

**REPORT OF THE SPECIAL TASK FORCE**

**Studying the Ways Faith-based  
Community Service Groups May  
Provide Assistance to Meet Social  
Needs**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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## ***Special Task Force to Study Ways Faith-Based Community Service Groups May Provide Assistance to Meet Social Needs***

### **I Executive Summary**

The original goal of the Special Task Force was to determine the best method to accomplish the goal of enhancing the implementation of the "charitable choice" provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, known as the Welfare Reform Act (P L 104-725). Congress included in this legislation the "charitable choice" provision which was intended to encourage states to contract with faith-based social services providers in the delivery of these welfare services while protecting the religious character of the organizations and the religious freedom of its clients.

In its first year the Special Task Force made a number of recommendations (House Document No 103 2000) all of which passed the General Assembly to

- ◆ create a liaison office to provide outreach training networking information and assistance to faith-based and charitable organizations that wish to participate in the provision of social services
- ◆ encourage all state agencies to examine their program needs and include faith-based and charitable organizations, and encouraging private donations by eligible individuals to groups providing services to welfare recipients
- ◆ recommend budget language that would support some additional assistance to food banks to expand their current efforts
- ◆ evaluate the opportunities within the programs administered by the Department of Social Services to expand the use of vouchers for the purchase of social services in a fiscally and programmatically responsible manner where clients would be free to choose from among approved programs that meet general criteria for positive outcomes that can be measured,
- ◆ expand the Virginia Neighborhood Assistance Program (NAP) to include donations from individuals to programs including faith-based organizations that meet the criteria of the program (Currently, only businesses and certain professionals qualify)
- ◆ extend the Special Task Force for an additional year to continue its work

In its second year of study, the Task Force held four meetings in Richmond and Norfolk to receive status reports on the implementation of its recommendations made the previous year and to continue to examine the advisability of expanding the use of "charitable choice" within state programs and how to best accomplish this goal while meeting legal and constitutional constraints. To assure that the work of the Task Force was inclusive of all opinions each meeting set aside time for a public hearing to allow interested parties to share their information with the members. The Task Force heard reports from both advocates and opponents on how the implementation of "charitable choice" would work including practical as well as constitutional issues.

The Task Force contracted with Stanley Carlson-Thies of the Center for Public Justice in Washington D C (now with the White House Office on Faith-Based Initiatives) to produce a report on implementation of "charitable choice" in Virginia as well as other ways the government can promote greater social action by faith-based organizations

The report, presented in November 2000 was adopted by the task force and serves as a suggested list of viable options that the state can implement to develop faith-based organizations as an important provider of social services The Task Force used this document as well as a number of recommendations made by Task Force members as well as other speakers appearing before the Task Force to develop its final recommendations

The Task Force also heard testimony about several new initiatives with community and faith-based groups, including Right Choices for Youth (reducing risky behavior) Power UP (providing computer training), and Operation Turnaround (reducing criminal recidivism) In fact, the Task Force learned in its first year of work the extent to which state and faith-based organizations already cooperate to provide needed services Last year, existing relationships and programs continued to grow, helped, in some cases by legislation passed by the 2000 General Assembly

To better assess the extent and type of community cooperation that is already working to help provide social services, the Office of the Faith-Based Liaison, at the request of the Task Force conducted a survey of local Community Action Agencies and departments of social services to determine what sort of arrangements they had with faith-based and community organizations and to determine their unmet needs The survey indicated that public agencies had arrangements that ranged from contractual to informal and that the faith-based and community organizations provided a wide variety of services Unmet needs varied from one locality to another and also covered a wide spectrum food housing, transportation childcare, credit counseling, companion services mentoring respite care, etc

In connection with its October meeting the Task Force also co-sponsored a one day conference in Norfolk to introduce local faith-based and charitable organizations to the concept of charitable choice and to provide an open forum for all organizations

The Task Force concluded the year by recommending that the General Assembly extend it work for another year, which was approved A recommendation that the Secretary of Public Safety to evaluate the use of "charitable choice" in corrections with emphasis on expanding Operation Turnaround was incorporated into the work of the Task Force

The recommendations of the Task Force and results are listed on page 22

## **II Charitable Choice Initiatives on the Federal Level<sup>1</sup>**

Beginning with the 1996 federal welfare reform law the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) Congress has proposed adding Charitable Choice language to a wide range of federal social service programs in order to expand the opportunity for faith based organizations to compete for government funds to provide services

Charitable Choice currently covers the following federal funds

- ◆ Substance abuse prevention and treatment funds administered by the Substance Abuse and Mental Health Services Administration (SAMHSA reauthorization as part of the Children's Health Act of 2000 P L 106-310)
- ◆ Temporary Assistance for Needy Families funds (PRWORA 1996)
- ◆ Welfare-to-Work funds (1997 amendment to PRWORA)
- ◆ Community Services Block Grants (1998 reauthorization of CSBG)

Charitable Choice language is currently being considered for inclusion in other programs as well, including the "Fathers Count Act " juvenile justice the New Markets/American Community Renewal Act, and Even Start spending for education

Much was heard in the national presidential campaign in 2000 about the anticipated expansion of the use of faith-based organizations and new areas of funding by both candidates President Bush has established an Office of Faith-Based Initiatives within the White House to promote compliance with Charitable Choice and to facilitate faith-based action in other ways

## **III Promoting Expanded Community Service by Virginia's Faith Communities A Report to the Special Task Force**

During the study the Special Task Force felt that assistance through contractual consultancy with an advocacy organization experienced in the implementation of Charitable Choice would expedite its work A contract was made with Stanley Carlson-Thies of the Center for Public Justice in Washington D C for that purpose The report was to (i) outline ways in addition to Charitable Choice by which government can promote expanded social action by faith-based organizations, (ii) propose ways the Commonwealth might help equip faith-based organizations to take on larger social service roles (iii) suggest how to make the Commonwealth's faith liaison as effective as possible and (iv) recommend steps to ensure that Charitable Choice is implemented in the Commonwealth (A copy of the body of the report is found in Appendix A )

The report suggests that "the best strategy for the Special Task Force is to promote models ideas, and strategies that are catalytic - that clear away barriers promote collaboration, strengthen the faith sector and make government more hospitable to faith-based organizations Then faith groups in different places can change and expand their activities as they see new opportunities And government officials will be freed to be creative as they redesign programs in

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<sup>1</sup> Stanley Carlson Thies *Promoting Expanded Community Service by Virginia's Faith Communities A Report to the Special Task Force* The Center for Public Justice November 29 2000

response to changing needs, the growing activities of community and faith-based organizations and the emergence of new collaboration partners "

The report states that the Commonwealth can pursue many avenues in addition to Charitable Choice to stimulate greater community service by faith-based organizations including

- ◆ Establishing a charity tax credit
- ◆ Initiatives to strengthen marriage and parenting and fatherhood within marriage,
- ◆ Creating of a statewide mentoring program that utilizes congregations as well as other community groups
- ◆ Creating of a referral network to organize faith-based groups to ensure that people needing assistance are directed to the best places,
- ◆ Establishing of innovative grant programs, not limited exclusively to contractual relationships to encourage the development of innovative services where the providers, rather than the government, define the services within limits
- ◆ Funding only those programs both secular and faith-based that are proven through performance evaluations to be effective This standard should apply to all providers regardless of their history of contractual arrangements
- ◆ Expanding the capacity of faith-based organizations to serve by improving the managerial and delivery capacity of potential partners through conferences that offer good models of programs and collaborations offer technical assistance and give leaders of faith-based organizations the opportunity to meet with each other as well as meet with government procurement and program officials, funding designated specifically for novice organizations, including faith-based, creating an incubator program that would fund community-based groups to provide technical assistance to small and novice organizations, and, having the legislature authorize appropriate departments to expend up to a certain small percentage of procurement funds as supplements to contracts in order to expand the capacity or improve the infrastructure of a faith based or community group so that the group is able to collaborate with government
- ◆ Contracting with a private entity to provide technical assistance and information about funding opportunities to faith-based organizations and other secular community groups
- ◆ Creating a consolidated community funding pool, such as that in Fairfax County to make it easier for organizations to apply for funds decrease unfruitful competition and better coordinate services
- ◆ Government should facilitate intermediary arrangements whereby small congregations which are too small on their own to provide services and do not wish to grow can contract with a larger organization to become their administrator and link to government Essentially they become subcontractors However, it may take government intervention to accomplish this
- ◆ Reforming the procurement process by breaking large contracts into smaller ones simplifying the Request for Proposal (RFP) process, and providing technical assistance to novice organizations



- ◆ Expanding the use of vouchers which promotes client choice and responsibility, diversity of services, and a less micro-managing relationship between government and service providers
- ◆ Establishing alternative accreditation requirements for programs that may not meet traditional standards but which must still meet alternative accountability standards
- ◆ Making the office of the faith liaison more effective, the position should be independent of any other responsibilities occupy a distinct organizational location occupy a prominent place on the Department's web site homepage have a toll-free number that is well-publicized, be known to every department official who deals with the public be visible in the communities, sponsor conferences and assist at conferences held by other entities interested in providing faith-based services, have counterparts in other departments have the responsibility of identifying barriers to the success of such a program, and operate an Internet "bulletin board" where information can be exchanged

#### **IV New Initiatives with Community and Faith-Based Organizations in Virginia**

The Special Task Force heard testimony about several new initiatives with community and faith-based organizations including **Right Choices for Youth, Power UP, and Operation Turnaround**

##### **Right Choices for Youth**

Right Choices for Youth is a campaign seeking to partner the community with faith-based organizations in order to help guide our youth in making the right choices for their futures regarding the five risk behaviors of alcohol drugs, sex tobacco and violence In 2000, the Governor's budget included \$2.2 million for the biennium A statewide conference and five regional conferences were held to get the message out to community leaders to take back the focus of the program to their localities, identify local organizations that work with youth, and encourage local businesses to financially support these organizations Seed grants are being developed to be given to faith based and community organizations to help these organizations reach youth to prevent certain behaviors or to assist in improving their lives

##### **Power UP**

Power UP is a new nonprofit organization that intends to provide technology resources in community and education-based locations throughout Virginia and is dedicated to helping underserved youth succeed in the digital age The Commonwealth recently committed a \$3 million grant to Power UP and will open approximately 100 locations throughout Virginia in the coming months Faith-based organizations will be among the possible locations allowed to compete to become Power UP grantees

## Virginia Business Education Partnerships

The Virginia Business Education Partnership has partnered both directly and indirectly with a number of faith based organizations over the course of this year. Approximately \$3.3 million from federal School-to-Work funds, is earmarked for faith-based programs. Not all the churches directly use the grant dollars.

There are three main types of grants given:

- ◆ **Local Partnership Grants** are grants given to school systems and allow schools to partner with local faith-based organizations. An example of this type of grant is found in the Portsmouth school system, which uses its grant for "America's Promise," "Hampton Roads Alliance for Youth" and "Making a Difference Foundation."
- ◆ **Local Pilot Initiative** are direct grants to faith-based organizations. These grants have been given to organizations such as "A Community that Cares" in New Kent County, "Making a Difference Foundation" throughout the Tidewater area, and "Stay Up While You are Out" in the Newport News area, which helps students who have been expelled from school keep up with their studies.
- ◆ **Statewide Grants** are given to statewide organizations.

## Operation Turnaround<sup>2</sup>

Operation Turnaround (OT) is a collaborative effort between Virginia's public safety agencies and local faith, business education, and human resource communities. As a volunteer partnership for safer communities, OT seeks to reduce criminal recidivism in the Commonwealth. For many ex-offenders, the prison system has become a revolving door. The rate of recidivism of ex-offenders is about 40 percent, which means that two out of five ex-offenders return to prison.<sup>3</sup> This cycle of re-incarceration creates tremendous burdens on the Commonwealth and its communities. The annual cost to house an inmate is more than \$21,000 and creates a drain on public resources. Besides economic costs, high recidivism strains families and drains communities. The first few months away from the highly structured environment of prison are critical to the successful re-entry of the ex-offender into the community, and psychologists can document a strong correlation between poor coping skills, destructive attitudes and criminal recidivism.<sup>4</sup>

In response to these concerns, OT was created as a joint effort between the Departments of Corrections, Juvenile Justice Correctional Education, and the Virginia Parole Board to help ex-offenders beat the odds of returning to the system. The aim of OT is a permanent change in behavior and the faith community is considered a prominent partner. The program recruits and trains mentors for ex-offenders exclusively from the ecumenical faith community, but participation for ex-offenders is voluntary. Pairings of mentors to ex-offenders is screened to

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<sup>2</sup> *Operation Turnaround: A Comprehensive Report*, March 1999 to December 2000. Submitted to the Office of the Secretary of Public Safety by the Virginia Department of Corrections, December 15, 2000.

<sup>3</sup> Estimates of recidivism vary with the length of the follow up period and the measure used to estimate the rate. Recidivism rates can be based on incidences of re-arrest, reconviction, or re-incarceration. Virginia uses re-incarceration to estimate recidivism.

<sup>4</sup> Drs. Vernon Quinsey and Edward Zamble, *The Criminal Recidivism Process*, Cambridge University Press, 1997.

respect the religious beliefs and traditions of the ex-offender. After the ex-offender consents, he is assigned two mentors and receives help for a minimum of 12 months, with additional time as agreed to by the participant and the mentors. Under ideal circumstances, the ex-offender begins the program while still in custody and involves the family whenever possible. Currently, the program targets nonviolent offenders in state prisons and state-responsible prisoners serving time in local jails. Expansion into the juvenile facilities is anticipated in the future.

The collaborative aspect of OT is deemed as the element that makes it effective. Potential employers come primarily from the business community; the educational community provides technical and vocational training; and the human resource community provides a social service safety net for ex-offenders and their families, thus addressing the "total person." The goal is to help the ex-offender address vital issues that are key to preventing re-entry into the system - jobs, housing, and relationships with families and others.

As of December 2000, 147 inmates had completed the life skills training program, 52 inmates had been assigned mentors, 287 persons had trained as mentors, 248 other volunteers had signed up to participate, and 32 houses of worship had signed up to participate in OT. Future expansion will likely depend upon the receipt of grants from the federal government and appropriations on the state level.

### **Faith, Freedom, and Family: The Value of Partnerships and Creating Linkages**

The Special Task Force co-sponsored, under the leadership of Carolyn Lincoln of Baby Steps, Inc., and a former member of the Task Force, a conference to introduce a number of local faith-based and charitable organizations to the concept of "charitable choice" and to provide an open forum for all organizations. The day-long conference provided a number of speakers as well as included the formal meeting and public hearing by the Task Force. While not all speakers and organizations favor the concept of "charitable choice," the Task Force viewed the results of the conference to be positive cooperation and communication between parties that are interested in the delivery of social services to those in need. It is hoped that other such conferences can be held to provide education, training, and networking opportunities among social services providers.

### **V Voucher System (SJR 253, 2000)<sup>5</sup>**

Virginia, through its implementation of the Workforce Investment Act (WIA), is developing a voucher system. "Individual empowerment through informed customer choice" is one of the guiding principles of the WIA. Adults are given the opportunity to choose training programs and training situations through a voucher system or individual training accounts. A master list compiled by the Virginia Employment Commission (VEC) includes all certified programs and providers throughout the Commonwealth. Much the same type of system could be used to provide services to clients in the social services network. Senate Joint Resolution 253 does not specifically refer to "charitable choice" but is included in the package of resolutions on this subject. As there is likely to be controversy surrounding the involvement of faith-based

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<sup>5</sup> *Voucher System and Senate Joint Resolution 253* Report of the Department of Social Services, 2000

organizations in providing government financed services the use of vouchers could help address this problem Giving clients the freedom of choice to choose from available providers could eliminate the government from being involved in the selection process on a personal basis What will be needed, however is a central list of state-certified service providers such as is being accumulated by the VEC The first step in the process will be to develop certification criteria Secondly local Department of Social Services should be involved in the selection process With the WIA the local Workforce Investment Areas submit the names of training providers [that] meet established certification requirements The VEC makes the final decision on inclusion on the state list As the first constitutional challenge to "Charitable Choice" has been filed in Texas, the voucher system could help eliminate or lessen one objection to faith-based providers Following are examples of what some other states and localities are doing with vouchers and some information on the opportunities that "Charitable Choice" can offer DSS participants

### **Maryland**

Some Maryland counties are experimenting with using vouchers for services through Child Protective Services, such as day care, parenting classes, counseling and emergency services The voucher system is also used for transportation in Anne Arundel County and Baltimore Payment for transportation services is allotted through the EBT (Electronic Benefits Transfer) card Similarly Baltimore uses a locally funded food voucher system for residents who are ineligible for the federal Food Stamp Program

### **West Virginia**

In 1998, Republican Governor Cecil Underwood made school clothing vouchers available to all eligible K-12 students in public and private schools Each child receives a \$100 voucher to buy clothing or sewing material for clothing The voucher system is financed through the federal SSBG Title XX (Social Services Block Grant), with an estimated state cost of \$2.5 to \$3 million annually

### **Other Voucher Initiatives**

Some county social services agencies in Colorado use their EBT system to pay for services such as work clothing and shoes The amounts are usually under \$100 At least six states have started programs that allow people to trade in their guns for vouchers to purchase food or merchandise Phoenix and Sacramento residents can get vouchers to purchase new electric lawnmowers when they trade in gas-powered lawnmowers Residents in New York Chicago and other large cities can purchase vouchers at local stores to give panhandlers for food, laundry services, or bus services Michigan started a "Tool Chest Program" where recipients receive vouchers for various services to improve their employability Several states, such as Massachusetts, have developed voucher systems to pay for child care and allow recipients choice options

## **Charitable Choice**

Under the "Charitable Choice" provision, states may use direct contracts or voucher systems to provide funding to both secular and faith-based organizations for a wide range of services. These may include such programs as

- ◆ Work Programs - subsidized jobs, community service positions, on-the-job training, job search help, job readiness preparation, job skills training, vocational education training, or GED programs
- ◆ Food Programs - subsidized meals, food pantries, or training in nutrition, shopping, or food budgeting
- ◆ Maternity Homes - unmarried minors and expectant mothers who cannot stay with their parents, and adult supervised residential care, second chance homes, and other suitable living arrangements
- ◆ Medical and Health Services - abstinence education, drug and alcohol treatment programs, vocational rehabilitation services, or health clinics

Concern over the problems religious social service providers have encountered in financial and non-financial relationships with government, as well as the realization that welfare reform wouldn't work without invigorated efforts by the faith community, prompted Senator John Ashcroft, Republican of Missouri (now Attorney General) to incorporate explicit protections for religious groups into the landmark 1996 federal welfare reform law. "One of my goals in proposing the "Charitable Choice" provision was to encourage faith-based organizations to expand their involvement in the welfare reform effort by providing assurances that their religious integrity would be protected," Ashcroft explained. Under "Charitable Choice," religious groups accepting government money are permitted to maintain control of the definition of their religious mission, appoint their governing board without state interference, preserve a religious atmosphere in their facilities, and discriminate on the basis of religion in their hiring practices.

