

February 25, 2016

The Honorable Loretta E. Lynch  
Attorney General of the United States  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

Dear Attorney General Lynch:

You have recently received a letter from Representatives John Conyers, Jr., Robert “Bobby” Scott, Steve Cohen, and Jerrold Nadler, asking you to review and reconsider a memorandum opinion dated June 29, 2007 by the Office of Legal Counsel(OLC).<sup>1</sup> The OLC memorandum demonstrates that the Religious Freedom Restoration Act (RFRA) may justify the participation by a religious organization that considers religion in staffing even in a federal grant program that has a statutory prohibition on religious (and other) job discrimination. RFRA has not changed and the letter makes no credible legal argument that controverts the OLC memorandum. We ask you, instead, to reaffirm the OLC opinion.

Our organizations work with faith-based organizations of diverse faiths and sectors of service. Many of them, in one way or another, consider religion when making employment decisions, just as, for example, environmental organizations assess potential employees for commitment to and compatibility with that important cause. While staffing consistent with our convictions is critical to preserving our religious identity and mission, our organizations do not discriminate among beneficiaries in administering our social welfare programs; we serve those in need, of any faith or none.

Consequently, the preservation of the carefully reasoned OLC memorandum is of great concern to us. We have responded by letter to each of the earlier calls to the administration to review and rescind the OLC memorandum.

As to the substance of the proffered arguments against the OLC memorandum, we bring to your attention the two attached letters from Professor Douglas Laycock, Robert E. Scott Distinguished Professor of Law in the University of Virginia School of Law. Professor Laycock wrote the first letter defending the OLC memorandum to your predecessor, the Honorable Eric Holder. The second letter, addressed to you, takes up an additional point in this new complaint against the OLC memorandum.<sup>2</sup>

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<sup>1</sup> “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.

<sup>2</sup> That new point, alleging that the OLC memorandum promotes third-party harm, confuses a religious exemption with a religious preference and misapplies *Estate of Thornton v. Caldor* (1985). The matter is addressed comprehensively in a forthcoming article by Carl H. Esbeck, University of Missouri School of Law, “When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?” *Oxford J. of Church and State* (2016) (<http://www.irfalliance.org/wp-content/uploads/2016/02/Oxford-J-of-Church-St-Forthcoming-Article.pdf>).

The criticisms of the OLC memorandum have no merit. The Representatives' letter would undermine a practice made lawful under the Civil Rights Act of 1964 and that is important to many religious organizations and how they function. It seeks to persuade the Administration to narrow its understanding of RFRA and of religious freedom as such by suggesting that "fairness and equal treatment under the law for all Americans" must require excluding from federal funding any organization that considers religion when making its employment decisions. But that would be to adopt a view of fairness and equal treatment that undermines religious exercise and diminishes the ability of faith-based organizations to serve in our society.

Religious hiring by religious organizations is an important aspect of the equal treatment of organizations: political organizations must be able to screen potential employees on the basis of their political convictions, and religious organizations by religious commitments. And religious hiring by religious organizations is an important aspect of fairness in our society, making it possible for some organizations to provide a faith-shaped employment setting for those who seek it, just as those without such a preference are able to choose from a wide range of employment settings where religion is not an employment criterion.

The Administration is continually being urged to reduce religious freedom in the name of preventing religious freedom from being "misused to permit discrimination," as the Representatives' letter puts it. But it is no gain for society if the freedom of religious organizations to select only staff compatible with their missions and identity is curtailed. This is a misuse of the concept "discrimination" and it can only diminish—discriminate against—religious organizations.

We urge you to reject the plea in the Representatives' letter and to uphold the OLC memorandum and religious hiring by religious organizations.

Sincerely,

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

Anthony R. Picarello, Jr., Associate General Secretary & General Counsel, U.S. Conference of Catholic Bishops

Nathan Diament, Executive Director for Public Policy, Union of Orthodox Jewish Congregations of America

David Nammo, CEO & Executive Director, Christian Legal Society

Galen Carey, Vice President and Director of Government Affairs, National Association of Evangelicals

Richard Stearns, President, World Vision U.S.

Attachments

cc The Honorable John Conyers, Jr.

The Honorable Steve Cohen  
The Honorable Robert C. “Bobby” Scott  
The Honorable Jerrold Nadler  
The Honorable Bob Goodlatte  
The Honorable Trent Franks  
The Honorable Darrell Issa  
The Honorable Trey Gowdy  
The Honorable Jim Sensenbrenner  
The Honorable Tom Marino  
The Honorable Peter J. Kadzik  
Melissa Rogers, Executive Director, White House Office of Faith-Based and  
Neighborhood Partnerships