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What is Charitable Choice?

The term Charitable Choice refers to a specific legislative proposal which seeks to require various governmental agencies to contract with faith-based organizations on the same basis as any nonprofit provider without "discriminating against the religious character". The proposal sets forth several exemptions for religious organizations and how they can participate in providing social services. Charitable Choice specifically provides that faith-based organizations do not have to alter their religious character and explicitly allows religious organizations the ability to discriminate in their employment with public funds and the ability to proselytize beneficiaries of public services.

Currently a number of religious affiliated organizations participate in government funded programs. Catholic Charities, Lutheran Services, etc. provide these services and do not need the drastic exemptions provided under Charitable Choice. These religiously affiliated organizations work hand in hand with government agencies providing aid to those most in need without discriminating in their employment or without presenting the multiple church/state entanglements that Charitable Choice presents.

When did Charitable Choice first appear in law?

Charitable Choice rules were first laid out in the 1996 welfare reform law -- Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193 -- and cover all states' TANF activities, and, to a lesser degree, states' administration of food stamps, Medicaid, and the Supplemental Security Income (SSI) program. These rules, like the rest of the law governing TANF programs, were set to expire on September 30, 2002; however, a series of temporary extensions that were enacted kept them in force. On February 8, 2006, P.L. 109-171 (the Deficit Reduction Act of 2005) was enacted. This law extends the life of TANF law (including its Charitable Choice provisions) through FY2010.

It is not necessary to pass new legislation. Today, any church can establish a 501(C)(3) and apply for federal funds. However, when they get these dollars today, they must abide by the civil rights laws. In fact, any program which can be funded under Charitable Choice can be funded today, except those programs sponsored by organizations who insist on discriminating in employment.

Why is there controversy surrounding the faith-based initiative and Charitable Choice?

There are many reasons why people the faith-based initiative and Charitable Choice language come under attack. Some of the most often sited criticisms are:

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By allowing direct grants for social programs to houses of worship or social service providers that have religious components into, government may, unconstitionally advance religion, blurring the separation of church and state;

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Expansion of direct grants to religious groups could make churches dependent on government, eroding their mission and leading to secularization;

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Under the faith-based initiative, organizations that receive federal funds can engage in government-funded discrimination by allowing religious organizations to hire and fire on the basis of religion using federal dollars; and

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Many religious groups fear that acceptance of funds through the faith-based initiative may threaten the religious integrity and automony of their institution. The institution opens itself up to government accountability mechanisms, including audits.

Does Charitable Choice violate the Establishment Clause of the United States Constitution?

Yes. Religiously affiliated organizations have a long history of partnering with the government to provide services to those most in need. Importantly, however, those organizations that have worked with the government did not discriminate in their employment when using public funds, and did not proselytize to beneficiaries who participate in publicly funded programs. As demonstrated by these successful partnerships between religiously affiliated organizations and the government, religiously affiliated organizations do not need the drastic constitutionally suspect exemptions provided under Charitable Choice to successfully administer a government grant.

Rather, Charitable Choice seeks to allow "pervasively sectarian" organizations to participate in government grant programs. Historically, the Supreme Court has generally forbidden government assistance, in the form of a direct funds, to flow to "pervasively sectarian" organizations on Constitutional grounds.

In various cases, the Supreme Court lists several criteria to be used in determining whether an institution is "pervasively sectarian": (1) location near a house of worship; (2) an abundance of religious symbols on the premises; (3) religious discrimination in the institution's hiring practices; (4) the presence of religious activities; and (5) the purposeful articulation of a religious mission.

Supporters of Charitable Choice have cited the recent Supreme Court decision in Mitchell v. Helms as an indication that Charitable Choice would be constitutional. Mitchell v. Helms upheld the constitutionality of an education program that provides grants for the acquisition of educational equipment and materials for use by children and teachers in public and private elementary and secondary schools. Private schools participate on an equitable basis, meaning that if 30% of the eligible children under the local school system's jurisdiction attend private school, then 30% of the resources obtained from this grant are to be given to these schools. These education materials include library books, computer hardware and software, printers, filmstrip projects, video cassette recorders, maps and globes.

Contrary to its proponents' assertions, Mitchell v. Helms does not apply to Charitable Choice. First, it should be noted that, unlike Charitable Choice provisions, there was no exchange of funds between the government and the private religious schools under the education program in Mitchell. Under that program, private schools (including religious schools), were only loaned educational equipment. The public school district received the grant funds and purchased the equipment.

Specific language in the plurality decision of Mitchell indicated that direct money grants to religious institutions, like those under the Charitable Choice proposals, are still unconstitutional, even when those grants are administered under neutral programs that are generally available to religious and non-religious entities alike. Justice Thomas noted that there are "‘special Establishment Clause dangers, 'when money is given to religious schools or entities directly..." In Justice O’Connor’s concurring opinion, she stated: "[T]he 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."

