UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
CARE NET PREGNANCY CENTER	)	
OF WINDHAM COUNTY	)	
	)	
and	)	Case No. 2011E000691
	)	
RURAL DEVELOPMENT	)	
	)	

APPEAL DETERMINATION

Care Net Pregnancy Center of Windham County (Appellant) timely filed an appeal challenging a May 16, 2011, decision of United States Department of Agriculture (Department), Rural Development's Rural Housing Service (Agency). Agency's decision denied Appellant's eligibility for a direct loan under the Community Facilities Loan and Grant Program (Program), as Agency concluded Appellant could not meet the faith-based eligibility factors based upon U.S. Constitutional issues with potential excessive government entanglement with religion. On September 26, 2011, a National Appeals Division (NAD) Hearing Officer held Agency's decision was not erroneous. On November 22, 2011, Appellant filed a complaint against Agency before the U.S. District Court for the District of Columbia (Court). On April 18, 2012, Agency (with the Department of Justice) filed a motion to dismiss or, alternatively, for partial summary judgment. On July 23, 2012, Agency filed a motion for summary judgment.

On October 10, 2012, the Court issued a *Memorandum Opinion and Order* (Order) regarding NAD's September 26, 2011, determination; Agency's May 16, 2011, adverse decision (Adverse Decision); and the pending motions. The Court's Order remanded the case back to NAD to address remaining Court issues: (1) Appellant's claim under the Fair Housing Act; (2) Appellant's claims under the Free Speech and Equal Protection Clauses of the First Amendment of the U.S. Constitution; and (3) Agency's defense under the Establishment Clause of the First Amendment of the U.S. Constitution. *See Care Net Pregnancy Ctr. v. U.S. Dep't of Agric.*, 896 F. Supp. 2d 98, 116-117 (D.D.C. Oct. 10, 2012). On October 30, 2012, I sought the parties' views on how NAD should proceed and the issues NAD should consider on Remand. The parties responded with initial briefs on November 28, 2012, and reply briefs on December 4, 2012, which I have incorporated into the case record.

Agency asserts NAD lacks jurisdiction to comply with and consider the issues from the Court's Order. Alternatively, Agency substantively argues Appellant is not eligible for Program assistance because Appellant could not meet the faith-based eligibility factors based on U.S.

Constitutional issues with potential excessive government entanglement with religion. The Agency based its concerns of excessive entanglement on the First Amendment's Establishment Clause. Agency maintains Appellant's claims under the Religious Freedom Restoration Act (RFRA), substantive component of the Due Process Clause, and equal protection for religious organizations are without merit.

Appellant asserts it is applying for a loan to renovate a building and it is not requesting financial assistance for voluntary religious activity. Appellant contends NAD has jurisdiction; it asserts even if Agency were correct on NAD's limited jurisdiction, some of Appellant's claims are not based on Agency discrimination and therefore within NAD's purview. Appellant argues Agency violated its rights under Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA), RFRA, the substantive component of the Due Process Clause, and Agency's regulations ensuring equal protection for religious organizations. Appellant also argues Agency's decision violates its rights under the Free Exercise, Free Speech, and Equal Protection Clauses of the First Amendment of the U.S. Constitution. Lastly, Appellant asserts there is no excessive entanglement issue and Agency is not entitled to an Establishment Clause defense. Therefore, Appellant argues Agency has violated its Constitutional and other legal rights because Appellant is eligible for Program assistance without Agency's burdensome and unfair conditions.

On December 5, 2012, I issued a *Procedural Ruling*, holding NAD has jurisdiction to respond to the Court's Order and review Agency's Adverse Decision. To address properly the Court's Order and the issues NAD forbore previously, I found, over Agency's objection, that a supplemental hearing was essential to capture in the case record the remaining concerns raised by the Court, relevant and necessary facts related thereto, and the changed circumstances affecting the parties. Among other things, I reasoned that significant time had elapsed since the July 2011 hearing, the issues NAD did not address were not developed fully in the initial case record, and significant facts changed or became known since the first hearing. On March 4, 2013, I conducted an in-person hearing. On March 15, 2013, Agency, and on March 25, 2013, Appellant timely submitted additional post-hearing exhibits. I closed the record on March 25, 2013. Based on the evidence and arguments the parties submitted, and the regulations that apply to this case, I conclude the Agency decision was erroneous. The basis for my decision follows.

STATEMENT OF THE ISSUES

I had to determine whether Agency erred in denying Appellant's Program eligibility and concluding Appellant does not meet faith-based eligibility factors. To make this determination, I had to resolve the following questions:

1. Does NAD have jurisdiction to comply with the Court's Order and review Agency's Adverse Decision?

2. Do Appellant's Religious Freedom Restoration Act (RFRA) and substantive component of the Due Process Clause claims show Agency error in its denial of Appellant's Program eligibility?

3. Do Appellant's equal protections for religious organizations claims show Agency error in its denial of Appellant's Program eligibility?

4. Do Appellant's claims under the Free Exercise, Free Speech, and Equal Protection Clauses of the First Amendment of the U.S. Constitution show Agency error in its denial of Appellant's Program eligibility?

5. Does Agency's position under the Establishment Clause of the First Amendment of the U.S. Constitution require Agency to deny Appellant's Program eligibility?

FINDINGS OF FACT (FOF)

1. Appellant is a not-for-profit, charitable organization with Internal Revenue Code § 501(c)(3) status. Appellant operates a pregnancy resource center in a rural community of under 20,000 persons. Appellant provides services, support, and education at no cost to women, men, and their families faced with unplanned pregnancies. Appellant's services include counseling, pregnancy tests, education, and baby supplies (baby clothes, furniture, and supplies). Appellant primarily serves both pre-natal and post-natal women in need. *(Agency Record [AR], pages 17, 19-33, and 51-54; Stipulation of Facts, pages 1-3; Agency Exhibit 9, pages 1-2; Second Hearing Audio Record [HAR 2], 02:21:45-02:26:58).*

2. In addition to Appellant's secular parenting and pregnancy classes, Appellant offers voluntary Bible classes to its clients. On March 17, 2011, Appellant changed its Bible classes from required to optional participation for all Appellant's clients. Over the past five-year period, Appellant offered to clients its Bible classes approximately eleven percent of the time, on average. Appellant provides pregnancy and parenting classes, healthy baby classes, and limited family classes for clients with court orders from family custody proceedings. Beyond those court-mandated classes, all clients choose to avail themselves of Appellant and its publicly available services. Appellant conducts all of its classes at its current facility, except for the "Why Am I Tempted?" (WAIT) class, which Appellant conducts in schools and churches. Bible classes and religious discussions and instruction are client-initiated – responsive to client requests – and not solicited by Appellant. Bible classes are nondenominational, servicing all religious backgrounds, but they have a predominantly Christian theme. *(AR, pages 9, 10, 14, 18, 20-23, 31-43, 46-47, and 70; Appellant Exhibit D, pages 1-4; Appellant Exhibit F, pages 1-2; Appellant Exhibit G, pages 1-3; Appellant Exhibit H, page 1; Appellant Exhibit J, page 1-2; HAR 2, 57:40-01:03:30; 01:10:00-01:11:55; 02:00:30-02:13:19; 02:19:30-02:20:55; 02:21:45-*

02:24:58; 02:30:01-03:11:59; 03:16:00-03:21:45; 03:46:20-03:57:00; 04:10:00-04:11:18; 04:13:05-04:16:10; and 04:18:00-04:19:55).

