

September 10, 2015

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Mr. President:

You have been asked yet again to direct the Office of Legal Counsel in the Department of Justice to withdraw its June 2007 memorandum¹ on the Religious Freedom Restoration Act (RFRA) and religious staffing. That OLC Opinion explains how RFRA can enable a faith-based organization that considers religion when making staffing decisions to participate in federal funding programs that include a statutory ban on religious (and other forms of) job discrimination. The August 20 public letter² from 130 progressive groups claims that this OLC Opinion, if not withdrawn, “will tarnish the legacy of your work to advance fairness and equal treatment under the law for all Americans.”

Mr. President, we ask you to turn aside this appeal, as you and your administration have turned aside the previous letters with the same request. We are grateful that you have welcomed “all hands” to contribute to federal social policy by maintaining and refining the federal faith-based initiative and its rules that provide for equal opportunity for faith-based organizations to collaborate with government in serving community needs. Making it more difficult for faith-based organizations to join those partnerships would undermine, rather than burnish, your commitment to effective and flourishing “all hands” partnerships.

It is clear from their letter that the signers object to religious staffing by religious organizations, regard such staffing to be illegitimate when federal funds are involved, and reject any interpretation of RFRA that would enable a faith-based organization that considers religion when making employment decisions to receive federal funds. But such opposition does not amount to a legal or constitutional argument. As church-state expert Professor Douglas Laycock wrote to former Attorney General Eric Holder in response to a similar earlier letter from many of the same groups, while the OLC Opinion considers RFRA in careful detail, the request to overturn it “makes no argument at all.”³

Religious staffing by religious organizations is protected in Title VII of the 1964 Civil Rights Act and is not illegal discrimination. This right is not somehow waived or otherwise lost simply by the receipt of government funds. See *Lown v. Salvation Army, Inc.*, 393 F. Supp.2d 223 (S.D.N.Y. 2005). Note, for instance, that Title VI of the same Act, concerning discrimination when federal funds are involved, does not mention religion. Furthermore, the rules governing

¹ Office of Legal Counsel, “Application of the Religious Freedom Restoration Act to the Award

² “Request for Review and Reconsideration of June 29, 2007 Office of Legal Counsel Memorandum Re: RFRA” (August 20, 2015), from 9to5, National Association of Working Women, et al.

³ Letter to A.G. Holder from Douglas Laycock, Nov. 13, 2009. Copy enclosed.

<http://mirrorofjustice.blogs.com/files/laycockholderrfra.pdf>

many federal programs do permit religious hiring by religious organizations—e.g., your Executive Order 13672 left in place provisions that protect religious staffing by federal contractors. However, it is true that the statutes governing some federal programs ban religious discrimination in employment by recipients, and yet, as the OLC Opinion fully explains, RFRA applies to such a restriction.

Your administration was right to rely on the OLC Opinion in discussing how religious organizations that staff on a religious basis can participate in VAWA funding, even though a prohibition on discrimination by recipients—including employment discrimination—was added to the program in 2013.⁴ The federal government’s compelling interest is not, as the August 20 letter alleges, to exclude from funding religious organizations that engage in the entirely legitimate policy of considering religion when making their employment decisions. Rather, the government’s compelling interest is to uphold the religious freedom rights of these organizations and to fairly interpret the protections provided by the Religious Freedom Restoration Act.

RFRA protects religious organizations and individuals against unnecessary substantial burdens on their religious exercise. The OLC Opinion rightly concludes that forbidding a religious organization from participating in federal funding because it exercises its Title VII freedom to staff on a religious basis is exactly a “substantial burden” that RFRA is designed to address. As Professor Laycock said in his letter to Attorney General Holder,

Does government substantially burden the exercise of religion, within the meaning of RFRA, when it offers monetary grants on condition that a religious organization abandon one of its religious practices? Yes it does. Such a conditional offer of funding forces the religious organization either to abandon its religious exercise in order to fund its program, or to forfeit potential funding in order to maintain its religious exercise. As the Supreme Court has long recognized, this amounts to a financial penalty on the exercise of religion.⁵

Mr. President, it is evident that you value the good that religious organizations contribute daily to our own society and to those overseas. We commend the action you have taken via the faith-based and neighborhood partnership initiative to support that important role of religious service organizations. And we commend you and your administration for maintaining basic principles and provisions of federal law that support religious staffing by religious organizations.

Please reject again the request that the OLC Opinion be withdrawn and instead continue to maintain it as an important tool to ensure that faith-based organizations can fully participate with others to serve their neighbors in partnership with the federal government.

Sincerely,

Stanley Carlson-Thies, Founder and Senior Director, Institutional Religious Freedom Alliance

⁴ Office on Violence Against Women, “Frequently Asked Questions, April 9, 2014, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013.” <http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>

⁵ Letter to A.G. Holder from Douglas Laycock, Nov. 13, 2009.

Most Rev. William E. Lori, Archbishop of Baltimore, Chairman, United States Conference of Catholic Bishops Ad Hoc Committee for Religious Liberty

Leith Anderson, President, National Association of Evangelicals

Galen Carey, Vice President for Government Relations, National Association of Evangelicals

Rabbi David Zwiebel, Executive Vice President, Agudath Israel of America

Rabbi Abba Cohen, Vice President for Federal Affairs and Washington Director and Counsel, Agudath Israel of America

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Rev. Dr. Gabriel Salguero, President, National Latino Evangelical Coalition; Pastor, Lamb's Church

The Rev. Luis Cortes, Jr, President, Esperanza

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Shirley A. Mullen, President, Houghton College

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Enclosure

cc Melissa Rogers, White House Office of Faith-Based and Neighborhood Partnerships
Attorney General Loretta Lynch