Even before federal reform, Mississippi launched its ambitious "Faith and Families" initiative. Aimed at fostering mentoring relationships between congregations and individuals making the transition from welfare to work, the program now involves more than 850 churches. Texas also used this idea and has forged some 431 mentoring relationships through its "Family Pathfinders" initiative. Local government agencies in numerous cities - among them, San Diego, Minneapolis, Montgomery, Seattle, and Annapolis - are partnering with churches in new efforts to provide job readiness training, day care, transportation, and mentoring to welfare recipients. Additionally, several faith-based organizations have joined together to establish a new web site, called "Churches at Work," which will serve as an information clearinghouse about faith-based efforts to serve needy families.

Congressional supporters of "Charitable Choice" are not waiting for a definitive resolution to the constitutional debate. Republican Representatives James Talent (Missouri) and J. C. Watts (Oklahoma) have incorporated Charitable Choice-type language in their "Community Renewal Project" bill. Attorney General Ashcroft was pushing legislation that expands the "Charitable Choice" protections to cover most federally funded social services (currently, only partnerships funded from the Temporary Assistance to Needy Families block grant are covered).

In Texas charitable choice provides opportunity for community collaboration, including the following areas

- ◆ establishing financial and non-financial agreements through contracts with organizations as providers of services
- ◆ engaging in several hundred regional initiatives with community organizations
- ◆ utilizing volunteer services to gain work experience and provide medical services
- ◆ providing personal care items clothing, payment of utility bills tax preparation assistance,
- ◆ providing emergency food supplies, home repairs, interpreter services, and visits to nursing homes, and
- ◆ providing an Interfaith Social Service Mission Directory to serve as a resource guide for community organizations

## **VI Department of Social Services Collaboration with Faith-Based Organizations**

In its first year of work, the Special Task Force was pleased to find the extent to which the state and faith-based and charitable organizations already cooperate to provide needed services. Because most programs are operated by local departments of social services who work directly with the organization, it is difficult, if not impossible to compile a complete list of the working relationships that currently exist. The Virginia Department of Social Services (VDSS) works with faith-based organizations in a variety of ways to provide support to families transitioning from welfare to self reliance. VDSS has community resource development efforts underway that bring together the social service system and its community partners including churches and synagogues.

Though not an exhaustive list, the following efforts demonstrate the types of collaboration the Department has with faith-based organizations

- ◆ The **Respite Child Care for Homeless Families** initiative involves working with representatives from the shelter, community, and child care sectors to develop respite child care slots for homeless children
- ◆ The Department approved 766 **religiously exempted child day programs** in Virginia with a capacity to serve 54 636 children. These programs are among the child care options available to temporary assistance recipients
- ◆ The **Refugee Resettlement Program** has historically worked with faith-based organizations. The Office of Newcomer Services contracts with four faith-based organizations for resettlement of refugees including the Catholic Diocese of Richmond the Virginia Council of Churches the Commonwealth Catholic Charities, and Lutheran Social Services
- ◆ The Department of Social Services Office of Community Services administers the **Community Services Block Grant Program (CSBG)**. This includes oversight for the network of 26 local community action agencies and three statewide community action organizations. CAA's mission is to address the issues of poverty and to

increase the self-sufficiency of low income families. They offer a broad range of anti-poverty programs and work collaboratively with other agencies to build a network of support for the most vulnerable populations in the Commonwealth. Every agency in the network has a close relationship with the faith community. They are represented on boards of directors and are close partners in the provision of emergency services. In addition to emergency services, the network works in partnership with the faith community in a broad range of human service programs.

- ◆ **Child Protective Services** has a contract with St. Joseph's Villa through the Community-Based Family Resource and Support Program. The contract is for the Families First Program. This is a parent education and prevention program for families of school-age children with developmental disabilities. Grant funds are used to support an in-home prevention specialist.
- ◆ The Adoption Unit has **adoptive services contracts** with United Methodist Family Services of Virginia, Catholic Charities, and Lutheran Family Services. Also, the Department has had a longstanding contractual relationship with "One Church, One Child" in Richmond to place minority children in adoptive homes.
- ◆ Commonwealth Catholic Charities is receiving \$11,000 through the **Victim of Crime Act Funds (VOCA) - Child Treatment Services** for the 2000-2001 fiscal year. The funds are being used for a Wise County victims of crime program.
- ◆ **Child Protective Services (CPS) Differential Response System**. The 2000 General Assembly passed legislation to expand current pilot projects that tested the differential response system to statewide status. This system gives localities options when responding to reports of suspected child abuse and neglect. This reform legislation arose from recognition that children's safety is a community responsibility with many stakeholders in public/private partnership who work together comprising a multi-arrayed, comprehensive and flexible approach to child abuse and neglect. With this type of community approach, resources can be used to prevent maltreatment before it occurs, and resources can identify and respond to the diverse causes of child abuse and neglect. The faith community can be very proactive and effective in assisting parents to recognize signs of stress and provide to these parents supportive interventions to help them cope and regain control. Church groups and their leaders can offer mentoring on child developmental stages, child nurturing, and child management in parent support groups. They can also provide solace and shelter to family members during crisis situations and pastoral counseling can be effective for the child and family in improving family relationships.
- ◆ **Neighborhood Assistance Program**. Faith-based organizations are eligible to participate in Virginia's Neighborhood Assistance Program (NAP) and many have. This \$8 million tax credit program awards approved projects an allocation of credits to use as an incentive to businesses for donations. Organizations whose primary function is providing services to low-income individuals are eligible to apply for participation. Last year this Special Task Force introduced legislation to expand the Neighborhood Assistance Tax Credit Program to allow individuals as well as businesses to make donations to organizations providing services such as educational programs, fatherhood programs, and food banks. Previously, individuals were not allowed to take a tax credit for their donations except in certain cases of certain medical professionals donating their professional services. The recommendation that

came out of the committee was to allow individuals to make a donation to a NAP project and receive a tax credit valued at 100 percent of the donation. A ceiling of \$200 was placed on contributions by individuals. This year, 220 nonprofit organizations have been approved and nine were pending approval at the time of this report. Approximately \$1.4 million in tax credits remain available and will be used to provide increased allocations as needed.

## **VII Office of Faith-Based Liaison**

In response to the perceived need for assistance to and coordination of faith-based organizations who may want to provide social services on a contractual basis, the Special Task Force recommended that the Secretary of Health and Human Resources appoint a person to serve as a liaison between the state and interested groups. This liaison was envisioned as an individual or office probably in the Department of Social Services since most of the programs covered by Charitable Choice relate to those persons transitioning off of temporary assistance, that could, among other things, (i) provide outreach and information on available programs to the various organizations, (ii) provide training and organizational skills necessary to meet the various requirements of social programs such as programmatic and fiscal audits, (iii) encourage meetings, conferences, and other types of mentoring activities for the groups to learn from each other, (iv) initiate some technical assistance such as a web page and a toll-free number, or other means of access to information, and (v) provide oversight and make regular reports to the Secretary on the status of such program.

In the summer of 2000, the Director of Community Programs in the Department of Social Services was appointed to serve as the faith liaison. A work plan for the year was developed and implemented immediately to provide the following activities:

- ◆ Develop an informational brochure on Charitable Choice for use by public agencies and charitable and faith-based organizations
- ◆ Place Charitable Choice information on the Department of Social Services web site
- ◆ Establish a Charitable Choice Liaison Network by identification of community resource staff in regional and local departments of social services and community action agencies as well as representatives of the charitable and faith-based organizations to coordinate with organizations on providing social services to those in need
- ◆ Conduct a survey on current Charitable Choice activities and unmet needs in local departments of social services and community action agencies. (The results of these surveys appear later in this document.)
- ◆ Conduct regional training for the local liaisons on the Charitable Choice provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Between January and March of 2001, training has taken place in nine areas or regions.
- ◆ Conduct regional informational meetings and provide technical assistance to faith-based, private and charitable organizations on Charitable Choice and collaboration in delivery of services.



- ◆ Social Services will work with the Department of General Services Division of Purchases and Supply to establish and apply consistent procurement policies and procedures related to Charitable Choice
- ◆ Update the Neighborhood Assistance Program application to include an informational statement to clarify participation by qualifying faith-based and charitable organizations
- ◆ Respond as needed to requests from public private, faith-based and charitable organizations for presentations on Charitable Choice

### ***Charitable Choice Survey - November 2000***

To gain a better perspective on the working relationships between local departments of social services and related agencies and faith-based organizations, the Special Task Force requested that the Office of the Faith-Based Liaison conduct a survey of the various agencies and departments that provide these services. They were asked to respond with information generally about the types of arrangements they used to work with faith-based and charitable organizations to provide services and to determine where their biggest needs could be documented. Local Community Action Agencies and departments of social services were surveyed.

### ***Community Action Agencies***

Eighteen of the 26 local and three statewide community action agencies responded to the survey. This sample provides a good representation of the relationships between community action agencies and faith-based organizations with rural and urban large and small agencies represented.

More than 350 individual churches/faith-based organizations were identified along with 19 associations representing an unknown number of other churches and faith-based organizations. There were 143 contractual relationships.

Many of the faith-based relationships are informal and deal with the provision of emergency services such as food, utility payments, clothing, shelter transportation etc. These relationships are reciprocal between community action agencies and the faith-based groups with both providing and receiving referrals. Many of the churches make regular donations to the CAAs to help support their programs. In urban areas there are more "programs" offered and supported by the faith-based organizations. In rural areas it appears that the faith based organizations and the community action agencies work together more on a case-by-case basis to help individuals or families through a crisis.

Of the contractual relationship People Inc. in Abingdon has the most, with 105 contracts with churches in 25 states related to its Appalmade program. In this program churches display crafts made by Appalmade producers as a means of funding mission projects and creating supplemental income for the crafters. The churches receive a 30 percent commission on sales.

New River Community Action has Memorandums of Understanding with 126 faith-based organizations. These organizations are host sites for the SHARE program that used volunteers to help package and deliver food. Volunteer participants can purchase the food for \$13 a package.

The STOP organization in Norfolk contracts with the Norfolk Interfaith Partnership Mentorship Program to match mentors from the faith community with individuals transitioning from welfare.

Most of the other contracts deal with space for Head Start classrooms or office space.

The survey identified a number of needs where the CAAs felt faith-based organizations could provide assistance, including

- ◆ CPAC - Amelia, Buckingham, Cumberland, Prince Edward, Charlotte, Lunenburg and Nottoway - more child care services, more food pantries, counseling for pregnant teens, transportation, literacy training, consumer education classes, and volunteers.
- ◆ New River - Blacksburg and Radford - space and child care services.
- ◆ VaCARES - Martinsville - housing/shelter.
- ◆ VaCARES - Danville - housing/shelter.
- ◆ VaCARES - Lynchburg - financial assistance, housing, food.
- ◆ Williamsburg/James City County - assistance with transportation issues including procuring "donated cars."

### ***Local Departments of Social Services***

More than one third of the local departments of social services replied to this survey. This sample is reflective of agencies of varying sizes, both urban and rural. Individual agencies reported from one to 60 charitable and faith-based organizations as active community partners. Charitable and faith-based organizations in the Commonwealth of Virginia are currently performing a variety of supportive services for families in need.

All of the local departments responding to the survey refer clients to faith-based groups for emergency assistance in areas such as rent or telephone costs. Likewise, in almost every jurisdiction, emergency food is also provided by charitable and faith-based agencies. Half of the localities reported that faith-based groups provide clothing, medicine, eyeglasses, and dental services. One-third of the respondents said that charitable groups provide emergency assistance for fuel, utility, and transportation needs. Parenting, job readiness, computers, and financial management classes are reported by almost one-third of the reporting agencies. Charitable groups in a similar number of communities supply emergency shelter and holiday gifts.

Additional services are supplied by faith-based groups in some localities and include development of affordable home options and home rehabilitation. Charitable groups also provide child and adult day care, youth summer camp experiences, household goods, school supplies, laundry services, and counseling. Legal services, including mediation and procurement of birth certificates, are performed by charitable and faith-based organizations in some areas of the Commonwealth.

Most of the reported contracts with charitable and faith-based organizations provided for child care services and were contracted under Child Care Development Fund and Head Start funding. Contracted services also include adult day care and operation of a girls' group home. Additionally, training for foster parents, mentor training and management, as well as intensive job readiness and employment services are offered through contracts with charitable and faith-based groups in half a dozen communities.

This wide variety of services is indicative of both the commitment and capability of charitable and faith-based organizations to be key players in the supportive service networks in Virginia's communities. The unmet needs identified show recognition of areas for potential collaboration. Among the unmet needs, those most often noted were mentoring, transportation, child care provider services and non-traditional hours for day care.

Areas in which faith based organizations could assist in addressing unmet needs as identified by local departments of social services include

- ◆ Bristol non-traditional hours for child care
- ◆ Campbell County assistance with companion services for the elderly
- ◆ Charlottesville expansion of the existing services to meet the increasing need
- ◆ Chesterfield-Colonial Heights transportation
- ◆ Dickenson food bank funding
- ◆ Floyd County assistance with recruitment of foster homes and day care providers
- ◆ Goochland County emergency transportation to work sites and child care providers as well as transportation "on call" and for varying shifts day and night
- ◆ Hanover credit counseling
- ◆ Henry Martinsville transportation and 24-hour child care services
- ◆ Hopewell rehabilitative services for women mentoring program, transportation, emergency need and medicines
- ◆ New Kent transportation food affordable housing emergency funds
- ◆ Norfolk faith-based organizations can identify the most effective practices, assist in eliminating duplications of effort and identify gaps in services
- ◆ Portsmouth after-hours transportation, free GED classes business attire clothes closet after hours child care services
- ◆ Prince William child care services transportation medical services, mentoring
- ◆ Suffolk mentoring and/or fatherhood programs
- ◆ Washington mentoring job coaches, transportation, emergency child care, respite care, guardianship, emergency rent and utilities assistance, prescription drugs

## **VIII On the Other Hand - A Brief Constitutional Discussion**

While current federal and state administrations have demonstrated great enthusiasm for the concept and implementation and expansion of Charitable Choice to assist in delivering social services to those in need, there are many who disagree on the basis of the perceived violation of the separation of church and state, which is protected in both the United States and Virginia.

Constitutions The Special Task Force has endeavored to be inclusive and sensitive to all sides of this issue and received presentations and testimony from the public on different occasions

For a retrospect of general constitutional issues, a review of the memorandum to the Special Task Force in 1999 is in order (Appendix B) The key elements would seem to fall under the issues of "neutrality" and "individual choice "

To excerpt from the memorandum, the U S Supreme Court has traditionally applied a three-prong test known as the *Lemon* test in assessing Establishment Clause issues The test requires that a governmental action must (i) have a secular legislative purpose, (ii) have a principal or primary effect that neither advances nor inhibits religion, and (iii) not foster an excessive government entanglement with religion <sup>6</sup>

"A theme that has gained importance in recent Establishment Clause jurisprudence is neutrality While religious institutions may not receive favored treatment by the state they may also not be disfavored in relation to other groups "<sup>7</sup> The memo goes on to point out that the Court has found that where government creates a public forum it cannot ban certain speech merely because it may express a religious viewpoint or that where governmental facilities are generally open for public use, religious organizations must be granted equal access

"The theme of neutrality was also important in *Bowen v Kendrick* 487 U S 589 (1988), the seminal case involving whether public funds may be given to religious institutions for purposes of providing welfare benefits or other services In *Bowen*, the United States Supreme Court applied the *Lemon* test in a case involving a challenge to the Adolescent Family Life Act, which gave grant money to organizations including religious organizations to sponsor programs to reduce teenage pregnancy The Court found no violation of the Establishment Clause since the grants were distributed in a neutral fashion vis a vis religious and non-religious institutions and religious affiliation was not a criterion for selection as a grantee "<sup>8</sup>

The memo goes on to state that individual choice appears to be an important element in determining the constitutionality of a program for five reasons that have evolved out of a number of court cases including

- ◆ It cures any problem in having money go directly from public coffers to a religious institution (*Rosenberger* 515 U S at 842)
- ◆ Individual choice generally presupposes a neutral program (*Board of Ed of Kiryas Joel Village School District v Grumet*, 512 U S 687, 704 (1994))
- ◆ The benefit of the program is generally for the individual, not the religious institution (*Mueller v Allen* 463 U S 400)
- ◆ Because of individual choice there is less likelihood that government will be seen to endorse the religious views of the institutions that are the beneficiaries of those choices (*Rosenberger* 515 U S at 841-42)

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<sup>6</sup> *Lemon v Kurtzman* 403 U S 602m 612 (1971)

<sup>7</sup> *Everson v Board of Ed of Ewing* 330 U S 1 16 (1947) as stated in the Memorandum to the Faith Based Community Special Task Force December 8 1999

<sup>8</sup> *Ibid* Memorandum December 8 1999 4

- ◆ The risk of excessive entanglement would be greater if the government were to attempt to restrict individual choices to purely secular activities (*Rosenberger*, 515 U S at 845)

To date only two cases challenging the constitutionality of Charitable Choice are in the courts. Two recent decisions by the U S Supreme Court are perceived to validate the concept of Charitable Choice. In *Mitchell v Helms*, 120 S Ct 2530 (2000), the court appeared to strengthen the test of neutrality when it set aside the "pervasively sectarian" standard that held that "it is necessarily unconstitutional for government to fund organizations with a distinct and explicit religious character"<sup>9</sup>. And in November 2000 the Virginia Supreme Court upheld the constitutionality of state issued tax-exempt bonds for Regent University (*Virginia College Building Authority v Lynn*) (See also Memo on Recent Developments in the Establishment Clause by Carl H Esbeck Director Center for Law and Religious Freedom, November 2000, found in Appendix D)

In order to represent all sides, testimony from a number of local, state and national organizations continued to express opposition to the concept of Charitable Choice for any public program

Americans United for the Separation of Church and State recall that "[in] Colonial America, church taxes were a common feature. People were forced to pay taxes to support religious groups they did not belong to and whose views they found abhorrent. This system sparked resentment and anger leading Thomas Jefferson, James Madison and other early leaders to create a separation of church and state ending taxpayer-supported religion at the federal level. The states soon followed suit and officially established religion withered away in America"<sup>10</sup>