3. Appellant's Articles of Association and By-laws contain no religious affiliation, sponsorship, or religious mission. However, Appellant's Standards of Affiliation, Statement of Faith, and list of available classes (including some Bible study classes), demonstrate Appellant is "Christ-centered" and conducts some voluntary religious activity at its facility with its secular activity. Appellant formed the corporation to help and educate pregnant women who are in a state of crisis to understand and work through the alternatives, make informed decisions, and receive emergency aid as needed. *(AR, pages 11, 19-29, and 36-47; Agency Exhibit 10, page 1; Agency Exhibit 11, pages 1-3; Agency Exhibit 12, pages 1-2; HAR 2, 02:48:55-02:50:23; and 02:58:01-02:59:00).*

4. On January 25, 2011, Appellant filed a pre-application with Agency for a direct Program loan to acquire and renovate a new building for client services. The Program benefits are available for essential community facilities in rural areas, which include hospitals, health clinics, schools, firehouses, community centers, and many other community-based facilities development, including Appellant's operation. *(AR, pages 5, 18, 34-50; Agency Exhibit 5, pages 1-5; HAR 2, 03:25:35-03:27:01; 03:45:30-03:46:20; 03:52:10-03:58:10; and 04:19:50-04:21:48).*

5. In early May 2011, Agency reviewed Appellant's pre-application materials and concluded Appellant is not eligible to participate in the Program. Agency reasoned Appellant would be conducting both "eligible" (secular activities, including pregnancy tests, education, support, counseling and parenting classes) and "inherently religious" activities in a building renovated with direct Federal assistance. Agency determined it would not be possible to ensure it allocated building renovation benefits only toward the eligible purposes and not towards inherently religious activities. Agency also determined that although only 10 out of 102, or just fewer than ten percent, visits to Appellant's current building over the past two years (2009-2011) were for Bible classes, those numbers could change based on demand. Agency provided information to Appellant, stating that if Appellant held its inherently religious activities at a different location, Appellant could qualify for Program eligibility and could proceed with the application process otherwise it could not. *(AR, pages 3-15, 69; Agency Exhibit 6, pages 1-3; Agency Exhibit 7, pages 1-3; HAR 2, 01:15:45-01:42:04; 01:44:50-01:47:04; 01:54:30-01:56:00; 03:32:20-03:36:50; 03:58:00-04:02:57; 04:11:30-04:12:30; 04:16:35-04:17:50; and 04:21:30-04:31:20).*

6. On May 16, 2011, Agency denied Appellant's eligibility to participate in the Program, stating Appellant could not meet the faith-based eligibility factors, finding Constitutional issues with potential excessive government entanglement with religion. *(AR, pages 3-6 and 71; HAR 2, 01:15:45-01:42:04).*

7. In early 2011, Appellant originally sought a Program loan to purchase and renovate a private building. Appellant now seeks to renovate a private building it acquired via donation on October 23, 2012, so that Appellant may better serve its clients, increase the number of clients it can serve, and expand the services it offers to pregnant women and new mothers. By owning the building, Appellant's monthly costs would decrease from $550 per month for rent to $506 per month for a mortgage and it would gain equity. Appellant needs at least approximately $100,000 funding under the Program for substantial renovations that are necessary to make the facility useable. Appellant is not able to hold its Bible classes in one location and all other services in another because of the financial, logistical, transportation, and client participation and enrollment difficulties Appellant would experience. Appellant's floor plan for this new building provides for three client rooms, kitchen, bathrooms, storage, administrative offices, and other common areas; classrooms account for approximately 20 percent of the 3,100 square feet of space. No building renovations, construction, facilities, or funding are required solely for or because of Appellant's Bible classes. *(Stipulation of Facts, pages 1-3; Appellant Exhibit C, pages 7 of 21; Appellant Exhibit G, pages 1-3; HAR 2, 01:03:30-01:05:00; 01:13:00-01:15:55; 01:56:00-02:00:30; 02:13:30-02:19:30; 02:20:30-02:21:31; 02:45:00-02:59:00; and 03:12:00-03:16:19).*

8. On March 15, 2013, Agency proposed Appellant could be eligible for Program funding based on several conditions: first, if Appellant's facility space is not used for inherently religious activity, and provided Appellant's clients are not required to engage in religious activities; second, Agency would deem two of the three "client rooms" 100 percent eligible, provided Appellant confines all religious activities to the third client room, which will be completely ineligible for funding; and third, the remaining common rooms and spaces in the facility are partially eligible for funding on a pro-rated basis based on the percentage total of client-room space occupied by the two eligible client rooms. *(Agency Post Hearing Brief, Exhibit A, pages 3-8; HAR 2, 04:31:50-04:33:00).*

9. From January 1, 2001, through July 19, 2011, Agency issued 135 direct Program loans, 56 guaranteed Program loans, and 140 Program grants to Faith-Based Organizations (FBOs) throughout the United States. The total number of direct Program loans throughout the U.S. in this period was 5,740 (3,177 Secular and FBOs; 2,563 for Cooperatives, Public Body and Indian Tribes). The total number of guaranteed Program loans throughout the U.S. in this period was 804 (701 Secular and FBOs; 103 for Cooperatives, Public Body and Indian Tribes). The total number of Program grants throughout the U.S. in this period was 11,243 (3,939 Secular and FBOs; 7,304 for Cooperatives, Public Body and Indian Tribes). *(Appellant Exhibit E, pages 1-3; HAR 2, 04:21:19-04:32:28).*

DISCUSSION

Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.) governs the appeal. Seven C.F.R. Part 1942, Subpart A; and 7 C.F.R. Part 16 govern the issues in this appeal.

1. NAD's jurisdiction.

NAD has jurisdiction to comply with the Court's Order and review Agency's Adverse Decision. NAD has jurisdiction over Department administrative appeals. *See* 7 U.S.C. §§ 6991-6998; 7 C.F.R. Part 11; *Bartlett v. U.S. Dep't of Agric*, ___ F.3d ___, 2013 WL 2420501, 1-4 (8th Cir. 2013); *McBride Cotton & Cattle Co. v Veneman*, 290 F.3d 973, 977 (9th Cir. 2002); *Bruhn v. U.S.*, 74 Fed. Cl. 749, 754-756 (Fed. Cl. 2006). An agency program participant has the right to appeal an agency's adverse decision to NAD. *See* 7 U.S.C. §6996(a); 7 C.F.R. § 11.6. The regulations define an 'adverse decision' as an administrative decision made by an agency that is adverse to a participant. 7 C.F.R. § 11.1 (*definition of adverse decision*). A 'participant' is any individual or entity who has applied for or whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any agency program is affected by a decision of the agency. 7 C.F.R. § 11.1 (*definition of participant*). Agency claims NAD lacks subject matter jurisdiction, preventing it from addressing the Court's Order. As I articulated in a December 5, 2012, *Procedural Ruling*, NAD has jurisdiction to comply with the Court's Order. NAD's jurisdiction is subject to the established limits set forth in statue, regulation, and as defined by NAD and the courts. *City of Arlington, Tex. v. FCC*, 569 U. S. ___, 133 S.Ct. 1863 (2013) (holding that an agency is eligible for *Chevron* deference even when interpreting the scope of its own jurisdiction); *Clason v. Johanns*, 438 F.3d 868, 871 (8th Cir. 2006). While NAD has jurisdiction to comply with the Court's Order and review Agency's Adverse Decision, I will address certain jurisdictional limitations in this determination.

NAD is not the proper forum in which to pursue a civil rights violation complaint. NAD's regulations define a participant, and enumerate eleven exclusions to NAD's jurisdiction based upon who qualifies as a participant. *See* 7 C.F.R. § 11.1 (*definition of participant, subsection 10*). Appellant argues the regulation, which excludes from NAD jurisdiction 'Discrimination complaints prosecutable under the nondiscrimination regulations at 7 C.F.R. Parts 15, 15a, 15b, 15e, and 15f,' does not include 7 C.F.R. Part 15d, which prohibits discrimination based on religion. Acknowledging that Department regulations do not expressly list 15d in the definition's exclusions, Agency responds that NAD's lack of jurisdiction is from an implied religious discrimination exclusion, carried over from a 1999 regulatory amendment as explained in 64 *Fed. Reg*. 33,367 (June 13, 1999). The parties acknowledge that the revised Department regulations unintentionally drafted part 15d, the religious discrimination exclusion, out of the participant exclusions in 1999. I find, however, that NAD has consistently interpreted 7 C.F.R. § 11.1 as holding NAD is not the proper forum in which to pursue a civil rights violation complaint, including one based on religion. Case No. 2013E000281 (Dir. Rev. June 3, 2013); Case No. 2012S000742 (Dir. Rev. May 30, 2013); Case 2013E000212 (Dir. Rev. April 26, 2013); Case No. 2012W000572 (Dir. Rev. March 4, 2013); Case No. 2008W000501 (Dir. Rev. November 25, 2008) (other NAD citations omitted). Therefore, since NAD has consistently

interpreted its regulations to divest it of jurisdiction concerning civil rights claims, including religion, I must find, for these reasons, that NAD is not the proper forum in which to pursue civil rights program complaint of religious discrimination.

