July 14, 2014

President Barack Obama
The White House
1600 Pennsylvania Avenue
Washington DC 20500

C/O Melissa Rogers, Executive Director, White House Office of Faith-based and Neighborhood Partnerships

Dear Mr. President,

As scholars of religious liberty and constitutional rights, we write to urge you to refrain from including religious exemption language in any executive order providing nondiscrimination guarantees for LGBT employees of federal contractors. Contrary to the counsel you have received from others,[1] such an exemption is not required by the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), or accommodations of religious liberty in other federal non-discrimination laws, including Title VII. Indeed, the proposed exemption would be unprecedented. Including such a provision in newly expanded rights for LGBT employees of federal contractors would at once undermine workplace equity for LGBT employees, relegate LGBT protections to a lesser status than existing prohibitions against discrimination, and allow religious employers to create or maintain discriminatory workplaces with substantial public funding.

There are several important reasons to resist the call for an exemption in this Order. First, it should be emphasized that the Supreme Court's opinion in *Hobby Lobby* and order in *Wheaton College* do not compel *in any way* the inclusion of religious exemptions language in an executive order prohibiting discrimination against LGBT employees of federal contractors. Both actions were predicated on the Court's belief that the government could fully realize its compelling goals of furthering women's health and equality through other means – because it could arrange for alternative contraception coverage for affected employees, who then would suffer no harm as a result of an employer exemption.[2] By contrast, there is no such alternative here. Exempting religious employers would harm LGBT employees and it would frustrate the Administration's compelling interests in providing equal rights and protection against employment discrimination for LGBT people, particularly in taxpayer funded situations.

[1] http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf (June 25 Letter); http://www.scribd.com/doc/232327567/Religious-Exemption-Letter-to-President-Obama (July 1 Letter).

[2] *See* Wheaton College v. Burwell, 2014 WL 3020426 at *1 (July 3, 2014) ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives."); Burwell v. Hobby Lobby Stores, Inc., 2014 WL 2921709 at *6 (June 30, 2014) ("[W]e certainly do not hold or suggest that RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby. The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.") (internal quotation marks omitted).

Second, the Court's jurisprudence, including its recent decisions under the Religious Freedom Restoration Act, in no way affect the promulgation of an executive order that establishes the conditions under which taxpayer dollars can be expended to subsidize the work of a private organization. The federal government is free to require that government contractors adhere to government standards. Religious contractors do not have a right to government contracts, and there is no burden on their religious exercise if they are unable or unwilling to comply with those requirements. When spending taxpayer dollars the government should be permitted to favor – and indeed, *should* favor – employers who do not discriminate on invidious grounds, including sexual orientation and gender identity. As with race, gender, or any other protected class, the fact that some religious employers who do not share a commitment to equal treatment will be disfavored by such a rule does not create a constitutional problem.[3]

Third, the Executive Order that currently governs religious organizations that receive federal contracts already contains an exemption[4] that is more than adequate to protect religious liberty. Patterned on an accommodation in Title VII of the Civil Rights Act of 1964,[5] it allows certain religious organizations to favor employees of their own faith. In issuing this new executive order, you should make clear that the existing exemption only permits discrimination in favor of co-religionists in hiring, not on any other basis. A recent letter to the Administration on this issue[6] misreads the relevant law in urging an inappropriately broad interpretation of Title VII's accommodation of religion. The letter states that religious organizations are free under Title VII to make a wide range of employment decisions, and to maintain a "conduct standard that reflects their religions' sincerely held beliefs, which include deep convictions about human sexuality."[7] But the letter provides no citations for this interpretation of Title VII, for a simple reason: the law does not support this reading of the religious liberty rights of private employers.

In fact, Title VII includes only narrowly drawn language that allows religious organizations to prefer people of their own faith in employment,[8] but does not excuse discrimination on the basis of race, sex, or national origin just because that discrimination happens to be motivated by religious belief. Title VII does not permit discrimination by any employer – including religious organizations – on any other prohibited ground.[9] There is no good reason to treat discrimination on the basis of LGBT status any differently from discrimination on the basis of race, sex, or national origin. This is not merely a matter of

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[3] *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (although not an employment case, *Bob Jones* upheld the IRS' authority to revoke the tax-exempt status of a university that discriminated on the basis of race in its student policies).

