

June 21, 2011

Mr. Barack Obama
The President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20510

Dear Mr. President:

We, the undersigned religious, civil rights, labor, health, women's, and other organizations, write to remind you of the upcoming seventieth anniversary of Executive Order 8802, which was the first executive order prohibiting government contractors from engaging in employment discrimination. In honor of this anniversary, we urge you to fully restore this civil rights protection by rescinding the language in Executive Order 13279 that permits religious organizations that contract with the government to discriminate against federally funded employees on the basis of religion.

Many of the undersigned organizations are members of the Coalition Against Religious Discrimination (CARD), which is a broad and diverse coalition formed in the mid-1990s to oppose legislative and regulatory efforts that eliminate the traditional safeguards that protect civil rights and religious liberty when government partners with faith-based organizations.

One of these traditional safeguards is the guarantee that otherwise qualified people are not disqualified from federally funded jobs because of their religion. This safeguard was first put in place by President Franklin D. Roosevelt when he signed Executive Order 8802 on June 25, 1941. The executive order prohibited employment discrimination by defense contractors based on "race, creed, color, or national origin."¹ This was the first action taken by the government to promote equal opportunity for all Americans, and the start of our longstanding, national commitment to barring even private organizations from discriminating in hiring using federal funds.

In subsequent executive orders, Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson expanded the protections. Indeed, Executive Order 11246, signed by President Lyndon B. Johnson in 1965, prohibits discrimination in *all* government contracts.² These executive orders led to the enactment of scores of civil rights statutes that prohibit discrimination, especially by recipients of federal funds.

Yet, in 2002, President George W. Bush rolled back these traditional safeguards and core civil rights protections for applicants for some government-funded jobs.³ Executive Order 13279, exempts religious organizations that receive government contracts from the requirements of Executive Order 11246 and allows them to discriminate in hiring based on religion. This civil rights rollback remains in place today.

We ask, therefore, that you take this opportunity to celebrate this civil rights landmark anniversary by restoring Executive Order 11246 to its original form, reinstating the anti-discrimination provision for all organizations. The traditional safeguard protecting against discrimination in government-funded jobs is particularly critical in government contracts. The government, in purchasing necessary goods and

¹ Exec. Order No. 8802, 6 F.R. 3109 (June 27, 1941).

² Exec. Order No. 11,246, 30 F.R. 12,319 (Sept. 28, 1965).

³ Exec. Order No. 13,279, 67 F.R. 77,141 (Dec. 16, 2002).

services *for its own use*, must not fund discrimination.⁴ President John F. Kennedy explained the importance of guaranteeing equal opportunity in government contracts: “[I]t is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment . . . on government contracts. . . .”⁵ From 1941 until 2002 this had been the law of the land. And since 1941, our values have reflected a strong commitment to ensuring that no one is disqualified from government-funded jobs because of his or her religion.

Restoring Executive Order 11246 for all government contractors would be an important first step toward fulfilling the campaign promise you made on July 1, 2008, in Zanesville, Ohio. In that speech you stated that you would reform the Faith-Based Initiative so that “if you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them – or against the people you hire – on the basis of their religion.” Yet, even though officials from your administration have said that the issue is being reviewed by the Justice Department⁶ and have expressed a commitment to ensuring that partnerships with religious organizations are consistent with our law and values, we have seen no forward movement on this issue.⁷

Accordingly, we urge you to honor this anniversary by rescinding Executive Order 13279’s amendment of Executive Order 11246 that exempted religious organizations that contract with the government from the prohibition against employment discrimination on the basis of religion. This would restore key civil rights protections that were first established seventy years ago and is consistent with our nation’s values.

Sincerely,

African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
Americans for Religious Liberty
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Anti-Defamation League
Asian American Justice Center
Baptist Joint Committee for Religious Liberty
Bazelon Center for Mental Health Law
B’nai B’rith International
Catholics for Choice
Center for American Progress Action Fund

⁴ See 31 U.S.C. § 6303 (“the principal purpose of [a government contract] is to acquire . . . property or services for the direct benefit or use of the United States Government”).

⁵ Exec. Order No. 10,925, 26 F.R. 1977 (Mar. 8, 1961).