The Department prohibits discrimination against its customers on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal, and where applicable, political beliefs, marital status, familial or parental status, sexual orientation, or all or part of an individual's income is derived from any public assistance program, or protected genetic information in any program or activity conducted or funded by the Department. (Not all prohibited bases will apply to all programs.) Appellant may file a civil rights program complaint of discrimination based on religion by completing the USDA Program Discrimination Complaint Form, found online at http://www.ascr.usda.gov/complaint_filing_cust.html or at any Department office, or call (866) 632-9992 to request the form. Appellant may also write a letter containing all of the information requested in the form and sending the completed complaint form or letter by mail to U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, by fax (202) 690-7442 or e-mail at program.intake@usda.gov.

Individuals who are deaf, hard of hearing or have speech disabilities, please contact the Department through the Federal Relay Service at (800) 877-8339 or (800) 845-6136 (in Spanish). Persons with disabilities, please see information above on how to contact the Department by mail directly or by e-mail. If Appellant requires alternative means of communication for program information (*e.g.*, Braille, large print, audiotape, etc.), it may contact the Department's TARGET Center at (202) 720-2600 (voice and TDD).

Appellant has due process to address its allegations of religious discrimination. Appellant may seek relief from the Department's Office of Civil Rights for Appellant's civil rights claims (including its FHA and ECOA claims). Consequently, while NAD has jurisdiction to comply with the Court's Order and review Agency's Adverse Decision, it is not the proper forum in which to pursue a civil rights violation complaint.

2. Appellant's RFRA and Substantive Due Process Clause claims.

Appellant's RFRA and the substantive component of the Due Process Clause claims do not show Agency error in its denial of Appellant's Program eligibility. RFRA is a statutory right, which prevents the Federal government from substantially burdening a person's free exercise of their religion. *See* 42 U.S.C. § 2000bb *et seq.* The Fifth Amendment's Due Process Clause requires the Federal government to afford due process whereby a citizen shall not " . . . be deprived of life, liberty, or property, without due process of law . . . " *U.S. Const. Amend. V.* In its Order, the Court concluded that Appellant failed to exhaust administratively its claims concerning RFRA and the Due Process Clause's substantive component and therefore granted summary judgment on these issues in Agency's favor. Since there has been no change in facts or new evidence affecting these claims, I find these issues are not properly before me. Accordingly,

Appellant's arguments under the RFRA and the Due Process Clause do not show Agency error in its denial of Appellant's Program eligibility.

3. Appellant's Equal Protection for Religious Organizations claims.

Appellant's equal protection for religious organizations claims show Agency error in its denial of Appellant's Program eligibility. Even though the Court Order granted partial summary judgment for 7 C.F.R. § 16.3(d)(1), I find new evidence and reading the regulations as whole in this case require me to re-examine these Department regulations. By way of example, some additional or new facts include, Appellant's Bible classes are now voluntary; they are offered to clients at their request and urging; Bible classes are 11 percent of Appellant's otherwise overall secular operations; Appellant has acquired building ownership where the Program loan will fund capital improvements; Bible classes will not have a cost to the building renovation or under the Program loan; Appellant's Bible classes are nondenominational, serving all religious backgrounds; and the Constitutional underpinnings of the Department's equal protection for religious organizations regulations have been thoroughly considered and examined based on evidence since the Court's Order.

Agency's Program is a Department assistance program, covered by the Department regulations for equal protection for religious organizations. *See* 7 C.F.R. Part 1942, Subpart A; 7 C.F.R. Part 16. *See Care Net*, 896 F. Supp. 2d at 114-116. The intent of the Department regulations for equal protection for religious organizations is to remove barriers to the participation of FBOs in Department programs and to ensure that these programs are implemented in a manner consistent with the requirements of the U.S. Constitution, including the religion clauses of the First Amendment. *See* 69 *Fed. Reg*. 41,375 (July 9, 2004) (*Summary*). A religious organization that participates in Department assistance programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that the religious organization does not use Department direct assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization. 7 C.F.R. § 16.2(b). A religious organization may, among other things, use space in its facilities to provide services and programs without removing religious art, icons, scriptures, or other religious symbols. 7 C.F.R. § 16.2(b)(1). Organizations that receive direct Department assistance under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services supported with direct Department assistance. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services supported with direct assistance from Department, and participation must be voluntary for beneficiaries of the programs or services supported with such direct assistance. 7 C.F.R. § 16.3(b). Direct Department assistance may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting Department programs and activities and only to the extent authorized by the applicable program statutes and regulations. Direct Department assistance may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used by the Department funding recipients for inherently religious activities. Where a structure is used for both eligible and inherently religious activities, direct

Department assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to Department funds. 16 C.F.R. § 16.3(d)(1). Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from Department uses as its principal place of worship, however, are ineligible for Department-funded improvements. 7 C.F.R. § 16.3(d)(1). Any use of direct Department assistance funds for equipment, supplies, labor, indirect costs and the like shall be prorated between the Department program or activity and any use for other purposes by the religious organization in accordance with applicable laws, regulations, and guidance. 7 C.F.R. § 16.3(d)(2). Department regulations provide that a religious organization is eligible, on the same basis as any other eligible private organization, to access and participate in Department assistance programs. 7 C.F.R. § 16.2(a).

Appellant asserts it is eligible for Program funds without Agency's conditions. Appellant argues that since its Bible classes will not have a cost to the building renovation or under the Program loan, Appellant need not have any use restrictions. Agency responds it must impose restrictions on Appellant concerning its Bible classes in the building. Agency argues that it cannot offer funding based on time separation as that is impossible to figure out from a practical perspective. Instead, Agency proposes to deem Appellant eligible for program funding based on geographic separation and pro-rate the funding based on space. Agency's proposal permits 100 percent funding for space used exclusively for secular activities, zero percent funding for any space where Bible classes are held (even if secular activities are also held in this space), and reduced percentage funding for common areas and administrative support offices, break rooms, and the like (FOF 8). I find Appellant's Bible classes are a strictly voluntary activity (FOF 2). The Bible classes over the past five years have been 11 percent of Appellant's overall operations, which are otherwise secular (FOF 2). Appellant provides Bible classes to clients at their request and election, not at Appellant's urging (FOF 2). Appellant has acquired building ownership where the Program loan will fund capital improvements for renovations (FOF 4, 7). Bible classes will not have a cost to the building renovations or otherwise impose a cost to secular activities or building improvements under the Program loan (FOF 7). Appellant's Bible classes are nondenominational, serving all religious backgrounds, albeit having a predominantly Christian theme (FOF 2). Appellant is not seeking government funds to subsidize religious education or instruction; rather, it seeks a government loan for capital improvements to a building (FOF 4 and 7). Department assistance will not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to Appellant's secular activities because no building renovations, construction, or funding are required for Appellant's Bible classes (FOF 7).

These Department regulations remove barriers for FBOs, so that FBOs may compete on an equal footing with other non-religious or religious organizations for Department Program assistance. While these regulations provide Appellant with significant protections, I agree with the initial NAD determination in this case that these regulations do not permit Appellant to use, without any limits, direct Department financial assistance to support inherently religious activities, such as worship, religious instruction, or proselytization. However, given the regulation's objectives, the new facts, and NAD's prior discussion regarding the issue, further review and clarifications are necessary. Reading 7 C.F.R. §§16.2(b), 16.3(b) and 16.3(d)(1) together and fully, rather than

in isolation, and comparing these sections with 7 C.F.R. § 16.3(d)(2), I find: (1) the regulations permit Appellant to receive direct Department Program funds for its secular activities under the Program; and (2) these regulations also permit Appellant to engage in voluntary, inherently religious activities (within reasonable limits), so long as the voluntary, inherently religious activities are separated either by time or by location, or do not impose an additional cost of funding secular activities. For costs directly attributable to inherently religious activities, including infrastructure directly related therewith, the funds and costs must be prorated if the inherently religious activities impose a cost to the Program loan over and above those costs attributable to secular activities. In a capital improvement context, such as the instant case, this would typically be costs for building a chapel, sanctuary, church, worship center, or other building, room, or fixture principally used for inherently religious activities in an otherwise secular building. When inherently religious activities impose a cost in addition to those of secular activities, the Program funds must be prorated and done so in the least burdensome a manner to a Program participant to allow compliance these regulations and consistent with their purposes.