Supporters of Charitable Choice also cite Agostini v. Felton as another indication that Charitable Choice is constitutional. This case involved a federal education program (Title I) that targets educational assistance to low income children. Again, private schools, including private religious schools, participated on an equitable basis in this federal education program. This case involved allowing teachers hired by the public school system to provide assistance to disadvantaged students on the premises of the private religious school. It must be noted that teachers were hired subject to all civil rights laws. The Agostini v. Felton case superseded a previous Supreme Court decision that had held that services had to take place in a non-sectarian environment. Agostini reversed the courts original decision and allowed the services to take place on school grounds. Although this case certainly allowed closer cooperation between government entities and pervasively sectarian religious organizations, there was still no exchange of funds between the government and private religious schools. That has been a constant line that the courts have been unwilling to cross.

Both of these cases have allowed "pervasively sectarian" organizations to receive services that are secular in nature and are available to all parties -- both public and private.

In a report to Congress, the Congressional Research Service, the non-partisan research service for Congress, noted that even given these Supreme Court cases Charitable Choice may run afoul of the Constitution:

"But it still appears to be the intent of charitable choice that the religious entities receiving direct public aid be able to employ their faith in carrying out the subsidized programs; and to the extent they do so, a constitutional question seems to exist even under the Court’s revised interpretation of the establishment clause. Moreover, it deserves mention that Justice O’Connor’s opinion, which proved decisive in Mitchell, simply left open the possibility that other factors might be constitutionally necessary. In upholding the ESEA program at issue in the

case, she cited not only the factors that the aid was distributed on the basis of neutral, secular criteria, and that it was secular in nature, and that there was little evidence of diversion to religious use- all of which appear to be constitutional requirements for a majority of the Justices. She noted as well that the statute required the aid to supplement and not supplant the schools' own funds, that title to the instructional materials and equipment had to remain in the local educational agency, that no funds ever reached the coffers of religious schools, and that there were 'adequate safeguards' to prevent the aid from being diverted to religious use....[C]haritable choice appears to push the envelope of existing judicial interpretations of the establishment of religion clause of the First Amendment concerning direct public funding of religious organizations, even as revised by the Supreme Court's recent decisions on the subject. As a consequence, charitable choice may, at least in some forms of its implementation, invite litigation that tests the continuing viability of those interpretations."

How may Charitable Choice interfere with and even override federal, state, and local nondiscrimination laws?

Proponents of Charitable Choice argue that religious organizations receiving federal funds should be able to "preempt contrary provisions in state and local laws ... when those spending-power laws do not permit FBO's [Faith Based Organizations] to select staff on he basis of faith commitments".

Congressional Research Service (CRS), the nonpartisan research arm for Congress, analysis has indicated that "there may be some question about their [Charitable Choice employment discrimination provisions] interplay with other nondiscrimination provisions. Title VII, for instance, allows religious organizations to discriminate on religious grounds but not on grounds of race, color, sex, or national origin. What happens, then, when religious doctrine mandates discrimination that may also implicate the other prohibited bases for discrimination?"

Some courts have upheld what amounts to pregnancy discrimination when a religious organization fired an unmarried pregnant employee because her behavior violated the tenets and teachings of their faith. If proponents of Charitable Choice have their way, this could happen even if the young woman's job was funded through a federal program. Until now, the courts have only considered religious organizations' abilities to practice discriminatory hiring with private funds. CRS has indicated that this existing exemption, allowing religious discrimination in hiring, "... appears quite broad. The Title VII exemption, for instance, has been held to protect employment discrimination by religious organizations in a variety of circumstances."

The NAACP Legal Defense Fund (LDF) analysis of Charitable Choice proposals indicates that it "could substantially enlarge the number and range of jobs in the United States that are not covered by the ‘ordinary’ protections against discrimination that have become an accepted part of the employment market in this country in the last 35 years. It is especially troubling that this would happen only when federal dollars make those jobs or job assignments possible."

The NAACP LDF analysis also concurs with the Congressional Research Service conclusion that publicly funded religious discrimination under the Charitable Choice proposals may cross over into other areas of discrimination: "In Bob Jones University v. United States, 461 U.S.574 (1983), the Supreme Court held that the University was not entitled to the indirect benefit of federal tax-exempt status in light of its policy forbidding interracial dating by students, which the University had adopted based on the fundamentalist conviction that 'the Bible forbids interracial dating and marriage,' see id. at 580. Yet, under the language of S. 2779 (containing Charitable Choice), Bob Jones University could become a provider of services under one or more federal programs and require that employees whom it hired or assigned to work in those programs subscribe to its religious tenets and not engage in interracial dating – and neither the EEOC nor a staff member fired for violating that requirement could obtain a remedy against the University under Title VII."