⁶ Attorney General Eric Holder, however, recently said that a particularly troubling component of the policy permitting hiring discrimination by religious organizations, the June 29, 2007, Office of Legal Counsel Memorandum regarding RFRA, was *not under review*. *Oversight Hearing on the United States Department of Justice Before the H. Comm. on Jud.*, 112th Cong. (May 3, 2011) (answer by Att’y Gen. Eric H. Holder Jr. to question from Rep. Robert C. “Bobby” Scott). In 2009, fifty-eight organizations, many of which join this letter, urged the administration to review and withdraw the memorandum and disavow its erroneous legal interpretation. A copy of the letter is enclosed herewith.

⁷ The Administration has not acted to restore Executive Order 11246, review the June 29, 2007 Office of Legal Counsel Memorandum regarding RFRA, nor institute a general policy that prohibits federally funded religious employment discrimination.

Center for Inquiry
 Central Conference of American Rabbis
 Council for Secular Humanism
 Disciples Justice Action Network
 Equal Partners in Faith
 Family Equality Council
 Friends Committee on National Legislation
 Gay & Lesbian Advocates & Defenders (GLAD)
 Hindu American Foundation
 Human Rights Campaign
 Interfaith Alliance
 Jewish Council for Public Affairs
 Lambda Legal
 Lawyers' Committee for Civil Rights Under Law
 Leadership Conference on Civil and Human Rights
 NA'AMAT USA
 National Center for Lesbian Rights
 National Center for Transgender Equality
 National Council of Jewish Women
 NCLR (National Council of La Raza)
 National Education Association
 National Employment Lawyers Association
 National Gay and Lesbian Task Force
 National Organization for Women
 People For the American Way
 PFLAG National (Parents, Families, and Friends of Lesbians and Gays)
 The Rabbinical Assembly
 Religious Coalition for Reproductive Choice
 Secular Coalition for America
 Sikh American Legal Defense and Education Fund (SALDEF)
 Texas Faith Network
 Texas Freedom Network
 Transgender Law Center
 Union for Reform Judaism
 Unitarian Universalist Association of Congregations
 United Church of Christ, Justice and Witness Ministries
 United Methodist Church, General Board of Church and Society
 Women of Reform Judaism

Encl.

cc: Eric H. Holder, Jr., Attorney General
 Hilda L. Solis, Secretary of Labor
 Melody Barnes, Director of the Domestic Policy Council
 Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs
 Robert F. "Bob" Bauer, White House Counsel
 Kathryn Ruemmler, Principal Deputy Counsel to the President
 Joshua Dubois, Executive Director, White House Office of Faith-Based and Neighborhood Partnerships

**REQUEST FOR REVIEW AND WITHDRAWAL OF
JUNE 29, 2007 OFFICE OF LEGAL COUNSEL MEMORANDUM RE: RFRA**

September 17, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The undersigned religious, education, civil rights, labor, and health organizations are committed to protecting religious liberty, and working to do so at all levels of the government. We write today to request that you direct the Office of Legal Counsel ("OLC") to review and withdraw its June 29, 2007 Memorandum ("OLC Memo").¹ The OLC Memo's interpretation that the Religious Freedom Restoration Act of 1993² ("RFRA") provides for a blanket override of statutory nondiscrimination provisions is erroneous and threatens core civil rights and religious freedom protections.

Some of us were leaders in the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact remedial legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Div. v. Smith* in 1990.³ This effort culminated in 1993, when then-President William J. Clinton signed RFRA into law.⁴ In essence, RFRA was intended to provide robust protection of free exercise rights, restoring a standard of strict scrutiny to federal laws that substantially burden religion.⁵

Many of us also are members of the Coalition Against Religious Discrimination (CARD), which formed in the mid-1990s specifically to oppose insertion of the legislative proposal commonly known as "charitable choice" into authorizing legislation for federal social service programs. Upon taking office, the Bush Administration sought to impose "charitable choice" on nearly every federal social service program. Stymied in its legislative efforts to do so,⁶ the Administration instead issued Executive Orders and federal regulations to allow religious

¹ Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007).

² 42 U.S.C. § 2000bb *et seq.* (2000).

³ 494 U.S. 872 (1990).

