

Coalition Against Religious Discrimination

June 18, 2010

The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

We, the undersigned members of the Coalition Against Religious Discrimination (CARD), write to request that you hold an oversight hearing in the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties to examine the current status of the Faith-Based Initiative.

As a candidate, President Obama promised to reinstate constitutionally required religious liberty protections and end federally funded religious discrimination in the Faith-Based Initiative. Yet, eighteen months after President Obama's inauguration, the White House and all the federal agencies are still operating under the same inadequate safeguards against proselytizing and insufficient constitutional protections imposed by the previous Administration.

During the Bush Administration, Mr. Chairman, you helped lead the successful congressional opposition to the insertion of statutory "charitable choice" provisions, the codification of the Bush Administration's Faith-Based Initiative, and other efforts to further entrench these provisions. We now request that your Subcommittee examine the current Administration's implementation of the Faith-Based Initiative and its failure to date to implement critically needed reforms. We recommend that a hearing examine (1) the Administration's efforts to reform the religious liberty provisions of the Faith-Based Initiative; and (2) the Administration's policy on federally funded religious discrimination, including efforts, if any, to review and repeal the flawed June 29, 2007, Office of Legal Counsel (OLC) Memorandum interpreting the Religious Freedom Restoration Act of 1993 (RFRA).

Reform of the Religious Liberty Provisions of the Faith-Based Initiative

Shortly after President Obama took office, his Administration established the President's Advisory Council on Faith-based and Neighborhood Partnerships, which, in February 2010, presented him with 12 recommendations for reforming the Faith-Based Initiative. The Council recommendations identify ways to strengthen constitutional protections against unwelcome proselytizing of program beneficiaries, to promote grantee and contractor transparency and understanding of church-state separation parameters, and to implement safeguards against excessive government entanglement with religious institutions. CARD supports the recommendations on which a consensus was reached, and has urged the Administration to promptly implement the consensus recommendations through Executive Orders and appropriate

rulemaking. Inserting these reforms into the four existing statutes containing “charitable choice” language, however, would require congressional action.

We believe that congressional oversight is urgent and necessary in this area because funds are being expended every day under rules that lack necessary constitutional protections. CARD believes that congressional oversight in this area may well encourage the Administration to more promptly implement the Council reforms. We would urge the Subcommittee to examine the Administration’s planned implementation of these recommendations, including its timeline. Witnesses on a panel examining this issue could include members of the President’s Council; White House or Administration officials tasked with implementing the reform recommendations; and Executive Director of White House Office of Faith-based and Neighborhood Partnerships, Joshua Dubois, or a senior official in the Department of Justice.

Federally Funded Religious Employment Discrimination

The Obama Administration has neither permitted the issue of federally funded religious employment discrimination to be examined and debated by its Faith-based Council, nor, to date, have we have seen any indication that the Administration has taken steps to overturn the still-in-place Bush Administration policy which permits religious discrimination in government-funded projects. Early on, Obama Administration officials asserted that a “case-by-case” analysis would be applied to determine whether a religious organization may discriminate with federal funds. The Administration, however, has never articulated the principle it applies to determine in which cases religious discrimination in a federally funded project is permissible. Moreover, it has not revealed whether it has, in fact, ever actually made such a determination, one way or another, under its policy.

Obviously, the use of such a “case-by-case” test would be harmful to the protection of civil rights, allowing for religious selectivity in federally funded projects while avoiding transparency or accountability. Furthermore, we are concerned that, until the Bush-era Executive Orders and federal regulations that officially permit such discrimination are modified they — rather than the “case-by-case” test — would actually govern the issue. Accordingly, CARD recommends that the Subcommittee question the Administration on the meaning and its implementation of the “case-by-case” test, as well as any plans it may have to meet President Obama’s campaign promise to end federally funded religious employment discrimination.

As you know, in September 2009, 58 national civil rights, religious, labor, health, and education organizations wrote to Attorney General Eric Holder to urge the Administration to review and rescind the OLC’s RFRA Memorandum. 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 result that would damage civil rights and religious liberty.

To date, there is no indication that the Administration has asked OLC to review this unfortunate, yet influential, memorandum.

While we have no desire to interfere with the ability of religious organizations to hire on the basis of religion with respect to privately funded positions, we believe that there is an urgent need for the Subcommittee to examine the Administration's position on federally funded discrimination in hiring on the basis of religion. We have seen several recent demonstrations that religious organizations that want to discriminate with federal funds are further entrenching discrimination policies into their programs. For example, World Relief, which receives about two-thirds of its funding from state and local governments, claims to have had a longstanding policy of hiring only Christians, but admits that such a policy "was never put in writing or enforced until this year." "Charity Defends Christian Only Hiring," *The Tennessean*, Bob Smietana, Mar. 31, 2010. Now, "[n]ew employees at World Relief have to prove they are Christians. They sign a statement of Christian faith and must get a letter of recommendation from their minister before being hired." *Id.*

We do not know the extent of this problem. The Subcommittee should ask the Administration for a full account of the religious organizations that it knows or has reason to believe are currently discriminating in federally funded projects.

Thank you for considering our request. We very much appreciate all of your hard work on this issue over the years and look forward to working with you on the implementation of a hearing.

Respectfully,

American Association of University Women
American Civil Liberties Union
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
B'nai B'rith International
Catholics for Choice
Center for Inquiry
Central Conference of American Rabbis
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance
Jewish Council for Public Affairs
NA'AMAT USA
National Council of Jewish Women
National Education Association

National Gay and Lesbian Task Force Action Fund
OMB Watch
People For the American Way
Secular Coalition for America
Sikh Council on Religion and Education
Union for Reform Judaism
United Methodist Church, General Board of Church and Society
Women of Reform Judaism