

The Coalition Against Religious Discrimination

June 26, 2013

Melissa Rogers
Special Assistant to the President and
Executive Director of the White House Office of
Faith-based and Neighborhood Partnerships
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Melissa:

Congratulations on your appointment as Director of the White House Office of Faith-based and Neighborhood Partnerships. Because of the many years your work has focused upon the constitutional issues surrounding the partnership between the government and faith-based organizations, we know that you are quite familiar with the Coalition Against Religious Discrimination (CARD) and our work. As you begin your tenure, we want to use this opportunity to highlight our current priorities and underline what we consider to be unfinished business for the Obama Administration in this important arena. We also want to express our desire to work closely with you and your Office to achieve effective reforms of the Faith-Based Initiative that will better protect religious freedom and civil rights.

As you know, the broad and diverse group of leading religious, civil rights, labor, health, secular, and women's organizations that make up CARD appreciate the important role religiously affiliated institutions play in addressing many of our nation's most pressing social needs, as a complement to government-funded programs; indeed, many members of CARD are directly involved in this work. Yet, we also recognize the dangers in many of the policy shifts pursued under the guise of "charitable choice" and the Faith-Based Initiative.

We care deeply about this issue and have the expertise and perspective that could contribute great value to your work in this new position. We hope to work with you on the issues discussed below, which are our top priorities.

Fully and Robustly Implement President Obama's Executive Order 13559

President Obama's Executive Order 13559,¹ which set out several "fundamental principles" to govern the partnership between the government and faith-based organizations, represents a huge step forward in protecting religious freedom, especially insofar as it protects beneficiaries. We hope to work with your Office to ensure that the Administration promptly implements these principles in a robust, clear, and uniform manner throughout each agency.

In April 2012, an Interagency Working Group, also created by Executive Order 13559, issued a Report regarding implementation of the Executive Order. CARD appreciates the many positive changes offered in the Working Group Report and recognizes that many of the proposed changes properly and effectively implement the Executive Order mandates. But we do have concerns about several areas in which we believe the Report falls short both of the demands of Executive Order 13559 and the recommendations made by the President's Advisory Council on Faith-Based and Neighborhood

¹ Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22, 2010) ("Executive Order").

Partnerships.² As the Administration moves forward in adopting regulations, guidance, and policy documents, we ask that it fully implement the Executive Order, giving agencies, beneficiaries, and providers clear and uniform rules that strongly protect religious freedom.³ In particular, we believe it is important to have exacting language in the following areas:

- the right of beneficiaries to have access to an alternative provider if they object to the religious character of a social service provider;
- the requirement that beneficiaries be informed of their rights;⁴
- the constitutional requirement that government money may not fund “explicitly religious activities” and the definition of such activities; and
- the mandate that agencies perform oversight and provide transparency to ensure that constitutional mandates are respected.⁵

End Federally Funded Employment Discrimination

Traditionally, religiously affiliated organizations that accepted government funds to provide social services were bound by the same rules as other non-religious providers, including the ban on discriminating in hiring based on religion for positions funded with taxpayer money. When the Bush Administration implemented its Faith-Based Initiative, it fundamentally changed these rules, allowing religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on nothing more than his or her religious beliefs. We strongly opposed this change, as the federal government should never subsidize workplace discrimination. During the 2008 campaign, President Obama agreed with us when he said he would restore employment protections: “[I]f 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.” The campaign then elaborated on these comments:

[Barack Obama] firmly believes in the principle of non-discrimination in our hiring laws—principles that have been on the books for over four decades. Taxpayer dollars should not be used to support hiring discrimination and religious organizations that receive federal dollars cannot discriminate with respect to hiring for government-funded social service programs—just like any other federal contractor.⁶

² Under your leadership, these recommendations were unanimously agreed upon by a religiously and politically diverse 25-member body. Its membership spanned (spans?) the ideological spectrum on fundamental constitutional and policy questions regarding the intersection of religion and government, including issues relating to federally funded faith-based social service programs.

³ Attached please find the CARD analysis, which identifies areas in the report that are inconsistent with the Executive Order and should be improved in implementation.