By reading 7 C.F.R. §§16.2(b), 16.3(b) and 16.3(d)(1) together, the regulatory limits mean that any renovation costs directly attributable to secular activities, and not to inherently religious activities, under the Program need not be prorated. These regulations envision religious organizations will participate in Department programs, and expect the Department will provide assistance to such organizations. These regulations envision that the religious organization will be able to retain its religious nature, character, and activities, to the extent such exist, as long as the Department is not funding inherently religious activities beyond the secular expenses. The regulations at 16 C.F.R. § 16.3(d)(1) expressly provide "Where a structure is used for both eligible and inherently religious activities …", and, at 7 C.F.R. § 16.3(d)(1), also expressly provide that a religious organization may, "among other things, use space in its facilities to provide services and programs without removing religious art, icons, scriptures, or other religious symbols." Allowing such expressions to remain public acknowledges that expression and differentiates it from inherently religious activities. Lastly, when protecting costs and government funding such costs, the standard for capital improvements and construction in 7 C.F.R. §16.3(d)(1) is different from the narrower treatment of disposable supplies set forth in 7 C.F.R. § 16.3(d)(2).

I applaud Agency for presenting a proposed plan of action – its *Proposed Eligibility Framework* found at Exhibit A of Agency's Post Hearing Brief. However, I find Agency's "Space attributable" methodology, the "Remaining spaces" conditions, and its requirements for when a client initiates a religious discussion and other prorating under the "Space occupied by the three client rooms" require too burdensome an approach for ensuring regulatory compliance. These Department regulations do not prohibit Agency funding of Appellant's Program loan since Appellant's voluntary Bible classes do not impose an additional cost of facility construction or renovation (*e.g.*, do not require the building of a chapel, sanctuary, church, worship center, or other building fixture *principally used* for inherently religious activities). If Appellant were to make its incidental and voluntary Bible classes mandatory or use coercion, or were to change its operations to become dominated by inherently religious activities and costs were imposed on

secular activities, then a different analysis would result. However, the capital improvement loan in this case does not lend itself to fund religious discussions or activity by the very nature of funding for building improvements. Based on the above facts and conclusions, Appellant's arguments for equal protection for religious organizations show Agency error in its denial of Appellant's Program eligibility.

4. Appellant's Free Exercise, Free Speech, and Equal Protection Claims.

Appellant's claims under the Free Exercise, Free Speech, and Equal Protection Clauses of the First Amendment of the U.S. Constitution show Agency error in its denial of Appellant's Program eligibility. The First Amendment provides, "Congress shall make no law ... prohibiting speech and the free exercise [of religion]." *U.S. Const. amend. I.* Religious speech is protected speech; government may not enact laws that suppress religious belief or practice. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)(government must not discriminate against speech on the basis of religious viewpoint); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760-761 (1995) (content-based prohibitions may endure, but only if they are justified by compelling state interests); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993)(if object of law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and is invalid unless justified by compelling interest and narrowly tailored); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993)(use of school facilities during off-hours for religious film would not violate First Amendment); *Pahls v. Thomas*, ___ F.3d ___ (10th Cir. 2013), 2013 WL 2398559 (freedom of speech is a negative liberty, a restriction on the government's power to abridge speech). I will evaluate Appellant's Free Exercise claim first, and then Appellant's Free Speech and Equal Protection claims together as one issue because they are so intertwined in case law analysis.

i. Appellant's Free Exercise Claim.

Appellant's claims under the Free Exercise Clause show Agency error. Even though the Court granted partial summary judgment on the issue of Appellant's Free Exercise claim (*see Care Net*, 896 F. Supp. 2d at 114-116), additional, new facts in this case require me to re-examine this issue. The Free Exercise Clause protects religious observers against unequal treatment. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 143-144 (1987). The bottom line under the First Amendment's analysis is that government is forbidden from using its power either to "favor" or to "handicap" any one religion or religion in general. *See American Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288-289 (6th Cir. 2009) *citing Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1946). While the Free Exercise Clause provides absolute protection to religious thoughts and beliefs, it does not prohibit government from validly regulating religious conduct. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) *citing Reynolds v. United States*, 98 U.S. 145, 164, (1878). In *Grace United*, the court held that neutral rules of general applicability normally do not raise Free Exercise Clause concerns, even if they incidentally burden a particular religious practice or belief. *Id. citing Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)(holding that the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and

neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes). On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the First Amendment unless the government advances a compelling governmental interest and narrowly tailors it. *Lukumi*, 508 U.S. at 533, 546.

To determine whether strict scrutiny or rational basis standard applies here, I must determine whether the government program at issue is neutral. *Lukumi*, 508 U.S. at 531-533. Neutrality is determined by both facial neutrality and how the government applies these regulations. *Id.* The Program regulations at 7 C.F.R. Part 1942, Subpart A, are facially neutral because the text neither benefits nor detriments religion on its face. The text of the Program regulations does not refer to religion or religious practices. Therefore, I find the Program regulations as written are neutral. For the second test, I must examine beyond facial neutrality, to how the Agency applied the regulations at 7 C.F.R. Part 1942, Subpart A, to determine if they are neutral – the *as applied* test. *Lukumi*, 508 U.S. at 534-536. This inquiry extends beyond the textual reading to, ". . . subtle departures from neutrality," which is also forbidden, *Gillette v. United States*, 401 U.S. 437, 452 (1971), and ". . . covert suppression of particular religious beliefs . . ." *See Bowen v. Roy*, 476 U.S. 693, 703 (1986). A rule is neutral as applied so long as its object is something other than the infringement or restriction of religious practices. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1233 (10th Cir. 2009); *Grace United*, 451 F.3d at 649–50; *citing Lukumi*, 508 U.S. at 546. Official action, whether intentional or not, which targets religious conduct for distinctive treatment, positively or negatively, cannot be shielded by mere compliance with the requirement of facial neutrality. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) *citing Lukumi*, 508 U.S. at 534-536. The Free Exercise Clause protects against governmental hostility, which may be masked, as well as overt. *See Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."). If the object of the law, program, or governmental action is to infringe upon or restrict practices because of religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling governmental interest and is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 531.

Appellant argues that Agency's denial of its pre-application was solely because Appellant was engaging in religious speech. Agency rejects this argument and asserts its actions were reasonable, the Program is not a forum for speech, and it is entitled to rational basis review under *Locke v. Davey*, 540 U.S. 712 (2004); *Cf. Colorado Christian Univ. v. Weaver*, 534 F.3d 1245; 1256 (10th Cir. 2008)("[Locke] does not imply that [government] is free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test."); *Bronx Household of Faith v. Board of Educ. of City of N.Y.*, 876 F.Supp.2d. 419 (S.D.N.Y. June 29, 2012)(". . . even the *Locke* Court itself intimated that *Locke* is *sui generis*."). I find the reason for Agency's denial at the pre-application stage was solely that Appellant would engage in religious speech in the building (FOF 2, 5, and 6). Agency acknowledges that it would find Appellant eligible for the loan so long as Appellant keeps religious speech out of the building (FOF 5 and 6). Appellant is not able to hold its Bible classes in one location, and all other

services in another, because of the financial, logistical, transportation, and client participation and enrollment difficulties Appellant would experience (FOF 7). Agency's recent proposal (FOF 8) may be a good faith effort, but it underscores the focus on content and its limitations upon Appellant's religious speech. Agency's conditions on Appellant's religious speech require Appellant to separate religious and secular activities by removing all religious discussion from the building or the room where they begin (FOF 5, 6, and 8). There is no evidence of intentional hostility here, and Agency routinely provides Program benefits to FBOs (FOF 4 and 9). Nevertheless, Agency denied Appellant in the pre-application stage specifically due to its religious speech (FOF 5 and 6). Agency would have found Appellant eligible for the Program loan so long as Appellant keeps religious speech out of the building or segregated to a separate room – a literal religious gerrymander. Adopting Agency's approach would require any religious discussion, regardless of whether it were to be initiated by Appellant or its clients, to cease and for the participants of that discussion to pause, leave the facility or room, and travel elsewhere to reengage in the discussion. This effect is more than an incidental burden on a particular religious practice or belief: it is significant pressure, which will almost certainly cause clients to end prematurely or avoid any religious discussion altogether. Such a burden would facilitate a "chilling effect" on such discussion and, in the case of outside travel, would create a material financial obligation or undertaking. This burden in this case was the object of Appellant's religious exercise, and not a reason incidental to its religious exercise.

