

The Coalition Against Religious Discrimination

April 30, 2021

Melissa Rogers
Executive Director of the White House Office
of Faith-Based and Neighborhood Partnerships
Senior Director for Faith and Public Policy
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Melissa:

Congratulations on your appointment as Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships and Senior Director for Faith and Public Policy. As you return to service in the White House, the Coalition Against Religious Discrimination (CARD) would like to highlight the issues we believe are of the highest importance and express our desire to work closely with you and the Office to address them.

We appreciate the important steps already taken by the Biden administration, including the signing of Executive Order 14015, which emphasizes that partnerships must “preserv[e] our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion.” But we know there is more work to be done. This is a moment of imperative and opportunity—not only to restore the critical policies you helped institute during the Obama administration but also to adopt new ones with even more robust protections for religious freedom and civil rights.

The Coalition Against Religious Discrimination

As you know, CARD is a broad and diverse group of leading religious, civil rights, labor, health, secular, and women’s organizations that formed in the 1990s to monitor legislative and regulatory changes impacting government partnerships with religious and other nonprofit social service providers, and, in particular, to oppose government-funded religious discrimination. We have long advocated for strengthening the constitutional and legal safeguards integral to the rules governing these partnerships, and we have been actively involved in the process that has led to each iteration of the applicable regulations.

We appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation’s most pressing social needs, as a complement to government-funded programs. Faith-based organizations, like secular organizations, however, should not be allowed to take government funds and then place religious litmus tests on whom they hire, whom they serve, or what services required under the program to provide.

We look forward to working with you on the priorities we outline below.

Restore protections for people who use federally funded social services programs.

In 2016, CARD welcomed the Obama administration regulations that strengthened religious freedom safeguards for beneficiaries of federally funded social service programs, which were based on the consensus policy recommendations that you worked to build. To our great disappointment—and despite strong opposition from a wide range of organizations, the Trump administration stripped these religious freedom protections from the regulations and made other changes that undermine beneficiaries' rights. These regulations eliminate notice and alternative provider requirements, expand religious exemptions for providers, and redefine “indirect aid.” The Trump administration put the interests of taxpayer-funded entities, some of which receive millions of dollars each year of government money, ahead of the needs of people, often vulnerable and marginalized, seeking critical social services. The new rules make it harder for people to get the services they need and undermine the effectiveness of government-funded programs.

Accordingly, we urge the Biden administration to restore the notice and alternative provider provisions, adopt a legally accurate definition of “indirect aid,” and further strengthen safeguards in social service programs. These steps will help ensure people never face the stark choice between accessing the services they need or remaining true to their own religion or beliefs. Restoring these provisions will ensure faith-based organizations cannot take government funds and then require people they serve to participate in religious activities, place religious litmus tests on who they serve, or refuse to provide services required under the program.

End federally funded employment discrimination.

Effective government partnership with faith-based groups does not require the sanctioning of federally funded discrimination. The previous administration, however, didn't just maintain controversial policies allowing taxpayer-funded employment discrimination, but expanded them. Government-funded employers should not be allowed to impose a religious test on their applicants or employees—no one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

Restore protections for the employees of federal contractors.

Executive Order 11246 protects the employees of federal contractors against employment discrimination. Decades after the order was signed by President Lyndon Johnson, President George W. Bush added a religious exemption to allow federal contractors to discriminate “with respect to the employment of individuals of a particular religion.” This religious exemption was, and continues to be, a highly controversial and harmful policy. We urge the Biden administration to restore Executive Order 11246's protections against religious discrimination. In addition, we urge the administration to rescind the rule, “Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,” which erroneously expands how the order's religious exemption is applied.

Protect employees working in federal grant programs.

The George W. Bush administration also used executive orders, regulations, and Office of Legal Counsel (OLC) memoranda to advance policies that allow federally funded grantees to engage in employment discrimination. We urge the Biden administration to finally put an end to these discriminatory policies.

To reach that goal, the administration must request that the OLC review the memorandum opinion, “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) (OLC RFRA Memo), which misapplies the Religious Freedom Restoration Act (RFRA) to require that federal agencies exempt religious organizations from federal nondiscrimination provisions tied to grant programs. This interpretation of RFRA wrongly provides a blanket override of statutory religious nondiscrimination provisions, threatening core civil rights and religious freedom protections. The administration must also revoke the provisions in regulations that permit federal grantees to discriminate in employment on the basis of religion.