⁴ The Coalition for the Free Exercise of Religion, chaired by the Baptist Joint Committee for Religious Liberty, also led the effort to enact the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000bb-2(4) (2000).

⁵ Although RFRA, as enacted, reached both federal and state law, the Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that application of RFRA to state and local laws was unconstitutional. The *Boerne* decision, however, did not render RFRA *per se* unconstitutional and subsequent cases demonstrate that, as applied to the federal government, RFRA remains good law. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal et al.*, 546 U.S. 418, 424 (2006).

⁶ In 2001, the Bush Administration strongly promoted legislation (H.R. 7) which would have expanded "charitable choice" to nearly all federal social service programs. The measure failed in Congress, in large part, because of the civil rights and religious liberty concerns CARD raised.

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organizations to participate directly in federal grant programs without the traditional safeguards that protect civil rights and religious liberty.

Not all statutory provisions barring religious discrimination in the workplace could be obviated by Executive Order,⁷ and the Bush Administration's attempts to repeal them in Congress were repeatedly rejected. Failing in its attempts to repeal these laws in Congress, the Administration then developed and promoted the far-fetched assertion, memorialized in the OLC Memo, that RFRA provides religious organizations a blanket exemption to these binding anti-discrimination laws.

The OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal nondiscrimination provision tied to a grant program. Although the OLC Memo's conclusion is focused on one Justice Department program, its overly-broad and questionable interpretation of RFRA has been cited by other Federal agencies and extended to other programs and grants. The guidance in the OLC Memo is not justified under applicable legal standards and threatens to tilt policy toward an unwarranted end that would damage civil rights and religious liberty.

When President Barack Obama issued Executive Order 13498, amending former President George W. Bush's Executive Order 13199 (Establishment of White House Office of Faith-Based and Community Initiatives), he underlined the importance of ensuring that partnerships between government and faith-based institutions can be created and maintained effectively while "preserving our fundamental constitutional commitments." The OLC Memo, however, stands as one of the most notable examples of the Bush Administration's attempt to impose a constitutionally questionable and unwise policy—RFRA should not be interpreted or employed as a tool for broadly overriding statutory protections against religious discrimination or to create a broad free exercise right to receive government grants without complying with applicable regulations that protect taxpayers.

We accordingly request that the Obama Administration publicly announce its intention to review the OLC Memo, and that at the end of that review, withdraw the OLC Memo and expressly disavow its erroneous interpretation of RFRA, the most significant free exercise protection of the post-*Smith* era.

Thank you in advance for your consideration of our views.

Respectfully,

African American Ministers in Action (AAMIA)
American-Arab Anti-Discrimination Committee
American Association of University Women
Asian American Justice Center (AAJC)
American Civil Liberties Union
American Federation of State, County and Municipal Employees, AFL-CIO
American Humanist Association
American Jewish Committee

⁷ Many programs – including Head Start, AmeriCorps, and those created by the Workforce Investment Act – contain specific statutory provisions barring religious discrimination that cannot be superseded by Executive Order.

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Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Bazelon Center for Mental Health Law
B'nai B'rith International
Center for Inquiry
Central Conference of American Rabbis
Disciples Justice Action Network
Equal Partners in Faith
Friends Committee on National Legislation
Interfaith Alliance
Hadassah, the Women's Zionist Organization of America
Hindu American Foundation
Human Rights Campaign
Japanese American Citizens League
Jewish Council for Public Affairs
Lambda Legal
Leadership Conference on Civil Rights
Legal Momentum
NAACP
NA'AMAT USA
National Center for Lesbian Rights
National Community Action Foundation
National Council of Jewish Women
National Council of La Raza
National Gay and Lesbian Task Force
National Education Association
National Employment Lawyers Association
National Ministries, American Baptist Churches USA
National Organization for Women
National Partnership for Women and Families
National Women's Law Center
OMB Watch
People For the American Way
The Rabbinical Assembly
Rainbow PUSH Coalition
Religious Coalition for Reproductive Choice
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Council on Religion and Education
Texas Faith Network
Texas Freedom Network
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
Women of Reform Judaism
Women's Law Project

cc: The Honorable Gregory B. Craig, White House Counsel