining whether the organization is so "pervasively sectarian" that it is constitutionally prohibited from receiving funds directly from the government.[39] For instance, if an organization does engage in such discrimination among employees in a program that is government-funded, that discriminatory practice could be relevant evidence that the organization expects the functions performed by its employees in that program to include religious teaching or inculcation (which would render the program constitutionally ineligible for direct government aid). By contrast, if an organization does not restrict its employees to coreligionists, that fact might help to

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government may not provide direct monetary aid under any circumstances.

[37] For instance, it might be that the SAMHSA-funded program represents but a small part of a religious organization's activities, and that the vast majority of the organization's other activities are sectarian in character.

[38] Of course, in a particular case an organization's provision of secular substance-abuse services could become such a prominent part of the organization's activities as to render its overall character and purpose primarily secular, in which case that organization would no longer be entitled to the section 702(a) exemption. But we have no reason to believe that invariably will be the case.

[39] See, e.g., Roemer, 426 U.S. at 757 (plurality opinion); Tilton, 403 U.S. at 686 (plurality opinion); Columbia Union College, 159 F.3d at 166 (although religious employment discrimination was relevant to question whether it would be constitutional to provide aid to college, it would not be dispositive); Minnesota Fed'n of Teachers, 740 F. Supp. at 720 (whether all faculty must be Christian would be a "principal" factual question in determining whether a particular school was so pervasively sectarian that it was ineligible to receive state aid).

demonstrate that religious activities are not an invariable part of the funded program's functions. But while religious discrimination in employment might be germane to the question whether an organization's secular and religious activities are separable in a government-funded program, that factor is not legally dispositive.[40] This Office reached a substantially similar conclusion in its 1988 opinion, 12 Op. O.L.C. at 193-94; and there has been no intervening development in the case law that would cause us to reconsider that conclusion.[41]

C. When the religious discrimination in employment occurs in the very program that receives SAMHSA aid, however, a much more difficult and novel question is raised. In particular, if a government, pursuant to its discretionary powers to allocate aid, chooses to provide direct funding to such a program, are there circumstances under which the government's choice to provide such aid to the discriminating organization would constitute an impermissible favoring or endorsement of the religious employment discrimination?

There can be no dispute that a government may not select its employees on the basis of religious affiliation or belief, or insist that its employees abide by the religious tenets of a particular denomination. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson, 456 U.S. at 244.[39]

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[40] See Columbia Union College, 159 F.3d at 163 (stressing that no one factor is dispositive)

[41] In 1983 this Office opined that an organization that discriminated on the basis of religion with respect to the beneficiaries of a social-services program "would by definition be a pervasively sectarian organization" to which direct funds cannot constitutionally be provided. Olson Opinion at 19; see also Lemon, 403 U.S. at 651 (Brennan, J., concurring) ("when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection"); id. at 671 n.2 (White, J., dissenting) (acknowledging that a statute authorizing aid to religious schools would be unconstitutional "to [the] extent" there were evidence "that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith"); Norwood v. Harrison, 413 U.S. 455, 464 n.7 (1973) (citing to Justice White's footnote with apparent favor); Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 892-93 (D. Kan. 1974) (opining that a state tuition grant program violated the Establishment Clause as applied to tuition used at a college that reserved the right to give preferences in enrollment to applicants from congregations of a particular church, as applied to colleges that required students to attend chapel services, and as applied to a college that required students to express a belief in Christianity).

In light of the provision in proposed PHSA section 582(f)(4) that would expressly prohibit program participants from engaging in religious discrimination against individuals receiving substance-abuse treatment, the conclusion in the 1983 memorandum is not implicated here. Accord Kmiec Opinion, 12 Op. O.L.C. at 194 n.8 (noting, and declining to reconsider, the 1983 conclusion).

[39] See also Kiryas Joel, 512 U.S. at 706-07 ("whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored") (citations omitted); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.") (footnotes omitted)).

Similarly, the Equal Protection Clause of the Fourteenth Amendment in many contexts would prohibit States from discriminating on the basis of religion,[40] a prohibition that would apply to the federal government by virtue of the equal protection component of the Due Process Clause of the Fifth Amendment.[41] Furthermore, article VI, clause 3 of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Accordingly, as Justice O'Connor has noted, "the Religion Clauses — the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion — all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Kiryas Joel, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment).[42]

Therefore, if private organizations receiving SAMHSA funding were state actors, they could not in that capacity hire employees on the basis of religion. In the context of the SAMHSA grant programs that you have asked us to consider, however, if a recipient organization engages in religious discrimination in employment, such discrimination does not become attributable to the government for constitutional purposes merely by virtue of the fact that the private organization has received government aid that it uses to fund that employment position. "It is . . . clear that mere receipt of government financial assistance will not transform the religious organization into a state actor subject to constitutional prohibitions on religious discrimination." Kmiec Opinion, 12 Op. O.L.C. at 195 n.12.[43] Furthermore, an organization receiving SAMHSA grants does not become a state actor merely by virtue of the fact that it "performs a function which serves the public." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). To be sure, on rare occasion the Supreme Court has found state action present in the exercise by a private entity of powers traditionally reserved exclusively to the state.[44] But the substance-abuse functions that

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[40] See, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); McDaniel v. Paty, 435 U.S. 618, 643-46 (1978) (White, J., concurring in the judgment);

[41] See United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[42] See also id. at 728 (Kennedy, J., concurring in the judgment) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion.").

[43] See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982).

[44] See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (regulation of speech on sidewalks of "company town"); Terry v. Adams, 345 U.S. 461 (1953) (conduct of primary election that, in effect, determined selection of public official); Evans v. Newton, 382 U.S. 296 (1966) (management of park that had a tradition of municipal control); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991) ("The selection of jurors represents a unique governmental function delegated to private litigants and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race."). See generally Flagg

are subsidized with SAMHSA funds are not functions that traditionally have been the exclusive prerogative of the state, nor functions "traditionally associated with sovereignty," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).[45] Nor is it likely that a private substance-abuse program receiving federal funding would qualify as an "Office or public Trust under the United States" for purposes of article VI, such that any decision to reserve certain employment positions for persons of a particular religion would constitute a prohibited "religious Test . . . required as a Qualification" to such Office or public trust.[46]

However, where a private entity discriminates with the use of government funds, a difficult Establishment Clause question may be raised respecting the constitutionality of the government's own decision to provide funds to that organization, a decision that undoubtedly is state action.[47] Moreover, that constitutional question is especially thorny where, as under the

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Bros., Inc. v. Brooks, 436 U.S. 149, 157-64 (1978).

[45] For similar reasons, we believe that a government's funding of religious organizations to engage in the substance-abuse services at issue under the PHSA ordinarily will not raise any question regarding an improper delegation of traditional state functions to ecclesiastical authorities. The Establishment Clause generally prohibits a government from "vesting discretionary governmental powers in religious bodies." Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982); see also id. at 127 ("The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."). But the authority of private organizations to engage in substance-abuse services (and to hire employees to work within substance-abuse programs) does not, by virtue of SAMHSA funding, become "a power ordinarily vested in agencies of government," id. at 122, let alone the sort of regulatory power and authority that was at issue in Larkin (which involved a statute that in effect permitted neighboring churches and schools to veto a city's issuance of liquor licenses for particular properties).

[46] Employment in a SAMHSA-funded substance-abuse program would not be an "Office . . . under the United States" for purposes of Article VI. The question whether the operation of a SAMHSA-funded program would be a "public Trust under the United States" is less clear. There is virtually no federal case law discussing what constitutes a "public Trust" for purposes of article VI's religious test ban, let alone whether and under what circumstances the notion of "public Trust" might encompass recipients of federal grants to perform social services. See Robert A. Destro, The Structure of the Religious Liberty Guarantee, 11 J.L. & Relig. 355, 369 n.59 (1994-1995). Cf. American Communications Ass'n v. Douds, 339 U.S. 382, 414-15 (1950) (concluding that a statutorily imposed oath for union officers did not impose a "religious Test" that would be inconsistent with Article VI, without discussing the question whether the position within the union was an "Office or public Trust under the United States"). We think the religious test ban might best be read as a limitation on or qualification of the first portion of article VI, clause 3, which provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." If that understanding is correct, then "public Trust" would properly be construed to be limited to certain positions, other than "Office[s]," that are subject to the oath requirement in the first portion of clause 3, such as federal "Senators and Representatives." A more expansive construction of "public Trust" might include any position or function the performance of which is subject to a duty of loyalty to the United States. Under either of these two interpretations, the operation of a SAMHSA-funded program would not be a "public Trust under the United States."