Americans United contends that religious activities should be paid for only by voluntary contributions of believers and that Charitable Choice could "potentially result in widespread discrimination based on religious belief. House of worship receiving government funding could discriminate in employment on the basis of religion. This amounts to federally-funded employment discrimination"<sup>11</sup>

The American Federation of State County and Municipal Employees raised the issue that Charitable Choice not only will violate the separation of church and state by subjecting beneficiaries to religious indoctrination, allowing religious discrimination in employment in programs that are utilizing tax dollars such discrimination that may systematically exclude persons on the basis of their gender, sexual orientation, marital status or pregnancy, and be potentially detrimental to the autonomy of religious organizations by providing greater governmental regulation of religious ministries due to the monitoring requirements that accompany federal funds. Equally troubling to AFSCME is the specter of government picking and choosing among religions to perform a limited number of programs that could result in religions lobbying to receive government grants<sup>12</sup>

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<sup>9</sup> Carlson Thies *Report to the Special Task Force* November 2000 3

<sup>10</sup> *Charitable Choice Churches Welfare & Your Tax Dollars* Faith and Freedom Series Americans United for the Separation of Church and State

<sup>11</sup> *Ibid*

<sup>12</sup> Larry Henry Executive Director American Federation of State County and Municipal Employees Council 27 Testimony Before the Special Task Force December 12 2000

John W Tadlock emphasized the difficulty in defining "direct proselytizing" as well as determining whether the church is using public money to do it "Tax money simply should not flow through the church house door because stifling, intrusive government regulations will quickly follow" Mr Tadlock goes on to say that "[t]herefore instead of pretending that government shekels can miraculously come without government shackles we should emphasize that, even for religious organizations, accepting tax funding has consequences In short, I fear that for houses of worship to accept tax funds would have the same effect as the kudzu that grows so freely in my home state of Mississippi it has become much too pervasive to get rid of and it takes over just about everything"<sup>13</sup>

## **IX Recommendations of the Special Task Force**

At the conclusion of its work for the 2000 interim the Special Task Force made the following recommendations (The complete texts are in Appendix F)

**RECOMMENDATION 1** *That the Task Force support a budget amendment of \$250 000 to the Liaison Office in the Department of Social Services to conduct to be co-sponsored by this Task Force five regional and one state educational summits to provide training and education on Charitable Choice service opportunities in the state legal protections and accounting safeguards for participating entities best practice models grantsmanship and funding resource opportunities and other topics*

*Status This amendment was not endorsed by House Appropriations*

**RECOMMENDATION 2** *That the Task Force support a resolution continuing the Special Task Force for an additional year to encourage broadened awareness by localities and faith communities on the opportunities afforded by Charitable Choice*

*Status House Joint Resolution No 683 2001 passed*

**RECOMMENDATION 3** *That the Secretary of Public Safety evaluate the status of the use of faith-based initiatives in corrections juvenile justice programs and drug treatment programs for offenders and ex-offenders in the Commonwealth with a special emphasis on the efforts of Operation Turnaround and ways in which that program can be enhanced*

*Status This resolution was combined into the work of the Special Task Force in HJR No 683 2001*

**RECOMMENDATION 4** *That the Task Force support a budget amendment to transfer some of the TANF surplus funds to three programs (i) network liaisons (ii) incubator programs and (iii) the marriage initiative*

*Status This amendment was not endorsed by House Appropriations*

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<sup>13</sup> John W Tadlock Testimony to the Special Task Force December 12 2000

**RECOMMENDATION 5** *That the Task Force support legislation that would include language in the procurement process to make it clear that faith-based organizations are welcome to compete for funding for TANF programs and that would also incorporate the federal Charitable Choice language into state law*

*Status Senate Bill 1212 2001 passed*

**RECOMMENDATION 6** *That the Task Force support legislation that would clarify the employment exemption for religious and charitable groups under the Civil Rights Act*

*Status Senate Bill 1212 2001 passed*

## **X. Appendices**



**Promoting Expanded Community Service by Virginia's Faith Communities A Report to the Special Task Force**

Stanley W. Carlson-Thues  
The Center for Public Justice  
November 29, 2000

**Introduction**

There are, across the states, multiple examples of creative new collaborations between government social programs and community and faith-based organizations. And churches, social clubs, neighborhood groups, religious nonprofits, and individual volunteers are creating innovative ways to act independently of government to care for those closest to them. Which collaboration, what independent action, should this Task Force promote? In reality, what is best for the Commonwealth of Virginia depends on the (changing) needs of Virginia's families and neighborhoods. And it depends on the specific strengths and interests of the Commonwealth's faith-based and community organizations.

The best strategy for the Special Task Force is to promote models, ideas, and strategies that are catalytic—that clear away barriers, promote collaboration, strengthen the faith sector, and make government more hospitable to faith-based organizations. Then faith groups in different places can change and expand their activities as they see new opportunities. And government officials will be freed to be creative as they redesign programs in response to changing needs, the growing activities of community and faith-based organizations, and the emergence of new collaboration partners.

Drawing on the Center for Public Justice's on-going research into the implementation and impact of Charitable Choice and into public policies that foster collaboration and strengthen civil society, this report

- signals expanding support in Congress for the Charitable Choice rules to make procurement hospitable to faith-based service providers,
- suggests ways in addition to Charitable Choice by which government can promote expanded social action by faith-based organizations,
- proposes ways the Commonwealth might help equip faith-based organizations to take on larger social-service roles,
- suggests how to make the Commonwealth's faith liaison(s) as effective as possible, and
- recommends steps to ensure that Charitable Choice is fully implemented in the Commonwealth.

The goal of the suggestions is to improve the lives of the poor and needy by improving the services available to them. Charitable Choice and other measures to expand the action of civil society should not be regarded as efforts to decrease government responsibility, the accountability of service providers, or the protections due to clients.

None of the suggestions implies that faith-based providers are necessarily better, that the poor only need religion, or that government should step back and permit a free-for-all competition

Some of the recommendations directly address the need for oversight and coordination of services and for enhancing the capabilities of potential new partners

The challenge for the Special Task Force and for the legislature is to invite greater service by faith-based and other community groups while enhancing the effectiveness, accountability, and coordination of the organizations and their services

## **A Charitable Choice in Congress**

Beginning with the 1996 federal welfare reform law (PRWORA), Congress has proposed adding Charitable Choice language to a wide range of federal social service programs in order to expand the opportunity for faith-based organizations to compete for government funds to provide services. In its current session Congress added Charitable Choice to federal drug treatment funding.

Thus Charitable Choice currently covers the following federal funds (and any state and local funds that are commingled with these federal funds)

- Substance abuse prevention and treatment funds administered by the Substance Abuse and Mental Health Services Administration (SAMHSA reauthorization as part of the Children's Health Act of 2000, P L 106-310, signed by Pres Clinton Oct 17, 2000),
- Temporary Assistance for Needy Families funds (Personal Responsibility and Work Opportunity Reconciliation Act, 1996),
- Welfare-to-Work funds (adopted in 1997 as an amendment to PRWORA),
- Community Services Block Grants (1998 reauthorization of CSBG)

The following additional applications of Charitable Choice have received favorable action in Congress but have not (yet) been adopted by both houses

- The "Fathers Count Act" (HR 3073) would authorize federal grants to faith-based and other organizations for projects to promote marriage and fatherhood, the House has passed the bill, but the Senate has not acted
- The same fatherhood provisions have now been adopted by the House as part of a new bill, HR 4678, a companion Senate bill (S 3189), with bipartisan sponsors, awaits committee action.
- Both the House and Senate have passed juvenile justice bills that include Charitable Choice language (HR 1501/S 254), but differences on other matters have prevented reconciliation and passage

- The New Markets/American Community Renewal Act (HR 4923), adopted by the House in cooperation with the Clinton administration, expands Charitable Choice to cover drug treatment funds, the companion Senate bill (S2779) would expand Charitable Choice to cover all federal funding for public health and social services. The Senate bill may be attached to an appropriations bill.
- The House added Charitable Choice language to Even Start spending (HR 3222, Literacy Involves Families Together Act)—the first extension of the language to education programs, opponents are seeking to remove the language in the Senate.

**The New Administration** Both Al Gore and George W. Bush have declared their commitment to implementing Charitable Choice and to expanding it to new areas of funding. Bush has proposed the most extensive Charitable Choice effort, which also involves other measures to promote faith-based action, such as a charity tax credit. He has proposed a high-level Office of Faith-Based Initiatives to promote compliance with Charitable Choice and to facilitate faith-based action in other ways.

**Court Action** Two cases challenging the constitutionality of Charitable Choice are currently in the courts (a Texas case against a contract with the Jobs Partnership of Washington County and a Wisconsin case against state funding of the Faith Works program in Milwaukee). However, the U.S. Supreme Court, in its June, 2000, decision, *Mitchell v. Helms*, continued its line of decisions moving away from strict separationism in favor of the concept of government neutrality in dealing with secular and religious organizations. In particular, a majority of justices in this decision set aside the "pervasively sectarian" standard which held that it is necessarily unconstitutional for government to fund organizations with a distinct and explicit religious character. *Mitchell v. Helms* upholds the Charitable Choice ideas of government neutrality and the duty of government to respect rather than encroach upon a faith-based organization's religious character. Most recently, in November, 2000, the Virginia Supreme Court upheld the constitutionality of state-issued tax-exempt revenue bonds for Regent University, a "pervasively sectarian" institution (*Virginia College Building Authority v. Lynn*).

## **B Encouraging Greater Service by Faith Communities**

The Commonwealth can pursue many avenues in addition to Charitable Choice to stimulate greater community service by faith-based organizations.

**Charity Tax Credit** The Special Task Force successfully recommended changing the Virginia Neighborhood Assistance Program so that individuals, as well as businesses and professionals, can claim a tax credit. In the NAP model, donors contribute to a general fund, not to a particular charity, and charities must compete for funds, rather than receiving them directly from donors. **The government can expand the flow of private resources to social-service groups by means of a charity tax credit.**

- Arizona charity tax credit (HB 1357, Rep. Mark Anderson) a taxpayer who donates up to \$200 annually to an organization that provides direct services to low-income persons receives a tax credit. The charity immediately receives the donated income, the donor can choose which charity to support and is therefore more likely to donate.

Organizations must certify to the tax authorities that they are a qualified charity—a 501(c)(3) organization or a community action agency that spends at least half of its budget on services to the poor

- To improve the yield of the tax credit, the Arizona legislation provides that up to \$500,000 of the funding authorized for the credit may be used for marketing. Marketing has included mailings to accountants about this new credit for itemizers, newspaper advertisements, brochures, and presentations by officials to community organizations to alert taxpayers to the new opportunity to donate money to worthy charities, and announcements via United Way materials. Rep. Anderson estimates that in the Phoenix metropolitan area, the credit stimulated \$400,000 in giving the first year, \$900,000 the second year, and \$2,000,000 in 1999.

**2. Marriage Initiative** A considerable proportion of poverty and social distress is due to childbearing outside of marriage and to broken marriages. Many policy experts see initiatives to strengthen marriage and parenting and fatherhood within marriage as the next major objective in welfare reform. Faith leaders and faith institutions are among the key social supports for marriage, and any strategy to strengthen marriage must utilize them. Conversely, a strategy to strengthen marriage will naturally create new opportunities for community action on the part of houses of worship and other faith-based organizations.

- The Oklahoma Marriage Initiative is using \$10 million in TANF funds to promote "the formation and maintenance of two-parent families," which is one of the purposes of the federal welfare law. The Initiative includes public events such as a Marriage Summit for faith, education, government, community, and business leaders, commissioned research, training of faith leaders and others to conduct marriage preparation and enrichment classes, promotion of community covenants in which clergy agree not to marry anyone who has not gone through marriage preparation classes, and classes for TANF recipients and others on dealing with conflict within marriage and avoiding divorce. The Initiative is not limited to faith leaders and organizations, but it does specifically cultivate their participation. A private organization, Public Strategies, has contracted to run the Initiative.

**3. Congregational Mentors** Mentors can be a great help to people required to make the transition from welfare to work and those who encounter various challenges in their first or second job placement. Conversely, congregations are rich in potential mentors. Local welfare offices in various parts of the Commonwealth already utilize mentors. Creation of a statewide mentoring program drawing on congregations as well as other community groups is one way to create new service opportunities for congregations. Equally important, it is also a way to highlight the Commonwealth's strong interest in partnering with faith communities in order better to serve families in need.

- Models include the Faith and Families program in Mississippi, which was run first inside government and then on a contract basis, and the Family Pathfinders program in Texas, operated by the Department of Human Services, with regional staffing in part by AmeriCorps volunteers.

**4. Networks** The government can help organize faith-based groups in a referral network that will ensure that folks needing help are directed to the best places, keep certain groups

from routinely getting clients dumped on them, and help clergy steer clients through the government social-service system. Such networks stimulate greater awareness of need by faith groups and give them a greater opportunity to serve. A network is particularly valuable as a way to expand the service opportunities of faith groups too small to contemplate contracting to provide services.

- The Maryland Department of Human Resources, on the initiative of the Partnership Council (a joint committee of DHR officials and faith leaders), operates an information clearinghouse and referral system, initially for the Baltimore area. DHR contributes part of a staff member's time, computer facilities, and use of a DHR toll free number. Congregations, community groups, and faith-based nonprofits take part by saying what kind of assistance they can offer under what conditions and by utilizing the system to refer clients to other resources or to help clients receive government assistance. DHR gains access to the resources of participating groups without the danger of dumping clients. The system stimulates congregations to consider what they can offer and promotes collaboration generally.

- An elaborate Safety Network is under development in Tarrant County, Texas, to tie together government, nonprofit service providers, and faith-based providers in a client management and information sharing system. This is envisioned as an Internet-based social safety net that will coordinate service delivery, stimulate service development, and enable the tracking of individuals and families in need, whether or not they utilize government programs.

**5 Innovation Grants** Contracting is a restrictive form of collaboration, despite Charitable Choice and other changes. Government does not always need to "steer" providers so tightly, in fact, the best way to gain innovative services may be to allow the providers, rather than government, to define the services, within limits.

- As a partial alternative to contracting for social services, Texas has set aside TANF funds for competitive grants to fund innovative partnerships between the Department of Human Services or local workforce development boards and faith-based and community groups. In 1999, about \$7 million was allocated for grants of up to \$250,000 per year for a two-year period. Instead of the government specifying the services to be provided, Innovation Grants allow the community groups to say how they intend to serve needy folks within the broad parameters of the TANF program.

**Performance Evaluations** The government should only fund effective faith-based programs. But the same standard should apply also to secular programs, including those which have traditionally been government's partners and therefore often have the inside track on new contracts. Competition and services can be improved by requiring performance evaluations for funded programs.

- Wisconsin Assembly Bill 533, Sec. 11 (1999, Speaker Scott Jensen and the Joint Legislative Council, not enacted) proposed that the government must develop methods to evaluate the effectiveness of substance abuse programs, that all contracts for substance abuse treatment services must include an evaluation component, and that all contractors must provide information to the government to permit evaluation of their programs.

### **C. Enabling Faith-based Organizations to Serve**

Many of the faith-based and community organizations that provide excellent assistance nevertheless do not measure up to the requirements of collaborating with government or the standards imposed by many philanthropies and corporate donors. The organizations are trusted, perfectly located, and provide intensive and personalized help, but do not have the structure or capacity that would allow them to generate the reports needed by outside agencies, operate formally enough, or provide services in the volume often expected by government agencies. Rather than simply assume there is an inevitable mismatch, the government can take action to facilitate development of the organizations and also action that makes it easier for the organizations to collaborate with the government. The intent here is not to reduce standards but to carefully change them where possible so that excellent services can be encouraged and utilized by government.

**1 Expanding Capacity** There are many ways that government can invest in the faith sector to improve the managerial and delivery capacity of potential partners

• **Conferences** Many jurisdictions have invested TANF funds in conferences for the faith communities that provide information about Charitable Choice and procurement. These feature good models of programs and collaborations, offer technical assistance on organizational and program development, and give leaders of faith-based organizations the chance to meet with government procurement and program officials. On October 20, 2000, the Colorado Department of Human Services organized a conference, "Faith Makes a Difference: State Government Partnering with Faith Communities," that featured Governor Bill Owens. On October 2-3, 2000, the Texas Governor's Office, with the assistance of the Leadership Network, a faith-based organization, sponsored a two-day "Faith in Action" conference for Texas faith groups.

• **Special Funding** Some states have designated funding specifically for faith-based organizations that are new to government contracting. In August, 2000, the California Employment Development Department released an RFP for \$5 million in competitive grants for employment services for the hardest-to-employ individuals. Eligible organizations have to be faith-based and to have been unable in the past to receive government funding due to their own limitations or because of the complexities of the procurement process. Unfortunately, this RFP itself is quite complex and the competition excluded so-called "pervasively sectarian" organizations. New Jersey Governor Christine Todd Whitman has designated special funding for religious community development corporations, with the rationale that such groups can be especially important in revitalizing distressed neighborhoods but have in the past encountered various barriers to collaborating with government. However, this funding, too, has been restricted to organizations able to set aside much of their religious character as a condition of participation.

In fact, many of the groups that have much to offer are "pervasively sectarian"—houses of worship and explicitly religious nonprofits. It is just this religious character that has barred them from participating in funding programs in the past.

Capacity-building funding should not exclude such organizations, at the same time, such funding should be open to all novice organizations, not only faith-based ones

**• Incubators** The government can assist small and novice groups by helping to fund technical assistance. Groups outside of government, some of them faith-based, do or can provide technical assistance. Through a competitive grant program, the government can enhance the ability of such groups to provide the assistance that many faith-based and community groups need. Wisconsin Assembly Bill 533, Sec 12 (1999, Speaker Scott Jensen and the Joint Legislative Council, not enacted) proposed the creation of a "neighborhood organization incubator grant" program that would fund community-based groups to provide technical assistance to small and novice organizations.

**• In-Kind Donation** One Texas workforce development board (Tarrant County) enabled a faith-based organization that effectively served its neighborhood become qualified to accept a government contract by supplementing the contract with the part-time services of a government-paid bookkeeper (contact Debby Kratky, Welfare-to-Work Manager, Tarrant County Workforce Development Board, 817-531-6755). The Special Task Force could recommend that the legislature authorize appropriate departments to expend up to a certain small percentage of procurement funds as supplements to contracts or grants in order to expand the capacity or improve the infrastructure of a faith-based or community group so that the group is able to collaborate with government.

**2. FaithWorks Indiana** In order to build a bridge to faith-based organizations, provide technical assistance to them, and provide information about funding opportunities and Chantable Choice, the Indiana Department of Human Services in November, 1999, contracted with Crowe-Chuzek, an accounting firm experienced in working with government and nonprofits, to organize the FaithWorks Indiana initiative. FaithWorks Indiana has a toll free number and a website ([www.state.in.us/fssa/faithworks](http://www.state.in.us/fssa/faithworks)). It has organized regional information meetings for faith communities and technical training workshops. It has contracted with several regional groups to provide on-going technical assistance. Services are open to secular community groups as well religious groups. FaithWorks Indiana also educates clients about their religious liberty rights and faith-based organizations about their religious liberty duties.

**• Consolidated Community Funding Pool** To make it easier for organizations to apply for funding, decrease unfruitful competition, and better coordinate services, Fairfax County, Virginia, funds human services through an innovative consolidated community funding pool. Such a funding pool should be recommended to other jurisdictions, in part as a way to make it easier for new entrants to compete for funding, and in part to ensure coordinated services.

Two caveats: a) since only some funds are governed by Chantable Choice and others have highly restrictive rules, it is important that faith-based organizations not be inadvertently excluded when funds from different sources are combined for administrative efficiency, and b) to ensure that faith-based organizations can take part, it is essential that a coordinated funding system not be allowed to exclude certain providers as being too sectarian—it

is the total set of services offered that must be diverse, individual providers should be allowed, within the law, to embody a distinctive viewpoint

**4 Intermediaries** Many congregations and small faith-based nonprofits will never become as large as conventional contractors, they do not want to grow, and if they did grow they would lose much of the informality, flexibility, and diversity that is their strength. Nevertheless, they can become valuable collaborators by joining efforts. Congregations and small nonprofits can join collaboratives such as Interfaith Community Ministry Networks. Networks of small congregations can contract with a larger organization, such as Catholic Charities or Goodwill, to become their administrator and link to government. Individual small groups can become subcontractors to larger religiously affiliated providers such as the Salvation Army or to secular nonprofits that seek to provide diversified services.

Government can facilitate such intermediary arrangements by requiring large contractors to subcontract with community and faith-based organizations (such subcontracting is a performance criterion for Wisconsin's contracts with W-2 welfare contractors), by paying the administrative charge that allows a larger organization to administer services provided by a network of small groups, and by encouraging program officials to work, where possible, with neighborhood-rooted collaboratives.

**5 Procurement Reforms** Government can also facilitate collaboration with smaller organizations by breaking large contracts into smaller ones, simplifying RFPs, contracts, and the procurement process, and by providing extensive technical assistance concerning procurement to novice organizations.

**6 Vouchers** On the recommendation of the Special Task Force, the legislature has encouraged the Virginia Department of Social Services to consider how to use vouchers more extensively in the delivery and payment of services. Vouchers promote client choice and responsibility, diversity of services, and a less micro-managing relationship between government and service providers. But using a voucher system instead of contracts requires an extensive redesign of VDSS services and procedures. It may be prudent to ask the legislature to go beyond encouraging VDSS exploration of vouchers to authorizing VDSS to dedicate a portion of TANF funds and staff resources to the task of converting some assistance to a voucher system.

- In some states, vouchers are being used in welfare reform for those instances in which the client is being sanctioned but benefits are still due to the children (a voucher limits expenditures to specific items), in other places, vouchers are being used to increase client choice, as in South Carolina, to assist TANF families to obtain services that enable them to move to areas with greater employment opportunities. Under the new Workforce Investment Act, certain services for welfare recipients and others are to be provided via vouchers.

**7 Alternative Accreditation** One barrier to service by some faith-based groups is accreditation or licensing requirements that do not accept as valid their style of providing the assistance—for example, the requirement that substance abuse treatment must use the “medical model” rather than a faith-based understanding of addiction and cure. Accountability is nonetheless essential, so the solution should be alternative accountability systems.



- **Texas alternative licensing** In 1997, the Texas legislature adopted HB 2481 to exempt faith-based drug programs using exclusively spiritual or religious treatment methods from the conventional licensing requirements and to establish an alternative registration system for such programs. The legislation provides that clients of the faith-based programs can continue to receive their state and federal social benefits (e.g., Food Stamps)—a right previously in doubt because the programs had been construed as not offering legitimate treatment. Unfortunately, the legislation does not permit the faith-based programs to receive government funding for the faith-based treatment services.

- **The American Community Renewal Act**, currently under consideration in Congress as part of a package with the President's New Markets Initiative, outlines an alternative credentialing method for faith-based substance abuse programs (HR 815, Sec 585). A faith-based treatment program can petition officials to set aside conventional educational qualifications if the program has a record of at least three years of successful drug treatment, and government officials are unable to "demonstrate empirically" that the conventional qualifications are essential to a successful program.

#### **D Effective Faith Liaisons**

The Special Task Force successfully initiated the formation of a faith liaison network for the Commonwealth which, under Jane Brown, is quickly taking shape as an effective institution to bridge between the Department of Social Services and the Commonwealth's faith communities.

To make a faith liaison maximally effective

- **Officials with liaison responsibility should have a title announcing that responsibility**, such as "Faith and Community Liaison." Such a title immediately identifies the person—to the faith communities, the public, and the government—as the bridge builder and ombudsman.
- **The officials, at least at the top, should occupy a distinct organizational location**—an Office of Faith and Community Liaison makes the function visible and indicates its importance in a way that subsuming the official(s) in a general Community and Volunteer Office cannot.
- **The officials, the office, and the network should occupy a prominent place on the Department's website homepage.**
- **The faith liaison network should have a toll-free number that is well-publicized.**
- **Every Department official who deals with the public should know who the faith liaisons are, what they do, and how they can be contacted.**

- as much as possible, particularly in the initial stages, faith liaisons should be out in the faith communities, making themselves known and making it obvious that the Department is intent on expanded collaboration
- the faith liaison network should sponsor its own (regional) how-to conferences, equally important, faith liaisons should systematically appear at conferences organized by denominations, provider networks, faith-based organizations, and other such groups
- to ensure that faith liaisons can be out "evangelizing" for the Department's collaboration goals and not merely responding to incoming calls, the liaison responsibility should be made a half-time or full-time task and not just be an additional responsibility tacked on to other tasks
- to the extent that departments other than the Department of Social Services also spend funds covered by Charitable Choice or otherwise should be encouraged or required to expand their collaboration with faith-based organizations, those departments also should develop Faith and Community Liaisons
- in addition to providing information and technical assistance to the faith communities and responding to questions from those communities, faith liaisons should be empowered to watch for barriers to collaboration that continue to exist and to report such problems to the head(s) of the relevant department(s)
- one way to highlight the government's desire to reach out to faith communities, as well as to provide practical help to faith groups, is to organize a special faith liaison initiative such as FaithWorks Indiana, and not only a faith liaison network
- the government can make it easier for faith-based organizations to contact it by instituting an Internet "bulletin board" such as the "Charitable Choice, Faith-based & Community-Based Organizations Bulletin Board" featured on the Texas Workforce Commission website

Because faith liaisons are located inside government, they can be the government's outreach to the faith communities and also an ombudsman for the faith communities, intervening on their behalf to deal with government obstacles. However, their internal location necessarily makes them outsiders to the faith communities. It is unlikely that a faith liaison can become the trusted point of contact for every or most faith communities, which instead have their own networks of various kinds. Thus it is a major responsibility of faith liaisons to reach out to a locality's faith networks.

In doing so, it is vital that faith liaisons cultivate contacts with as many of the networks as possible, taking special care to reach out to those that are not part of his or her personal context. Faith liaisons must keep in mind that none of the networks is inclusive. In particular, interfaith networks, while providing a bridge between faiths and denominations, typically do not include theological conservatives, and provider or urban ministry networks are likely to include only those groups already mobilized for service and not those who may be ready for action if asked.

## **E Implementing Charitable Choice**

**Charitable Choice is the single most important government innovation to remove barriers and expand the community-service roles of faith-based organizations. It goes beyond warm intentions to making specific legal changes right at the heart of the formal and technical procurement process.**

**The single most important thing the Commonwealth can do is to comply thoroughly, enthusiastically, and publicly with all the requirements of Charitable Choice. A visible review of procurement policies and practices, coupled with visibly made changes where needed, sends a loud and clear signal to the faith communities, to procurement and program officials, and to the public in general that the Commonwealth has entered a new day of pursuing collaboration with faith-based organizations.**

- The governors of Texas, Colorado, and Arkansas have publicly announced executive orders directing all relevant agencies to review their procurement policies and procedures, to make any necessary changes, and to report on progress to the governor within a limited time period.**
- Several states have enacted Charitable Choice into their own statutes (Wisconsin, Arizona, and Texas). This makes it clear to all that the Charitable Choice freedoms supersede former restrictive state rules and eliminates any possible conflict between federal and state procurement requirements. In enacting Charitable Choice, these states also expanded its scope beyond the federal funds (and any commingled state or local funds) to state and local funds. Texas declared that the Charitable Choice principles must also govern nonfinancial collaborations. Charitable Choice legislation to cover all state agencies in Oklahoma has been proposed.**
- Charitable Choice provides that faith-based organizations retain their exemption that allows them to make personnel decisions based on religious considerations. When Charitable Choice funds are involved, faith-based organizations cannot be required to certify that they will disregard religion when they hire and fire, although they must still be able to certify that they will refrain from other forms of discrimination. Texas has written specific exemption language.**
- To make it clear that faith-based organizations are now welcome to compete for funding despite past restrictions, RFPs and other documents should not only be stripped of language excluding such organizations but have language added welcoming their participation. Texas includes specific welcoming language in communications about funding possibilities.**
- At the direction of the legislature, the California Department of Social Services is writing regulations on how counties must comply with Charitable Choice when they procure services (DeAnna Setzer, Chief, Office of Regulations Development, California DSS, 916-657-2586).**
- Charitable Choice is designed to create a level playing field in procurement, not to replace the previous bias against faith-based organizations with a new bias in their favor. And it is designed not only to expand the opportunity for faith-based organizations to**

participate in procurement without sacrifice of their religious character but also to fully protect the religious liberty of clients. The Texas Department of Human Services includes specific language in contracts to emphasize the government's neutrality and to ensure that clients know of their rights.

- Officials can encourage changes in procurement practice and not only in formal policies -by requiring regular reports on the implementation of Charitable Choice. The reporting method needs to be carefully designed so that only contracts that meet Charitable Choice standards can be entered as evidence of progress. However, the system should encourage officials to report separately on other forms of collaboration and to document the various ways they are facilitating new action and collaboration by faith-based and community organizations.
- The homepage of the Virginia Department of Social Services website (and websites of other relevant departments) should include a prominently placed link entitled Charitable Choice or Faith Initiatives. The link should take viewers to specific information on Charitable Choice and on the Commonwealth's faith initiatives. Highlighting Charitable Choice in this way not only makes information accessible but indicates to everyone that this is one standard by which the government's actions should and will be evaluated.
- To change procurement practice and attitudes about collaboration in local offices, the state can provide specific training on-site for all staff members who deal, or should deal, with faith-based organizations. The Texas Workforce Commission recently contracted for Charitable Choice and collaboration training for each of the 26 local workforce development boards and for the ten regional Department of Human Services offices. The contract is for up to \$100,000, using TANF funds, and will last 13 months. Several years ago, the state of Ohio contracted with the National Center for Neighborhood Enterprise to organize regional conferences on collaboration and to provide training for officials at the county level. This contract was for \$150,000 of TANF funds and lasted for 18 months.

**Resources**

- Stanley W Carlson-Thues, *Putting Charitable Choice into Action A Guide for State, Local, and Federal Officials* (Washington, DC The Center for Public Justice, forthcoming)**
- Amy L Sherman, *The Growing Impact of Charitable Choice A Catalogue of New Collaborations Between Government and Faith-based Organizations in Nine States* (Washington, D C Center for Public Justice, March, 2000)**
- Charitable Choice Compliance A National Report Card* (Washington, DC The Center for Public Justice, [September 2000])**
- A Guide to Charitable Choice The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation with Faith-based Social-Service Providers* (Washington, DC Center for Public Justice, and Annandale, Virginia Center for Law and Religious Freedom of the Christian Legal Society, January 1997)**
- The Empowerment Network, *Empowerment 2001 Blueprint Strategies for Family & Community Renewal in a New American Century* (Washington, DC The Empowerment Network, [2000])**
- Governor s Advisory Task Force on Faith-Based Community Service Groups, *Faith in Action A New Vision for Church-State Cooperation in Texas* (December 1996)**
- C Eugene Steuerle, et al , eds , *Vouchers and the Provision of Public Services* (Washington DC Brookings Institution Press, Committee for Economic Development, Urban Institute Press, 2000)**



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## MEMORANDUM

**TO** MEMBERS OF THE SPECIAL TASK FORCE STUDYING FAITH-BASED COMMUNITY SERVICE GROUPS WHO MAY PROVIDE ASSISTANCE TO MEET SOCIAL NEEDS – HJR 764 (1999)

**FROM** *Ashley L. Taylor, Jr.*  
ASHLEY L. TAYLOR, JR.  
Deputy Attorney General

**DATE** December 8, 1999

**SUBJECT** *Memorandum of Legal Principles Related to the Participation of Faith-Based Groups in the Welfare Reform Process.*

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During its 1999 session, the General Assembly adopted House Joint Resolution No 764, which established a task force “to study ways in which faith-based community service groups may provide assistance through their programs to meet social needs” H J Res 764 (1999). The task force was charged with, among other things, “[surveying] the Commonwealth’s legal and regulatory landscape to identify obstacles to the participation of faith-based groups in the welfare reform process.” *Id.* Pursuant to this mandate, the Chairman of the Task Force, at the September 14, 1999 meeting, asked the Office of the Attorney General to write a memorandum outlining the relevant state and federal constitutional principles that control this area of law. This is a response to that request.

This memorandum does not purport to provide definitive answers to all possible issues and varied fact scenarios that may arise in this context. Indeed, the United States Supreme Court has counseled against such an approach invariably cautioning that decisions in this area of law are keenly fact-sensitive. Nor does this memorandum address the constitutionality of any particular program or idea. It is meant instead to provide an overview of the state and federal constitutional principles that animate this area, and to apply those principles to a few basic models of programs that may arise in this context.

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### I Controlling Constitutional Provisions

#### A. United States Constitution

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble and to petition the government for a redress of grievances ”

The foregoing embodies fundamental restraints on the power of government Under the 14<sup>th</sup> Amendment, these restraints apply not only to the “laws of Congress,” but also to the policies, practices and decisions of state and local government. *Cantwell v Connecticut*, 310 U S 296 (1940)

#### B Constitution of Virginia (1971)

The Commonwealth of Virginia, through its own constitution, also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs

Art I, § 16 Free exercise of religion, no establishment of religion – That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or the support of any church or ministry, but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please

The Virginia Constitution also contains a specific prohibition against appropriation to religious or charitable organizations

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

## II The Conceptual Framework in Federal Law

There are no “bright lines” for determining whether governmental action has violated the Establishment Clause In other words, each situation requires an independent factual and legal analysis The United States Supreme Court itself has remarked that “the [Establishment] Clause erects a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship” *Lynch v Donnelly*, 465 U S 668, 679 (1984)<sup>1</sup> While not confining itself to any particular test, the Court traditionally has applied a three-part test known as the *Lemon* test in assessing Establishment Clause cases In brief, the *Lemon* test requires that governmental action

- (1) must have a secular legislative purpose,
- (2) must have a principal or primary effect that neither advances nor inhibits religion, and,
- (3) must not foster an excessive government entanglement with religion

*Lemon v Kurtzman*, 403 U S 602, 612 (1971)<sup>2</sup>

In other words, governmental decisions motivated by purely religious goals will ordinarily be invalidated Even when governmental action is animated by secular interests it will nonetheless fail if its primary effect advances or inhibits religion or entangles government excessively in religious affairs or vice versa.

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<sup>1</sup> “Justice Jackson is reported to have quipped that Jefferson’s wall of separation was in danger of becoming as serpentine as the wall Jefferson had built at the University of Virginia” A E Dick Howard, *Commentaries on the Constitution of Virginia* at 302-303 n.84 (1974) (citation omitted)

<sup>2</sup> Although the *Lemon* test has often been criticized and sometimes ignored, it has not been overruled and remains the basic conceptual framework through which all Establishment Clause cases are analyzed. See *Lamb’s Chapel v Center Moriches Union Free Sch. Dist.* 508 U S 384 394 n.7 (1993)



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A theme that has gained importance in recent Establishment Clause jurisprudence is neutrality. While religious institutions may not receive favored treatment by the state, they may also not be disfavored in relation to other groups. See *Everson v Board of Ed of Ewing*, 330 U.S. 1, 16 (1947) (cautioning that the courts must be sure not to "inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief"). The courts have held that where government creates a public forum, it cannot ban certain speech merely because it may express a religious viewpoint. *Lamb's Chapel v Center Moriches Union Free Sch Dist*, 508 U.S. 384, 392-393 (1993). Moreover, where governmental facilities are generally open for public use, religious organizations must be granted equal access. See e.g. *Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"), see also *Bd of Educ of Westside Community Schools v Mergens*, 496 U.S. 226 (1990) (high school that permits student clubs may not prohibit religious clubs from operating at the school), *Widmar v Vincent*, 454 U.S. 263 (1981) (if university permits open access to school facilities, it cannot deny use of facilities to religious organizations).

In one recent case, the Supreme Court extended this neutrality principle to a case involving public funds. In *Rosenberger v Rector and Visitors of the Univ of Virginia*, 515 U.S. 819 (1995), the Supreme Court held that if the University of Virginia gave money to groups that wished to form a student newspaper, the University could not refuse to give money to a religious group merely because of the religious content of the publication. The court held that a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. The Court held it was not unconstitutional for the University to provide funds to religious organizations since, "[t]he program neutrality distinguish[ed] the student fees from a tax levied for the direct support of a church or group of churches." *Id.* at 840.<sup>3</sup>

The theme of neutrality was also important in *Bowen v Kendrick*, 487 U.S. 589 (1988), the seminal case involving whether public funds may be given to religious institutions for purposes of providing welfare benefits or other social services. In *Bowen*, the United States Supreme Court applied the *Lemon* test in a case involving a challenge to the Adolescent Family Life Act, which gave grant money to organizations including religious organizations to sponsor programs to reduce teenage pregnancy. The Court found no violation of the Establishment Clause since the grants were distributed in a neutral fashion *vis a vis* religious and non-religious institutions and religious affiliation was not a criterion for selection as a grantee. *Id.* at 608.