Revisit policies, guidance, opinions, memoranda, and other actions.

One of the main ways prior administrations advanced religious discrimination and other problematic policies was through the misuse of RFRA. Some of us were members of the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact RFRA; yet, we all agree RFRA was meant to be a shield to protect religious freedom, not a sword to allow discrimination against others. The government should only grant religious exemptions when they are necessary to protect religious exercise and are not part of a scheme to deny rights to others.

Two memoranda are most troubling: the OLC RFRA Memo, explained above, and the Attorney General’s memorandum on “Federal Law Protections for Religious Liberty” (Oct. 6, 2017). These memoranda wrongly assert that RFRA authorizes blanket exemptions to laws that protect against discrimination. Together, they dismiss the government’s compelling interest in enforcing prohibitions on religious employment discrimination, and even go so far as refusing to recognize the compelling interest in eradicating discrimination against protected characteristics other than race. They also fail to acknowledge the constitutional limits on the government’s ability to grant exemptions under RFRA—the Establishment Clause prohibits the government from granting religious exemptions that “impose unjustified burdens” on others (*e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005)).

The repercussions of these memoranda have been far reaching—numerous regulations, policies, guidances, certifications, directives, and exemptions issued by the Trump administration reference these two memoranda or use the same unsound analysis. For example, the Department of Health and Human Services granted an exemption under RFRA to a regulation barring discrimination, thus allowing service providers to use a religious litmus test to decide who can participate in taxpayer-funded programs. In South Carolina, this has harmed children in foster care by allowing discrimination against Catholic, Jewish, and LGBTQ families which narrows the pool of qualified adults who can help.

We urge the Biden administration to revisit the flawed analysis and conclusions in the memoranda, and to ensure they comport with the law and uphold the civil rights of everyone. The administration should also revise the numerous other policies in place that are based on the memoranda or the same misinterpretations of the law.

* * *

Each of the policies we have highlighted undermine the fundamental principle of religious freedom and could result in people losing access to critical services or facing discrimination. We urge this administration to quickly take concrete steps to restore religious freedom and signal that it rejects the misuse of this fundamental American value.

We look forward to working with you to put these principles into action and build toward a better future—one that values religious freedom and equality for all.

Sincerely,

ADL (Anti-Defamation League)
African American Ministers In Action
Alliance of Baptists
American Atheists
American Civil Liberties Union
American Conference of Cantors
American Federation of Teachers
American Humanist Association
American Jewish World Service
Americans United for Separation of Church and State
Autistic Self Advocacy Network
B'nai B'rith International
Baptist Joint Committee for Religious Liberty
Bayard Rustin Liberation Initiative
Bend the Arc: Jewish Action
Catholics for Choice
Center for American Progress
Center for Inquiry
Center for LGBTQ Economic Advancement & Research (CLEAR)
Center for Reproductive Rights
Central Conference of American Rabbis
CHANGE (Center for Health & Gender Equity)
Council for Global Equality
Disciples Center for Public Witness
Disciples Justice Action Network
Equal Partners in Faith
Equality California
Equality Federation
Family Equality
FORGE, Inc.
Freedom From Religion Foundation
GLAAD
GLBTQ Legal Advocates & Defenders (GLAD)
GLSEN
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance

Jewish Women International
Lambda Legal
The Leadership Conference on Civil and Human Rights
MAZON: A Jewish Response to Hunger
Men of Reform Judaism
Methodist Federation for Social Action
Metropolitan Community Churches, Global Justice Institute
Movement Advancement Project
Muslims for Progressive Values
NAACP
NARAL Pro-Choice America
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Churches
National Council of Jewish Women
National Education Association
National Employment Law Project
National Equality Action Team (NEAT)
National LGBTQ Task Force
National Partnership for Women & Families
National Women's Law Center
Network of Jewish Human Service Agencies
New Ways Ministry
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Presbyterian Church (USA)
Religious Coalition for Reproductive Choice
SAGE
Secular Coalition for America
SPLC Action Fund
T'ruah: The Rabbinic Call for Human Rights
Union for Reform Judaism
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
The United Methodist Church - General Board of Church and Society
Uri L'Tzedek: Orthodox Social Justice
Whitman-Walker Institute
Women of Reform Judaism
YATOM: The Jewish Foster & Adoption Network