[47] See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion); id. at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

SAMHSA programs in question, the government metes out scarce aid selectively among competing applicants, pursuant to subjective and discretionary criteria.[48]

In recent cases in which the Supreme Court has upheld governmental provision of certain benefits to religious organizations or institutions, or to students attending religiously affiliated schools, the benefits in question were generally available to all parties that satisfied some objective, neutral criteria, and the Court identified such neutrality as a critical protection against the risk of the government favoring (or disfavoring) religiously affiliated recipients. See, e.g., Mitchell, 120 S. Ct. at 2541-44 (plurality opinion); id. at 2556-58 (O'Connor, J., concurring in the judgment) (explaining that neutrality is an important, but not sufficient, indicia of constitutionality); Agostini v. Felton, 521 U.S. 203, 228, 231-32 (1997). The same emphasis on neutral criteria has been critical to the Court's decisions in a series of cases involving the question whether the Establishment Clause would prohibit the use of government property for religious expression where such property is made broadly available for a range of other forms of private expression.[49] More generally, and in addition to its focus on neutrality, the Court has, "[i]n recent years, . . . paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).[50] The endorsement test asks whether a reasonable observer would view a government decision as endorsing religion in general, or any particular religious creed. See, e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, concurring in part and concurring in the judgment). One obvious way in which such impermissible endorsement might occur is if the state is reasonably perceived as having used its discretionary authority to favor particular religions, religious adherents, or religious activities.[51]

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[48] See also infra note 55 (discussing a related equal protection question).

[49] See, e.g., Pinette, 515 U.S. at 761-66 (plurality opinion); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993); Board of Educ. of Westside Community Schs., 496 U.S. 226, 247-52 (1990) (plurality opinion); Widmar v. Vincent, 454 U.S. 263, 273-75 (1981).

[50] See also id. at 624-32 (O'Connor, J., concurring in part and concurring in the judgment); Mitchell, 120 S. Ct. at 2559 (O'Connor, J., concurring in the judgment); Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2278 (2000); Agostini, 521 U.S. at 235; Pinette, 515 U.S. at 773-75 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment).

[51] For example, in County of Allegheny the Court invalidated the state's placement of a creche on the Grand Staircase of the county courthouse, in part because that site was not "the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche." 492 U.S. at 600 n.50. Because the government was highly selective in choosing private displays that could be placed at that location, "any display located there fairly may be understood to express views that receive the support and endorsement of the government." Id.; see also Pinette, 515 U.S. at 764 (plurality opinion) (distinguishing County of Allegheny from public-forum cases on the ground that the "staircase was not . . . open to all on an equal basis, so the county was favoring sectarian religious expression").

Where the state provides aid to religious groups in the context of a program that makes aid "generally" available to all applicants that satisfy some objective and neutral criteria, such "generally available" aid will rarely reflect or convey any governmental endorsement of or preference for religion, or for the particular religious tenets of the recipient.[52] But it is our understanding that SAMHSA grants to private organizations are rarely, if ever, made "generally" available to all organizations that satisfy specified secular, objective criteria. Instead, grants typically are awarded on a competitive basis, where a governmental entity (such as SAMHSA or a State agency) is free to make highly subjective individualized assessments of the grant applicants and the manner in which such applicants will use the SAMHSA funds. A government's application of such subjective criteria may require, or at least be reasonably perceived as reflecting, governmental judgments about the relative value of the recipient entities, and of the manner in which such organizations plan to use the SAMHSA aid. "[T]he more discriminating and complicated" the criteria underlying the government's decisions, "the greater the potential for state involvement in evaluating the character of the organizations." Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 698-99 (1970) (Harlan, J.). And the greater the potential for such evaluative judgments by the state, the greater the risk of real or perceived religious preference or endorsement.[53]

Of course, this concern that the government will be perceived as endorsing religiously affiliated organizations is inherent in the very practice of choosing such organizations to receive government funds to engage in social services pursuant to a process in which government decisionmaking is governed by discretionary and subjective criteria. Yet the Court's holding in Bowen v. Kendrick indicates that the perceived endorsement problem in such a context does not constitutionally disqualify religious organizations from eligibility for such discretionary aid where "nothing on the Act's face suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution," 487 U.S. at 608, where the aid may not be used for religious activities, and where (therefore) there would be little reason for a reasonable observer to assume that the government's choice to fund a religious organization was based on, or reflects endorsement of, that organization's religious activities, tenets or affiliations.

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[52] We do not mean by this to suggest that such neutrality and objective criteria inevitably would eliminate all possibility of unconstitutional endorsement or aid. Even where a government implements formally neutral and objective criteria, the provision of aid to religious organizations or for religious speech sometimes can create an undue risk of perceived government endorsement. See, e.g., Mitchell, 120 S. Ct. at 2559-60 (O'Connor, J., concurring in the judgment); Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2278 n.21 (citing Pinette, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment)).

[53] Cf. also, e.g., Decker v. O'Donnnell, 661 F.2d 598, 616-17 & n.36 (7th Cir. 1980) (holding that government aid was unconstitutional as applied to religious schools in large part because of the "wide degree of discretion" that the government exercised in choosing among "competitive applications" for the aid); Constitutionality of Section 7(b)(3) of the Emergency Veterans' Job Training Act of 1983, 13 Op. O.L.C. 31, 44 n.17 (1989) (emphasizing the constitutional distinction between a program that provides funds to any applicant meeting objective criteria and a program that vests discretion in the government to choose aid recipients).