Proponents of Charitable Choice argue that the Title VII exemption is not lost when a religious organization becomes a provider of publicly funded services. In fact, past court cases have only dealt with the Title VII exemption for religious organizations in which private funds were being used. Thus far there has only been one case involving discriminatory employment practices based on religion when using public funds. The Federal District Court in Mississippi held (in an unpublished case) that the funds in question "constituted direct financial support in the form of a substantial subsidy, and therefore, to allow the Salvation Army to discriminate on the basis of religion, would violate the Establishment Clause of the First Amendment". Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss.)

Does Charitable Choice protect beneficiaries from discrimination?

Nearly all versions of Charitable Choice, including the welfare reform law, allow discrimination against beneficiaries if a standing local, state, or federal law permits it.

Why does Charitable Choice threaten the religious liberty of beneficiaries seeking publicly funded services?

Charitable Choice proposals set up a "separate but equal" social service safety net for beneficiaries who are seeking publicly funded services and who are uncomfortable with or even disagree with the religious content of the service provider. Charitable Choice entitles those beneficiaries to a "separate but equal" social service somewhere else.

A 1998 letter from the U.S. Department of Justice to the Honorable William F. Goodling indicates the constitutional dangers of directly funding houses of worship to administer secular programs as Charitable Choice proposes:

"As the Court has explained, the reason for the prohibition on direct governmental aid to pervasively sectarian institutions is the unacceptable risk that that where- as in pervasively sectarian organization- secular and religious functions are 'inextricably intertwined,' government aid, although designated for a secular purpose, in fact will invariably advance the institution's religious mission....And even if it were possible, as a theoretical matter, for a pervasively sectarian organization to use government assistance exclusively for secular functions in such institutions, the degree and kind of governmental monitoring necessary to ensure compliance with the requisite restrictions would itself create Establishment Clause problems."

Charitable Choice proposals ignore not only the constitutional problems with providing publicly funded social services through houses of worship, they also violate the religious liberty of beneficiaries. In addition to the insulting proposition that we are setting up a "separate but equal" delivery of social services, Charitable Choice has several other problems that threaten the religious liberty of beneficiaries.

Charitable Choice does not provide adequate safeguards to protect the religious liberty of beneficiaries receiving services in publicly funded programs.

Under Charitable Choice, vulnerable individuals seeking publicly funded social services may be held as captive audience to proselytization, sectarian worship in order to receive a public service- literacy tutoring, job counseling, substance abuse counseling, etc. Charitable Choice

provisions provide only that "no funds provided directly to institutions or organizations to provide services....shall be expended for sectarian worship, instruction, or proselytization." This would not, of course, cover the privately paid employee or volunteer from engaging in such activity as part of the publicly funded program. It also allows public funds which are distributed in a voucherized form to be used for that purpose. It also would be impossible for any government agency to police and enforce these restrictions, particularly if the religious organization does not separate out the grant funds from the general ministry account.

Charitable Choice also fails to notify beneficiaries that they have a right not to participate in sectarian activities.

While Charitable Choice provides that beneficiaries cannot be discriminated against for their refusal to participate in worship or other sectarian activities in a program, it fails to provide them a notice of their rights to refuse to participate.

In addition, most Charitable Choice proposals fail to notify beneficiaries that they are entitled to a "separate but equal" alternative provider.

It is troubling to note that beneficiaries are only informed of their right to seek an alternative only after they have raised an objection. In the implementation of Charitable Choice, it is important to note that for some areas and for some programs that there is such a dire lack of resources and services available to a community. As a result, the alternative provider may be in theory only.

How do Charitable Choice and the faith-based initiative, as it currently stands, threaten civil rights laws?

Charitable Choice has considerable implications for our civil rights laws. Charitable Choice authorizes providers with religious affiliation to discriminate on religious grounds in the hiring and firing of publicly funded positions. All Charitable Choice proposals provide specifically that the exemption afforded under Title VII of the 1964 Civil Rights Act for religious organizations applies to federally funded positions. The Title VII exemption is a common sense provision allowing religious organizations to discriminate based on religion in hiring for church employees.

This common exemption allows, for example, a Catholic Church to require that it's priest be Catholic, but it was intended to be limited to church funds, not governmental funds collected from all taxpayers. Under Charitable Choice, a church sponsoring a federally funded drug program is free to discriminate against job applicants solely on the basis of their religion.

Other forms of discrimination, disguised as religious discrimination, could certainly follow and it would be nearly impossible to prevent or bring enforcement actions.