



## Joint Statement

### By the Council on American-Islamic Relations of New York & Columbia Law School's Public Rights/Private Conscience Project

May 15, 2017

As advocates for free exercise of religion, civil rights, and religious pluralism, we are deeply concerned that President Trump's recently signed Executive Order "Promoting Free Speech and Religious Liberty" will serve to limit, not protect, religious freedom. The order was signed on May 4, 2017, in a ceremony that included Christian musician Steven Curtis Chapman and statements by Pentecostal televangelist Paula White, Baptist Pastor Jack Graham, Catholic Archbishop Donald Wuerl, Rabbi Marvin Heir, and Vice President Mike Pence. While the executive order—unlike a prior leaked draft—does not single out particular religious beliefs for special protection, we are nevertheless concerned that the broad discretion it offers to federal agencies will have the effect of favoring majoritarian faiths at the expense of religious minorities.

#### *Religious Liberty Guidance Provision*

Section 4 of the order directs the Attorney General to "issue guidance interpreting religious liberty protections in Federal law." This provision suggests that the administration plans to take an aggressive approach in affirmatively interpreting federal religious accommodation laws, like the Religious Freedom Restoration Act (RFRA), to grant exemptions from federal law to religious objectors. Religious exemptions are often essential to protecting religious minorities when neutral laws and policies unintentionally burden their beliefs and practices. For example, religious exemptions have ensured that Sikhs, Muslims, and Jews in the military and other workplaces are able to wear religious headwear despite uniform rules. However, President Trump's order signals an intent to construe religious exemptions more broadly than in the past; such wide discretion is likely to disproportionately protect majoritarian beliefs, perhaps at the expense of religious minorities and other marginalized communities. The Executive Order's signing ceremony was representative of a larger and pervasive bias in the way that this administration has interpreted "religious liberty": neglecting, if not, affirmatively denying, the rights of religious minorities – especially Muslims.

So too, this administration is committed to expanding too broadly the notion of religious liberty for some people of faith over others. In particular, inappropriately-broad exemptions run the risk of allowing religious *objectors* to become religious *enforcers*, and to impose their views on third

parties. Faith-based exemptions from health, employment, and civil rights laws would protect religious health care providers, employers, and landlords, at the expense of workers, patients, and tenants who do not share their beliefs. It is important to note that overly-broad interpretations of religious exemptions threaten religious liberty itself, even among Christians, since even members of the same faith often hold divergent views on many moral and philosophical issues. For example, many Christians *as a matter of their faith* support reproductive rights for women, equality for LGBTQ people, and religious pluralism in the workplace, public accommodations and elsewhere. Nevertheless, religious minorities are at particular risk of being coerced into abiding by or supporting dominant religious beliefs. This is especially true for minority religions that already face significant mistrust and discrimination, including Muslims, Sikhs, and nonbelievers. Other communities—including LGBTQ people, unmarried families, and those seeking reproductive health care— may also be harmed if the DOJ takes an overly-expansive approach to federal religious exemption law that allows religious objectors to impose their beliefs on others.

We are especially troubled by the fact that the order directs sensitive religious exemption decisions to be made by Attorney General Jeff Sessions, who has a long history of supporting Islamophobic measures, organizations, and beliefs. This history includes:

- In December 2015, then-Senator Sessions voted against a nonbinding amendment seeking to prevent a religious litmus test for people entering into the United States. During that vote, Senator Sessions said: “Many people are radicalized after they enter. How do we screen for that possibility, if we cannot even ask about an applicant's views on religion?” Following the horrific shooting that targeted LGBTQ Latinx people at a nightclub in Orlando, Sessions warned Americans on FOX News Sunday to “slow down” on foreign born admissions into the United States, particularly those with Islamic backgrounds. “It’s a real part of the threat that we face and if we can’t address it openly and directly and say directly that there is an extremist element within Islam that’s dangerous to the world and has to be confronted.” In an interview in June 2016, Sessions said of U.S. immigration policy, “We need to use common sense with the who-what-where of the threat. It is the toxic ideology of Islam.”
- In October 2013, Senator Sessions as Ranking Member of the Senate Budget Committee sent a letter to the National Endowment for the Humanities (NEH) in part demanding a justification for why the NEH was “promoting” Islamic cultures at the expense of Christian and Jewish cultures. The purpose of NEH’s Muslim Journeys program is to “offering resources for exploring new and diverse perspectives on the people, places, histories, beliefs, and cultures of Muslims in the United States and around the world.”
- Sessions has also associated himself with anti-Muslim hate groups. In 2015, Sessions accepted the “Keeper of the Flame” award from the Center for Security Policy, whose leader Frank Gaffney has advanced the conspiracy theory that President Obama is Muslim and whose reporting the FBI has said “overstated” any threat Muslim observances pose to America. In 2014, Sessions accepted the “Annie Taylor Award” from the David Horowitz Freedom Center and he attended the group’s annual

“Restoration Weekend” retreats in 2008, 2010 and 2013. The Southern Poverty Law Center, a group that tracks hate movements in the United States, labels David Horowitz “the godfather of the modern anti-Muslim movement.”