Nevertheless, even though (as Kendrick indicates) there is no constitutionally significant risk that the government would reasonably be perceived as endorsing all of a funding recipient's practices, tenets or affiliations, in certain cases there would be a risk that the government's discretionary and subjective decisionmaking would reasonably be perceived as reflecting the government's endorsement of the uses to which the scarce government funds are put. The individualized determination by government decisionmakers that one particular substance-abuse program is sufficiently meritorious or effective to warrant the preference for that program over all others vying for public funding could reasonably suggest that the government approves of the recipient's use of the aid.[54]

Accordingly, where a government selectively exercises its discretion to award funds to one recipient among several competing for such aid, knowing that such funds are to be used to subsidize employment positions that are reserved for persons of a particular religion, the question might arise whether the government would reasonably be viewed as giving its imprimatur to the religious discrimination, which the Establishment Clause forbids. The answer to that question would depend on the facts of a particular governmental funding practice. See Allegheny County, 492 U.S. at 629 (O'Connor, J., concurring in part and concurring in the judgment) ("the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice"). The constitutional calculus in any given case likely would turn, in large part, on whether a reasonable observer, familiar with the "history and context" of the governmental practice in question, Pinette, 515 U.S. at 780 (O'Connor, J., concurring in the judgment), would conclude that the government's decision to provide aid to the discriminating organization was made in spite of, rather than because of, the organization's discriminatory employment practice. Such an inquiry would "require[] courts to examine the history and administration of a particular practice to determine whether it operates as [an impermissible] endorsement." Id. at 778. The risk that a court would find an impermissible endorsement would be heightened where a government's funding decisions are dependent in part upon discretionary evaluation of the identity or characteristics of the employees who are to operate a substance-abuse program. By contrast, if a government disbursing SAMHSA funds is generally indifferent to the criteria by which a private organization chooses its employees and to the identity and characteristics of those employees, there would be less likelihood that the government could reasonably be perceived to endorse the organization's use of religious criteria in employment decisions.[55]

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[54] See, e.g., Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2278, 2282 (where school district implements policy of "extremely selective access" by giving student-body majority the power to select one speaker from among many candidates to provide statement before football games, "an objective . . . student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval"); see also Board of Regents of Univ. of Wis. Sys. v. Southworth, 120 S. Ct. 1346, 1357 (2000); Rosenberger, 515 U.S. at 892-93 n.11 (Souter, J., dissenting) (noting the "communicative element inherent in the very act of funding itself").

[55] In this context, we should note a related constitutional question. In Norwood v. Harrison, 413 U.S. 455 (1973), the Supreme Court held that the Equal Protection Clause prohibits a State from "giving significant aid to institutions that practice racial or other invidious discrimination," id. at 467, even pursuant to a neutral program in

D. The final constitutional question presented is whether title VII's section 702(a) exemption itself would be an unconstitutional preference for religious organizations as applied to employees within a program that receives direct government funding — i.e., employees who must, as a matter of constitutional and statutory law, refrain from specifically religious activities within the funded program. This, too, is a difficult and unresolved constitutional question.[56]

As noted above, title VII generally forbids employers from discriminating against employees on the basis of their religion. The section 702(a) exemption creates an express preference for certain religious employers, permitting them to avoid title VII liability for conduct (religious discrimination) that all other employers must forego. This preference harms prospective and actual employees against whom the exempted employers are permitted to discriminate, both by limiting their employment opportunities and by "burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or . . . employment itself. The potential for coercion caused by such a provision is in serious

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which aid is awarded on the basis of objective criteria having nothing to do with such discrimination, where the aid "has a significant tendency to facilitate, reinforce, and support" the discrimination, id. at 466. Especially in light of more recent doctrinal developments, see, e.g., Washington v. Davis, 426 U.S. 229 (1976), the parameters of the Norwood precedent, even with respect to government aid that supports racial discrimination, are uncertain and ill-defined. Compare, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 622-23 n.4 (1983) (Rehnquist, J., dissenting); and Brief for the United States, Goldsboro Christian Schs. v. United States and Bob Jones Univ. v. United States, 461 U.S. 574 (1983), Nos. 81-1 and 81-3, at 39-40 & n.36, with, e.g., United States v. Virginia, 518 U.S. 515, 599-600 (1996) (Scalia, J., dissenting); National Black Police Ass'n v. Velde, 712 F.2d 569, 580-83 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); Young v. Pierce, 628 F. Supp. 1037, 1052-55 (E.D. Tex. 1985); Bishop v. Starkville Academy, 442 F. Supp. 1176, 1180-82 (N.D. Miss. 1977). See also Brown v. Califano, 627 F.2d 1221, 1235-37 (D.C. Cir. 1980); Mayer G. Freed and Daniel D. Polsby, Race, Religion, and Public Policy: Bob Jones University v. United States, 1983 S. Ct. Rev. 1, 12-17. What is more, even assuming the continuing force of Norwood in the context of race discrimination, courts have had little occasion to consider the Norwood question in the context of funding of private, religiously motivated discrimination in favor of coreligionists. But cf. note 41, supra (citing the opinions of Justices Brennan and White in Lemon). Therefore it is very difficult to predict whether and how Norwood would be applied in the context of such religious discrimination by recipients of SAMHSA funds. We think, however, that if a court in a particular case rejected the Establishment Clause argument that the decision to provide SAMHSA aid constitutes an impermissible endorsement of the recipient's religious discrimination, it is extremely unlikely that such court would then conclude that the provision of aid raised a serious equal protection problem under Norwood.

