

September 12, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Acosta:

On behalf of the 21 undersigned Jewish organizations, we urge you to rescind the August 10, 2018 Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) Directive 2018-03 that would authorize taxpayer-funded discrimination.

This guidance reflects that federal contractors, on the basis of their religious beliefs, will soon be able to discriminate against current and future employees. It therefore could harm broad categories of people including LGBTQ people, religious minorities, single parents, or even individuals who infrequently attend religious services. Such a radical directive would erode religious liberty and jeopardize the health, economic security and wellbeing of individuals and families.

The directive erroneously relies on recent U.S. Supreme Court decisions in *Masterpiece Cakeshop v. Colorado Commission on Civil Rights* and *Trinity Lutheran Church of Columbia, Inc. v. Comer* as justifications for the Department of Labor sanctioning federal contractors to discriminate against their employees.

The directive's citation to *Masterpiece Cakeshop* omits the central fact that the Court sidestepped the case's fundamental questions about religious freedom and free speech. Indeed, the Court did not establish any new First Amendment precedent. Rather, its opinion is narrowly based on its view that the Colorado Civil Rights Commission had been improperly biased against the baker in rejecting his religion and free speech claims.¹

Critically, the decision in *Masterpiece* plainly refutes DOL's new guidance. In reaching its ultimate holding the Court stated:

*As this Court observed in Obergefell v. Hodges, "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.*² (Emphasis added).

¹ https://www.supremecourt.gov/opinions/17pdf/16-111diff2_e1pf.pdf

² See footnote 1, citations omitted.

Thus, in the private context the Court indicates it would likely uphold violations of generally applicable anti-discrimination laws to business where the application is neutral. In the context of taxpayer-funded jobs, this dicta should have even more significance.

Furthermore, the guidance's note on *Trinity Lutheran* also fails to reference the oft-cited and crucial footnote to the decision: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."³ Neutral application of anti-discrimination prohibitions is based on discriminatory conduct and not religious identity. Therefore, the guidance's reliance on *Trinity Lutheran* is highly questionable.

The directive, and any future rulemaking that follows, will sanction publicly funded employment discrimination in each and every federal contract. It is directly counter to the bedrock constitutional principle of equal protection for all, and fundamentally misconstrues religious liberty in America. Constitutional protections for faith and houses of worship are intended as a shield to protect individual and institutional religious freedom, not a sword to harm people because of who they are or how they worship.

As Jews, we believe that all people deserve dignity and respect. We urge you to rescind this directive and reverse any prospective regulations arising from it that would make discrimination official federal policy.

Signed,

American Conference of Cantors
Anti-Defamation League
Arizona Jews for Justice
Avodah
Bend the Arc: Jewish Action
Central Conference of American Rabbis
Jewish Alliance for Law and Social Action
Jewish Community Action
Jewish Labor Committee
Jewish Women International
Keshet
Men of Reform Judaism
National Council of Jewish Women
New Israel Fund
Rabbinical Assembly
Reconstructionist Rabbinical Association
T'ruah: The Rabbinic Call for Human Rights
Union for Reform Judaism
Uri L'Tzedek: Orthodox Social Justice
Witness to Mass Incarceration
Women of Reform Judaism

³ https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf