



AMERICAN ATHEISTS

December 17, 2018

U.S. Commission on Civil Rights
National Place Building
1331 Pennsylvania Ave., NW
11th Floor, Suite 1150
Washington, DC 20425

Re: Comments Regarding Public Briefing on “Are Rights a Reality? Evaluating Federal Civil Rights Enforcement.” (Doc. No. 2018-22963)

Dear Madam or Sir:

American Atheists and the undersigned organizations representing the secular community, including atheists, agnostics, humanists, and the religiously unaffiliated, as well as all Americans who value true religious freedom and equality, write to provide comments pursuant to the U.S. Commission on Civil Rights briefing held on November 2, 2018. Focusing on Fiscal Years 2016 through 2018, the Commission seeks to evaluate key elements for civil rights enforcement, including:

- Whether agencies have sufficient resources to fulfill enforcement responsibilities; and
- Whether the federal government is satisfying its obligation to protect and vindicate civil rights in areas such as education, housing, healthcare, employment, and policing.

We write to raise serious concerns about the enforcement of civil rights laws and the manner in which religious equality has been undermined. The federal government is not satisfying its obligation to protect and vindicate civil rights in areas such as education, housing, healthcare, employment, and policing. Moreover, the Trump Administration has made a concerted effort to expand religious exemptions that can favor one religious group over others, undermining the civil rights of all Americans.

1. The Administration has misapplied legal precedent and made spurious legal arguments in order to undermine civil rights enforcement.

In several prominent civil rights cases, the Administration has taken shockingly inappropriate legal positions which serve only to undermine enforcement and the very foundation of civil rights law. For example, in the *Masterpiece Cakeshop*¹ case, the Administration argued that the Free Speech guarantees of the First Amendment override well-established non-discrimination protections so long as the conduct can be described as expressive,² a proposition which contravenes 50 years of precedent.³ Of

¹ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

² Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018) (No. 16-111).

³ See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

course, such a broad exception to civil rights laws would fatally undermine them – nearly any activity can be described as “expressive” with good lawyering.

In another example, in a brief submitted on the issue of whether the Supreme Court should review a 6th Circuit Court of Appeals ruling regarding discrimination against a transgender person,⁴ the Administration went out of its way to argue that transgender people should not be included within the scope of federal civil rights laws.⁵ This argument was made despite the opposing position of the Equal Employment Opportunities Commission (EEOC), the landmark decisions by EEOC on this very issue,⁶ and the overwhelming majority of relevant Circuit Court holdings. Not only is this position legally untenable,⁷ it serves only to exclude one of the most marginalized and vulnerable of minorities from well-established civil rights protection.

Moreover, the Administration has an unfortunate record of misstating or overstating various legal holdings in order to undermine civil rights enforcement. For example, in a memorandum by former Attorney General Jeff Sessions on executive branch policy pertaining to religious liberty, he set forth a number of dubious legal pronouncements which far exceed precedential support.⁸ For example, the memo requires religious exceptions to be applied broadly to corporations, requires the presumption that any sincerely held religious belief is valid, professes that only the entity seeking a religious exception can weigh the burden on their religious exercise, and questions whether prohibiting discrimination on bases other than race is a compelling government interest.

In another distressing example, the Administration has sought to revise various agencies’ regulations on grant and contract awards to religious organizations in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a 2017 Supreme Court decision which was expressly limited to discrimination based on religious identity with respect to playground resurfacing.⁹ Despite the limited applicability and relevance of this decision, the administration has repeatedly misapplied the case to justify special dispensation and regulatory exemptions for religious organizations.¹⁰

2. The Administration is attempting to manufacture inappropriate, overly broad, and often unconstitutional exemptions into civil rights laws, thereby undermining religious freedom.

In defiance of statutory authority and the U.S. Constitution, the Trump Administration has sought to insert overly broad religious exemptions into regulations implementing civil rights laws, in order to

⁴ *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424 (6th Cir. 2018).

⁵ Brief for the Federal Respondent in Opposition, Petition for Certiorari, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (U.S. Oct. 24, 2018) (No. 18-107).

⁶ See, e.g., *Macy v. Holder*, Appeal No. 0120120821 (U.S. Equal Employment Opportunity Commission, Apr. 20, 2012); *Lusardi v. McHugh*, Appeal No. 0120133395 (U.S. Equal Employment Opportunity Commission, Apr. 1, 2015).