While neutral rules of general applicability ordinarily do not raise free exercise concerns, even if they incidentally burden a particular religious practice or belief, *see Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) *citing Lukumi*, 508 U.S. at 531, in this case there is more than an incidental burden upon Appellant's religious speech. Agency's denial affected Appellant's First Amendment free exercise of religion and religious speech rights by denying Appellant's pre-application as a direct result of – because of – Appellant's religious speech (and its anticipated religious speech). Therefore, the government's application of its regulations is not neutral. Accordingly, the standard of strict scrutiny applies in this case. Agency's burden of Appellant's religious conduct violates the First Amendment unless the government advances a compelling governmental interest and narrowly tailors it. *Lukumi*, 508 U.S. at 531. *Cf. Corder*, 566 F.3d at 1233 (not a violation of First Amendment for a school to require the valedictorian to give to her principal the speech for prior review and subjecting her to discipline for failure to do so – not on the religious content of the speech). Based on the above, Agency's arguments for a rational basis standard and its compliance therewith are unavailing.

Under strict scrutiny, Agency has failed to demonstrate a compelling interest for requiring Appellant hold its religious activity at a separate location – essentially relegating religious speech to a different location – in order to receive any funding. Agency's reliance on the Establishment Clause, while in other cases may be compelling, is misplaced here (as will be discussed in point 5 below). *See Lamb's Chapel*, 508 U.S. at 395 (if the government's "posited fears of an Establishment Clause violation are unfounded," the Establishment Clause defense "will not do."). Agency's efforts to tailor narrowly its interests also are unpersuasive, especially since it employed a rational basis and lesser restrictive alternatives exist. Both Agency and Appellant have offered or discussed lesser-restrictive means to facilitate funding Appellant's building

renovation while not inappropriately endorsing or promoting religious speech. Agency has failed to demonstrate a compelling interest for its Agency burdening of Appellant's religious practice and it has not demonstrated sufficiently that it narrowly tailored the burden. Accordingly, Appellant's claims under the Free Exercise Clause of the First Amendment of the U.S. Constitution show Agency error in its denial of Appellant's Program eligibility.

ii. Appellant's Free Speech and Equal Protection Claims.

Having evaluated Appellant's Free Exercise claim, I will now address Appellant's Free Speech and Equal Protection claims as one issue because they are so intertwined in case law analysis. Appellant's claims under the Free Speech and Equal Protection Clause claims of the First Amendment of the U.S. Constitution show Agency error in its denial of Appellant's Program eligibility. Courts have often treated a litigant's Free Speech, Free Exercise, and Equal Protection claims resulting from a government funding denial based on religious speech as one Constitutional inquiry. *See Columbia Union College v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) *citing Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 827 (1995); *Lamb's Chapel*, 508 U.S. at 389; *Widmar v. Vincent*, 454 U.S. 263, 266 (1981). The First Amendment forbids government from discriminating for or against private speech because of the content or viewpoint of the speech. *See Columbia Union*, 159 F.3d at 156 *citing Rosenberger*, 515 U.S. at 828. Where the government regulates private speech based on its religious content, strict scrutiny applies. *Satawa v. Macomb Co. Rd. Comm'n*, 689 F.3d 506 (6th Cir. 2012) *quoting Pinette*, 515 U.S. at 760 ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.")*; Lamb's Chapel*, 508 U.S. at 384.

Even where the government subsidizes rather than penalizes private speech, it usually cannot, ". . . favor some viewpoints or ideas at the expense of others." *Lamb's Chapel*, 508 U.S. at 394 *quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The government, provided it does not violate the Establishment Clause (discussed in point 5 below), may selectively aid certain kinds of private speech and thereby regulate the content of what is or is not expressed in two clearly defined instances. *Rosenberger*, 515 U.S. at 833. First, government may provide assistance to certain viewpoints when "it enlists private entities to convey its [the government's] own message." *Id.; see also Rust v. Sullivan*, 500 U.S. 173, 198–99 (1991). Second, the government may appropriate public funds "to promote a particular policy of its own." *Rosenberger*, 515 U.S. at 833. Privately donated signs and monuments in public parks are an example of the former, *see, e.g., Pleasant Gove City, Utah v. Summum*, 555 U.S. 460 (2009), and government funding the promotion, marketing, and consumption of beef and beef products ("Beef. It's what's for Dinner.") is an example of the latter. *See Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005). Neither one of these two circumstances is present in this case. Instead, the speech involved here is private speech on private property, with financial support for building renovations derived, in part, from the government's Program loan.

First Amendment protections are especially strong where an individual engages in speech activity from his or her own private property. *Jones v. Parmley*, 465 F.3d 46, 52 and 56 (2d. Cir.

2006)(Sotomayor, J.); *see also, City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994)(striking down a city ordinance that banned nearly all residential signs). The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. at 553. With rare exceptions, content discrimination in the regulation of speech of private citizens on private property is presumptively impermissible. *Rosenberger*, 515 U.S. at 828-829; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Neighborhood Enterprises v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) *citing City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring). Moreover, the presumption of impermissibility is a strong one. *Id.*, 644 F.3d at 737.

Under the strict scrutiny standard, the government must show that its denial of Appellant's pre-application was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end. *Pinette*, 515 U.S. at 760; *Perry Educ. Ass'n v. Perry Educ. Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also, Good News Club*, 533 U.S. 127 *citing Kuntz v. New York*, 340 U.S. 290, 293-294 (1951); *R.A.V. v. St. Paul*, 505 U.S. 377, 395-396 (1992). While the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech, *Pinette*, 515 U.S. at 761-762 *citing Lamb's Chapel*, 508 U.S. at 394-395, if the government's "posited fears of an Establishment Clause violation are unfounded (as will be discussed in point 5 below), the Establishment Clause defense "will not do." *Lamb's Chapel*, 508 U.S. at 395. *See also, Bronx Household*, 650 F.3d at 37 *citing Good News Club*, 533 U.S. 103-104; 107-108 ("religious instruction" exclusion violated the Free Speech Clause because the school district refused to allow, as here, the teaching of moral lessons from a religious perspective, while permitting the teaching of moral lessons from a secular perspective). Lastly, private speech endorsing religion is what the Free Speech and Free Exercise Clauses are to protect. *See Morgan v. Swanson*, 659 F.3d 359, 409 (5th Cir. 2011) *citing Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

Appellant argues Agency violated its Free Speech and Equal Protection rights due to the nature of the speech. Agency counters that it must remove religious speech from the building in order to avoid excessive entanglement with religion based on the Establishment Clause. In the instant case, the speech involved is private speech (FOF 2 and 7). The government is not the speaker (FOF 4 and 9). Under the Program, Agency does not seek to enlist private, not-for-profit charities to either convey some message for Agency or to promote a particular government policy (FOF 4-6, and 9). Agency admits as much when it asserted the Program is "not a forum for speech." Rather, Agency's policy is to promote and support community facilities and community rural development generally (FOF 4). Thus, Agency funds a broad array of qualifying private and public entities to encourage rural development, services, and improved quality of life in rural communities. Appellant is not able to hold its Bible classes in one location, and all other services in another, because of the financial, logistical, transportation, and client participation and enrollment difficulties Appellant would experience (FOF 7). The reason for Agency's denial at the pre-application stage was solely that Appellant would engage in some religious speech in the building (FOF 2, 5, and 6). Agency acknowledges that it would find Appellant eligible for the loan so long as Appellant keeps religious speech out of the building (FOF 5 and 6). While the Program regulations themselves are content-neutral (facially neutral), Agency's requiring

religious discussion or instruction expelled to a separate building or room *because* of their subject matter is a content-based restriction (as applied) and unduly constricts Appellant's opportunities for free expression.