[56] The one district court that has directly addressed the question held, without substantial analysis, that section 702(a) was unconstitutional as applied to the Salvation Army's religious discrimination against an employee of a domestic violence shelter where the position in question was substantially government-funded. Dodge v. Salvation Army, 1989 WL 53857, at *2-*4 (S.D. Miss. 1989); see also Siegel v. Truett-McConnell College, 13 F. Supp. 2d 1335, 1343-44 (N.D. Ga. 1994) (reasoning that even if Dodge was correctly decided in the context of direct subsidies, there could be no constitutional violation where the government did not fund a college that engaged in employment discrimination but instead merely provided aid to students to attend that college), aff'd mem., 73 F.3d 1108 (11th Cir. 1995); Young v. Shawnee Mission Med. Center, 1988 U.S. Dist. LEXIS 12248 at *3-*6 (D. Kan. 1988) (rejecting argument similar to that in Dodge, but relying on questionable ground that defendant's acceptance of Medicare payments "for individual patient's benefit" does not "transform defendant into a federally funded institution").

tension with our commitment to individual freedom of conscience in matters of religious belief." Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340-41 (1987) (Brennan, J., concurring in the judgment). The imposition of such harms naturally raises the question whether, as applied to the employees in question, the Establishment Clause prohibits the religious preference in section 702(a).

It is a "principle at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." Kiryas Joel, 512 U.S. at 703. Thus, as a general rule the government may not provide a public benefit exclusively to religious adherents, or exempt them "from a general obligation of citizenship," Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); instead, in order to pass muster under the Establishment Clause, government benefits generally must be provided on a religion-neutral basis. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Kiryas Joel, 512 U.S. at 703-05. A religious exemption from a general obligation of citizenship, such as the exemption found in section 702(a) of title VII, would uniquely benefit certain religious organizations and therefore run afoul of this Establishment Clause requirement unless it could be defended as what the Court has called a permissible "accommodation" of religious exercise. A statutory exception exclusively for religion may be a permissible "accommodation" where it has the purpose and effect of "alleviat[ing] significant governmental interference" with the exercise of religion. Amos, 483 U.S. at 335, 339 (1987) (emphasis added); see also Kiryas Joel, 512 U.S. at 705 ("the Constitution allows the State to accommodate religious needs by alleviating special burdens") (emphasis added); Texas Monthly, 489 U.S. at 15 (plurality opinion) (religion-only accommodation must "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion") (emphasis added).[57]

In Amos, the Court sustained the constitutionality of the religious exemption in section 702(a) as applied to "secular" employment positions of qualifying nonprofit religious corporations, reasoning that the exemption as so applied was "rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 339. The reasons for the Court's conclusion are important to the question here.

The plaintiffs in Amos argued that, as applied to employees who were involved exclusively in their employers' secular, rather than religious, activities, the title VII exemption did not relieve any burden on the employers' religious exercise, and thus could not be viewed as a permissible religious accommodation. The Court did not take issue with plaintiffs' contention

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[57] Even where an exemption would lift a "significant" or "special" government-imposed burden, the Constitution might prohibit extending such exemption exclusively to religious persons or entities if the exemption "burdens nonbeneficiaries markedly." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating religious preference that did not lift government-imposed burden and that did impose "significant" and "substantial" burdens on nonbeneficiaries). The Court's decision in Amos indicates that the burden section 702(a) imposes on disfavored employees (and applicants for employment), while serious, is not in and of itself so significant as to automatically render the exemption unconstitutional, at least as applied to nonprofit employers.

that confining such employment positions to coreligionists would not directly assist the organizations in fulfilling their religious missions. The Court explained, however, that Congress's 1972 extension of the exemption to all of a qualifying employer's employees (see supra at 6) did, indeed, alleviate a different "significant burden" on religious exercise — namely, the burden of requiring an organization, "on pain of substantial liability, to predict which of its activities a secular court will consider religious." Id. at 336 (emphasis added). The Court further explained why this burden of "prediction" was "significant": "The line [between the organization's secular and religious activities] is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." Id. (footnote omitted). Moreover, the broader exemption alleviated serious entanglement concerns by "avoid[ing] the kind of intrusive inquiry into religious belief" by the government that would be necessary if the exemption were limited to an organization's "religious" activities. Id. at 339.