[4] See E.O. 11246, *available at* http://www.dol.gov/ofccp/regs/statutes/eo11246.htm.

[5] 42 U.S.C. § 2000e-1.

[6] June 25 Letter.

[7] June 25 Letter, at 1.

[8] Title VII allows certain "religious organizations" and "religious educational institutions" to prefer employment of individuals who share their religion. 42 U.S.C. § 2000e-1. *See, e.g.*, Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) (in filling theology position, university could refuse to hire individual with strong pro-choice views that were hostile to Catholic doctrine); Amos v. Corp. of Presiding Bishop, 483 U.S. 327 (1987) (holding that requiring building engineer to adhere to religious requirements of Mormon church was permissible under Title VII "religious organization" exemption and that exemption did not violate Establishment Clause).

[9] *See, e.g.,* Memo. from U.S. Ass't Att'y Gen. (2000), at 30-32 and accompanying cites, *available at* http://balkin.blogspot.com/olc.charitablechoice.pdf.

principle – it has enormous practical implications. Under the expansive interpretation urged in the aforementioned letter, a religious organization working as a federal contractor could refuse employment to a person who was in an interfaith or interracial relationship or marriage, who was an unmarried parent, or whom the employer learned had had an abortion or used contraception. The exception would truly swallow the rule. No legal precedent or legislative history supports this reading of the religious accommodation language in Title VII, a misreading that threatens to gut a well-settled consensus about the importance of workplace equity.

What is more, those calling for an additional exemption paint a misleading picture of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[10] In *Hosanna-Tabor* the Court affirmed a constitutional right of religious organizations to make hiring and firing decisions *only with respect to ministers.* The Court could not have been clearer that the right protected extended only to ministers, because of their special relationship with congregants.[11] Notwithstanding this limitation, the letters promote an expansive misreading of the case that would allow religious employers to discriminate against employees on the basis of their sexuality regardless of the position they hold, ministerial or otherwise.

Finally, in seeking to expand the protections well beyond what Title VII contemplates and misreading the ministerial exception, advocates of an additional exemption promote a rule that would burden the religious freedom of the majority of employees working for federal contractors, because it would "operate[] to impose the employer's religious faith" on them.[12] Requiring federal contractors to respect the rights of LGBT employees would serve to advance a diversity of religious and secular values in the workplace by sending a compelling message of equality and respect for all workers' dignity. Expanding that exemption beyond religion to allow discrimination on the basis of sexual orientation and/or gender identity would be a grave injustice.

Including an exemption for religious discrimination in an executive order securing work-place rights for LGBT people sends a message that the federal government has a more ambivalent commitment to sexual orientation and gender-identity based discrimination as compared with other forms of workplace equality. Indeed, it would establish a tiered legal structure where sexual orientation and gender identity-based rights are demoted to second-class status in the architecture of federal anti-discrimination protections. The Free Exercise Clause of the Constitution, the Religious Freedom Restoration Act, and Title VII provide ample protections for the deeply-held and sincere beliefs of religious employers. Contrary to the suggestion of those supporting a license to discriminate in this context, it is the creation of a hierarchy of rights and an exclusion of LGBT individuals from the full protection of the law that would "fragment our nation."

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[10] 132 S. Ct. 694 (2012).

[11] As the Court explained, "The Free Exercise Clause ... protects a religious group's right to shape ... the employment relationship between a religious institution and its *ministers*," because "[t]he members of a religious group put their faith in the hands of their *ministers*." *Id.* at 705-706 (emphasis added).

[12] *See* United States v. Lee, 455 U.S. 252, 261 (1982). *See also* Burwell v. Hobby Lobby Stores, Inc., 2014 WL 2921709, at *29 (June 30, 2014) (Kennedy, J. concurring) (noting that free exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling").

Sincerely,*

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[ß] Denotes signatures that were received after the letter was initially published on July 14th, 2014.