⁷ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 16-2424 (6th Cir. 2018).

⁸ Federal Law Protections for Religious Liberty, Office of the Attorney General (Oct. 6, 2017).

⁹ 137 S. Ct. 2012, Footnote 3 (2017).

¹⁰ See, e.g., FEMA, Public Assistance Program and Policy Guide, FP-104-009-2 (January 2018). Available at https://www.fema.gov/media-library-data/1515614675577-be7fd5e0cac814441c313882924c5c0a/PAPPG_V3_508_FINAL.pdf.

enshrine particular religious viewpoints into the law. Unconcerned with lack of legal precedent, statutory language, or historical implementation, various agencies have proposed and adopted sweeping regulatory changes which align with those sought by Christian supremacists. In just a few examples:

- A. The Department of Health and Human Services proposed regulations¹¹ pertaining to “Protecting Statutory Conscience Rights in Health Care” that go far beyond the limited statutory religious exemptions created by federal law. These rules would provide protection for religious conduct based on a specific set of beliefs and undermine the religious liberty of others, thereby threatening the safety, health, and well-being of millions of Americans. If adopted, these proposed rules will undoubtedly lead to increased discrimination and denials of care for vulnerable people across our nation. Notably, the proposed rules seek to wrap vaguely defined religious exemptions in the language of civil rights protections in order to bootstrap to them well-developed legal doctrines, such as the doctrine of disparate impact.
- B. The Department of Health and Human Services proposed regulations¹² pertaining to Title X family planning programs¹³ which would undermine religious freedom by giving preference to religious organizations in the distribution of federal funds and unconstitutionally infringe on First Amendment freedom of speech. The proposed rules would prevent providers from discussing abortion as an option or medically necessary procedure, blocking access for low-income and minority women to reproductive care. Inhibiting the ability of providers to refer patients for reproductive services and actively working to confuse them with referral lists that do not indicate whether a provider performs abortions—even when explicitly requested—only complicates the patient’s ability to make a fully informed decision surrounding a pregnancy. Disturbingly, these rules also seek to “promote grantee diversity” by shifting funding to religious entities that have previously been ineligible to receive Title X funds because they refuse to inform patients of their full range of medical options, or refuse to refer patients for requested, or even medically necessary, procedures.¹⁴
- C. The Department of Labor issued a directive,¹⁵ and signified the department’s intent to regulate, to expand religious exemptions to non-discrimination protections pertaining to federal contractors. Relying upon blatant mischaracterizations of recent Supreme Court decisions, the department seeks to allow religious contractors to not only discriminate to prefer co-religionists in employment, but to discriminate on other protected bases due to religious belief. Despite the Administration’s framing, there have been no court rulings which directly require this broader exemption. Currently, this policy change will have the greatest impact on LGBTQ communities,

¹¹ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88).

¹² Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502 (Health & Human Servs. Dep’t proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59).

¹³ Population Research and Voluntary Family Planning Programs, Public Law 91-572.

¹⁴ See, e.g., Colliver, Victoria. “Anti-abortion clinics tapping into federal funds under Trump.” Politico, 16 Dec. 2018. Available at https://www.politico.com/story/2018/12/16/abortion-pregnancy-centers-planned-parenthood-1007765?mc_cid=280c3d439a&mc_eid=143799cf2e.

¹⁵ U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-03 (10 Aug. 2018).

but it also presages how the Trump Administration may move to interpret other federal civil rights laws, such as Title VII, which shares similar religious exception language.

At the same time, the Administration seems unconcerned about the effects such broad exemptions for religious organizations and religious beliefs would have on the health, welfare, or religious freedom of third parties. Instead, the Administration has gone out of its way to scrap basic accommodations for beneficiaries. For example, President Trump withdrew the following referral protections from the executive order establishing faith-based programs:

(h)(i) Referral to an Alternative Provider. If a beneficiary or prospective beneficiary of a social service program supported by Federal financial assistance objects to the religious character of an organization that provides services under the program, that organization shall, within a reasonable time after the date of the objection, refer the beneficiary to an alternative provider.