While the decision in Amos provides a helpful framework for evaluating whether application of section 702(a) to employees of a SAMHSA-funded program would be a permissible accommodation, it does not resolve that question, because the rationale for the Court's decision in Amos is inapposite in the context of employers that receive direct SAMHSA funds. As explained above at 12-16, the Establishment Clause requires that the activities in the SAMHSA-funded program be secular: organizations that receive direct government aid under a SAMHSA grant program categorically cannot use such aid for "specifically religious activit[ies] in an otherwise substantially secular setting." Kendrick, 487 U.S. at 621 (internal quotation omitted). Unlike the Appellant church in Amos, which wished to "propagate its religious doctrine through the Gymnasium" that had employed the plaintiff, 483 U.S. at 337, a direct recipient of SAMHSA grants may not "propagate its religious doctrine" in a subsidized substance-abuse program. The "line," in other words, is a "bright one," id. at 336, in this case: It would not be difficult for a recipient of SAMHSA aid to "predict" that activities in its government-funded program would be secular, rather than religious, because the Constitution requires such a clean separation (and H.R. 4923 itself also would prohibit the use of the funds for specifically religious activities). "Since the state funded . . . functions are to be exclusively secular, there can be no chilling effect created by uncertainty as to how these jobs would be characterized by a reviewing court."[58] Accordingly, confining such jobs to persons of a particular religion would not appear to serve any religious objective, and title VII's legal proscription against religious discrimination would not impose the significant burden that the Amos Court identified. An organization receiving SAMHSA funding for a substance-abuse program would not be required, "on pain of substantial liability," id. at 336, to make difficult predictions concerning which of its activities in that program would be considered religious. Nor in this context would application of title VII's antidiscrimination rule require government officials to engage in any additional "intrusive inquiry into religious belief." Id. at 339. The government

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[58] Alan Brownstein, Constitutional Questions About Charitable Choice, in Welfare Reform & Faith-Based Organizations 219, 234 (Derek H. Davis & Barry Hankins eds., 1999).

already would be required to take steps sufficient to ensure that prohibited religious activities are not present in federally funded programs. Such monitoring need not itself result in an impermissible entanglement, Kendrick, 487 U.S. at 616-17, and the antidiscrimination rule would not result in any additional governmental entanglement in religious affairs. For these reasons, the majority's opinion in Amos does not provide a rationale as to why a recipient organization could claim a religious need to discriminate on the basis of religion in hiring persons to work in the secular, SAMHSA-funded program.

Nevertheless, Justice Brennan's concurring opinion in Amos provides a possible alternative rationale that some religious organizations receiving SAMHSA funds might be able to invoke to explain how title VII's prohibition on religious discrimination would impose a significant burden on their exercise of religion, even as applied to employees who must, by law, be engaged in wholly secular activities. Many religious organizations and associations historically have engaged in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular — in the sense that it does not include religious teaching, proselytizing, prayer or ritual — the religious organization's performance of such functions may be "infused with a religious purpose." Amos, 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities "often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster." Id. at 344 (footnote omitted). In other words, the provision of "secular" social services and charitable works that do not involve "explicitly religious content" and are not "designed to inculcate the views of a particular religious faith," Kendrick, 487 U.S. at 621, nevertheless might be "religiously inspired," id., and can, in addition, play an important part in the "furtherance of an organization's religious mission." Amos, 483 U.S. at 342 (Brennan, J., concurring).

As Justice Brennan further explained, a religious organization may have good reason for preferring that individuals similarly committed to its religiously motivated mission operate such secular programs, for such collective activity can be "a means by which a religious community defines itself." Id. Indeed, such collective activity not only can advance the organization's own religious objectives, but also can further the religious mission of the individuals that constitute the religious community: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." Id.

