

July 12, 2011

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

Re: Maintaining Religious Hiring Rights of Faith-Based Contractors

Dear Mr. President:

As leaders of faith-based service organizations, religious freedom advocates, and people of faith, we commend your steadfast preservation of federal policies that protect the freedom of religious organizations to consider religion in making employment decisions. This freedom maintains an appropriate separation between government and the self-governance of religious institutions, respects the core American value of religious freedom, fosters fruitful partnerships to the benefit of underprivileged persons and society at large, enhances religious diversity in the public square, and respects the balance codified by Congress almost 50 years ago in the Civil Rights Act of 1964.

In several public letters to you or Attorney General Holder, the most recent dated June 21, 2011, the Coalition Against Religious Discrimination (CARD) has called upon you to withdraw or overturn various federal policy instruments that support the participation in federally funded programs by religious organizations that exercise their basic freedom to consider religion when hiring. But CARD's opposition to the traditional right of religious groups to hire according to their religious beliefs is misguided and misleading on several counts.

Contrary to CARD's unsupported allegations,

- religious hiring by religious organizations in the context of government funding simply allows religious organizations to do what secular organizations do while receiving government funding: employ persons who agree with the organizations' mission;
- by clarifying that religious organizations that engage in religious staffing are eligible for government contracts, Executive Order 13279 upholds fundamental civil rights principles by eschewing the discrimination against religious organizations that would result if religious groups were denied eligibility to compete for federal contracts because they maintain their religious identity in their staffing decisions;
- the Office of Legal Counsel's June 29, 2007, memo ("OLC memorandum")¹ correctly interpreted the Religious Freedom Restoration Act to protect faith-based organizations' staffing decisions in the context of federal grants from federal programs; and

¹ Office of Legal Counsel, U.S. Department of Justice, "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); <http://www.justice.gov/archive/fbci/index.html>.

- religious organizations that receive government funds, whether via contract or grant, are not thereby rendered state actors.

Religious organizations maintain a variety of policies and views concerning the relevance of religion as a criterion in making employment decisions. An incoming federal administration selects staff and appointees based upon political convictions and commitment to the administration's principles. And religious entities necessarily pay attention to the "fit" between their religious convictions and practices and potential employees' views and conduct. Even groups like the Sierra Club, Planned Parenthood, and a host of other groups across the ideological and political spectrum routinely select employees based on their political, ideological, or social convictions. Religious groups employ a similar, but much more fundamentally important, practice when they insist on shared religious viewpoints.

This is why when, at the height of the Civil Rights Era, Congress set out the federal non-discrimination standards for private employers in Title VII of the Civil Rights Act of 1964 and its modification in 1972, religious hiring by religious organizations was specifically not labeled to be illegal job discrimination. Nor does Title VII provide that religious hiring by religious organizations suddenly becomes illegal discrimination if government funds are involved. (Indeed, Title VI, which sets out the conditions that apply to private organizations that receive federal funds, pointedly does not name "religion" as one of the forbidden selection criteria).

Religious hiring by religious organizations is not a deviation from the great civil rights legacy of the United States but rather a distinctive and vital feature of it—vital because it protects the religious freedom of religious organizations. And religious organizations are a vital means by which religious individuals exercise their religious faith. To deny religious organizations the ability to be distinctively religious is to deny millions of Americans their unique religious voice. Religious diversity is enhanced when religious groups speak in distinctive religious voices, rather than in a coerced monotone.

Neither is it the case that private religious organizations are transformed by some constitutional alchemy into state actors simply by accepting a government grant or contract. The courts have repeatedly declared the opposite.² In the most recent federal decision, *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005), the contested employment decisions were in social services almost totally funded by federal, state, or municipal funds. The federal judge pointed out that the statutes each included an explicit exemption permitting religious staffing decisions, held that such religious exemptions did not violate the Establishment Clause, and declared that "the Salvation Army is not a state actor" (*Id.* at 226, 255). Executive Order 13279 acknowledges this logic: because religious hiring by religious organizations is not illegal, the rules that apply to federal contractors ought not to exclude religious organizations because of their religious hiring practices.

