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"). 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

³ 494 U.S. 872 (1990).

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).

⁴² U.S.C. § 2000bb et seg.(2000).

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,

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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 for 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

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

Union for Reform Judaism

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