



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

March 25, 2010

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W.
Room 10276
Washington, DC 20410-0500

Re: *Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity* – 76 Fed. Reg. 4194, Docket No. FR 5359-P-01 (Jan. 24, 2011).

Dear Sir or Madam:

We write on behalf of the United States Conference of Catholic Bishops in opposition to a proposed regulation that would add “sexual orientation” and “gender identity” to the list of protected categories for which discrimination in HUD programs is prohibited. 76 Fed. Reg. 4194 (Jan. 24, 2011).

We urge HUD not to adopt the proposed regulations for two reasons.

First, making “sexual orientation” and “gender identity” a protected classification for purposes of federal housing programs has no support in any Act of Congress and appears at odds with at least one other, namely, the Defense of Marriage Act. Unlike discrimination based on age, disability, or other categories long recognized in federal law, Congress has never acted to prohibit discrimination generally, or housing discrimination in particular, because of sexual orientation or gender identity. Accordingly, there is no statutory basis for a rule forbidding such discrimination in HUD programs, and there is a statute that would be undermined by such a rule.

Second, the proposed addition of these new classifications (“sexual orientation” and “gender identity”) in HUD regulations may, perhaps unintentionally, cause a type of discrimination not contemplated in the proposed rule. Specifically, the regulations may force faith-based and other organizations,

as a condition of participating in HUD programs and in contravention of their religious beliefs, to facilitate shared housing arrangements between persons who are not joined in the legal union of one man and one woman.

By this, we do not mean that any person should be denied housing. Making decisions about *shared* housing, however, is another matter. Particularly here, faith-based and other organizations should retain the freedom they have always had to make housing placements in a manner consistent with their religious beliefs, including when it concerns a cohabiting couple, be it an unmarried heterosexual couple or a homosexual couple. Given the very large role that faith-based organizations play in HUD programs, the regulation, by infringing upon that freedom, may have the ultimate effect of driving away organizations with a long and successful track record in meeting housing needs, leaving beneficiaries *without* the housing that they sought or that the government intended them to receive.

For these reasons, we urge HUD not to adopt the proposed regulations.

1. The Proposed Regulation Lacks Any Statutory Basis and Undermines the Policy of a Statute in Full Force, the Defense of Marriage Act.

The preamble to the regulations is itself an implicit concession that there is no statutory basis for the proposed regulation, which would forbid discrimination on the basis of sexual orientation or gender identity. In its discussion of legal authority, the preamble notes only that (a) some state and local jurisdictions have laws forbidding such discrimination and (b) Congress has enacted hate crimes legislation to enhance penalties for crimes motivated by the victim's sexual orientation or gender identity. From these premises, the preamble leaps to the conclusion that federal housing programs should bar discrimination based on sexual orientation and gender identity.

The premises do not support the conclusion. First, the rules applicable to HUD programs are *federal* rules. Their content and effect do not hinge upon, and are unaffected by, state and local laws. The presence or absence of a state law forbidding housing discrimination based on disability, for example, has no effect whatsoever on HUD's prohibition of such discrimination. *See* 24 C.F.R. 5.105 (referencing the Americans with Disabilities Act and Rehabilitation Act). Second, the enactment of federal *hate crimes* legislation is irrelevant to the criteria that should govern federal *housing* programs. The fact that hate crimes legislation is the *only* federal statutory basis asserted in support of the proposed rule is a telling admission that the rule simply has no statutory warrant.

Generally, the protected categories applicable to federal housing programs are well known; they are the categories that Congress has established by statute. There is, however, no Act of Congress establishing a general policy of forbidding discrimination based on “sexual orientation,” including any such policy in federal housing programs. In effect, the Administration appears to have invented the policy out of whole cloth.

The decision to create new protected classes by rulemaking without an underlying statutory policy to support it is especially problematic when the unauthorized rule hangs in such tension with a statute that Congress actually *has* passed, namely, the Defense of Marriage Act (DOMA). The proposed rule at least undermines, if not squarely violates, DOMA’s requirement that the federal government treat only different-sex unions as “marriage,” by treating same-sex unions as “families” and prohibiting as “sexual orientation” discrimination any distinction between different-sex and same-sex unions. That is, the rule would prohibit as discrimination among government contractors and grantees a distinction that the government itself is legally obliged to make.