Therefore, due to the regulation of speech (removing it from the location or segregating it), the nature of the speech (protected religious), and the regulation of the speech (content-based and discriminatory effect), the regulation of speech of private citizens on private property in this case is impermissible. Agency has failed to demonstrate a compelling interest and its efforts to tailor narrowly, especially since alternatives exist. While the Program objectives for community development are compelling to active their ends, Agency's provided no legitimate compelling interest to burden Appellant's religious speech in the manner it did. On the other hand, both Agency and Appellant have offered or discussed lesser-restrictive means to facilitate funding of Appellant's building renovation while not inappropriately endorsing or promoting religious speech. Therefore, even had Agency provided a legitimate compelling interest relative to religious speech limitations, it is questionable whether the approach would have been tailored narrowly in this case. *See Simon & Schuster*, 502 U.S. at 116 ("broad principle [that] [r]egulations which permit the [government] to discriminate on the basis of content of the message cannot be tolerated under the First Amendment."). Accordingly, I find Agency's restrictions on Appellant's religious speech is a violation of Appellant's Free Speech and Equal Protection rights. Consequently, Appellant's claims under the Free Exercise, Free Speech, and Equal Protection Clauses of the First Amendment show Agency error in its denial of Appellant's Program eligibility.

5. Agency's Establishment Clause Defense.

Agency's position under the Establishment Clause of the First Amendment of the U.S. Constitution does not require Agency to deny Appellant's Program eligibility. The Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion." *See U.S. Const. Amend. I.* The distinction is that government speech endorsing religion is what the Establishment Clause prohibits, while the First Amendment protects private speech regarding religion. *Rosenberger*, 515 U.S. at 841. To determine if a government program violates the Establishment Clause, courts have examined (1) if the program has a secular or religious purpose, and (2) whether the program has the primary effect of advancing or inhibiting religion. *See Mitchell v. Helms*, 530 U.S. 793, 807-808 (2000) *citing Agostini v. Felton*, 521 U.S. 203, 222-223; 234-235 (1997). The primary criteria for determining the effect of a statute or government program is by analyzing whether the statute or program will (a) result in religious indoctrination by the government, and (b) define its recipients by reference to religion, or (c) create an excessive entanglement. *See Mitchell*, 530 U.S. at 808. The examination must be applied to the program as a whole and not to the individual program as requested by the participant. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 651-653 (2002).

Appellant argues that Agency may fully fund the building renovation, including where its Bible classes will take place. Appellant asserts the funding would not violate the Establishment Clause because, among other things, the Program has a secular purpose and is neutral toward religion.

Agency counters that Appellant is ineligible under the Establishment Clause because, on the facts of this case, Agency could not fund Appellant's facility renovation without Appellant diverting funds to religious activity and because pro-rating is difficult-to-impossible to accomplish. The Program makes and guarantees loans in rural areas with less than 20,000 people community facilities (FOF 4). Appellant offers information, referrals, and services to individuals who are involved with an unplanned pregnancy, including tests, education, counseling, parenting classes, and baby supplies (FOF 1, 2, 3, and 7). Appellant's Bible classes over the past five years are 11 percent of Appellant's overall operations, which are otherwise secular (FOF 2) even though Appellant is a "Christ-Centered" not-for-profit corporation (FOF 1, 2, and 3). Appellant offers its Bible classes to clients at their request and election, not at Appellant's urging (FOF 2). Appellant has acquired building ownership where the Program loan will fund capital improvements for renovations (FOF 4, 7). Bible classes will not have a cost to the building renovations or otherwise impose a cost to secular activities or building improvements under the Program loan (FOF 7). Appellant's Bible classes are nondenominational, serving all religious backgrounds, albeit having a predominantly Christian theme (FOF 2).

Under the Establishment Clause, I must examine this case under the tests set forth in *Mitchell*, *Agostini*, and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[1] The primary test that the Program must pass is neutrality: a government program of providing funds must allocate benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries. *See Good News Club*, 533 U.S. at 114; *Mitchell*, 530 U.S. 807-810; *Rosenberger*, 515 U.S. at 839-840. Essentially, programs must not allocate benefits based on distinctions among religions, non-religious, and areligious recipients. *Id.; See also, School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963)(invalidating programs mandating daily Bible reading to all in public school). Yet programs that evenhandedly allocate benefits to a broad class of groups, without regard to their religious beliefs and practices, generally withstand scrutiny.[2] The Program provides loans, grants, and other funding available in an evenhanded manner to a broad and diverse spectrum of beneficiaries (FOF 4 and 9). The Program does so based on neutral, secular criteria to determine eligibility, funding, and how much an applicant may receive. *See* 7 C.F.R. Part 1942, Subpart A.

[1]Although factions have criticized the *Lemon* test and the Supreme Court has attempted to depart from it under *Mitchell v. Helms*, and *Agostini v. Felton* (*citations above*), lower courts have taken the position that the Supreme Court has declined to disavow it. Instead, such courts have employed a *Lemon/Agostini/Mitchell* "hybrid" test to analyze Establishment Clause issues. *See e.g., Barnes-Wallace v. City of San Diego*, 704 F.3d 1067(9th Cir. 2012); *Satawa v. Macomb Co. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012); *Bronx Household of Faith v. Board of Educ. of City of N.Y.*, 650 F.3d 30 (2d Cir. 2011); *American Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009); *Americans United for Sep. of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007); *Skoros v. City of New York*, 437 F.3d 1, 17 n. 13 (2d Cir. 2006); *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir.2005); *Johnson v. Economic Dev. Corp. of Co. of Oakland*, 241 F.3d 501 (6th Cir. 2001); and *Utah Highway Patrol Ass'n v. American Atheists*, 132 S.Ct. 12 (2011), to name a few. *Cf. Van Orden v. Perry*, 545 U.S. 677 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639, 651-653 (2002).

[2] *See e.g., Good News Club*, 533 U.S. at 114; *Mitchell*, 530 U.S. at 809–14; *Agostini*, 521 U.S. at 230–231, 234–235; *Rosenberger*, 515 U.S. at 840–843; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Lamb's Chapel*, 508 U.S. at 395; *Witters v. Wash. Dep't of Svcs. for the Blind*, 474 U.S. 481, 487–488 (1986); *Mueller v. Allen*, 463 U.S. 388, 398–399 (1983); *Widmar*, 454 U.S. at 273–275; *Bd. of Educ. v. Allen*, 392 U.S. 236, 238, 243–44 (1968); *Everson*, 330 U.S. at 17–18; *see also Walz v. Tax Comm'n*, 397 U.S. 664, 672–673 (1970).

FBOs are a significant part of this Program (FOF 9), which strengthens the position of neutrality rather than violates it. *See American Atheists*, 567 F.3d at 291-292; *Committee for Pub. Educ. & Religious Lib. v. Regan*, 444 U.S. 646, 656-659 (1980). *Cf. Committee for Pub. Educ. & Religious Lib. v. Nyquist*, 413 U.S. 756 (1973)(holding that "all or practically all" of the schools eligible for grants were not merely religious; they were from the same denomination).

Since this Program passes the significant hurdle of neutrality, I am required to determine if the Program has the *primary effect* of advancing religion. I will examine the following five issues to determine if Appellant's loan efforts pass muster under prevailing Establishment clause jurisprudence: (1) does Agency's Program have the primary effect of advancing religion if it employs a skewed selection criteria that "stacks the deck" in favor of groups that engage in religious indoctrination, encouraging potential recipients to take part in religious activities by rewarding them from doing so?; (2) does Agency's Program have the primary effect of advancing religion if it leads to "religious indoctrination" that "could reasonably be attributed to governmental action"?; (3) does Agency's Program have the primary effect of advancing religion if the benefit itself has an inherently religious content?; (4) does Agency's Program have the primary effect of advancing religion if the recipient diverts secular aid to further its religious mission?; and (5) does Agency's Program have the primary effect of advancing religion if it excessively entangles[3] the government in religious affairs? *See American Atheists*, 567 F.3d at 289-294; *Mitchell*, 530 U.S. at 807-808; *Agostini*, 521 U.S. at 222-223, 230-234; and *Lemon*, 403 U.S. 614-615.

