



Douglas Laycock

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February 23, 2016

The Honorable Loretta E. Lynch  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Dear Attorney General Lynch,

Various interest groups have repeatedly asked your office to withdraw the Office of Legal Counsel's Memorandum on the Religious Freedom Restoration Act, dated June 29, 2007. Your office has repeatedly declined to do so, and for good reason. Now the request comes from respected Members of Congress, but the response should be the same. The Memorandum is sound and should be retained.

I enclose my letter to Attorney General Holder, dated November 13, 2009 and responding to the first such request. What RFRA meant then, it means now. What OLC said about it in 2007, and what I said about it in 2009, remains accurate today.

Unlike the earlier interest groups, the Members of Congress make a bit of an argument, suggesting that allowing federal grantees and contractors to follow faith-based hiring principles burdens third parties. Such arguments would defeat a RFRA claim if restricting faith-based hiring serves a compelling government interest by the least restrictive means. It does not.

OLC concluded that there is no compelling government interest, because federal law does not generally prohibit religious discrimination by religious organizations, even in federally funded contexts. Its focus was on hiring on the basis of religion as such, but its point has even more force with respect to hiring on the basis of compliance with a religious organization's moral teachings. No federal statute prohibits discrimination on the basis of sexual orientation or non-marital sexual behavior in the private sector.

There is no compelling interest here for the more fundamental reason that those who seek to work for a religious organization have not been harmed or burdened in a legally cognizable way. There can be no right to be hired to do the work of a religious organization without supporting the organization's

religious tenets; any such right would be fundamentally at odds with the right of religious organizations to control their own identity and teachings.

Cases in which a federal contractor is unwilling to provide the contracted services to beneficiaries of the program are more likely to present a compelling government interest. But those issues must be dealt with case by case, and the government must prove its compelling interest. The potential for such cases is no reason to withdraw the OLC Memorandum, which does not even address such issues.

I am no RFRA absolutist; I just filed a brief in support of the government's position in *Zubik v. Burwell*. But I do take RFRA seriously. What is at issue here is government using the power of the purse to bludgeon religious organizations into surrendering their religious commitments. That would be a profound violation of religious liberty, which your office has wisely refused to authorize. You should not authorize it now.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas Laycock". The signature is written in dark ink and includes a stylized flourish at the end.

Douglas Laycock