Accordingly, it is possible that a preference for coreligionist employees in particular social-service programs could advance a religious organization's religious mission, facilitate the religiously motivated calling and conduct of the individuals who are the constituents of that organization, and fortify the organization's religious tradition. Where an organization makes such a showing, it is possible the courts might conclude that the title VII prohibition on religious discrimination might impose "significant governmental interference" with the ability of that organization "to define and carry out [its] religious mission[]," Amos, 483 U.S. at 335, even as

applied to employees who are engaged in work that must, by law, be wholly secular in content. And, where that is the case, the section 702(a) exemption might be a permissible religious accommodation that "alleviat[es] special burdens," Kiryas Joel, 512 U.S. at 705 (emphasis added), rather than an impermissible religious preference. We emphasize, however, that such a theory has not yet been tested by the courts, and thus the constitutionality of the section 702(a) exemption in such a case remains a difficult and unresolved question.

II. Statutory Question

Finally, you have asked whether, as a matter of statutory law, section 702(a) in any respect exempts qualifying religious organizations from title VII's prohibitions on employment discrimination other than religious discrimination, such as discrimination on the basis of race, color, sex (including pregnancy), or national origin.[59]

By its terms, section 702(a) applies only "with respect to the employment of individuals of a particular religion." In other words, that exemption "merely indicates that [qualifying] institutions may choose to employ members of their own religion without fear of being charged with religious discrimination." Boyd v. Harding Academy of Memphis, 88 F.3d 410, 413 (6th Cir. 1996).[60] Furthermore, the legislative history manifests congressional intent that section 702(a) would not exempt qualifying organizations from other forms of discrimination that title

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[59] We note that another provision of title VII, section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1994), provides that it shall not be an unlawful employment practice under title VII for an employer to hire and employ employees on the basis of religion, sex or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This "BFOQ" exception is construed narrowly, permitting the otherwise-prohibited forms of discrimination only where use of the classification can be shown, based on objective and verifiable evidence, to be reasonably necessary to ensure employees' ability to perform a job related to the central mission (or "essence") of the employer's business. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 200-04 (1991). We suspect the BFOQ exception would rarely, if ever, justify discrimination on the basis of sex or national origin in federally funded substance-abuse programs.

[60] At least two courts of appeals have held that section 702(a) affords qualifying employers an exemption from title VII liability not only when they prefer employees affiliated with a particular religious denomination, but also when they insist that such coreligionist employees share the organization's beliefs or philosophies, see Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997) (involving divinity school discharge of teacher who allegedly did not share the school's theological views), or when they insist that employees abide by particular requirements of religious observance, see Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (involving Catholic school's failure to renew contract of teacher who had failed to pursue the proper canonical process from the Roman Catholic Church to obtain validation of her second marriage). Nothing in those decisions suggests that section 702(a) would exempt an employer from title VII liability if the employer imposed such a belief or observance requirement in a manner that discriminates against certain employees on the basis of, e.g., sex or race. And, as we discuss in the text above, courts have held that where an employer is entitled to insist that its employees conduct their lives in accord with certain moral or religious standards, "Title VII requires that this code of conduct be applied equally to both sexes." Boyd, 88 F.3d at 414 (citation omitted).

VII proscribes, such as discrimination on the basis of race and sex.[61] Indeed, the Senate Managers' section-by-section analysis that accompanied the Conference Committee Report on the 1972 amendments to title VII includes a clear statement of intent that religious organizations that qualify for the section 702(a) exemption generally should be required to abide by title VII's prohibitions, except with respect to the favoring of coreligionists:

> The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation [under the 1964 law] to religious activities. Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.

118 Cong. Rec. 7167 (1972) (presented by Sen. Williams) (emphasis added). Accordingly, the courts uniformly have concluded that section 702(a) does not exempt qualifying employers from title VII's prohibitions on any form of discrimination other than preferences for coreligionists,[62] even where such discrimination is religiously motivated.[63]

Thus, for example, one court of appeals has held that section 702(a) does not exempt an employer from liability under section 704(a), 42 U.S.C. § 2000e-3(a), for discharging an employee in retaliation for having instituted EEOC proceedings, even where the employee's conduct violated church doctrines prohibiting lawsuits against the church. EEOC v. Pacific Press

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[61] During consideration of title VII in 1964 and later the Equal Employment Opportunity Act of 1972, Congress considered and rejected proposals that would have categorically excluded certain religious employers from coverage under title VII. Congress instead enacted the more limited exemption for discrimination in favor of employees "of a particular religion," and extended that exemption in 1972 to all of a qualifying organization's employees. See, e.g., EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1276-77 (9th Cir. 1982) (recounting legislative history).

[62] See, e.g., Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999); Boyd, 88 F.3d at 413; DeMarco v. Holy Cross High Sch., 4 F.3d 166, 173 (2d Cir. 1993); EEOC v. Freemont Christian Sch., 781 F.2d 1362, 1366 (9th Cir. 1986); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); Pacific Press, 676 F.2d at 1276-77; EEOC v. Mississippi College, 626 F.2d 477, 484 (5th Cir. 1980), cert denied, 453 U.S. 912 (1981); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 348 (E.D.N.Y. 1998); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 806-08 (N.D. Cal. 1992); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980).

