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May 11, 2016

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

Thank you for your Administration's ongoing efforts to protect Americans' civil rights. In that spirit, I am writing to respectfully request your consideration of two items. First, I request that you to direct the Department of Justice to review and repeal the June 29, 2007 Office of Legal Counsel memo from the Department of Justice, permitting the Religious Freedom Restoration Act (RFRA) to override statutory nondiscrimination provisions (the "OLC Memo"). Second, I write to request that your Administration work diligently to oppose language that was adopted in the House Armed Services Committee's mark up of the Fiscal Year 2017 National Defense Authorization Act that would have the effect of codifying and expanding the discrimination permissible under the OLC memo.

There is no dispute that churches and religious institutions have the right to hire co-religionists with their own private funds when carrying out the religious mission of their faith. However, when administering a federal social service grant and using federal dollars, collected from the taxpayers of differing beliefs, we have historically recognized the need for civil rights protections to reject religious discrimination in the use of these funds. Both the Bush-era OLC memo and your administration turn the clock back on that progress.

2007 OLC Memo Permitting Discrimination

On April 10, 2014, you spoke eloquently at the Lyndon B. Johnson Presidential Library in Austin, Texas, celebrating President Johnson's commitment to securing civil rights protection for all Americans. You stated that "the presidency ... affords a unique opportunity to bend those currents -- by shaping our laws and by shaping our debates; by working within the confines of the world as it is, but also by reimagining the world as it should be."

The OLC memo incorrectly concludes that RFRA can be “reasonably construed” to exempt a faith-based grantee from an explicit federal nondiscrimination provision tied to a federally funded grant program. As a result of this interpretation, employment discrimination on the basis of religious beliefs -- which, as we have seen, can act as a cover for discrimination on the basis of race, sex, sexual orientation, and gender identity – is permitted in federal grant programs like those funded under the Juvenile Justice and Delinquency Prevention Act (JJDP)¹, Head Start, the Workforce Innovation and Opportunity Act (WIOA), the Violence Against Women Act (VAWA), National Service programs, and the Substance Abuse Mental Health Services Act (SAMHSA), despite explicit language prohibiting such discrimination. The Bush-era OLC memo was affirmed on April 9, 2014 when the Department of Justice issued an FAQ indicating that the RFRA can be used to undermine the plain language of the non-discrimination provision added to VAWA when the law was reauthorized last Congress.²

In response to your Administration’s position, 90 religious, educational, civil rights, and civil liberties groups contacted then-Attorney General Eric Holder between September 2009 and June 2014 requesting that he review and withdraw the 2007 OLC memo. Despite these letters, critical editorials from the *New York Times* and the *Los Angeles Times*, and my repeated requests, the 2007 OLC memo remains in effect. Indeed, as a result of the OLC memo’s interpretation of RFRA and your administration’s continued support for it, we are seeing efforts in Congress to codify and to broaden its scope. This further endangers and erodes long held civil rights protections prohibiting discrimination in federal contracts.

Expansion of Discrimination in the FY17 National Defense Authorization Act

Last week, the OLC memo’s reach was extended by an amendment to the Fiscal Year 2017 National Defense Authorization Act (NDAA) offered by Congressman Russell of Oklahoma. The adopted amendment has the effect of authorizing discrimination by religious organizations who receive any Federal “contract, subcontract, grant, purchase order or a cooperative agreement.” Further, this amendment even extends to the Americans with Disabilities Act (ADA), a law that was not covered by the 2007 OLC memo interpretation. I have a hard time comprehending why a religious entity might want or need to discriminate on the basis of disability.

¹ Memorandum Opinion of Deputy Ass’t Att’y Gen’l John P. Elwood for the General Counsel, Office of Justice Programs, Regarding Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, June 19, 2007, available at <http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf>

² Department of Justice Frequently Asked Questions on Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013, April 9, 2014, available <http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>

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Unlike the OLC memo, which applies only to grants, the Russell amendment extends the OLC memo's sanction of employment discrimination to all types of procurement using federal dollars. In sum, this amendment is a major rollback of President Roosevelt's and President Johnson's executive orders banning discrimination in employment by entities that receive taxpayer funds, and stands in stark contrast to your speech on Faith in America delivered on July 1, 2008 in Zanesville, Ohio. You stated:

"If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them – or against the people you hire – on the basis of their religion."

Religious freedom is one of our most cherished values – one enshrined in the First Amendment in the U.S. Constitution. However, the Russell amendment, which codifies and broadens the reach of the OLC Memo, would allow all entities receiving Federal dollars to discriminate in employment with the use of Federal dollars, regardless of the type of procurement.

Your leadership addressing these two matters is greatly appreciated.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member

cc.: Valerie Jarrett, Senior Advisor to the President of the United States
The Honorable Loretta E. Lynch, Attorney General of the United States