While Sessions has expressed hostility towards Muslims, he has long supported writing conservative Christian beliefs about sex, marriage, and reproduction into law. In one interview, he expressed doubt about admitting into the country Muslims who hold conservative views about sex and sexuality, suggesting that immigrants should be asked if they “respect minorities such as women and gays.” Despite this, he has been an ardent opponent of LGBTQ equality and reproductive rights, and was a sponsor of the First Amendment Defense Act (FADA), a religious exemption law that would create special protections for those who believe that sex should only take place within a cisgender, different-sex marriage. Thus, we hold deep reservations that Attorney General Sessions will be willing and able to interpret religious exemption laws equally for all religions and beliefs, and will adequately consider the burdens that religious exemptions place on third parties.

### ***Johnson Amendment Provision***

The potential ramifications of the recently signed EO are especially worrying, given that President Trump joins a long line of Republican figures who support repeal of the Johnson Amendment, a federal law that prohibits tax-deductible non-profits (including universities, charities, and houses of worship) from participating or intervening in “any political campaign on behalf of (or in opposition to) any candidate for public office.” Recent examples include the U.S. House’s Free Speech Fairness Act (which is supported by 57 Republican Representatives) and its companion bill in the U.S. Senate (which is supported by 5 Republican Senators).

For years, conservative political activists have fought against this provision, arguing that it amounts to an unconstitutional limitation of the First Amendment rights of religious leaders and houses of worship to comment on political activities. In contrast, political observers note that the repeal of the amendment, combined with the tax deductibility of 501(c)(3) donations, would effectively lead to taxpayers subsidizing political activism from houses of worship and other non-profits.

The operative provision of the executive order, Section 2, is quite limited: the Treasury Secretary is not to challenge the tax exempt status of religious organizations that speak “about moral or political issues from a religious perspective, where speech of similar character has . . . not ordinarily been treated as participation or intervention in a political campaign . . . .” Since the IRS has never shown any interest in expanding tax exempt enforcement against houses of worship, the order is, at most, a ratification of the status quo. For years, activists have flagrantly violated the Johnson Amendment, only to see the IRS refuse to respond or agree to generous settlements. Since 2008, conservative activists such as the Alliance Defending Freedom (ADF) have hosted Pulpit Freedom Sunday a few weeks before Election Day, encouraging pastors across the country to talk electoral politics in church as part of a deliberate effort to draw scrutiny from the IRS so that ADF can launch a constitutional challenge to the law. ADF encourages Christian Pastors to engage in civil disobedience and “speak truth into every area of life from the pulpit.” To date, none of the participating pastors have faced IRS enforcement measures.

If Congress repealed the Johnson Amendment, or if President Trump implemented a more robust executive order on the topic, the effect would be strikingly asymmetrical. Christian and Jewish clergy (and other politically-secure religious traditions) would be empowered to bring faith and politics together at the very moment that Muslim clergy worry about the growing net of suspicion and surveillance being cast on their community. Unlike their counterparts in other faiths, Muslim clergy are primarily fearful of the local, state, and federal intelligence operations that target their houses of worship, and not without cause. Muslims already face increased scrutiny from law enforcement officials. For example, the National Security Agency and the FBI allegedly tracked email accounts of five Muslim American leaders between 2006 and 2008, according to an NSA spreadsheet of email addresses disclosed by former NSA contractor Edward Snowden. More recently, over 100 people contacted the Council on American Islamic Relations to report that they were visited by the FBI prior to the 2016 election.

The effect would be particularly pronounced here in New York, where Muslims face additional scrutiny from the NYPD, which has a long history of suspicionless, warrantless surveillance of the Muslim community. According to the NYPD's own inspector general, 95% of recent NYPD intelligence investigations targeted Muslim New Yorkers or organizations associated with Islam, and the NYPD has repeatedly inserted undercover agents everywhere from New York masjid to Muslim student groups at public colleges.

While President Trump's May 4<sup>th</sup> executive order, self-styled as "Protecting Free Speech and Religious Liberty," was largely symbolic, it has disturbing implications for how measures that purportedly advance religious liberty can promote majoritarian religious institutions, while harming the minority faiths most in need of protection. Hopefully, the order isn't a harbinger of more meaningful and substantive measures in the months and years to come.