

**REQUEST FOR REVIEW AND WITHDRAWAL OF
JUNE 29, 2007 OFFICE OF LEGAL COUNSEL MEMORANDUM RE: RFRA**

September 17, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The undersigned religious, education, civil rights, labor, and health organizations are committed to protecting religious liberty, and working to do so at all levels of the government. We write today to request that you direct the Office of Legal Counsel ("OLC") to review and withdraw its June 29, 2007 Memorandum ("OLC Memo").¹ The OLC Memo's interpretation that the Religious Freedom Restoration Act of 1993² ("RFRA") provides for a blanket override of statutory nondiscrimination provisions is erroneous and threatens core civil rights and religious freedom protections.

Some of us were leaders in the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact remedial legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Div. v. Smith* in 1990.³ This effort culminated in 1993, when then-President William J. Clinton signed RFRA into law.⁴ In essence, RFRA was intended to provide robust protection of free exercise rights, restoring a standard of strict scrutiny to federal laws that substantially burden religion.⁵

Many of us also are members of the Coalition Against Religious Discrimination (CARD), which formed in the mid-1990s specifically to oppose insertion of the legislative proposal commonly known as "charitable choice" into authorizing legislation for federal social service programs. Upon taking office, the Bush Administration sought to impose "charitable choice" on nearly every federal social service program. Stymied in its legislative efforts to do so,⁶ the Administration instead issued Executive Orders and federal regulations to allow religious

¹ Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: 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).

² 42 U.S.C. § 2000bb *et seq.* (2000).

³ 494 U.S. 872 (1990).

⁴ The Coalition for the Free Exercise of Religion, chaired by the Baptist Joint Committee for Religious Liberty, also led the effort to enact the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000bb-2(4) (2000).

⁵ Although RFRA, as enacted, reached both federal and state law, the Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that application of RFRA to state and local laws was unconstitutional. The *Boerne* decision, however, did not render RFRA *per se* unconstitutional and subsequent cases demonstrate that, as applied to the federal government, RFRA remains good law. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal et al.*, 546 U.S. 418, 424 (2006).

⁶ In 2001, the Bush Administration strongly promoted legislation (H.R. 7) which would have expanded "charitable choice" to nearly all federal social service programs. The measure failed in Congress, in large part, because of the civil rights and religious liberty concerns CARD raised.

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organizations to participate directly in federal grant programs without the traditional safeguards that protect civil rights and religious liberty.

Not all statutory provisions barring religious discrimination in the workplace could be obviated by Executive Order,⁷ and the Bush Administration's attempts to repeal them in Congress were repeatedly rejected. Failing in its attempts to repeal these laws in Congress, the Administration then developed and promoted the far-fetched assertion, memorialized in the OLC Memo, that RFRA provides religious organizations a blanket exemption to these binding anti-discrimination laws.

The OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal nondiscrimination provision tied to a grant program. Although the OLC Memo's conclusion is focused on one Justice Department program, its overly-broad and questionable interpretation of RFRA has been cited by other Federal agencies and extended to other programs and grants. The guidance in the OLC Memo is not justified under applicable legal standards and threatens to tilt policy toward an unwarranted end that would damage civil rights and religious liberty.

When President Barack Obama issued Executive Order 13498, amending former President George W. Bush's Executive Order 13199 (Establishment of White House Office of Faith-Based and Community Initiatives), he underlined the importance of ensuring that partnerships between government and faith-based institutions can be created and maintained effectively while "preserving our fundamental constitutional commitments." The OLC Memo, however, stands as one of the most notable examples of the Bush Administration's attempt to impose a constitutionally questionable and unwise policy—RFRA should not be interpreted or employed as a tool for broadly overriding statutory protections against religious discrimination or to create a broad free exercise right to receive government grants without complying with applicable regulations that protect taxpayers.

We accordingly request that the Obama Administration publicly announce its intention to review the OLC Memo, and that at the end of that review, withdraw the OLC Memo and expressly disavow its erroneous interpretation of RFRA, the most significant free exercise protection of the post-*Smith* era.

Thank you in advance for your consideration of our views.

Respectfully,

African American Ministers in Action (AAMIA)
American-Arab Anti-Discrimination Committee
American Association of University Women
Asian American Justice Center (AAJC)
American Civil Liberties Union
American Federation of State, County and Municipal Employees, AFL-CIO
American Humanist Association
American Jewish Committee

⁷ Many programs – including Head Start, AmeriCorps, and those created by the Workforce Investment Act – contain specific statutory provisions barring religious discrimination that cannot be superseded by Executive Order.

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Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Bazelon Center for Mental Health Law
B'nai B'rith International
Center for Inquiry
Central Conference of American Rabbis
Disciples Justice Action Network
Equal Partners in Faith
Friends Committee on National Legislation
Interfaith Alliance
Hadassah, the Women's Zionist Organization of America
Hindu American Foundation
Human Rights Campaign
Japanese American Citizens League
Jewish Council on Public Affairs
Lambda Legal
Leadership Conference on Civil Rights
Legal Momentum
NAACP
NA'AMAT USA
National Center for Lesbian Rights
National Community Action Foundation
National Council of Jewish Women
National Council of La Raza
National Gay and Lesbian Task Force
National Education Association
National Employment Lawyers Association
National Ministries, American Baptist Churches USA
National Organization for Women
National Partnership for Women and Families
National Women's Law Center
OMB Watch
People For the American Way
The Rabbinical Assembly
Rainbow PUSH Coalition
Religious Coalition for Reproductive Choice
The Religious Action Center of Reform Judaism
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Council on Religion and Education
Texas Faith Network
Texas Freedom Network
Unitarian Universalist Association of Congregations
United Church of Christ Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
Women of Reform Judaism
Women's Law Project

cc: The Honorable Gregory B. Craig, White House Counsel