The recent decision of the Department of Justice (DoJ) to cease defending the constitutionality of Section 3 of DOMA in court, the particular provision of DOMA that defines marriage as the union of one man and one woman for purposes of federal laws and programs, does nothing to diminish this tension, least of all provide any legal basis for the regulations. First, the decision no longer to *defend* Section 3 in court did not entail a decision no longer to *enforce* Section 3 or any other part of DOMA. Quite the contrary, the Attorney General has informed Congress that Section 3 “will continue to be enforced by the Executive Branch” and that “the President has instructed Executive agencies to continue to comply with Section 3 of DOMA.” Letter of Feb. 23, 2011, from Eric H. Holder, Jr., to John A. Boehner, p. 5. Second, the rationale of DoJ’s decision—that the Constitution generally forbids the *government* from making distinctions based on “sexual orientation”—does not and cannot forbid *private* entities that are not state actors (such as religious providers of low-cost housing) from making such distinctions.

In short, HUD should not create a new protected classification where there is no statutory policy undergirding it and where the new classification flies in the face of a policy expressly adopted by Congress.

2. The Proposed Regulation May Infringe Upon the Rights of Faith-Based Organizations Not to Facilitate Shared Housing Arrangements That Violate the Organization's Religious Beliefs.

Faith-based organizations fulfill a vital role as partners in implementing HUD and other government housing programs. A 1988 survey found that nearly half of Section 202 housing projects (projects designated for the elderly) had religious sponsors, producing an estimated 161,000 housing units. U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research, Faith-Based Organizations in Community Development, at 12 (Aug. 2001). Faith-based organizations "were also important participants in the Section 236 program, which provided assisted housing for families." *Id.* Last year, nearly a half-million people received housing services from Catholic Charities agencies, with 67 percent of Charities' cash income coming from government sources, including six percent from HUD. *See* Catholic Charities at a Glance at 1-2.¹

Perhaps the most comprehensive snapshot of the Catholic Church's footprint in housing shows that in 2007 "Catholic Charities agencies were a sponsor or an affiliate of a program that provided housing or housing-related services to 662,954 unduplicated clients." Center for Applied Research in the Apostolate, Catholic Charities USA: 2008 Catholic Housing Survey (Sept. 2008) at 8. "Housing programs sponsored or affiliated by Catholic Charities are especially likely to have served ... persons with HIV/AIDS" (*id.* at 13)—suggesting that not only does the Church *not* decline services to, but actively serves, a client base that includes large numbers of homosexual clients. Catholic dioceses and religious institutes likewise play a large role in housing services. As a percentage of providers affiliated with the Catholic Church, "Dioceses sponsor or are an affiliate of 27 percent of Catholic housing units, 27 percent of beds, and provide housing for 12 percent of the clients served." *Id.* at 8. Likewise, "[r]eligious institutes sponsor or are an affiliate of 24 percent of Catholic housing units, 28 percent of beds, and provide services for 5 percent of the clients served." *Id.*

It is especially imperative, given their large role in meeting the housing needs of the poor, elderly, disabled, and others, that such faith-based and other organizations not be required, as a condition of participating in such programs, to compromise or violate their religious beliefs. To continue to participate in these programs, these organizations must retain the freedom they have always had, when meeting housing needs, to avoid placements for shared housing that would violate

¹ <http://www.catholiccharitiesusa.org/NetCommunity/Document.Doc?id=1924>.

their religious beliefs. Similarly, organizations should retain the freedom to exercise their judgment with respect to shared sleeping areas and bathrooms. *Cf.* proposed § 5.105 (stating only that the proposed prohibition does not forbid “inquiries” about “an applicant’s or occupant’s sex” where the housing involves the sharing of sleeping areas or bathrooms).

To be clear, we are not suggesting that any person should be denied housing. But neither should a recipient or sub-recipient of HUD funds be required to facilitate cohabitation between unmarried persons, be it an unmarried heterosexual couple or a homosexual couple, or facilitate shared sleeping areas or bathrooms, especially when such a requirement (a) is divorced from any command of Congress, (b) reflects a policy that is opposite the one adopted by Congress, and (c) stands to affirmatively violate the recipient’s or sub-recipient’s religious beliefs.

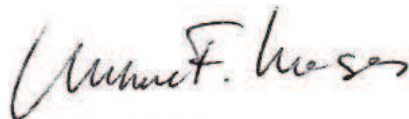
In the final analysis, the ultimate effect of a rule requiring organizations to choose between adherence to their religious beliefs, on the one hand, and accepting government funds to carry out needed services, on the other, may be that those organizations with the greatest expertise and success provide fewer services (there being less money to fund them) or cease providing them altogether (if no money remains to fund them). Neither scenario will benefit anyone. Either scenario will affirmatively harm those clients most in need.

We urge you to reconsider.

Sincerely,

A handwritten signature in blue ink that reads "Anthony R. Picarello, Jr." in a cursive style.

Anthony R. Picarello, Jr.
General Counsel

A handwritten signature in black ink that reads "Michael F. Moses" in a cursive style.

Michael F. Moses
Associate General Counsel