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<sup>3</sup> The Court also found it significant that University funds did not go directly to the religious organization but rather to the printer who printed the student newspapers. The Court explained, "[t]here is no difference in logic or principle and no difference of constitutional significance between a school using its funds to operate a facility to which students have access, and a school paying a third party contractor to operate the facility on its behalf." *Id.* at 843.

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“[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all” *Roemer v Maryland Bd of Public Works*, 426 U S 736, 746 (1976)

Courts remain sensitive, however, to whether the population affected by the governmental program contains a captive audience” such that the government’s endorsement of religion could be viewed as coercive. The cases that explore this theme have generally arisen in the public school context. See *Lee v Weisman*, 505 U S 577 (1992) (striking down government policy of permitting prayer at public middle school commencement ceremony), *School Dist v Ball*, 473 U S 373, 390 (1985) (“The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free voluntary choice”) Although governments must be aware of this danger in the welfare context as well, it would not appear that a mere symbolic union would be sufficient to suggest government endorsement of religion. See *Bowen*, 487 U S at 613-14, see also, *Bd of Educ of the Westside Community Schools v Mergens*, 496 U S 226, 250 (1990) <sup>4</sup>

Government programs that provide for individual choice are not as vulnerable to constitutional attack. It is now a well-established axiom that the First and Fourteenth Amendments do not preclude a state from granting aid which may flow to a religious institution “only as a result of a genuinely independent and private choices of aid recipients” *Witters v Washington Dept of Servs for the Blind*, 474 U S 481, 487 (1986) <sup>5</sup> Thus, the concept of

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<sup>4</sup> The Supreme Court has recognized the ability of both college and high school students to understand that governments do not endorse everything they fail to censor. See *Widmar* 454 U S at 274 n.14 (explaining that “University students are of course young adults. They are less impressionable than younger students and should be able to appreciate that the University’s policy [of permitting equal access to University facilities] is one of neutrality toward religion”) *Mergens* 496 U S at 250 (high school) *Tinker v Des Moines Indep Community School Dist* 393 U S 503 (1969) (high school)

<sup>5</sup> In a case approving of a grant of vocational rehabilitation educational assistance to a blind person who used the grant to attend a Christian College in order to become a pastor the Supreme Court pointed out the goal posts in this arena

It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example a State may issue a paycheck to one of its employees who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the State. Aid may have that effect even though it takes the form of aid to students or parents. The question presented is whether on the facts as they appear in the record before us extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above or is an impermissible direct subsidy.

*Witters v Washington Dept of Servs for the Blind* 474 U S 481 486-87 (1986) (internal citations and quotation marks omitted)

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individual choice has surfaced as an important element in determining the constitutionality of a program. Courts consider individual choice to be important for at least five reasons. First, it cures any problem in having money go directly from the public coffers to a religious institution. See *Rosenberger*, 515 U.S. at 842 (“We do not confront a case where the government is making direct money payments to an institution or group that is engaged in religious activity.”) Secondly, individual choice generally presupposes a neutral program. See *Board of Ed. Of Kiryas Joel Village School Dist v Grumet*, 512 U.S. 687, 704 (1994) (“[T]he principle is well grounded in our case law, [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.”) Third, the benefit of the program is generally for the individual, not the religious institution. The mere fact that a religious institution may obtain a benefit is more the by-product of individual choice rather than government policy. *Mueller*, 463 U.S. at 400 (characterizing as “attenuated” any financial benefit “that eventually flows to parochial schools” as a result of “private choices of individual parents”). Fourth, because of individual choice there is less likelihood that government will be seen to endorse the religious views of the institutions that are the beneficiaries of those choices. See *Rosenberger*, 515 U.S. at 841-42 (where University provided funds to student organizations on a neutral basis for them to publish student newspapers the University had not fostered “any mistaken impression that the student newspapers speak for the University” nor was there any “real likelihood that the speech in question [was] either endorsed or coerced by the State”), *Mueller v Allen*, 463 U.S. 388, 399 (1983) (finding that in a program where aid becomes available to a religious institution only as a result of decisions of individual parents no imprimatur of state approval, can be deemed to have been conferred on an particular religion, or on religion generally), *Witters*, 474 U.S. at 488-89 (“Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion.”) Fifth, the risk of excessive entanglement would be greater if the government were to attempt to restrict individual choices to purely secular activities. See *Rosenberger*, 515 U.S. at 845 (explaining that even if the University were able to distinguish between permissible and impermissible discussions of religion in a student newspaper, “merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.”)

### III State Constitutional Issues

The Virginia Constitution is not, however, identical to the United States Constitution. Since early in the history of the Commonwealth, the Virginia Constitution has contained restrictions against the use of state resources in support of religious institutions.

There is a dearth of cases interpreting Virginia’s Constitutional provisions regarding the separation of church and state. As observed by the noted constitutional commentator, A.E. Dick

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Howard, “[f]airly sparse case law has thrown only a bit of light on [Article IV, § 16] whose language and ambit are not the clearest.” A E Dick Howard, *Commentaries on the Constitution of Virginia* at 551 (1974). One of the few cases in Virginia involving the giving of public funds to religious institutions is *Almond v Day*, 197 Va 419 (1955). In *Almond*, the Virginia Supreme Court struck down a provision in the Appropriation Act of 1954 (“the Act”) that provided money for the education of children of veterans killed or disabled during World War II. The money provided payment of “tuition, institutional fees, board, room rent, books and supplies, at any education or training institution of collegiate or secondary grade in the State of Virginia.” Acts 1954, ch 708, p 970

Since *Almond* arose in the context of schools, the section of the Virginia Constitution that was most applicable was the provision stating “[n]o appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof.”<sup>6</sup> Since the Act’s “broad language made [the funds] available for use while such children are attending either sectarian or nonsectarian private schools,” the Court held it violated the Virginia Constitution. *Almond*, 197 Va. at 423

In *Almond* J Lindsay Almond, Jr., the Attorney General of Virginia, argued on behalf of the Commonwealth that the Act was “not an appropriation directly to the institutions which the eligible children may attend, but [was] an appropriation to the parents or guardians of such children, [was] primarily for the benefit of such children, and only incidentally for the benefit of the selected private schools.” *Id* at 424. The Court rejected General Almond’s “child benefit” theory argument, explaining that even if the individual students chose where they went to school the money was still “for the benefit of” of that school.” *Id* at 426. The Court determined that “the parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State to the school is transmitted.” *Id* at 428. Such determination was based primarily upon the Court’s finding that “[a]s a matter of fact the record shows that from July 1950, through June 1954, payments of these appropriations have usually been made directly to the institutions.” *Id* at 425. Thus, the narrow holding of *Almond* did not reach General Almond’s “child benefit” theory, but merely held that direct tuition payments to religious schools constituted a prohibited appropriation.

Most significantly, the decision in *Almond* was largely based on the Court’s view that “[t]he trend of recent US Supreme Court decisions strongly indicates” that the Act was violative of the First Amendment to the US Constitution, and that there existed “the strong possibility that the provisions of the Virginia Constitution dealing with separation of Church and State would also be construed as prohibiting the type of appropriation here under consideration.” *Id* at 427-28.<sup>7</sup>

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<sup>6</sup> At the time *Almond* was decided, this provision was found in section 141 of the Constitution of Virginia. It now appears as Art. VIII, § 10 of the Virginia Constitution of 1971.

<sup>7</sup> It does not appear that the Court’s view on this matter was challenged by the Attorney General during the case. See *Almond* at 430.

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In making that prediction in 1955, the *Almond* court failed to anticipate the substantial development of Establishment Clause jurisprudence that has occurred during the last forty-four years. As mentioned above, the Supreme Court has subsequently established that the Establishment Clause is not violated merely because state aid flows to religious institutions as a result of individual choice. *Witters*, 474 U S 481, 487 (1986), accord *Zobrest v Catalina Foothills Sch Dist*, 509 U S 1 (1993) (quoting *Mueller v Allen*, 463 U S 388, 389 (1983) (no violation of the Establishment Clause occurs when public funds become available to sectarian schools ‘only as a result of numerous private choices of individual parents of school-age children’)). The Fourth Circuit has found *Almond* to be “outdated jurisprudentially in that the federal establishment clause permits more state assistance to religion than it was thought to allow in 1955.” See *Phan v Virginia*, 806 F 2d 516, 524 (1986) (opining that Article IV, § 16 would not appear to bar voucher-type programs where the funds go for the benefit of the recipient and not the religious institution. A E Dick Howard also has suggested “[t]here is nothing in the language of [Article VIII, § 10], that would prevent the Virginia courts from adopting the ‘child benefit’ theory or some other approach that would allow given forms of aid to be extended to children in sectarian schools.” 2 A E “Dick” Howard, *Commentaries on the Constitution of Virginia* at 956 (1974). In light of these decisions treating the recipients of funds as independent decision makers rather than mere conduits between the government and the school, it is unclear how much viability *Almond* retains, even with respect to the Virginia Constitution.

#### IV Relevant Models

Since the Task Force has not asked us to assess any particular program, this memorandum is necessarily general in nature, however, we hope this final section will keep this memorandum from being purely theoretical and enhance its usefulness to the task force in crafting any programs or policies it might wish to suggest. The following discusses two types of programs that involve the use of government funds by religious institutions for programs that do not have as a primary goal a religious purpose or effect.

##### A. Client Pick – No Religious Purpose or Effect

The first model involves situations in which government appropriates money for some legitimate secular function or service and allows individuals to choose the institution to provide that service thereby permitting some money to go to religious institutions that perform that secular, non-religious function.

The classic case involves the use of federal Medicaid dollars that are given to health care providers, including religiously owned hospitals, to reimburse the health care provider for care to Medicaid recipients. These types of programs are undoubtedly constitutional. This is primarily

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because the function performed is secular and not religious. See *Bradfield v Roberts*, 175 U S 291 (1899) (finding that since religiously operated hospitals have an independent secular function, state funds may constitutionally be given to aid that secular function). Moreover, it is the patient that chooses where the money is spent.

If such a program were analyzed under the *Lemon* test, a court would undoubtedly find that (1) such a program had a legitimate secular purpose, (2) a program that allowed patients to use either religious institutions or non-religious institutions did not have a primary effect that either advances or inhibits religion, and, (3) a program that permitted hospitals to be reimbursed for care to patients did not have an excessive entanglement between government and religious authority.

Under the neutrality theory, the Supreme Court would undoubtedly also hold that in programs such as these where government money is made available for the provision of legitimate secular services, it would be impermissible to deny access to such money to a hospital simply because it was a religious institution.

### **B Agency Pick – No Religious Purpose or Effect**

The second model involves programs in which the government directly contracts with or provides a grant to a religious institution for the provision of a secular function or service. In this case, there is no intermediate individual who makes the choice where the money goes, thus for the program to be viable, the service provided by the religious institution must secure a secular purpose.

The case in which this model was tested was *Bowen*, 487 U S at 589. In *Bowen* the Supreme Court upheld the constitutionality of the Adolescent Family Life Act (the "Act") that gave grants to various organizations to provide teen pregnancy counseling. The Act specifically stated that religious organizations would be eligible for the grants. The Court held the Act did not violate the constitution on its face, although the application of the Act to particular programs may or may not be valid.

Under the first *Lemon* prong, *Bowen* found the statute "was motivated primarily, if not entirely, by a legitimate secular purpose, (i.e. the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood)." *Id* at 602. The mere fact that religious organizations were given a role to play did not vitiate the primarily secular purpose of the Act. "Nothing in our previous cases prevents Congress from recognizing the important part that religion or religious organizations may play in resolving certain secular problems." *Id* at 606. Nor was the eligibility of religious organizations to receive grant money enough to render the Act unconstitutional, since the grants were distributed in a neutral fashion *vis a vis* religious and non-religious institutions and religious affiliation was not a criterion for selection as a grantee. *Id* at 608. This is in line with the Court's previous statement that

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“religious institutions need not be quarantined from public benefits that are neutrally available to all” *Roemer*, 426 U S at 746 Indeed, the Supreme Court “has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs” *Bowen*, 487 U S at 609

*Bowen* then analyzed the Act under the second *Lemon* prong to determine if the Act had the “primary effect of advancing religion” *Id* at 609 The Court observed that “[o]ne way in which direct government aid might have that effect is if the aid flows to institutions that are ‘pervasively sectarian’” *Id* at 610 (citing *Hunt v McNair*, 413 U S 734, 743 (1973)) The Court recognized that it had invalidated programs where “there was a ‘substantial risk that aid to religious institutions would, knowingly or unknowingly, result in religious indoctrination’” *Id* at 612 However, the Court rejected the idea that a regulation that provided grant money to a religious institution for a primarily secular purpose would be unconstitutional merely because it created a modicum of interaction between government and religion *Id* at 613-14 After acknowledging that government must tread lightly in this area, the Court held the Act did not lead to “an excessive government entanglement with religion” *Id* at 615 (quoting *Lemon*, 403 U S at 613)

Again, the theme of neutrality and fairness is important Although governments may not be required to set up certain programs where money is made available to eligible groups for the performance of a legitimate secular function or service, the government may not deny religious organizations the ability to apply for the money The Supreme Court has “never said that ‘religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs’” *Zobrest*, 509 U S at 6 (quoting *Bowen*, 487 U S at 609)

It appears that religious organizations are already involved in many projects such as this in Virginia Consider, for example, the Department of Social Services’ (“DSS”) Office of Newcomer Services which currently contracts with faith-based organizations to provide refugee resettlement services DSS also reimburses child care centers for child care provided to certain low-income individuals Centers operated by religious organizations are eligible to receive this money DSS’ “One Church, One Child” program uses churches to find adoptive homes for minority children DSS also uses churches in a program to provide respite child care for homeless individuals while they search for employment Moreover, twenty-nine community action agencies work closely with hundreds of faith-based organizations statewide that provide services and classroom space for head start and other programs

## V Recent Developments

On Wednesday, December 8, 1999, the United States Supreme Court heard arguments on the case of *Mitchell v Helms*, 119 S Ct. 2336 *Mitchell v Helms* originated in Louisiana when a group of taxpayers of a local public school district challenged the school district’s decision to

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provide instructional materials and equipment including hardware, to religious schools. The materials and equipment were made available to the religious schools under Chapter 2 of Title 1 of the Elementary and Secondary Education Act (“the Federal Education Act”). The case thus raises the issue of whether the Establishment Clause permits school districts to provide instructional materials to religious schools under the Federal Education Act. The decision in this case will provide courts and decision makers with additional guidance as to what criteria should be considered in determining whether certain governmental aid violates Establishment Clause principles.

**VI CONCLUSION**

All of the foregoing necessitates careful consideration of all salient circumstances in fashioning any program involving faith-based community service groups in the welfare reform process. It is critical that policy makers and legislators understand the constitutional limitations in this area, while, at the same time, not adopting the blanket rule that any involvement by faith-based groups in the welfare reform process is impermissible.



January 13 2000

Ms Gayle Vergara, Senior Research Associate  
General Assembly Building  
910 Capitol Street 2nd Floor  
Richmond, VA 23219

RE Comments on Recommendations of the Special Task Force on Faith-Based Organizations

This memo provides comments on the following recommendations of the Task Force

- 1 In general the recommendations in the first point are appropriate as long as the services listed are available to all private and charitable organizations and are therefore not limited to faith-based organizations In addition it is critical that with respect to faith-based organizations the government must not engage in any conduct or set any policies that promote faith-based organization or otherwise advance one religion over another, or religion in general
  
- 2 Although the Task Force recommendation and much of the commentary discuss altering the language of the state s RFPs contracts rules and regulations to make them consistent with Charitable Choice, it is imperative that Charitable Choice be examined in the context of the Constitution Many aspects of the Charitable Choice legislation are inconsistent with the Establishment Clause of the U S Constitution, and as is always the case with statutory law the Constitutional requirements prevail regardless of the terms of the statute For instance, the Supreme Court has interpreted the Constitution as barring government grants to pervasively sectarian organizations or those that would provide sectarian-based programs *See Bowen v Kendrick*, 487 U S 589 (1988) Therefore, unless the state's RFPs, contracts, rules and regulations reflect a thorough analysis of the constitutionality of the provisions in Charitable Choice many of these documents are likely to deceive possible government contractors and, ultimately, to be ruled unconstitutional

For example, the provision in Charitable Choice that "permits" religious organizations to engage in employment decisions on the basis of religion in their publicly-funded employment is most certainly unconstitutional *See Corporation of Presiding Bishop v Amos*, 483 U S 327 (1987) At no time has the U S Supreme Court allowed tax funds to be expended in a religiously-discriminatory manner In addition the Court s decision in *Amos* was based on the concern that government oversight over a religious organization s private employment decisions would result in an unconstitutional entanglement between the government and the organization s exercise of religion This concern does not apply in the publicly-funded jobs under Charitable Choice because these positions are, by



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definition secular See 42 U S C Sec 604(a)(j) Limitations on Use of Funds for Certain Purposes No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction or proselytization

Finally, unlike the claims of many of the recommendations and commentaries there is no evidence of "discrimination" against faith-based organizations that wish to contract with the government If faith-based organizations were willing to abide by the same laws and regulations that apply to secular government contractors there are no barriers to their ability to obtain government grants or contracts

- 3 It is unconstitutional under both the U S and the Virginia Constitutions to limit any government funding or other benefit to churches or other houses of worship Any budget provision or other legislation that earmarks funds to religious organizations alone will most certainly be met with a constitutional challenge See *Texas Monthly v Bullock*, 489 U S 1 (1989)
- 4 Again as long as these programs do not have the purpose or effect of advancing religion or religious organizations religious missions it is probably appropriate to expand access to summer food programs through community organizations, including but not limited to faith-based organizations
- 5 An accountability problem exists with tax credits Charitable Choice makes clear that public funds cannot be spent on proselytizing worship, or other religious activity To ensure this, Charitable Choice allows for audits of all government-funded programs A tax credit given for the provision of similar services, however, lacks guarantees that the publicly subsidized programs are secular
- 6 This recommendation is appropriate as long as the organizations eligible to receive voucher funds comply with the same laws, regulations, and constitutional safeguards and meet the same requirements that recipients of direct contracts or grants must meet These requirements include, but are not limited to, (1) no funds provided though a voucher may be used for religious worship instruction, or proselytization, (2) beneficiaries of assistance must not be subjected to any form of religious indoctrination, and (3) employees paid with voucher funds may not be employed based on religion