(ii) Agency Responsibilities. Each agency responsible for administering a social service program or supporting a social service program with Federal financial assistance shall establish policies and procedures designed to ensure that (1) appropriate and timely referrals are made to an alternative provider; (2) all referrals are made in a manner consistent with all applicable privacy laws and regulations; (3) the organization subject to subsection (h)(i) notifies the agency of any referral; (4) such organization has established a process for determining whether the beneficiary has contacted the alternative provider; and (5) each beneficiary of a social service program receives written notice of the protections set forth in this subsection prior to enrolling in or receiving services from such program.¹⁶

The Attorney General's 2017 memorandum makes clear that "the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable," and it lays out a test that looks only at whether the government could have used another, less restrictive method to achieve its aims.¹⁷ The Constitution, however, requires a much different analysis.

The Establishment Clause of the First Amendment and federal law require the government to consider the impact any accommodation or religious exemption for religious health care providers would have on third parties. Specifically, the Constitution bars the federal government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.¹⁸ The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"¹⁹ "impose unjustified burdens on other[s];"²⁰ or have a "detrimental effect on any third party."²¹

¹⁶ Text removed from Exec. Order 13279 (Sec. 2(h)) by Exec. Order 13831 (May 3, 2018).

¹⁷ Federal Law Protections for Religious Liberty (2017).

¹⁸ U.S. Const. amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

¹⁹ *Cutter v. Wilkinson*, 544 U.S. at 722.

²⁰ *Id.* at 726.

²¹ *Id.* at 720, 722; See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests...contravenes a fundamental

As described above, many of the regulations and policies proposed or implemented by this Administration unjustifiably expand the limited religious exemptions created by Congress or required by the Constitution in ways which are grievously harmful to third parties. Allowing particular religious entities to act with governmental funding and support, while asserting rights and immunities which trample over the freedoms of others, is exactly the sort of harm which the Establishment Clause was intended to prevent.

3. The Administration eschews its enforcement obligations to pursue an agenda to undermine civil rights and favor particular religious viewpoints.

Unfortunately, this Administration spends its time and resources to actively undermine, rather than to enforce, civil rights laws. At the expense of its duty to enforce existing civil rights laws, the Administration pursues an agenda opposed, or at best indifferent, to civil rights at the behest of those who would see a particular religious viewpoint enshrined into the law. For example, the Administration has:

- Failed to oppose, or even corroborated with, lower court rulings misapplying federal law to undermine civil rights protections.²²
- Unilaterally withdrawn from ongoing court cases that seek to enforce civil rights laws which the Administration opposes politically.²³
- Dismissed hundreds of civil rights cases without a legal basis for doing so, in the name of expediency.²⁴
- Acted in an unprecedented manner to actively oppose the Equal Employment Opportunity Commission's stances on civil rights enforcement.²⁵

principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

²² See, e.g., Barnes, Robert. "In major Supreme Court case, Justice Dept. sides with baker who refused to make wedding cake for gay couple." The Washington Post, Washington, DC, 9 Sep. 2017. Available at https://www.washingtonpost.com/politics/courts_law/in-major-supreme-court-case-justice-dept-sides-with-baker-who-refused-to-make-wedding-cake-for-gay-couple/2017/09/07/fb84f116-93f0-11e7-89fa-bb822a46da5b_story.html?utm_term=.66d6f5befc8a; Pear, Robert. "Trump Plan Would Cut Back Health Care Protections for Transgender People." The New York Times, New York, NY, 21 Apr. 2018. Available at <https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html>.

²³ See, e.g., Berman, Mark. "Justice Dept. drops federal lawsuit over North Carolina's 'bathroom bill.'" The Washington Post, Washington, DC, 14 Apr. 2017. Available at https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/?noredirect=on&utm_term=.666e3eb8b898.

²⁴ See, e.g., "DeVos Education Dept. Begins Dismissing Civil Rights Cases in the Name of Efficiency." The New York Times, New York, NY, 20 Apr. 2018. Available at <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>.

²⁵ See, e.g., Kittaka, Mark. "Sexual Orientation: DOJ and EEOC Take Opposite Positions in Amicus Briefs Filed in Same Case." BT Currents, 8 Aug. 2017. Available at <http://www.btcurrentsemployment.com/sexual-orientation-doj-and-eec-take-opposite-positions-in-amicus-briefs-filed-in-same-case/>.