⁴ In a 2010 *Washington Post* piece, you described the Obama Executive Order as providing “key religious liberty mandates that had been missing” from the Bush Executive Order. These include the new requirements that “beneficiaries have a right to an alternative provider if they object to a provider’s religious character, and that beneficiaries must be given written notice of their religious liberty rights at the outset.” Melissa Rogers, *Continuity and Change: Faith-Based Partnerships under Obama and Bush*, WASH. POST, December 13, 2010, available at <<http://www.brookings.edu/research/opinions/2010/12/13-faith-based-rogers>>.

⁵ All four of these changes were also included in the recommendations made by you and E.J. Dionne in 2008. Melissa Rogers and E.J. Dionne Jr, *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*, December 2008, available at <http://www.brookings.edu/~media/research/files/papers/2008/12/religion%20dionne/12_religion_dionne.pdf>.

⁶ Q&A Concerning This Morning’s AP Story, attached.

We ask, therefore, that the Administration fulfill this promise and end taxpayer-funded employment discrimination through the actions listed below.

Rescind Regulations, Policies, and Guidance that Permit Federally Funded Employment Discrimination

After Congress rejected legislation⁷ that would have sanctioned employment discrimination in most federally funded social service programs, the Bush Administration implemented that policy through executive orders and regulations across federal agencies. These remain in place today. In order to effectuate the promise of ending federally funded employment discrimination, the Administration must revoke the executive orders and regulations and any accompanying or supporting policies and guidance documents.

Review and Withdraw the June 29, 2007, Office of Legal Counsel Memorandum re: RFRA

The White House should direct the Justice Department’s Office of Legal Counsel (OLC) to review and withdraw its June 29, 2007, Memorandum interpreting the Religious Freedom Restoration Act of 1993 (RFRA), titled “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act.” The OLC memo wrongly asserts that RFRA is “reasonably construed” to *require* that a federal agency categorically exempt religious organizations from explicit federal nondiscrimination provisions tied to grant programs. This interpretation of RFRA, which provides for a blanket override of statutory religious nondiscrimination provisions, is not justified under applicable legal standards and threatens core civil rights and religious freedom protections. Accordingly, CARD renews its request for the review and withdrawal of this OLC memo.⁸

Restore Executive Order 11246

Executive Order 11246⁹ prohibits religious discrimination in all government contracts. This Executive Order, signed by President Lyndon B. Johnson in 1965, expanded upon decades of executive orders signed by Presidents Roosevelt, Truman, Eisenhower, and Kennedy, which barred private organizations from discriminating in hiring using federal funds. Yet, in 2002, President George W. Bush rolled back these traditional safeguards and core civil rights protections. Section 4(c) of Executive Order 13279¹⁰ exempts religious organizations that receive government contracts from the requirements of Executive Order 11246 and allows them to discriminate in hiring based on religion.¹¹

This civil rights rollback remains in place today. We ask, therefore, that the Administration restore Executive Order 11246 to its original form, reinstating the nondiscrimination provision for all organizations that contract with the government.

We appreciate your consideration of our concerns and interests. We sincerely hope to work on these issues with you and we look forward to renewed cooperation and openness as the Administration moves forward with reforms to the Faith-Based Initiative.

⁷ The Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001).

⁸ In September 2009, 58 organizations wrote the Obama Administration urging it to review and withdraw this OLC Memo. The letter is attached.

⁹ Exec. Order No. 11,246, 30 F.R. 12,319 (Sept. 28, 1965).

¹⁰ Exec. Order No. 13,279, 67 F.R. 77,141 (Dec. 16, 2002).

¹¹ On the 70th anniversary of Executive Order 8802, which was the first to prohibit government contractors from engaging in employment discrimination, 52 organizations wrote to President Obama asking him to reinstate Executive Order 11246. That letter is attached.

Sincerely,

African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union
American Humanist Association
American Jewish Committee (AJC)
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Catholics for Choice
Center for Inquiry
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hadassah, The Women's Zionist Organization of America, Inc.
Human Rights Campaign
Hindu American Foundation
Institute for Science and Human Values, Inc.
Interfaith Alliance
Jewish Council for Public Affairs
Lawyers' Committee for Civil Rights Under Law
Military Association of Atheists & Freethinkers
NAACP
National Council of Jewish Women
National Education Association
National Organization for Women
People For the American Way
Protestant Justice Action
Secular Coalition for America
Texas Freedom Network
Union for Reform Judaism
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society