First, does Agency's Program have the primary effect of advancing religion if it employs a skewed selection criteria that "stacks the deck" in favor of groups that engage in religious indoctrination, encouraging potential recipients to take part in religious activities by rewarding them from doing so? Agency's Program funds may be used for essential community facilities including, among other things, health services, transportation facilities, electric and telephone systems, and general community support. *See* 7 C.F.R. Part 1942. No party has provided evidence objecting to or disputing Agency's selection criteria. Appellant's Articles of Association and By-laws contain no religious affiliation, sponsorship, or religious mission even though it conducts voluntary inherently religious activity at its building with its secular activity (FOF 2-3). Appellant seeks a Program loan for capital improvements, not its program content (FOF 7). Secular program beneficiaries have been a significant part of this Program (FOF 9). Agency rightfully has established neutral, secular Program selection criteria that neither favors nor disfavors religion and the Program is widely available to both religious and secular beneficiaries (FOF 4 and 9). *See also* 7 C.F.R. §§ 1942.1 1942.2, 1942.5, and 1942.17. Thus, I find the Program does not have the primary effect of advancing religion, does not "stack the

[3] Some courts have found the "excessive entanglement" doctrine, ". . . protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits (as in *Lemon*, 403 U.S. 602) or as a basis for regulation or exclusion from benefits (as here)." *Colorado Christian*, 534 F.3d at 1261). *See also University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-1345 (D.C. Cir. 2002)(excessive engagement with the school's religious views); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)(same).

deck" in favor of groups that engage in religious indoctrination, and has a valid, neutral and secular purpose (as discussed above).

Second, does Agency's Program have the primary effect of advancing religion if it leads to religious indoctrination that could reasonably be attributed to governmental action? A government program may have the primary effect of advancing religion if it leads to religious indoctrination that could reasonably be attributed to governmental action. *See American Atheists*, 567 F.3d at 289-294; *Mitchell*, 530 U.S. at 807-808; *Agostini*, 521 U.S. at 222-223, 230-234; *Lemon*, 403 U.S. 614-615. Appellant's loan is to fund capital improvements (FOF 7). Appellant's application is not seeking a government loan to promote worship, religious instruction, or proselytization (FOF 4, 7). Appellant offers information, referrals, and services to individuals who are involved with an unplanned pregnancy, including tests, education, counseling, parenting classes, and baby supplies (FOF 1, 2, 3, and 7). Appellant's Bible classes over the past five years are 11 percent of Appellant's overall operations, which are otherwise secular (FOF 2 and 7). Secular program beneficiaries have been a significant part of this Program (FOF 9). Agency's Program loan does not single out a particular class for favorable treatment and does not have the effect of implicitly endorsing a particular religious belief. The Program loan in this case does not inculcate religion by indoctrination or proselytization, and Agency has not shown evidence of Appellant using this aid to do so. *See Mitchell*, 530 U.S. at 809, 857-858, *citing Agostini*, 521 U.S. 223-224; 226, 230. Since Agency funds are not being used to subsidize inherently religious activity (even though Appellant's limited Bible classes may benefit from the incidental use of this space), the Program and Appellant's resulting loan do not advance or inhibit religion and do not lead to religious indoctrination that could reasonably be attributed to governmental action. *See Good News Club*, 533 U.S. at 98; *Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384; *Widmar*, 454 U.S. 263; *Cf. Americans United for Sep. of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406 (2007)(finding an Establishment Clause violation where government provided public funds and State control of inmates via contract for a values-based treatment program at a State correctional facility which was "dominated by Bible Study, Christian classes, religious revivals, and church services"). In fact, no reasonable person would infer from Appellant's participation in the Program, alongside and on equal terms with the many other secular entities (FOF 4 and 9), that the Agency has endorsed, approved, or encouraged inherently religious activities by funding building improvements. *See American Atheists*, 567 F.3d 278. Therefore, I find that any possible or arguable religious indoctrination, if it were to exist (which does not at this time), would not reasonably be attributed to governmental action: the government itself has not advanced religion through its own activities and influence in granting Program benefits in this case. *See Mitchell*, 530 U.S. at 807-808; *Skoros v. City of N.Y.*, 437 F.3d 1, 32-33 (2d. Cir. 2006)(holding a policy intended to ensure that thousands of holiday displays created annually for New York City's public school classrooms, hallways, and lobbies comport with the First Amendment's religion clauses, even though they are all on public property and are publicly funded). A reasonable observer would not glean from the facts of this case that the principal or primary effect of the Program would be to advance or inhibit religion. Consequently, the Program does not lead to religious indoctrination that could reasonably be attributed to governmental action.

Third, does Agency's Program have the primary effect of advancing religion if the benefit itself has an inherently religious content? A government program may have the primary effect of advancing religion if the benefit itself has an inherently religious content. *See American Atheists*, 567 F.3d at 292. As discussed above, the Program's purpose and Appellant's funding goals of renovating a community facilities building is secular in nature (FOF 4, 7, and 9). The government is not passing out religious icons, textbooks, symbols, prayer booklets, palm cards, or distributing religious information or instruction itself (FOF 4 and 9). In this case, the government is funding capital improvements for community needs (FOF 4). The nature of the aid that the government would provide in this case is neutral and non-ideological (FOF 4, 9). The Program is available to both religious and secular applicants, and is devoid of religious content. Agency will provide funds, but does not provide or distribute religious symbols and similar items to participants or to Appellant's clients (FOF 4). All building and construction renovations are infrastructure and lack content altogether. The funding of Appellant's building or renovations, which may permit incidental religious activity within, does not define Appellant by reference to religion since the Program and its regulations are wholly neutral. Therefore, the Program does not have an inherently religious content and is therefore content neutral.

Fourth, does Agency's Program have the primary effect of advancing religion if the recipient diverts secular aid to further its religious mission? A government program may have the primary effect of advancing religion if the recipient inappropriately diverts secular aid to further its religious mission. *See American Atheists*, 567 F.3d at 289-294; *Mitchell*, 530 U.S. at 807-808; *Agostini*, 521 U.S. at 222-223, 230-234; *Lemon*, 403 U.S. 614-615. Courts have found that where government subsidizes a medium of communications on religion-neutral terms, to a wide spectrum of speakers (as here at FOF 4 and 9), the Establishment Clause does *not* bar a private group from using government-provided medium to espouse its own message, even a religious one. *See American Atheists*, 567 F.3d at 292 *citing Rosenberger*, 515 U.S. at 842; *Good News Club*, 533 U.S. at 109; *Lamb's Chapel*, 508 U.S. 384; *Widmar*, 454 U.S. 263. In *Mitchell*, even Justice O'Connor concluded that proof of actual diversion of government aid for religious indoctrination was necessary and rejected the 'possibility that aid will be diverted' in order to invalidate a program because 'presumptions of religious indoctrination, which at most point to possibilities, are typically unhelpful and "normally inappropriate" in evaluating neutral aid programs under the Establishment Clause. *Mitchell*, 530 U.S. at 857-858 *citing Agostini*, 521 U.S. at 223-224; *Americans United*, 509 F.3d 406, 424-425. Appellant does not have a religious mission (FOF 3), although it engages in Bible classes and is "Christ-centered" (FOF 2 and 3). In the instant Program, Agency provides the same support to Appellant as it does with every other applicant (FOF 9), so no reasonable observer could attribute a religious message to Agency. "When the government endorses everything, it endorses nothing." *American Atheists*, 567 F.3d at 292; *see also Muller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Zobrest*, 509 U.S. at 10. While some cases have approved of limited public religious messages under Establishment Clause analysis (*see e.g., American Atheists*, 567 F.3d at 292, upholding not only refurbishing religious buildings but also religious signs and messages on the exterior of the buildings), here Agency is funding capital improvements and not religious messages (FOF 7). Any Bible classes would take place privately, inside the building, without pressure and at the client's request (FOF 2). The government is not utilizing the 'power,

prestige, and influence' of a public institution to bring religion into the lives of citizens. *See Walz*, 397 U.S. at 696 *citing Sch. Dist. of Abington Twp.*, 374 U.S. at 307. Appellant and its non-denominational Bible classes (FOF 2) are dissimilar to where the object of the overall government program is to show "favoritism" to a specific denomination or individual religious group. *Cf. Nyquist*, 413 U.S. at 768 ("all or practically all" of the schools eligible for grants were not merely religious; they were from the same denomination.); *American Atheists*, 567 F.3d at 297. Beyond capital improvements (Appellant's loan purpose), Appellant's conduct and speech is, at most, prayer, teaching, or discussion of doctrine or scripture and not religious worship (FOF 2 and 3).[4] *See Bronx Household*, 650 F.3d 30 (affirming a statute that prohibits worship services in schools, but permits the expression of religious points of view through activities such as prayer, singing of hymns, preaching, and teaching or discussion of doctrine or scripture). I find the Appellant's religious actively is limited, and Appellant's secular mission does not define it as religious or pervasively religious. Accordingly, the Program does not have the primary effect of advancing religion if Appellant were to divert secular aid.