[63] See, e.g., Fremont Christian Sch., 781 F.2d at 1364-67 (church-owned school violated title VII by providing health insurance to married men but not married women, even where such discrimination reflected scriptural belief that in marriage only a man can be the head of a household).

Publishing Ass'n, 676 F.2d 1272, 1276-77, 1280 (9th Cir. 1982).[64] Similarly, courts have held that, even where an employer is entitled to insist that its employees conduct their lives in accord with certain moral or religious standards, "Title VII requires that this code of conduct be applied equally to both sexes." Boyd, 88 F.3d at 414 (citation omitted).[65] For instance, whereas an employer may be permitted to insist that its employees adhere to an evenhandedly enforced policy requiring males and females alike to refrain from adultery,[66] the employer may not (even for religious reasons) discipline or dismiss female employees on the basis of pregnancy outside of marriage, because title VII defines such pregnancy discrimination as a proscribed form of sex discrimination, see title VII section 701(k), 42 U.S.C. § 2000e(k) (1994).[67]

Finally, we would be remiss if we did not mention that in analyzing whether a particular religious institution may be sued under title VII for forms of employment discrimination that are not subject to the section 702(a) coreligionists exemption, courts often may also need to consider a related constitutional question. Several courts of appeals have held that the Religion Clauses of the First Amendment compel what has been termed a "ministerial" exception to title VII and analogous antidiscrimination statutes, which permits religious institutions to select and retain certain of their representatives free from government interference and the threat of litigation.[68] The ministerial exception is not confined to members of the clergy, but extends as well to employees of religious institutions whose "'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in

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[64] Section 704 prohibits certain forms of retaliation against employees who raise claims or questions concerning alleged title VII violations. That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[65] Accord Cline, 206 F.3d at 658; Ganzy, 995 F. Supp. at 348.

[66] Cline, 206 F.3d at 658; Boyd, 88 F.3d at 414; Ganzy, 995 F. Supp. at 348-49, 359-60; Dolter, 483 F. Supp. at 270.

[67] Cline, 206 F.3d at 658; Ganzy, 995 F. Supp. at 348; Vigars, 805 F. Supp. at 806-08; Dolter, 483 F. Supp. at 269-70.

[68] See, e.g., EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 800-01 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301-04 (11th Cir. 2000); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945-50 (9th Cir. 1999); Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 345-50 (5th Cir. 1999), and cases cited therein, id. at 347; EEOC v. Catholic Univ. of America, 83 F.3d 455, 461-67 (D.C. Cir. 1996); Rayburn, 772 F.2d at 1168-72; McClure, 460 F.2d at 558-61.

religious ritual or worship.'" Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1545 (1979)), cert. denied, 478 U.S. 1020 (1986).[69]

Having said that, we should add that we suspect the ministerial exception would rarely, if ever, apply in the context of substance-abuse programs that receive direct SAMHSA funds. The ministerial exception, which is limited to what is necessary to comply with the First Amendment,[70] "does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes,"[71] and, in particular, does not extend to employees whose primary duties do not consist of spiritual functions, even if such employees are, for example, expected to be "exemplars" of a particular faith or denomination.[72] Therefore it is unlikely that the ministerial exception would apply to employees of a religious organization whose primary duties are to conduct the operations of a SAMHSA-funded substance-abuse program, because such employees cannot within that program engage in the sort of specifically religious activities that can trigger the ministerial exception.[73]

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[69] Accord Roman Catholic Diocese of Raleigh, 213 F.3d at 801; Catholic Univ. of America, 83 F.3d at 461. See generally Hartwig v. Albertus Magnus Coll., 93 F. Supp. 2d 200, 207-12 (D. Conn. 2000) (canvassing cases applying ministerial exception to particular employment positions).

[70] See Bollard, 196 F.3d at 947.

[71] Roman Catholic Diocese of Raleigh, 213 F.3d at 801.

[72] See Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999) (quoting Mississippi College, 626 F.2d at 485), cert. denied, 121 S. Ct. 49 (2000); Mississippi College, 626 F.2d at 488-89.

[73] See, e.g., Shirkey v. Eastwind Community Devel. Corp., 941 F. Supp. 567, 576-78 (D. Md. 1996) (ministerial exception could not be applied to "lay position of community developer," where the religious employer's job description did not require the employee to lead religious services, act as a pastoral counselor, or perform services necessitating religious training), reaffirmed in pertinent part by dist. ct., 993 F. Supp. 370, 372-73 & n.1 (D. Md. 1998).