- Removed information about existing civil rights protections from federal websites, particularly materials relating to disfavored minority populations and materials in diverse languages for non-English speakers.²⁶
- Unilaterally withdrawn policy guidance for federal recipients regarding enforcement of civil rights laws.²⁷
- Created new federal offices entirely designed to allow individuals and institutions to evade civil rights laws through expansive religious exemptions, to the harm of beneficiaries.²⁸
- Ceased investigation of systemic civil rights abuses, which are essential to reveal institutional bias against minority populations.²⁹
- Appointed officials ideologically opposed to the civil rights laws they are charged with enforcing.³⁰
- Engaged in a campaign of misallocation of funding to stop civil rights enforcement and reassignment or elimination of staff charged with civil rights enforcement.³¹

²⁶ See, e.g., “Trump administration still has no Spanish-language content on White House website.” Associated Press, 11 Feb. 2018. Available at <https://pix11.com/2018/02/11/trump-administration-still-has-no-spanish-language-content-on-white-house-website/>; Toosi, Nahal. “State Department report will trim language on women’s rights, discrimination.” Politico, 21 Feb. 2018. Available at

<https://www.politico.com/story/2018/02/21/department-women-rights-abortion-420361>; Firth, Shannon. “HHS Website Loses Wording on Sex Discrimination.” Medpage Today, 23 Jul. 2018. Available at <https://www.medpagetoday.com/publichealthpolicy/healthpolicy/74178>.

²⁷ See, e.g., Somashekhar S, Brown E, and Balingit M. “Trump administration rolls back protections for transgender students.” The Washington Post, Washington, DC, 22 Feb. 2017, Available at

https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.6d9335fb9f37; Anderson, Nick and Balingit, Moriah. “Trump Administration moves to rescind Obama-era guidance on race in admissions.” The Washington Post, Washington, DC, 3 Jul. 2018. Available at https://www.washingtonpost.com/local/education/trump-administration-moves-to-rescind-obama-era-guidance-on-race-in-admissions/2018/07/03/78210e9e-7ed8-11e8-bb6b-c1cb691f1402_story.html?utm_term=.2a4dd9fad37.

²⁸ See, e.g., Huetteman, Emmarie. “At New Health Office, ‘Civil Rights’ Means Doctor’s Right to Say No to Patients.” Kaiser Health News, 5 Mar. 2018. Available at <https://khn.org/news/at-new-health-office-civil-rights-means-doctors-right-to-say-no-to-patients/>.

²⁹ See, e.g., Meckler, Laura. “How do you enforce civil rights? Under Betsy DeVos, a stark shift in approach.” The Washington Post, Washington, DC, 30 Jul. 2018. Available at https://www.washingtonpost.com/local/education/how-do-you-enforce-civil-rights-under-betsy-devos-a-stark-shift-in-approach/2018/07/30/0ebf6e3e-8eb2-11e8-bcd5-9d911c784c38_story.html?utm_term=.45cdb0d3894d.

³⁰ See, e.g., Taylor, Jeff. “Jeff Sessions is installing ‘religious freedom’ czars in every U.S. Attorney’s office.” LGBTQ Nation, 7 Feb. 2018. Available at <https://www.lgbtqnation.com/2018/02/jeff-sessions-installing-religious-freedom-czars-every-u-s-attorneys-office/>; Kodjak, Alison. “Civil Rights Chief at HHS Defends the Right to Refuse Care on Religious Grounds.” NPR, 20 Mar. 2018. Available at <https://www.npr.org/sections/health-shots/2018/03/20/591833000/civil-rights-chief-at-hhs-defends-the-right-to-refuse-care-on-religious-grounds>.

³¹ See, e.g., Eilperin J, Brown E, and Fears D. “Trump administration plans to minimize civil rights efforts in agencies.” The Washington Post, Washington, DC, 29 May 2017. Available at https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82_story.html?utm_term=.0ae2ae97bc13;

These broad and far-ranging attacks on civil rights laws, enforcement, and the very concept of a society based on legal equality cannot stand. We urge the U.S. Commission of Civil Rights to draw public attention to the systematic assault by the Trump Administration on the civil rights and equality of all Americans and to take all possible steps to stymie these activities. If you should have any questions regarding our opposition to this Administration's efforts to undermine civil rights laws, please contact Alison Gill, American Atheists Vice President for Legal and Policy, at 908.276.7300 x9 or by email at agill@atheists.org.

American Atheists
American Humanist Association
Center for Inquiry
Freedom From Religion Foundation
Secular Coalition for America
Secular Student Alliance

Rothschild, Mike. "Experts Agree that the White House Budget Will Hamper Civil Rights Efforts." Attn., 30 May 2017. Available at <https://archive.attn.com/stories/17386/experts-agree-white-house-budget-has-huge-cuts-civil-rights>.