- 7 We do not object to a companion tax credit for contributions to certified charitable organizations, including religious organizations, provided the credit is not skewed in any way toward religious organizations and providers

In addition to the above comments on the Task Force recommendations it is critically important to note that "Charitable Choice" is rife with constitutional problems and special attention must be given to these issues when examining whether and how the state should contract with or provide vouchers to faith-based organizations to provide social services

First churches and other houses of worship should only provide publicly funded services in a manner that is discrete and institutionally separate from the religious ministries. It is advisable for churches and other houses of worship to establish a separate religiously-affiliated nonprofit to administer, operate, and perform the welfare programs

In addition, the environment within which the publicly funded services are provided should not be sectarian and religious icons or messages should be avoided. Furthermore as already mentioned, employees paid with public funds should not be hired or fired on the basis of religion. Public funds should not be commingled with private funds. Finally and perhaps most importantly, religious organizations should guard against all forms of proselytization of the beneficiaries of the government funded benefits. In other words services provided under the act cannot be religious in character. This should be in addition to the prohibition on the use of public funds for religious purposes that is already contained in Charitable Choice

In implementing Charitable Choice, it is critical that the constitutionality of programs, under both the U S and Virginia Constitutions be ensured in order to protect the religious liberty of program beneficiaries, religious institutions, and the taxpayers. Thank you for the opportunity to comment on these recommendations

Sincerely,



Steven K. Green, J D , Ph D  
General Council and Director of Policy

**Testimony before**  
**Special Task Force Studying**  
**Faith-Based Community Service**  
**Groups Who May Provide Assistance**  
**To Meet Social Needs**

**December 12, 2000**

**By**

**Larry Henry**  
**Executive Director**  
**American Federation of State, County**  
**and Municipal Employees**  
**Council 27**  
**Richmond, VA**

**FAITH-BASED GROUPS PROVIDING SERVICES**  
**TO MEET SOCIAL NEEDS**

Good morning My name is Larry Henry and I am Executive Director of the American Federation of State, County and Municipal Employees (AFSCME) Council 27 here in Richmond Council 27 represents Virginia State employees in a number of areas including corrections, health care, and job training

I am here today to urge caution and restraint as this Task Force studies and puts forward recommendations for expanding the role of "faith-based", religious organizations in providing social services in Virginia As noted in House Joint Resolution No 291, the constitutionality of the "charitable choice" provision contained in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) remains very much in doubt, as evidenced by a number of lawsuits now pending across the country

Why does AFSCME favor a narrow interpretation of charitable choice? We believe that allowing a religious institution to administer a governmental contract in a non-secular way violates the separation of church and state found in the First Amendment to the U S Constitution Specifically, it subjects beneficiaries to religious indoctrination that may counter their own religious beliefs and may require provision of services in churches or other houses of worship where religious icons art, and symbols are displayed And, charitable choice allows taxpayer funds to flow directly into the coffers

of pervasively sectarian religious institutions, leading to increased government interference in religious programs by virtue of this new contractual relationship

Significantly, several religious organizations have been speaking out forcefully against charitable choice, which they see as detrimental to religious autonomy. For example, the associate general counsel for the Baptist Joint Committee wrote in an op-ed piece in *The Washington Post* that charitable choice is "the wrong way to do right." She argues that charitable choice threatens to damage religion and religious liberty by necessitating greater government regulation of religious ministries due to the monitoring requirements that accompany federal funds.

In addition, charitable choice expands the reach of government-sanctioned employment discrimination. Title VII of the 1964 Civil Rights Act carved out a limited religious institution exemption from the prohibition against employment discrimination so that, for example, Catholic Churches could "discriminate" against other religions when hiring priests. With charitable choice, religious government contractors may maintain internal structures that systematically exclude people from employment on the basis of their religious beliefs, marital or familial status, gender, sexual orientation, or pregnancy.

Also troubling is the fact that charitable choice forces the government to pick and choose among religions because it cannot fund them all. This raises the specter of

religions lobbying elected legislators in their competition to receive government grants, thereby fanning the fire of religious division

AFSCME's national office in Washington, D C has informed me that a large group of religious and non-sectarian organizations have come together to work for religious freedom in social services and in opposition to charitable choice. The religious organizations in this coalition include the American Jewish Congress, the Presbyterian Church, USS, the United Church of Christ, Office for Church in Society, and the United Methodist Church, General Board of Church and Society, among many others.

In conclusion, I urge this Task Force to step back and consider all of the potential negative ramifications of aggressively expanding charitable choice in Virginia. As I have stated, those include eroding the separation between church and state, increasing employment discrimination, and religious organizations' loss of autonomy.

Thank you for giving me the opportunity to address this Task Force on an issue of such importance to employees in our state and recipients of services and benefits.

**Testimony to the Special Task Force Studying Charitable Choice  
House Room D, General Assembly Building  
December 12, 2000**

**"The Wrong Way to Do the Right Thing"  
By John W Tadlock**

Both major party candidates in the still undecided presidential campaign received glowing reviews for their proposals to address social problems through new partnerships between faith-based organizations and government

Without doubt, government and religion can do much good together to address the pressing needs of our times. It has long been permissible, for example, for the government to fund groups that have ties to religion but are set up to perform secular social services, such as Catholic Charities and Lutheran Services in America. But this idea has been taken a giant step further by advocating "charitable choice," a plan where tax subsidies might flow to houses of worship and other thoroughly religious entities that perform social services

Vice-President Gore deemed charitable choice (which first appeared in the 1996 welfare reform law) a "carefully tailored approach" and proposed extending it "to other vital services where faith-based organizations can play a role---such as drug treatment, homelessness and youth violence prevention." Governor Bush also supports charitable choice and made the concept a focal point in his campaign

But charitable choice threatens to damage the very things both gentlemen say they treasure---religion and religious liberty. Put simply, charitable choice is the wrong way to do the right thing

1 For one thing, religious ministries would likely be regulated by the government, which would mean audits and probably, tedious reporting, intrusive compliance reviews and even the subordination of religious principles to government policies and objectives

Some who favor it have emphasized that the charitable choice law attempts to protect the religious character and autonomy of providers, but whether these protections would survive judicial scrutiny is highly questionable. For example, is it constitutional to allow a religious ministry to insist that no Jews or Muslims need apply for jobs that are tax-funded? One federal district court has already refused to allow the Salvation Army to fire an employee whose salary was paid substantially with tax money simply because the employee was a Wiccan

2 Second, under charitable choice, religious ministries could become administrative centers of government benefits and services and gain associated duties such as terminating benefits, reporting on beneficiaries and otherwise policing the system.



Instead of being known as sanctuaries, houses of worship could come to be viewed essentially as arms of the state. If tax subsidies flow to churches and other religious ministries, the role of religion as a prophetic critic of government also will be diminished.

3 Finally, despite the insistence that "government must never promote a particular religious view," charitable choice would force the government to pick and choose among religions---it cannot fund them all. Religions might compete for government grants before elected legislators, thereby fanning the fires of religious division and giving representatives yet another opportunity to turn religion into a political tool.

The vice president believes that imposing certain "clear and strict safeguards" will obviate religious liberty problems. He has stated that "government must never try to force anyone to receive faith." He also cautioned that "we must ensure that there is always a high-quality secular choice available [and] continue to prohibit direct proselytizing as part of any publicly funded efforts."

But some of these safeguards are impossible to administer. How does one define "direct proselytizing," much less ensure that a church isn't using public money to do it? Moreover, these safeguards are insufficient. Tax money simply should not flow through the church house door, because stifling, intrusive government regulations will quickly follow. These are some of the reasons the Supreme Court has ruled that tax funds should not flow to thoroughly religious entities such as churches.

Church and state can and should work cooperatively without being tied together with funding strings. Houses of worship and governmental officials can and should share information about needs and programs. The government can highlight the good work that religious and other social service groups are doing and make referrals to these groups when appropriate.

Government also can encourage increased private subsidies for religious ministries (as Mr. Gore did during the campaign). Legislatures can help by passing tax incentives for charitable giving, such as the bipartisan Charitable Giving Tax Relief Act, which would allow non-itemizers to deduct 50 percent of their charitable gifts over \$500.

Another way for church and state to cooperate is for churches and other religious groups to form separate entities to provide secular social services with tax money.

Religion in America is robust precisely because it relies on the strength of its message and voluntary gifts, rather than compulsory tax funds, for its support. Religion in America is vital precisely because it is largely free from government direction and regulation.

Therefore, instead of pretending that government shekels can miraculously come without government shackles, we should emphasize that, even for religious organizations, accepting tax funding has consequences. In short, I fear that for houses of worship to accept tax funds would have the same affect as the kudzu that grows so freely in my

home state of Mississippi it has become much too pervasive to get rid of and it takes  
over just about everything



# Jewish Community Federation of Richmond

October 30 2000

Stewart Kasen  
President

Richard Arenstein  
President Elect  
Jerome Gumenick  
Vice President  
Stuart Siegel  
Vice President  
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Rabbi Zvi Ron  
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Joyce Scher  
Michael Schewel  
Daniel Siegel  
Joyce Slater  
Emily Sterling  
Mark Susky  
Rabbi Richard Smith  
Rabbi Levy Smolar  
David Struminger  
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Executive Committee

Ms Gayle Vergara  
Division of Legislative Services  
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BY FAX (804) 371-0169

Dear Ms Vergara



Re Charitable Choice Legislation


During the last two years the Jewish Community Federation of Richmond's official position regarding Charitable Choice legislation has been to urge the Faith Based Community Services Task Force to proceed with caution in considering ways to involve faith based organizations (FBOs) in the provision of public services. Our particular concern relates to public resources (including but not limited to funds) being transferred to FBOs that may be engaged in proselytizing or discriminatory activities.

We also have some concern regarding consideration of Stanley W. Carlson Thies as a consultant to the Task Force. Dr. Carlson Thies has exhibited a reputation of pushing the church/state envelope on the issue of FBOs. For example, in his guide to "Everything You Need to Know About Charitable Choice" (available on the Center for Public Justice web site) he urges the use of the "voucher method" of providing services through religious organizations, a practice that we believe raises serious constitutional issues.

Moreover, in his Top Ten Tips for Public Officials (also available on the web site) he comments that past practices and assumptions about appropriate church/state relations have left a legacy of distrust between government and faith communities, and urges government to acknowledge its mistakes and make amends with a statement of the rights of faith based providers. The Jewish Community Federation of Richmond, which remains strongly committed to the continued separation of church and state (a principle that is one of Virginia's most important legacies to the nation and the world) believes that government has no need to make amends or apologies in this area. These are but two examples of the ways in which Dr. Carlson Thies' conception of Charitable Choice differs strongly from our own and from the best interests of the Commonwealth.

We hope that you and the members of the Task Force will keep our concerns in mind when making your important decisions. Thank you for your consideration in this regard. Best wishes on your future efforts.

Sincerely,  
  
Stephen A. Meyers, Chairman  
Jewish Community Relations Committee  
  
Richard Grossman & Michael A. Wolf  
Government Affairs Subcommittee



Center for Law  
and Religious Freedom

Appendix D

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November 10, 2000

The Honorable John H Hager, Chairman  
Special Task Force Studying Faith-Based Service Groups  
Office of the Lt Governor  
State Capitol  
Richmond, Virginia 23218

RE Recent Developments in the Establishment Clause

Dear Lt Governor Hager

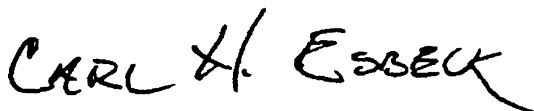
Thank you for inviting me to testify on October 31, 2000, before the Special Task Force Studying Faith-Based Community Service Groups Who May Provide Assistance To Meet Social Needs - HJR 291 (2000) / HJR 764 (1999)

During the course of my remarks I indicated that the Memorandum of December 8, 1999, by Mr Ashley L Taylor, Jr, Deputy Attorney General, needed to be updated in light of the recent U S Supreme Court case of *Mitchell v Helms*, 530 U S \_\_\_, 120 S Ct 2530 (2000). The plurality in *Mitchell* adopted the neutrality theory. Justice O'Connor's concurring opinion reached the same result, but relied heavily on *Agostini v Felton*, 521 U S 203 (1997).

You requested that I detail my view of the *Mitchell* case in a memorandum. Enclosed is the paper you requested.

Please give a copy of my paper to Mr Taylor. Should you or Mr Taylor have any comments or questions, please do not hesitate to contact me.

Sincerely,



Carl H Esbeck  
Director, Center for Law and Religious Freedom

## CHARITABLE CHOICE AND THE CRITICS

Carl H Esbeck

Charitable choice is now part of three federal social service programs. The provision first appeared in the Welfare Reform Act of 1996,<sup>1</sup> two years later it was incorporated into the Community Services Block Grant Act of 1998,<sup>2</sup> and most recently it was made part of the Children's Health Act of 2000<sup>3</sup> signed by President Clinton, on October 17, 2000. In each of these programs, government funds are directly placed into the hands of private social service providers via grants and purchase of service contracts.

Charitable choice interweaves three fundamental principles, and each receives prominence in the legislation. First, the statute imposes on government the duty to not discriminate with regard to religion when it comes to the eligibility of providers to deliver social services under these programs. Rather than examining the nature of the service providers, charitable choice focuses on the nature of the services and the means by which they are provided. The relevant question concerning provider eligibility is not "Who are you?" but "What can you do?"

---

<sup>\*</sup> *Isabella Wade and Paul C. Lyda*, Professor of Law, University of Missouri—Columbia, and currently serving as Director of the Center for Law and Religious Freedom in Washington, D.C. Copyright 2000, all rights reserved.

<sup>1</sup> 42 U.S.C. § 604a (19\_\_). Charitable choice appeared as § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2161 (1996).

<sup>2</sup> 42 U.S.C. § 9920 (19\_\_). Charitable choice appeared as § 679 of the Community Services Block Grant Act, which was Title II of the Coats Human Services Reauthorization Act of 1998, Pub. L. No. 105-280, 112 Stat. 2702 (1998).

<sup>3</sup> 42 U.S.C. § \_\_\_\_ [at end of § 300x-51 et seq. add a new § 1955]. Charitable choice appeared as Title XXXIII, § 3305 of the Children's Health Act of 2000, Pub. L. No. 106-\_\_ 114 Stat. \_\_\_\_ (2000).

Second, the statute imposes on government the duty to not intrude into the religious autonomy of faith-based providers. Charitable choice extends a guarantee to each faith-based organization [FBO] that agrees to participate that the organization “shall retain its independence from Federal, State, and local governments including such organization’s control over the definition, development, practice, and expression of its religious beliefs”<sup>4</sup>. A private right of action to sue a government that tries to renege on that duty gives real teeth to the guarantee<sup>5</sup>. Additionally, there are prohibitions on specific types of governmental interference such as demands to strip religious symbols from the walls of FBOs and bans on regulations requiring FBOs to adjust their governing boards to reflect some “ethnic or gender balance” thought more politically correct<sup>6</sup>.

Third, the statute imposes on both government and participating FBOs the duty to not abridge certain religious rights of the ultimate beneficiaries of these programs. Each of these federal social service programs has a secular purpose, namely, helping the poor and needy, and they seek to achieve this object by providing resources in the most effective and efficient means available. The purpose of the program is not, of course, aid to the participating social service providers, whether secular or religious. Rather, the purpose of the program is to benefit the poor and needy, hence, it is they who are the ultimate beneficiaries.

I will touch on these three principles below, and do so in reverse order.

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<sup>4</sup> 42 U.S.C. § 604a(d)(1)

<sup>5</sup> 42 U.S.C. § 604a(i)

<sup>6</sup> 42 U.S.C. § 604a(d)(2)

## I

In programs subject to charitable choice, when funding goes directly to the social service providers<sup>7</sup> the ultimate beneficiaries are empowered with a choice. Beneficiaries who want to receive services from an FBO may do so, assuming that is, that an FBO has otherwise qualified for a grant or service contract.<sup>8</sup> On the other hand, if a beneficiary objects out of religious reasons to receiving services at an FBO then the state is required to provide equivalent services at an alternative provider.<sup>9</sup> This is the "choice" in charitable choice. The possibility of choosing to receive services at an FBO is every bit an exercise of religious freedom as is the right not to be served at a provider objectionable for reasons of religious conscience. There is much concern by civil libertarians about the latter choice, whereas the former is often overlooked. Charitable choice regards these choices as of equal importance.

If a beneficiary selects an FBO that receives direct funding, the provider cannot discriminate against beneficiaries on account of religion or a refusal to actively participate in a religious practice.<sup>10</sup> Protection of the ultimate beneficiaries was bolstered in the charitable choice provisions in the Children's Health Act of 2000. Now beneficiaries not only have the right of choice and protection from discrimination, but also must receive actual notice of these rights.<sup>11</sup>

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<sup>7</sup> Charitable choice contemplates both direct and indirect forms of aid. 42 U.S.C. § 604a(a)(1). Some statutory rights and duties pertain only to direct funding.

<sup>8</sup> It may be that no FBOs successfully compete for a grant or service contract. Charitable choice is not a guarantee that aid will flow to FBOs. Charitable choice guarantees only that FBOs will not be discriminated against with regard to religion.

<sup>9</sup> 42 U.S.C. § 604a(e)(1)

<sup>10</sup> 42 U.S.C. § 604a(g)

## II

If the availability of government money should cause the undermining of the religious character of FBOs, then charitable choice will have failed. If the availability of government funding should cause FBOs to become dependent on government or should it silence their prophetic voice, then charitable choice will have failed. Accordingly, charitable choice acts to safeguard the “religious character” of faith-based organizations. Protecting the institutional autonomy of FBOs was done to enable them to succeed at what they do so well, namely helping the poor and needy in a holistic way. Protecting autonomy was also required to get reluctant FBOs to participate in government programs, something FBOs are far less likely to do if they face invasive or compromising regulations.

One of the most important of these guarantees of institutional autonomy is the ability to select staff on a religious basis. FBOs can hardly be expected to sustain their religious vision without the ability to employ individuals who share the tenets and practices of the faith. The guarantee is central to each organization’s freedom to be its own self according to the dictates of conscience. Accordingly, in addition to the broad guarantee of “independence” from government, charitable choice specifically provides that FBOs need not alter their policies of “internal governance” formed as a matter of religious faith<sup>12</sup> and that FBOs retain their exemption from federal employment.

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<sup>11</sup> See 42 U.S.C. § 1955(e)(2). Of course, nothing in prior versions of charitable choice prevents states from giving actual notice of beneficiary rights. It would be prudent to supply notice of rights whether required or not by the legislation, but the absence of a requirement in older versions of the law hardly rises to the level of a constitutional concern.