Fifth, does Agency's Program does have the primary effect of advancing religion if it excessively entangles the government in religious affairs? A government program has the primary effect of advancing religion if it excessively entangles the government in religious affairs. *See Mitchell*, 530 U.S. at 807 *citing Lemon*, 403 U.S. at 613-614; *Agostini*, 521 U.S. 232-233. In order to determine whether the government entanglement with religion is excessive, I must examine (a) the character and purposes of the institutions that are benefited; (b) the nature of the aid that the government provides; and (c) the resulting relationship between the government and the religious authority. *See Lemon*, 403 U.S. at 613-614; *Waltz*, 397 U.S. at 668.

In examining (a), the character of the institutions benefited, Appellant is not a religious institution, but a not-for-profit, charitable entity, which exercises some religious themes and activities supporting its secular mission (*e.g.*, Christ-centered, yet nondenominational instruction) (FOF 1, 2, and 3). Under (b), the nature of the aid that the government would provide in this case is neutral and non-ideological (FOF 4, 9), as discussed above. *See also Everson*, 330 U.S. at 18. As an economic development and rural community development Program, it has no religious content, purpose, and it is not ideological. Lastly, under (c), the resulting relationship between the government and the religious authority is acceptable in this case. Legal precedence has demonstrated tolerance and upheld many instances where it accepted some level of involvement between the government and religious entanglement or relationship.[5] In this case, there is not a

[4]Perhaps it more accurate to characterize Appellant's Bible classes and content more as teaching morals and character development themed on religious principles to those affected by pregnancy. *See Good News Club*, 533 U.S. at 109.

[5] *See, e.g., Agostini*, 521 U.S. at 203 *citing Bowen v. Kendrick*, 487 U.S. 615 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736, 764-765 (1976)(no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion); *Rosenberger*, 515 U.S. 819 (holding that a state may reimburse a religious student-group for costs incurred in printing an indoctrinating publication); *Zobrest*, 509 U.S. at 3 (holding that the Establishment Clause permits the state to provide a sign language translator for a deaf

need for Agency to engage in pervasive monitoring, although there may be some acceptable coordination and cooperation while the renovations are completed (FOF 1-4, 7, and 9). *See Americans United,* 509 F.3d at 425-426 (finding government coordination and cooperation acceptable, reversing on other grounds). Therefore, the Program does not require Agency to make judgments about religious messages and content of particular projects. The Program does not require Agency to impose a scheme of "comprehensive, discriminating and continuing state surveillance," nor remain enmeshed in Appellant's educational, instructional, or conversational affairs on an ongoing basis. *See Agostini,* 521 U.S. at 233-234; *Lemon,* 403 U.S. at 613-614. Consequently, I find the Program does not have the primary effect of advancing religion because it does not excessively entangle the government in religious affairs.

Accordingly, based on the above five-part analysis, I find Agency's Program and Appellant's funding request in this case have a secular purpose; they have a principal or primary effect that neither advances nor inhibits religion; and they do not foster an excessive government entanglement with religion. Funding for Appellant's loan is not government speech endorsing religion, requiring the protection of religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices. Therefore, Agency's position under the Establishment Clause does not require Agency to deny Appellant Program eligibility.

DETERMINATION

Seven C.F.R. § 11.8(e) provides that an appellant bears the burden of proving that an agency's decision is erroneous by a preponderance of the evidence. In this case, Appellant has met its burden. The Agency's Adverse Decision is erroneous because Appellant's equal opportunity for religious organizations, Free Exercise, Free Speech, and Equal Protection claims show Agency error in its denial of Appellant's Program eligibility. In addition, the Establishment Clause does not require Agency to deny Appellant Program eligibility and does not provide Agency a defense regarding its Adverse Decision.

This is a final determination of the Department of Agriculture unless either party files a timely request for Director Review.

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student in a parochial school in order to allow her to be indoctrinated); *Witters*, 474 U.S. 481 (holding permissible state funding of a visually impaired student's rehabilitative assistance that was used for tuition at a religious school); *Mueller*, 463 U.S. 388 (sustaining a state statute allowing parents to deduct the costs of tuition, textbooks, and transportation even though the statute would result in children undergoing indoctrination at parochial schools); *Everson*, 330 U.S. at 16-18 (approving state funding of children's transportation to parochial schools although the effect was to expose some children who would not otherwise have attended those schools to religious indoctrination); *American Atheists*, 567 F.3d 278 (upheld a government program that gave building renovation grants on the same basis to secular organizations as to religious organizations, including churches); *DeStefano v. Emergency Housing Group*, 247 F.3d, 397 (2d. Cir. 2001)(no Establishment Clause issue with the religious alcohol treatment program taking place in a publically owned building rented to a not-for-profit with the rent being paid by a government grant); *Americans United for Sep. of Church & State v. Prison Fellowship Ministries,* 509 F.3d 406 (8th Cir. 2007)(State funding, by means of direct aid, for inmate rehabilitation program administered by Christian provider did not result in excessive entanglement; *rev'd on other grounds*).

Dated and mailed this 14th day of June 2013.

/S/

CHRISTOPHER J. HANIFIN
Hearing Officer
National Appeals Division

Attachments:
Notice of Right to Request Director Review and/or Copy of Audio Record
Request for Director Review

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NAD Case Record

NOTICE OF RIGHT TO REQUEST DIRECTOR REVIEW
AND/OR COPY OF AUDIO RECORD

DIRECTOR REVIEW REQUEST

Either party may request that the Director of the National Appeals Division (NAD) review this determination. A suggested format is attached, but any request is acceptable if it has all the information in the "Instructions for Request for Review" listed below.

An appellant or third party who believes that this determination is wrong must file a request for Director Review within **30 days** of receipt of this determination. Unless appropriate documentation shows otherwise, the Director presumes that it usually takes 7 days for a determination to reach an appellant by mail. However, the Director will accept requests filed more than 37 days from the date of the determination if the person shows that receipt of the determination took longer than usual. A request must be in writing and be signed by the appellant or third party. A request must also follow the "Instructions for Request for Review" listed below.

The agency may also file a request for Director Review if it believes the determination is wrong. The agency must file its request within **15 business days** of receipt of this determination. The head of the agency or someone acting in that capacity must sign the request. The agency must also follow the "Instructions for Request for Review" listed below.

Parties may file written responses to a request for Director Review within **5 business days** of receipt of a copy of the request for review.

The date a document is considered "filed" is either the date it is delivered in writing to NAD, its postmark date, or the date that a complete facsimile copy is received by NAD.

Instructions for Requests for Review

A request for review must include the following information:

- be personally signed and dated by appellant, third party or head of the agency;
- specifically request a review;
- give the case number for the Hearing Officer determination (the case number is on the top right-hand side of the first page of the determination);
- note the date the requester received the Hearing Officer determination;
- say why the determination is wrong;
- confirm that the requester has also sent a copy of the request and additional information, if any, to the other party at the same time that the request was sent to NAD; and
- be mailed, faxed or delivered by commercial delivery service to the following address:

National Appeals Division
Eastern Regional Office
P.O. Box 68806
Indianapolis, IN 46268-0806
1-800-541-0457 (Phone)
1-800-791-3222 (TDD number)
1-317-875-9674 (Facsimile)

COPY OF AUDIO RECORD REQUEST

The appellant(s), third parties, and the agency may obtain a copy of the audio record made of the pre-hearing/hearing proceedings at no cost. Copies may be obtained by making a written request to the NAD Regional Office.

REQUEST FOR DIRECTOR REVIEW

I/We, *(print* name(s)) _____, am/are the Appellant(s)/Third Party/Agency head in the above-referenced appeal and I/we request a Director review of the appeal determination in the case.

The case number is: _____.

I/We received the appeal determination on _____.

The specific reasons why I/we believe the appeal determination is wrong are: (The requester may attach additional sheets and documents, if desired.)

A copy of the request, along with any attachments, was mailed to the other parties on _____.

I swear that all statements in this filing are true to the best of my knowledge and belief.

_____ _____
Appellant(s)/Third Party/Agency head signature(s) Date