Similarly, the OLC memorandum does not, as alleged by CARD,³ "provide[] for a blanket override of statutory nondiscrimination provisions." Rather, the OLC memorandum simply recognizes that the Religious Freedom Restoration Act's broad scope necessarily covers the context of

² Citations and discussion in C. Esbeck, S. Carlson-Thies, and R. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Center for Public Justice, 2004), 34-39.

³ September 17, 2009, letter to Attorney General Holder.

federally-funded programs. The OLC memo affirms that, faced with a statutory ban on religious staffing in a particular federal program, a religious organization has the opportunity to demonstrate that abandonment of its religious staffing practices in order to participate in the program wrongfully imposes on it a “substantial burden” that the government need not — and should not — impose.

As in its prior letter, the latest CARD letter fails to provide any substantive reason why this should be regarded as a misinterpretation of RFRA. As leading church-state expert Douglas Laycock (University of Virginia Law School) noted in his public letter to the Attorney General in response to the earlier CARD letter, “The letter urging you to withdraw the Memorandum makes no argument at all. The letter simply asserts, repeatedly but without explanation, that the OLC Memorandum is erroneous, unreasonable, and far-fetched.” In contrast, Professor Laycock provides a legal analysis that upholds the OLC memo, and concludes that “the OLC’s analysis is perfectly sound” and that the memo “should not be withdrawn.”⁴ As Professor Laycock explains:

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.

Mr. President, your appreciation for the good that religious organizations contribute on a daily basis to our society is evident, and we ask that your Administration maintain its steadfast commitment to religious freedom.

As the history and specific provisions of Title VII demonstrate, the freedom of religious organizations to hire on a religious basis is not a deviation from, but rather a valued and important dimension of, our honored civil rights heritage. And yet, even if CARD were correct that there is a civil rights history and imperative that is separate from our nation’s glorious commitment to religious freedom, religious freedom and other civil rights should not be pitted against each other. Existing religious exemptions that enable religious organizations that staff by religion to accept federally-funded contracts and grants is the way to maintain a commitment both to employment non-discrimination and to the First Amendment’s religious freedom guarantee.

We commend you and your Administration for maintaining current federal law and policy so as not to put new barriers in the way of religious organizations that wish to assist the federal government in the greatly needed “all hands” battle against poverty, illness, addiction, and other challenges.

Sincerely,

Stanley Carlson-Thies, President, Institutional Religious Freedom Alliance

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

⁴ Douglas Laycock, Nov. 13, 2009, letter to Attorney General Eric Holder.

Jim Wallis, President and CEO, Sojourners

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

Dr. Richard Land, President, The Ethics & Religious Liberty Commission, Southern Baptist
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John Ashmen, President, Association of Gospel Rescue Missions

Dan Busby, President, Evangelical Council for Financial Accountability

Rev. Larry Snyder, President, Catholic Charities USA

Ron Sider, President, Evangelicals for Social Action

Paul R. Corts, President, Council for Christian College & Universities

The Reverend Luis Cortes, Jr, Esperanza

Pat Nolan, Vice President, Prison Fellowship

Jim Daly, President and CEO, Focus on the Family

Leith Anderson, President, National Association of Evangelicals

Rev. Samuel Rodriguez, President, National Hispanic Christian Leadership Conference/
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Dennis Rapps, Esq., Executive Director and General Counsel, National Jewish Commission on
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Fred L. Potter, CEO, Christian Legal Society

Stephan J. Bauman, President & CEO, World Relief

Dave Evans, US President; Keith Wright, International President; Food for the Hungry

Dr. Wesley Stafford, President, Compassion International

Richard Stearns, President, World Vision (US)

Jay H. Van Groningen, Executive Director, Communities First Association

Jeff Littlejohn, Executive Director, Imagine NW!

Jim Palmer, President, Orange County Rescue Mission

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cc: Eric H. Holder, Jr., Attorney General
Virginia Seitz, Assistant Attorney General, Office of Legal Counsel
Joshua DuBois, Executive Director, White House Office of Faith-Based and
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