<sup>12</sup> 42 U.S.C. § 604a(d)(2)(A).



discrimination laws<sup>13</sup> While it is essential that FBOs be permitted to make employment decisions based on religious considerations, along with all other providers FBOs must obey federal civil rights laws prohibiting discrimination on the basis of race, color national origin, gender, age, and disability<sup>14</sup>

As a general proposition FBOs must comply with existing state and local employment nondiscrimination laws These laws were enacted pursuant to each state's police power Some states and municipalities also have nondiscrimination laws and procurement policies enacted pursuant to government spending power When these spending power laws do not permit FBOs to select staff on the basis of faith commitments, the laws are not enforceable against FBOs acting pursuant to charitable choice revenue streams This is because the federal statutory guarantees in charitable choice that promise to protect the "religious character and "internal governance" of FBOs preempt contrary provisions in state and local laws<sup>15</sup>

Occasionally the charge is made that charitable choice is, "Just government-funded discrimination" This is untrue Rather than "funding discrimination," the government s

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<sup>13</sup> 42 U S C § 604a(f)

<sup>14</sup> See Title VI of the Civil Rights Act of 1964 42 U S C § 2000d et seq (19\_\_ ) (prohibiting discrimination on the bases of race, color and national origin) Title IX of the Educational Amendments of 1972 42 U S C §§ 6101-6107 (19\_\_ ) (prohibiting discrimination in educational institutions on the bases of sex and visual impairment) Section 504 of the Rehabilitation Act of 1973 29 U S C § 794 (19\_\_ ) (prohibiting discrimination against otherwise qualified disabled individuals including individuals with a contagious disease or an infection such as HIV) The Age Discrimination Act of 1975 29 U S C § 706(8)(c) (19\_\_ ) (prohibiting discrimination on the basis of age)

<sup>15</sup> This is not unlike when claims of religious freedom override state laws protecting sexual orientation or marital status See e.g. Altman v Minn Dept. of Corrections, 80 Fair Empl Prac Cas (BNA) 1166 (D Minn 1999) (sexual orientation) Madsen v Erwin 395 Mass 715 481 N E 2d 1160 (1985) (sexual orientation) Walker v First Presbyterian Church 22 Fair Empl Prac Cas (BNA) 762 23 Empl Prac Dec (CCH) ¶ 31 006 (Cal Super 1980) (sexual orientation), McCready v Hoffius, 586 N W.2d 723 (Mich 1998) vacated in part on other grounds 593 N W 2d 545 (Mich 1999) (marital status) Attorney General v Desilets 636 N E 2d 233 (Mass 1994) (marital status) Amaga v Loma Linda University 10 Cal App 4<sup>th</sup> 1556, 13 Cal Rptr 2d 619 (1992) (marital status) Cooper v French 460 N W.2d 2 (Minn 1990) (marital status)

object is funding social services for the poor and needy. Whether or not the social service provider is an FBO with employment policies rooted in its religion is probably unknown to the government and that is the way it ought to be. The government's concern here is helping the poor and needy with the most effective and efficient programs. It is the FBO of course, that is discriminating on the basis of religion in its staffing decisions, not the government. The discrimination, if there is any, is not "state action" in the sense of that term in the Fourteenth Amendment.<sup>16</sup> Moreover, the private act of discrimination by an FBO is not out of intolerance or malice. Rather, the FBO is acting, understandably so, in accord with the dictates of its sincerely held religious convictions. If FBOs cannot operate in accord with their own sense of mission, then they are not going to be able to sustain the impressive record they now have of successfully helping the poor and needy.

A religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization favoring employees devoted to environmentalism, a feminist organization hiring only those devoted to the causes of women, or a teacher's union hiring only those opposed to school vouchers. To disallow a religious organization from hiring on a religious basis is to assail the very cause for which the organization was formed in the first place.

Section 702 of Title VII of the Civil Rights Act of 1964<sup>17</sup> permits religious organizations to make employment decisions based on religion.<sup>18</sup> Occasionally claims

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<sup>16</sup> See *Blum v Yaretsky*, 457 U.S. 991 (1982) (holding that pervasive regulation and receipt of government funding at private nursing homes does not, without more, constitute state action); *Rendell Baker v Kohn*, 457 U.S. 830 (1982) (holding that private school heavily funded by state is not state actor); *Flagg Brothers Inc v Brooks*, 436 U.S. 149, 164 (1978) (stating that mere acquiescence by the law in private actions of warehouse does not convert the acts into those of the state).

<sup>17</sup> 42 U.S.C. § 2000e-1(a) (19\_\_). Religious educational institutions are separately exempt under 42 U.S.C. § 2000e-2(e)(2) (19\_\_).

are made that the § 702 exemption is waived when an FBO becomes a provider of federally funded social services. The law is to the contrary. Indeed, charitable choice expressly states that the § 702 exemption is preserved.<sup>19</sup> Having just promised FBOs that they will not be “impair[ed]” in their “religious character” if they agree to provide social services, it would be wholly contradictory to then deem FBOs as having impliedly waived valuable autonomy rights. Waiver of rights is always disfavored in the law, and, as would be expected, the credible case law holds that the § 702 exemption is not lost when an FBO becomes a provider of publicly funded services.<sup>20</sup>

Occasionally the suggestion is made that, as federal taxpayers, each of us has a personal right of conscience to not have our taxes paid to a religious organization via government programs such as charitable choice. The putative legal claim by such a taxpayer would be that he or she has a right not to be coerced or otherwise “religiously

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<sup>18</sup>The Title VII religious exemption was upheld in *Corporation of Presiding Bishops v Amos*, 483 U.S. 327 (1987). *Amos* held that the exemption was not a preference violative the Establishment Clause.

<sup>19</sup> 42 U.S.C. § 604a(f).

<sup>20</sup> *Hall v Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6<sup>th</sup> Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); *Siegel v Truett McConnell College*, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994) *aff'd*, 73 F.3d 1108 (11<sup>th</sup> Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); *Young v Shawnee Mission Medical Center*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received thousands of dollars in federal Medicare payments), *see* *Arraga v Loma Linda University*, 10 Cal. App. 4<sup>th</sup> 1556, 13 Cal. Rptr.2d 619 (1992) (religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding); *Saucier v Employment Security Dept.*, 954 P.2d 285 (Wash. Ct. App. 1998) (Salvation Army's religious exemption from state unemployment compensation tax does not violate Establishment Clause merely because the job of the employee in question was funded by a government grant); *Seale v Jasper Hospital Dist.*, 1997 WL 606857 (Tx. Ct. App. Oct. 2, 1997) (Catholic hospital does not waive its rights to refuse to perform sterilizations and abortions merely because it had a lease with the government on its building). The only case to the contrary is criticized by the court in *Siegel* as well as limited to its facts, 13 F. Supp.2d at 1343-44 (discussing *Dodge v Salvation Army*, 48 Empl. Prac. Dec. (CCH) ¶ 38619 (S.D. Miss. 1989)).

offended' when general federal revenues end up going to a religious organization. The idea has a certain superficial appeal, but the law is to the contrary and for good reason.

The U.S. Supreme Court has refused to recognize a federal taxpayer claim of coercion or other personal religious harm. In *Tilton v Richardson*,<sup>21</sup> plaintiffs claimed that payment of federal taxes, the monies of which were later appropriated to faith-based colleges and other institutions of higher education, caused them to suffer coercion in violation of the Free Exercise Clause. Finding no plausible evidence of compulsion relating to matters of faith, the Court held that a federal taxpayer's cause of action for religious coercion failed to state a claim under the Free Exercise Clause.<sup>22</sup> In *Valley Forge Christian College v Americans United*,<sup>23</sup> plaintiffs challenged as violative of the Establishment Clause the transfer of government surplus property to a religious college. The Supreme Court rebuffed all asserted bases for standing to sue because the plaintiffs lacked the requisite personal "injury in fact." One of the rejected claims was that the plaintiffs had a "spiritual stake" in not having their government give away property to a religious organization or to otherwise act in a manner contrary to no-establishment values. The high court rejected the plaintiffs' characterization of "injury" and held that a spiritual stake in having one's government comply with the Establishment Clause is not a constitutionally cognizable harm.<sup>24</sup>

As federal citizens our taxes support all manner of policies and programs with which we deeply disagree. Taxes pay the salaries of public officials whose policies we

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<sup>21</sup> 403 U.S. 672 (1971)

<sup>22</sup> *Id.* at 689

<sup>23</sup> 454 U.S. 464 (1982)

<sup>24</sup> *Id.* at 486 n.22

despise and oppose at every opportunity. None of these complaints give rise to constitutionally cognizable "injuries" to us as federal taxpayers. There is no reason that a federal taxpayer alleging "religious coercion" or being "religiously offended" should, on the merits of the claim, be treated any differently.

### III

Charitable choice requires that social service providers be selected without regard to religion. When discussing the restraints of the Establishment Clause on generally available programs of aid, this principle of equal treatment or nondiscrimination is termed "neutrality theory." The Supreme Court case that most recently addressed the neutrality principle is *Mitchell v Helms*<sup>25</sup>. The four-justice plurality, written by Justice Thomas, and joined by the Chief Justice, and Justices Scalia and Kennedy, embraced neutrality theory<sup>26</sup>. In the sense of legal positivism, however, Justice O'Connor's opinion concurring in the judgment is controlling in the lower courts<sup>27</sup>.

From Justice O'Connor's opinion, when combined with the numbers comprising the plurality, it can be said that (1) neutral, indirect aid to religious organizations does

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<sup>25</sup> 530 U.S. \_\_\_, 120 S. Ct. 2530 (2000) (plurality opinion)

<sup>26</sup> Before proceeding under the assumption that Justice O'Connor's opinion is controlling at least until the Supreme Court should again address this issue, it is well to extol the virtues of the plurality opinion. The plurality adopted the neutrality principle without any qualifications. Hence, the plurality is not only a bright line rule of easy and sure application, but brings the constitutional theory of the Establishment Clause—heretofore in confusing disarray—in line with the Free Exercise Clause and the Free Speech Clauses. See Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J. OF LAW, ETHICS & PUB. POLICY 285, 300-02 (1999). In the plurality opinion, Justice Thomas said that failing to adhere to the neutrality principle "would raise serious questions under the Free Exercise Clause." *Mitchell*, 120 S. Ct. at 2555 n. 19.

<sup>27</sup> *Id.* at 2556 (O'Connor, J. concurring in the judgment). Justice Breyer joined Justice O'Connor's opinion.

not violate the Establishment Clause,<sup>28</sup> (2) neutral, direct aid to religious organizations does not, without more, violate the Establishment Clause<sup>29</sup> Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that (a) *Meek v Pittenger*<sup>30</sup> and *Wolman v Walter*<sup>31</sup> should be overruled, (b) the Court should do away with presumptions of unconstitutionality, hence, the "pervasively sectarian" test would seem to be no longer relevant to the Court's analysis, and (c) proof of actual diversion of government aid to religious indoctrination would be violative of the Establishment Clause

The issue in *Mitchell* concerned the scope of the Establishment Clause when evaluating a program of governmental assistance entailing direct aid to organizations, including religious organizations<sup>32</sup> The federal program at issue in *Mitchell* entailed federal aid to k-12 schools, public and private, secular and religious, allocated on a per-student basis The same principles apply, presumably, to social service or health care

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<sup>28</sup> *Id* at 2558-59

<sup>29</sup> *Id* at 2557

<sup>30</sup> *Id* at 2556-2563-66 *Meek v Pittenger* 421 U.S. 349 (1975) (plurality in part) had struck down loans to religious schools of maps, photos, films, projectors, recorders, and lab equipment, as well as disallowed services for counseling, remedial and accelerated teaching, psychological speech and hearing therapy

<sup>31</sup> *Id* at 2556-2563-66 *Wolman v Walter* 433 U.S. 229 (1977) (plurality in part) had struck down use of public school personnel to provide guidance, remedial and therapeutic speech and hearing services away from the religious school campus, disallowed the loan of instructional materials to religious schools, as well as disallowed transportation for field trips by religious school students

<sup>32</sup> *Mitchell* does not speak—except in the most general way—to the scope of the Establishment Clause when it comes to other issues such as religious exemptions in regulatory or tax laws, issues of church autonomy, religious symbols on public property, or religious expression by government officials. In that regard, *Mitchell* continues the balkanization of doctrine that is different Establishment Clause tests for different contexts. This splintering of doctrine can be avoided because a comprehensive and integrated view of the Establishment Clause is possible. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power* 84 IOWA L. REV. 1 (1998)

programs, albeit the Court has scrutinized more closely direct aid to k-12 schools compared to social welfare and health care services<sup>33</sup>

In cases involving programs of direct aid to k-12 schools, Justice O'Connor started by announcing that she will follow the analysis used in *Agostini v Felton*<sup>34</sup> She began with the two-prong *Lemon* test is there a secular purpose and is the primary effect to advance religion? Plaintiffs did not contend that the program failed to have a secular purpose, thus she moved on to the second prong of *Lemon*<sup>35</sup> Drawing on *Agostini*, Justice O'Connor noted that the primary-effect prong is guided by three criteria The first two inquiries are whether the aid is diverted to government indoctrination of religion and whether the program of aid is neutral with respect to religion The third criterion is whether the program creates excessive administrative entanglement now clearly just a factor under the primary-effect prong<sup>36</sup> Alternatively, the same evidence that is sifted under the effect prong can be examined pursuant to Justice O'Connor's no-endorsement test<sup>37</sup>

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<sup>33</sup> See *Bowen v Kendrick*, 487 U S 589 (1989) (upholding on its face religiously neutral funding of teenage sexuality counseling centers) *Bradfield v Roberts* 15 U S 291 (1899) (upholding use of federal funds for construction at religious hospital)

<sup>34</sup> *Mitchell* 120 S Ct at 2556 2560 *Agostini v Felton* 521 U S 203 (1997) upheld a neutral program whereby public school teachers go into religious schools to deliver remedial educational services

<sup>35</sup> *Mitchell* 120 S Ct at 2560 Plaintiffs were wise not to argue the program lacked a secular purpose See Carl H Esbeck *The Lemon Test Should It Be Retained, Reformulated or Rejected?* 4 NOTRE DAME J OF LAW ETHICS & PUB POLICY 513 515 21 (1990) (collecting authorities holding that the secular purpose prong of *Lemon* is easily satisfied when dealing with neutral programs of aid to education health care or social welfare)

<sup>36</sup> In *Mitchell* plaintiffs did not contend that the program created excessive administrative entanglement 120 S Ct at 2560 For a survey of cases where the Supreme Court sought to employ the excessive entanglement test, see Carl H Esbeck *supra* note 26 NOTRE DAME J at 304-07 (1999)

The Supreme Court has long since abandon "political divisiveness" as an aspect of entanglement analysis See Carl H Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom Coherence Conflict or Chaos?* 70 NOTRE DAME L REV 581, 634 35 (1995) (collecting authorities)

<sup>37</sup> *Mitchell* 120 S Ct at 2560

To summarize, when examining a government program of direct aid, the steps of an Establishment Clause analysis as outlined by Justice O'Connor are as follows

- 1 Does the program of aid have a secular purpose?
  - 2 Does the program of aid have the primary effect of advancing religion? The effect inquiry is guided by three factors
    - a Is the aid actually diverted to religious indoctrination?
    - b Does the program define the eligibility of participating organizations without regard to religion?
    - c Does the program create excessive administrative entanglement?
- [Alt 2] The no-endorsement test asks whether an "objective observer" would feel civic alienation upon examining the program of aid <sup>38</sup>

After reviewing the Court's application in *Agostini* of the above-outlined analysis, Justice O'Connor then inquired into factors 2(a) and 2(b) on the facts as presented in *Mitchell*. Because the federal k-12 educational program was unquestionably neutral as to religion,<sup>39</sup> she spent most of her time on the diversion-to-indoctrination factor. Justice O'Connor noted that the educational aid in question was to supplement rather than to supplant monies from private sources, that the nature of the aid was such that it could not reach the coffers of a religious school, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes. On the point about nature of the aid she noted that the aid consisted of materials and equipment rather than cash, and that the materials were loaned to the religious schools with government retaining title <sup>40</sup>

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<sup>38</sup> Endorsement is unlikely unless a facially neutral program when applied, singles out religion for favoritism. Justice O'Connor utilized very little the alternative endorsement test in *Mitchell*. See *id.* at 2559. For criticism of the no-endorsement test because it focuses on individual harm rather than on separation of church and state see Esbeck, *supra* note 37, NOTRE DAME L. REV. at 631. The endorsement test, if used at all, is more suited to analyzing issues such as religious symbols on public property.

<sup>39</sup> Religious neutrality explained Justice O'Connor ensures that an aid program does not provide a financial incentive for the citizens intended to ultimately benefit from the aid "to undertake religious indoctrination." *Mitchell*, 120 S. Ct. at 2561 (quoting *Agostini*).

<sup>40</sup> *Id.* at 2562. On at least one occasion the Court has upheld cash payments to k-12 religious schools. *Committee for Public Educ. v. Regan*, 444 U.S. 646 (1980) (sustaining reimbursement to religious schools the actual costs of state mandated testing and reporting).



Justice O'Connor went on to reject a rule of unconstitutionality where the character of aid is capable of diversion to religious indoctrination, hence overruling *Meek* and *Wolman* <sup>41</sup> In doing so, she rejected employing presumptions of unconstitutionality, as the Court did in *Agostini*, and stated that she requires proof that the government aid was actually diverted <sup>42</sup> Because the "pervasively sectarian" test is a presumption of this sort, indeed, an irrebuttable presumption (i.e., any direct aid to a k-12 parochial school is assumed to advance religion), <sup>43</sup> Justice O'Connor is best understood to have rendered the "pervasively sectarian" test no longer relevant <sup>44</sup> Justice O'Connor's opinion apparently requires that religious organizations monitor or "compartmentalize" program aid <sup>45</sup> If the aid flows into the entirety of an educational activity and some "religious indoctrination [is] taking place therein," then that indoctrination "would be directly attributable to the government" <sup>46</sup>

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<sup>41</sup> 120 S. Ct. at 2562-68

<sup>42</sup> *Id.* at 2567

<sup>43</sup> See *id.* at 2561 (noting that *Agostini* rejected a presumption drawn from *Meek* and later *Agular*) *id.* at 2563-64 (quoting from *Meek* the "pervasively sectarian" rationale and noting it created an irrebuttable presumption which Justice O'Connor later rejects) *id.* at 2558-2566-67 (reading out of *Bowen v. Kendrick* dependence on the "pervasively sectarian" test) *id.* at 2567 (requiring proof of actual diversion thus rendering "pervasively sectarian" test irrelevant) *id.* at 2568 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be used only for secular purposes) and *id.* at 2570 (rejecting presumption of bad faith on the part of religious school officials)

<sup>44</sup> Being a "pervasively sectarian" organization never totally disqualified a school from receiving direct state aid. For example, school bussing and secular textbooks were repeatedly permitted by the Court. Other aid as well was occasionally upheld such as reimbursement for mandatory testing, but the lines between permitted and prohibited forms of aid were unclear. Indeed, the permitting of textbooks but not wall maps, the permitting of bussing from home but not on field trips, let the Court in for considerable ridicule. This line-drawing was unprincipled, and dispensing with the need to do so is yet another reason to welcome discarding of the "pervasively sectarian" test.

