Congress of the United States
House of Representatives
Washington, DC 20515

February 22, 2016

The Honorable Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Lynch:

We write to follow up on your response to a question that Rep. Steve Cohen asked you during your appearance before the House Judiciary Committee on November 17, 2015 about a legal opinion that the Department of Justice's Office of Legal Counsel (OLC) issued on June 29, 2007 that raises troubling implications.[1] In our view, the opinion wrongly asserts that the federal Religious Freedom Restoration Act (RFRA) could be used to justify overriding statutory employment nondiscrimination laws governing federal grant programs. When we asked you whether you would commit to instructing OLC to undertake a review and reconsideration of this opinion, you responded that you would like to look into the matter further and get more information about it.

We are deeply concerned that the OLC opinion is being cited with increasing frequency to protect discriminatory employment practices in cases beyond the specific grant at issue in the opinion. Relying on flawed analysis, the opinion concluded that RFRA was "reasonably construed" to permit World Vision, a religiously-affiliated federal grant recipient, to refuse to hire non-coreligionists for jobs that were funded by taxpayer money even though the statute governing the grant explicitly prohibited such religious hiring discrimination. While the OLC opinion specified that its conclusion was "limited to the issuance of this grant to World Vision," it has since been used to justify hiring discrimination practices in other Justice Department programs, such as the Violence Against Women Act, and in programs run by other federal agencies.[2]

Congress intended RFRA to provide protection for religious free exercise rights, applying strict scrutiny, on a case-by-case basis, to federal laws that substantially burden religious

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[1] U.S. Dep't of Justice, Office of Legal Counsel, *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, *available at* http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf.

[2] *See, e.g.,* U.S. Dep't of Labor, *The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance*, http://www.dol.gov/oasam/grants/RFRA-Guidance.htm (last visited Dec. 17, 2015).

exercise. Congress did not intend for RFRA to create blanket exemptions to laws that protect against discrimination using taxpayer money, as the OLC opinion suggests.

Although the OLC opinion is now more than eight and half years old, it remains problematic because it continues to be cited to justify blanket exemptions to nondiscrimination provisions in federally-funded programs. Just in the last year, it has been cited to justify a number of religion-based exemptions to nondiscrimination provisions, including beyond the employment context:

- **LGBT Hiring Discrimination:** The U.S. Conference of Catholic Bishops (USCCB) cited the OLC opinion to argue that federal contractors with religious objections should be permitted to fire and refuse to hire LGBT people – in direct defiance of President Barack Obama's historic Executive Order barring such discrimination – and continue to be awarded contracts from the government.[3]

- **Refusal to Provide Government-Funded Healthcare Services:** The National Association of Evangelicals (NAE), World Vision, USCCB, and other organizations cited the OLC opinion to argue that recipients of certain federal grants are not required to provide access to reproductive health care services and referrals, as required by law, to unaccompanied immigrant minors who have suffered sexual abuse.[4]

- **Refusal to Serve Certain Patients:** The Ethics & Religious Liberty Commission of the Southern Baptist Convention, USCCB, NAE, and others cited the OLC opinion to argue that RFRA guarantees them an exemption from the provision of the Affordable Care Act that prohibits sex discrimination – a nondiscrimination provision that protects women and LGBT patients – in the provision of healthcare programs and activities.[5]

Each of these religion-based exemptions, if granted, threatens to undermine the Administration's own work in important policy areas and would seem to be contrary to the Administration's own position against discrimination in federally-funded programs. The OLC opinion appears to be at odds with these commitments.

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[3] United States Conference of Catholic Bishops (USCCB), Comments to OFCCP on Discrimination on the Basis of Sex (Mar. 30, 2015), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf.

[4] United States Conference of Catholic Bishops (USCCB), Comments on Interim Final Rule on Unaccompanied Children, 7 (Feb. 20, 2015), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/02-20-15-comments-UM.pdf.

[5] United States Conference of Catholic Bishops (USCCB), Comments to U.S. Dep't of Health and Human Servs. Office of Civil Rights on Nondiscrimination in Health Programs and Activities (Nov. 6, 2015), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf.

While we believe it is essential to safeguard religious liberty because it is a fundamental American value, we are strongly opposed to efforts to cite it as the justification for blanket exemptions that harm others.[6] RFRA was intended to be a shield to protect religious liberty, particularly for adherents of minority religions. The OLC opinion, however, has helped to turn that shield into a sword.

Directing OLC to undertake a review and reconsideration of its 2007 opinion is one of the most important steps that the Administration can take to ensure that religious liberty is not misused to permit discrimination. Failing to do so could undermine fairness and equal treatment under the law for all Americans.

Thank you for your consideration. We look forward to your response.

Sincerely,

John Conyers, Jr.
Ranking Member
Committee on the Judiciary

Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce

Steve Cohen
Ranking Member
Subcommittee on the Constitution and Civil Justice

Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet

cc: The Honorable Bob Goodlatte

[6] The Supreme Court has long recognized that a religious exemption that imposes burdens on third parties violates the First Amendment's Establishment Clause. *See* Estate of Thornton v. Caldor, 472 U.S. 703, 710-11 (1985) (holding that a Connecticut statute that gave religious employees an absolute right not work on their Sabbath violated the Establishment Clause and noting that "This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well-articulated by Judge Learned Hand: 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'") (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)); *see also* Cutter v. Wilkinson, 544 U.S. 709, 722 (2005) (upholding the Religious Land Use and Institutionalized Persons Act and distinguishing it from the Connecticut statute at issue in Estate of Thornton because the Act did not "elevate accommodation of religious observances over an institution's need to maintain order and safety" and noting that an accommodation "must be measured so that it does not override other significant interests.").

The Honorable Peter J. Kadzik