

January 22, 2014

The Honorable Barack Obama
President of the United States of America
The White House
Washington, DC 20500

Dear Mr. President:

As persons who lead or work with faith-based service organizations, we write to express our grave concern about a widely-discussed possible executive order to apply to federal contractors certain employment nondiscrimination guarantees for LGBT employees. We do not all agree on the merits of such an executive order. However, we are united in asking that any such executive order be written in a way that protects the religious freedom of faith-based service providers.

Our requests are grounded in the historical context of strong federal legal protections for religious organizations' hiring practices. Under the Civil Rights Act of 1964, as upheld by a unanimous Supreme Court,¹ religious organizations are free to consider religion when deciding who is most qualified to join their respective staffs. They are free under Title VII to maintain a conduct standard that reflects their respective religions' sincerely held beliefs, which include deep convictions about human sexuality.

By a unanimous vote, the Supreme Court recently reaffirmed that, even in the context of federal nondiscrimination laws, both the Free Exercise and Establishment Clauses protect the right of religious organizations to hire ministerial staff according to their religious beliefs and standards of conduct.² The Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."³ While the courts have not precisely defined the scope of "ministerial staff," the Supreme Court's emphatic recognition of the constitutional protection that is due to the beliefs of religious groups and to their choices of key staff strongly supports our request for the balancing language we propose.

To its credit, your Administration has continued to respect this vital element of religious freedom by leaving intact the 2002 amendment to Executive Order 11246 that clarified that religious organizations that utilize their freedom under the religious exemption of Title VII of the 1964 Civil Rights Act are nonetheless eligible to be federal contractors or subcontractors.⁴ As a result,

¹ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

² *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

³ *Id.* at 710.

⁴ The amendment was made in a section of Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations (Dec. 12, 2002).

under prevailing law, faith-based organizations that consider religion in their employment decisions continue to contract with the federal government. The vital services that religious organizations provide acting as federal contractors include: 1) overseas relief and development services in partnership with USAID (which increasingly employs contracts as well as grants); 2) services on contract with the Bureau of Prisons; and 3) research, technical assistance, and other services via contracts and subcontracts with other federal departments and agencies. Many of these religious organizations maintain employee conduct standards along with their requirement that staff members agree with the organizations' religious commitments.

These organizations often are the best-qualified applicants for federal contracts or subcontracts. It would be counterproductive to bar them from offering their services to the federal government simply because of their legally protected religious convictions; it would be wrong to require them to violate those legally protected convictions in order to be eligible to receive federal contracts. Their exclusion from federal contracting would be diametrically opposed to the Administration's commitment to having "all hands on deck" in the fight against poverty and other dire social problems.

Specifically, we request that any LGBT executive order respect religious freedom by providing concrete protections for faith-based service organizations.

First, if the order provides for LGBT employment protections—e.g., in the context of federal contracting—we ask that language similar to that recently adopted by the Senate be included, so that the order not have the effect of punishing faith-based organizations if they exercise their constitutional and Title VII right to have religiously grounded employee belief and conduct requirements. In passing the Employment Non-Discrimination Act (S. 815), the Senate respected religious freedom and accommodated many religious organizations by exempting them from the proposed non-discrimination requirements as follows:

This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a), 2000e-2(e)(2)) (referred to in this section as a "religious employer").⁵

We ask that a similar exemption be included if there is an LGBT executive order.

Second, any LGBT executive order should include in its stated purposes language adopted in ENDA by the Senate. The Senate clarified that its purpose in adopting ENDA was not only to eradicate wrongful employment discrimination but also "to reinforce the Nation's commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom."⁶

⁵ The Employment Non-Discrimination Act of 2013 (S. 815), Sec. 6(a). We note that this language and the court decisions interpreting it only imperfectly denote the universe of religious organizations.

⁶ *Id.*, Sec. 2(4).

Third, because the manner in which courts are to balance these rights is contested, we request the following language to underscore this Administration's intent to protect religious freedom in the context of any LGBT executive order:

Nothing in this Executive Order shall be evidence of or construed to establish a compelling government interest with respect to a claim under the First Amendment of the Constitution of the United States or under the Religious Freedom Restoration Act of 1993 (42 U.S.C. §2000bb *et seq.*).

We understand that the Administration seeks to foster greater respect for LGBT persons. Such action need not be, and should not be, taken at the expense of faith-based organizations that simply desire to utilize staffing practices consistent with their deep religious convictions as they partner with the federal government via contracting or subcontracting.

Thank you for considering our concerns and recommendations. We are ready at any time to discuss these suggestions with the appropriate member of your Administration.

Sincerely,

Stanley Carlson-Thies, President, Institutional Religious Freedom Alliance

