

November 30, 2021

The Honorable Xavier Becerra  
Secretary of Health & Human Services  
U.S. Department of Health & Human Services  
200 Independence Avenue SW  
Washington, D.C. 20201

Dear Secretary Becerra:

As President Clinton remarked when signing the Religious Freedom Restoration Act into law, religious liberty is the first freedom of American citizens. It is the responsibility of HHS, no less than any other governmental institution, to protect that liberty.

Your November 24 decision to rescind the HHS Office of Civil Rights' authority to affirmatively protect Americans' conscience rights pursuant to the Religious Freedom Restoration Act<sup>1</sup>—authority originally extended in December 2017—abdicates that responsibility.<sup>2</sup> Under this new approach, the Office of Civil Rights will no longer be directed to accept and investigate complaints of RFRA violations or conduct internal RFRA compliance reviews, among other changes.<sup>3</sup> This shift comes on the heels of a draft memo leaked from the Department's Office for Civil Rights—signed by Lisa Pino, Director of that office—strongly suggesting that HHS has decided to shirk its obligation for self-evidently ideological reasons.<sup>4</sup>

Let's be clear: the only reason to remove RFRA compliance enforcement from the Office of Civil Rights is if your administration no longer believes that religious liberty is a civil right. Instead of affirmatively taking steps to ensure the Department is fully complying with its constitutional and statutory obligations, the underlying memo explains that the Office of Civil Rights will no longer "proactively" enforce RFRA. Instead, the burden will be on individual Americans of faith to hold the Department accountable for its conduct. And OCR sought to make this change in secret, stating that "[n]o formal rollout is planned for this action but we will need to provide confidential alerts to the White House and some members of Congress who work on civil rights and related issues."<sup>5</sup>

Indeed, the underlying memo was positively contemptuous of RFRA's protections. While conceding that "some case law may support the prior Administration's view of RFRA," the underlying memo declared that the prior administration's "expansive view of the use of RFRA . . . resulted in negative impacts for underserved communities." This proposition was rooted in the extraordinary claim that "removing this delegation demonstrates our belief that RFRA is meant to be a shield to protect the freedom of religion, not a sword to impose religious beliefs on others without regard for third party

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<sup>1</sup> 42 U.S.C. 2000bb *et seq.*

<sup>2</sup> Delegation of Authority, 86 Fed. Reg. 67067 (Nov. 24, 2021), <https://www.federalregister.gov/documents/2021/11/24/2021-25632/delegation-of-authority>.

<sup>3</sup> Draft Memo from Lisa J. Pino, Director of Office for Civil Rights, to Xavier Becerra, Secretary of Health & Human Services, at 1 (Nov. XX, 2021), <https://www.lankford.senate.gov/imo/media/doc/HHS%20RFRA%20Memo.pdf>.

<sup>4</sup> Draft Memo from Lisa J. Pino, at 1.

<sup>5</sup> *Id.* at 4.

harms, including civil rights.”<sup>6</sup> But this is merely a tired, ACLU-inspired talking point lacking any legal foundation whatsoever. The ACLU may have come to regret its past history of enthusiastic support for RFRA as the ACLU has transformed from a civil liberties group into a left-wing partisan group, but the plain text of the law remains.<sup>7</sup>

Moreover, this claim is included in a section of the memo entitled “Noteworthy Elements about Equity.” But “equity” has nothing to do with RFRA—and indeed, mentioning it in this context betrays a fundamental misunderstanding of the logic of the law. RFRA does not mandate “equity” in the sense of parity of outcomes across-the-board. To the contrary, the statute was passed in 1993 to mitigate the consequences of the Supreme Court’s 1990 decision in *Employment Division v. Smith*, which suggested that religious liberty claims as such warranted no exemptions from neutral laws of general applicability.<sup>8</sup> Enacted in the wake of *Smith*, RFRA was an attestation of the singular place of free exercise of religion in American life, and statutorily reaffirmed the constitutional principle that religious liberty claims are entitled to “special solicitude.”<sup>9</sup> Accordingly, to invoke the idea of “equity” here, in the context of flattening down legal protections for religious liberty, is baldly contrary to RFRA’s intent.

I urge you to immediately reverse course and reinstate the Office of Civil Rights’ RFRA enforcement authority. Additionally, I request a response to the following questions no later than December 10, 2021:

1. Why did the underlying memo propose making this policy change without a “formal rollout”?
2. What third-party groups or resources were consulted during the development of the decision to rescind OCR’s authority?
3. What, if any, legal authority supports the underlying memo’s observation that RFRA ought to be understood as “a shield, not a sword”?

I await the Department’s responses.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Hawley". The signature is fluid and cursive, with a large loop at the end of the last name.

Josh Hawley  
United States Senator

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & Religion 531, 533 (1993).

<sup>8</sup> Drinan & Huffman, *supra* note 7, at 540–41.

<sup>9</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 697 (2012).