<sup>45</sup> *Id.* at 2568

<sup>46</sup> *Id.* (explaining why her position in *Mitchell* is consistent with her position in *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985))

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in *Mitchell* reassured her that the program, as applied, was not violative of the Establishment Clause. A program of aid need not be failsafe, nor does every program require pervasive monitoring.<sup>47</sup> The statute limited aid to "secular, neutral, and nonideological" assistance, required that the aid supplement rather than supplant private-source funds, and expressly prohibited use of the aid for "religious worship or instruction."<sup>48</sup> State educational authorities required religious schools to sign assurances of compliance with the above-quoted statutory spending prohibition a term of the contract.<sup>49</sup> The state conducted monitoring visits, albeit infrequent, and did a random review of library book purchases for their religious content.<sup>50</sup> There was also monitoring of religious schools by local public school districts, including review of required project proposals submitted by the religious schools and annual program-review visits to each recipient school.<sup>51</sup> The monitoring did catch instances of actual diversion, albeit not a substantial number, and Justice O'Connor was encouraged that when problems were detected they were corrected.<sup>52</sup>

The diversion-prevention factors of supplement/supplant, aid not reaching religious coffers, the form of aid being in-kind rather than cash, and statutory prohibitions on "worship or other ideological uses," are not talismanic. Justice O'Connor expressly

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<sup>47</sup> 120 S Ct at 2569

<sup>48</sup> *Id*

<sup>49</sup> *Id*

<sup>50</sup> *Id*

<sup>51</sup> *Id* at 2569-70

<sup>52</sup> *Id* at 2571-72

declined to elevate them to the level of constitutional requirements<sup>53</sup> Rather, the factors are to be utilized if they make sense given the nature of the government's program of aid There may be programs where, for example, the supplement/supplant factor makes little sense<sup>54</sup>

## CONCLUSION

Charitable choice is clearly responsive to many aspects of Justice O'Connor's opinion in *Mitchell*

- 1 The legislation giving rise to the program of aid expressly prohibits diversion of the aid to "sectarian worship, instruction, or proselytization"<sup>55</sup>
- 2 The government-source funds may be kept in accounts separate from an FBO's private-source funds, and the government may audit these accounts at any time<sup>56</sup>
- 3 The government requires periodic audits by a CPA The results are to be submitted to the government, along with a plan of correction if any noncompliance is uncovered<sup>57</sup>
- 4 FBOs may monitor and, if need be, segregate aspects of their program to ensure that the government-provided aid is spent only on program activities involving no religious indoctrination<sup>58</sup>

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<sup>53</sup> *Id.* at 2572 ("[r]egardless of whether these factors are constitutional requirements")

<sup>54</sup> To get a fuller sense of what is important to Justice O'Connor one should also consider her multi-factor analyses in her separate opinions in *Agostini v. Felton* 521 U.S. 203 \_\_\_ (1997) *Rosenberger v. Rector of the Univ. of Virginia* 515 U.S. 819 \_\_\_ (1995) *Capitol Sq. Review & Adv. Bd. v. Pinette* 515 U.S. 753 \_\_\_ (1995) and *Bowen v. Kendrick* 487 U.S. 589 622 (1989) Justice O'Connor is prone to have a list of factors to examine However as her separate opinions demonstrate the factors she deems relevant are heavily wedded to the particular program policy or practice under review Accordingly the factors Justice O'Connor lists in *Mitchell* should not be elevated to the level of constitutional requirements

<sup>55</sup> 42 U.S.C. § 604a(j)

<sup>56</sup> 42 U.S.C. § 604a(h) In the Children's Health Act of 2000 the segregation of accounts is required 42 U.S.C. § 1955(g)(2) This improves accountability with little loss of organizational autonomy

<sup>57</sup> All federal programs of financial assistance to nonprofits institutions require audit by a CPA every two years unless the nonprofit receives less than \$25,000 a year in total federal awards Executive Office of the President of the United States Office of Management and Budget, Circular A-133 Audits of Institutions of Higher Learning and Other Non-Profit Institutions 55 Fed. Reg. 10019 to 10025 (March 16, 1990) The independent audit is not just fiscal but includes a review for program compliance

<sup>58</sup> Justice O'Connor nowhere defined what she meant by "religious indoctrination" The Supreme Court has found that prayer, devotional Bible reading veneration of the Ten Commandments classes in confessional religion and the biblical creation story taught as science are all inherently religious *Esbeck supra* note 26 *NOTRE DAME J.* at 307-08 (collecting cases)

Moreover, nothing in charitable choice prevents officials from implementing procurement regulations such as requiring providers to sign an Assurance of Compliance. It is a material breach of the contract if a provider's conduct does not measure up to the assurances. It is also common for procurement regulations to require self-audits. Any discrepancies uncovered by an audit must be reported to the government along with a plan to correct the deficiency. These procurement policies would, of course, have to be equally applicable to secular providers, and none of the details of the procurement requirements may be intrusive of the "religious character" of FBOs. Charitable choice facially satisfies the parameters of Justice O'Connor's *Mitchell* opinion, and for most FBOs it can be applied in accord with her requirements as well.

Carl H. Esbeck  
November 10, 2000

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**PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION  
ACT OF 1996**

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

**(a) In General -**

**(1) State Options - A State may -**

**(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable religious or private organizations and (B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) with certificates vouchers or other forms of disbursement which are redeemable with such organizations**

**(2) PROGRAMS DESCRIBED - The programs described in this paragraph are the following programs**

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

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

**(i) permits contracts with organizations or**

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

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

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

**(d) RELIGIOUS CHARACTER AND FREEDOM -**

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

**(2) ADDITIONAL SAFEGUARDS -** Neither the Federal Government nor a State shall require a religious organization to -

**(A)** alter its form of internal governance, or

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

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

**(e) RIGHTS OF BENEFICIARIES OF ASSISTANCE -**

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

**(2) INDIVIDUAL DESCRIBED -** An individual described in this paragraph is an individual who receives applies for, or requests to apply for, assistance under a program described in subsection (a)(2)

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

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

**(h) FISCAL ACCOUNTABILITY -**

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

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

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

**(j) LIMITATIONS ON USE OF FUNDS FOR CERTAIN PURPOSES - No funds provided directly to institutions of organization to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship instruction or proselytization.**

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

## VIRGINIA ACTS OF ASSEMBLY – 2001 SESSION

## CHAPTER 774

*An Act to amend and reenact § 11-35 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 11-35.1 relating to procurement contracts with certain religious organizations*

[S 1212]

Approved March 26, 2001

Be it enacted by the General Assembly of Virginia

1 That § 11-35 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 11-35.1 as follows

§ 11-35 Title purpose, applicability

A This chapter may be cited as the Virginia Public Procurement Act.

B The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor or some third party is providing the consideration.

C The provisions of this chapter however shall not apply except as stipulated in the provisions of §§ 11-35.1, 11-41.1, 11-41.2.2 through 11-41.2.5, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80, to any town with a population of less than 3,500 as determined by the last official United States census.

D Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

Except to the extent adopted by such school board, the provisions of this chapter shall not apply, except as stipulated in subsection E, to any school division whose school board adopts by policy or regulation alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such school board. This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of this section, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

E Notwithstanding the exemptions set forth in subsection D, the provisions of §§ 11-35.1, 11-41.1, 11-41.2.2 through 11-41.2.5, 11-46 B, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth. The method for procurement of professional services set forth in subdivision 3 a of § 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2.2 shall be exempt from the provisions of this chapter except, relative to such purchases, the school board shall comply with the provisions of



§§ 11-51 and 11-72 through 11-80, however, a school board that makes purchases through its public school foundation established pursuant § 22 1-212 2 2 shall not be exempt from the provisions of this chapter

F The provisions of this chapter shall not apply to those contracts entered into prior to January 1 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed

G To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation

H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia Retirement System related to the management, purchase or sale of authorized investments including but not limited to actuarial services, shall be governed by the standard set forth in § 51 1-124.30 and shall not be subject to the provisions of this chapter

I The provisions of this chapter shall apply to procurement of any construction or planning and design services for construction by a Virginia not-for-profit corporation or organization not otherwise specifically exempted when the planning, design or construction is funded by state appropriations greater than \$10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to procurement procedures which are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of this chapter

J The provisions of this chapter shall not apply to items purchased by public institutions of higher education for resale at retail bookstores and similar retail outlets operated by such institution. However, such purchase procedures shall provide for competition where practicable

K. The provisions of this chapter shall not apply to the Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62 1-128 et seq) of Title 62 1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners and approved by the Department of General Services procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

L. Notwithstanding the foregoing provisions of this section, the selection of services by the Board of the Virginia College Savings Plan related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record-keeping or consulting services, shall be governed by the standard set forth in § 23-38 80 and shall not be subject to the provisions of this chapter

M Notwithstanding the provisions of this section, the selection of services by the University of Virginia related to the management and investment of its endowment funds shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268 1 et seq) as required by § 23-76 1 and shall not be subject to the provisions of this chapter

N Notwithstanding the provisions of this section, the selection of investment management services by the State Treasurer related to the external management of funds shall be governed by the standard set forth in § 2 1-328 14, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services, and not be subject to the provisions of this chapter

*§ 11-35 1 Permitted contracts with certain religious organizations purpose limitations*

*A It is the intent of the General Assembly in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 P.L. §§ 104-193 to authorize public bodies to enter into contracts with faith-based organizations for the purposes described in this section on the same basis as any other nongovernmental source without impairing the religious character of such organization and without diminishing the religious freedom of the beneficiaries of assistance provided under this section*

*B For the purposes of this section "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 P.L. §§ 104 193*

*C Public bodies in procuring goods or services or in making disbursements pursuant to this section shall not (i) discriminate against a faith based organization on the basis of the organization's religious character or (ii) impose conditions that (a) restrict the religious character of the faith-based organization except as provided in subsection F or (b) impair diminish or discourage the exercise of religious freedom by the recipients of such goods services or disbursements*

*D Public bodies shall ensure that all invitations to bid requests for proposals contracts and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations*

*E A faith-based organization contracting with a public body (i) shall not discriminate against any recipient of goods services or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion religious belief refusal to participate in a religious practice or on the basis of race age color gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided however if the faith-based organization segregates public funds into separate accounts only the accounts and programs funded with public funds shall be subject to audit by the public body Nothing in clause (ii) shall be construed to supercede or otherwise override any other applicable state law*

*F Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 P.L. §§ 104 193 funds provided for expenditure pursuant to contracts with public bodies shall not be spent for sectarian worship instruction or proselytizing however this prohibition shall not apply to expenditures pursuant to contracts if any for the services of chaplains*

*G Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right as expressed in 42 USC (§ 2000e-1 et seq) to employ persons of a particular religion*

*H If an individual who applies for or receives goods services or disbursements provided pursuant to a contract between a public body and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods services or disbursements the public body shall offer the individual within a reasonable period of time after the date of his objection access to equivalent goods services or disbursements from an alternative provider*

*The public body shall provide to each individual who applies for or receives goods services or disbursements provided pursuant to a contract between a public body and a faith based organization a notice in bold face type that states "Neither the public body's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character practices or expression No provider of services may discriminate against you on the basis of religion a religious belief or your refusal to actively participate in a religious practice If you object to a particular provider because of its religious character you may request assignment to a different provider If you believe that your rights have been violated please discuss the complaint with your provider or notify the appropriate person as indicated in this form "*

2001 SESSION

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HOUSE JOINT RESOLUTION NO 682

Offered January 10 2001

Prefiled January 10 2001

*Requesting the Secretary of Public Safety to study the role in which charitable private faith based and other organizations and programs may provide services to ex-offenders to reduce recidivism*

Patron—McDonnell

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Referred to Committee on Rules

10 WHEREAS, for many ex-offenders the prison system has become a revolving door and  
11 WHEREAS the rate of recidivism for ex-offenders is about 40 percent meaning that two out of  
12 five ex-offenders return to prison and

13 WHEREAS the annual cost to house an inmate is more than \$20 000 and besides the economic  
14 drain on public resources the high rate of recidivism causes immeasurable drain on families and  
15 communities and

16 WHEREAS Operation Turnaround is a volunteer partnership between the state and local faith  
17 business education and human resource communities and its goal is to help ex-offenders become  
18 productive law-abiding members of their communities and

19 WHEREAS, holistic in its approach, Operation Turnaround attempts to help ex-offenders by  
20 offering life skills courses mentoring, career counseling and other assistance to gain employment  
21 and assistance with housing and

22 WHEREAS the Commonwealth in its attempts to reduce recidivism rates needs to examine a  
23 variety of avenues to develop programs that will provide ex-offenders with the life skills necessary to  
24 avoid crime and become a productive member of the community now therefore be it

25 RESOLVED by the House of Delegates the Senate concurring, That the Secretary of Public Safety  
26 study the role in which charitable private faith based and other organizations and programs may  
27 provide services to ex-offenders to reduce recidivism The Secretary shall examine but not be limited  
28 to the possible expansion of Operation Turnaround and the development of other similar programs  
29 that utilize the efforts and contributions of charitable private faith-based and other organizations and  
30 programs to rehabilitate ex-offenders

31 All agencies of the Commonwealth shall provide assistance to the Secretary for this study upon  
32 request

33 The Secretary of Public Safety shall complete his work in time to submit his findings and  
34 recommendations to the Governor and the 2002 Session of the General Assembly as provided in the  
35 procedures of the Division of Legislative Automated Systems for the processing of legislative  
36 documents

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Official Use By Clerks			
<b>Agreed to By</b>		<b>Agreed to By The Senate</b>	
<b>The House of Delegates</b>		<b>with amendment</b>	<input type="checkbox"/>
with amendment	<input type="checkbox"/>	substitute	<input type="checkbox"/>
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Date _____		Date _____	
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Clerk of the House of Delegates		Clerk of the Senate	

# GENERAL ASSEMBLY OF VIRGINIA – 2001 SESSION

## HOUSE JOINT RESOLUTION NO 683

*Continuing the Special Task Force Studying Ways Faith-Based Community Service Groups May Provide Assistance to Meet Social Needs*

Agreed to by the House of Delegates February 22 2001

Agreed to by the Senate February 21, 2001

WHEREAS House Joint Resolution No 764 (1999) established a Special Task Force to Study Ways Faith Based Groups May Provide Assistance to Meet Social Needs and

WHEREAS House Joint Resolution No 291 (2000) continued the Special Task Force and

WHEREAS beginning in 1996 with the adoption by Congress of the Personal Responsibility and Work Opportunity Reconciliation Act, "charitable choice" language has been added to a wide range of federal social service programs to expand opportunities for faith-based organizations to compete for government funds to provide services and

WHEREAS, federal funds covering substance abuse treatment, welfare Welfare to Work, and Community Services Block Grants include "charitable choice" language and

WHEREAS additional applications of "charitable choice" are now on the table in Congress including fatherhood initiatives juvenile justice public health and literacy and

WHEREAS the Bush administration has declared a commitment to expanding this concept to new areas of funding including the creation of a high-level Office of Faith-Based Initiatives, and

WHEREAS for many ex-offenders the prison system has become a revolving door and

WHEREAS, the rate of recidivism for ex-offenders is about 40 percent, indicating that two out of five ex-offenders return to prison and

WHEREAS the annual cost to house an inmate is more than \$20 000 resulting in an economic drain on public resources and the high rate of recidivism causes immeasurable drain on families and communities and

WHEREAS Operation Turnaround is a volunteer partnership between the state and local faith business education and human resource organizations whose goal is to help ex-offenders become productive law abiding members of their communities and

WHEREAS Operation Turnaround attempts to help ex-offenders by offering a holistic approach to assistance including life skills courses, mentoring career counseling and assistance in gaining employment and housing and

WHEREAS to reduce recidivism rates, the Commonwealth needs to examine a variety of avenues to develop programs that will provide ex-offenders with the life skills necessary to avoid crime and become productive members of the community and

WHEREAS the Special Task Force has made several recommendations for the expansion of the "charitable choice" provisions in state government and is actively working with the new Liaison Office within the Office of the Secretary of Health and Human Resources to expand opportunities for faith-based and charitable organizations to become involved in the provision of human services and continued oversight is necessary and desirable now therefore be it

RESOLVED by the House of Delegates the Senate concurring That the Special Task Force Studying Ways Faith-Based Community Service Groups May Provide Assistance to Meet Social Needs be continued The Special Task Force shall consist of 14 members which shall include 8 legislative members and 6 nonlegislative members to be appointed as follows 5 members of the House of Delegates to be appointed by the Speaker of the House in accordance with the principles of proportional representation contained in the Rules of the House of Delegates 3 members of the Senate to be appointed by the Senate Committee on Privileges and Elections 5 citizen members 3 of whom shall be appointed by the Speaker of the House and 2 of whom shall be appointed by the Senate Committee on Privileges and Elections and the Lieutenant Governor

The Special Task Force shall complete its objectives pursuant to House Joint Resolution No 764 (1999) and House Joint Resolution No 291 (2000) The Special Task Force shall also request the Secretary of Health and Human Resources to study the role in which charitable private faith-based and other organizations and programs may provide services to ex-offenders to reduce recidivism including the possible expansion of Operation Turnaround and the development of other similar

programs that utilize the efforts and contributions of charitable private, faith based and other organizations and programs to rehabilitate ex-offenders and report his findings and recommendations to the Special Task Force for its consideration on a date as may be determined by the Task Force

The Division of Legislative Services shall continue to provide staffing for the study

All agencies of the Commonwealth shall provide assistance to the Special Task Force upon request.

The direct costs of this study shall not exceed \$12 500

The Special Task Force shall complete its work in time to submit its final written findings and recommendations which shall include the findings and recommendations of the Secretary of Health and Human Resources by November 30 2001 to the Governor and the 2002 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee The Committee may withhold expenditures or delay the period for the conduct of the study

