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Tuesday, March 31, 2020

U.S. Department of State Commission on Unalienable Rights:

As a faith-based organization committed to upholding the human rights of vulnerable people across the world, American Jewish World Service (AJWS) writes to express our grave concerns regarding the Commission on Unalienable Rights. We are deeply worried that the Commission’s work and its expected report will be profoundly detrimental to long-established and internationally recognized human rights. In particular, we strongly oppose any efforts by the Commission to elevate freedom of religion and conscience above other human rights in a thinly veiled attempt to promote discrimination against women, girls, lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) people, and other vulnerable communities.

Since the Commission was established, AJWS has been consistently troubled by the ongoing rhetoric toward human rights espoused by Secretary Pompeo and the commissioners, suggesting that human rights are “merely personal preferences” or are poorly defined.¹ Commissioners have claimed that there is a proliferation of rights and therefore there needs to be a prioritization of these rights.² This is not the case. The international human rights framework has been well-defined by the United Nations and its relevant treaty bodies and independent human rights experts. This framework has reasserted that all human rights – including economic, social, and cultural rights – are interdependent, interrelated, and equal in treatment.³ We have also been shocked to hear assertions by Secretary Pompeo and commissioners regarding “alleged” human rights,⁴ “new” rights,⁵ or “ad hoc” rights.⁶ Such statements undermine numerous human rights movements across the globe over history, including movements for women, LGBTQI

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¹ See Michael R. Pompeo, *Remarks by Secretary*, (October 23, 2019), available at <https://www.state.gov/commission-on-unalienable-rights-public-meeting>.

² During the Commission’s third meeting (held on 12/11/19), Commissioner David Pan responded to remarks by Michael Abramowitz of Freedom House regarding concerns over the Commission’s apparent desire to create a “hierarchy of rights,” asking Mr. Abramowitz if he would “support that same prioritization that we want to do.” The Commission also reproduced a discussion regarding the “prioritization” of rights in the published “minutes” of the third meeting. See <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>. Additionally, in a February 2019 article, Chairwoman Glendon advocated for the prioritization of “basic” set of rights that are “universal” in nature and articulated a list that did not include a single economic, social or cultural right. See Mary Ann Glendon, Seth Kaplan, *Renewing Human Rights*, First Things, (2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights>.

³ Article 5 of the 1993 Vienna Declaration specifically notes that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” UN OHCHR, *Vienna Declaration and Programme of Action* (1993), available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>. See also Human Rights Committee, General Comment No. 12: Art. 1 (Right to Self-determination), U.N. Doc. HRI/GEN/1/Rev.6 (March 13, 1984); Committee on Economic, Social and Cultural Rights, General Comment No. 22 (right to sexual and reproductive health (Art. 12)), UN Doc. E/C.12/GC/22 (March 4, 2016).

⁴ During the Commission’s second meeting (held 11/1/2019), the Chair of the Commission, Mary Ann Glendon, stated that it was the responsibility of the Commission “to help the U.S. to think more clearly about alleged human rights”

⁵ See Michael Pompeo, *Remarks on Commission on Unalienable Rights*, (October 23, 2019) at <https://www.state.gov/commission-on-unalienable-rights-public-meeting>.

⁶ See Michael Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street Journal, (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

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people, people with disabilities, migrant workers, and indigenous peoples. Rather than supporting the rights of these individuals, the Commission appears, in contravention of decades of U.S. policy, intent on slashing the rights of these vulnerable groups by using a skewed, narrow interpretation of freedom of religion and conscience as a cudgel to perpetuate injustice and bigotry.

As a Jewish organization, we know from our own history the importance of freedom of religion and conscience, but we also know the damage caused by such rhetoric to justify and promote hate and discrimination. The United Nations Special Rapporteur on freedom of religion or belief's recent report found that skewed religious beliefs often underpin amoral laws and state-sanctioned practices that violate the dignity of women, girls, and LGBTQI people.⁷ The Special Rapporteur simultaneously found that religious freedom is being used to justify the roll back to laws that protect against gender-based violence and discrimination. The Special Rapporteur also stated that there should be limits to freedom of religion, particularly when *it is a threat to the rights of others*. As a faith-based organization, we know that using freedom of religion and conscience to violate the rights of others is a miscarriage of morality that threatens the basic dignity of everyone, everywhere. Moreover, the requirement to limit religious freedom in order to uphold the human rights of others lies in the International Covenant on Civil and Political Rights (ICCPR), a binding international human rights treaty of which the United States is a party.

In our own work partnering with human rights activists around the world, we have seen a rise of private actors, particularly from the United States, with radical religious motivations using these very same interpretations of freedom of religion or conscience to press for anti-LGBTQI legislation and regulations in countries across the globe. Such laws have resulted in widespread human rights violations, forcing LGBTQI people to flee their country for safety. Other countries have used religious freedom and conscience as a means to implement total bans on access to abortion, contraception, and gender reassignment surgery, as well as limiting evidence-based comprehensive sexuality education, all of which are necessary to living a life of dignity. The use of religious justifications for these laws has put the lives of women, girls, LGBTQI people, and other vulnerable populations at risk by increasing rates of violence, stigma, and discrimination.

In addition to discriminatory laws against vulnerable populations, we have witnessed the expansion of sweeping exemptions for healthcare providers and institutions to use conscientious objections, resulting in limited access to services that vulnerable people need to realize their full human rights. For example, conscientious objections are used to refuse services to LGBTQI people, including access to healthcare, employment, housing, and other commercial services, violating their rights. Meanwhile, healthcare providers have increased their use of conscientious objections to deny access to abortion or contraceptive services, even though these are key components of healthcare for women,

⁷ See 2020 Report of the Special Rapporteur on freedom of religion or belief (Freedom of religion or belief and Gender Equality), A/HRC/43/48, available at <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>.

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girls, and other individuals who require them. The suggestion that individuals could seek these services elsewhere is flawed because the expansion of freedom of religion and conscience allows providers to refrain from even providing referrals for services, further reducing access to information and imposing yet another barrier to their right to health. It is also important to note that many people across the world access comprehensive healthcare services at one clinic, which may also be the only one in their region, increasing the likelihood that individuals will be forced to turn to unsafe methods of obtaining services, putting their lives at risk.

Efforts to suggest that freedom of religion or conscience lie at the top of a priority list of human rights contain the potential to disproportionately violate the rights of the most vulnerable groups, including women, girls, and LGBTQI people. As a faith-based organization committed to the belief that everyone is created in the divine image, we believe that all people are entitled to sexual and reproductive health and rights, including freedom from discrimination based on sexual orientation, gender identity, or sex characteristics, and rights to health including access to contraceptive and abortion services.⁸

Unfortunately, we have deep concerns that the Commission would support creating a priority list of rights with freedom of religion and conscience at the top that would be used to subvert human rights protections.⁹ Our fears are not unwarranted, as several of the commissioners have well-documented views that violate the rights of women, girls, and LGBTQI people. These dangerous views have often been justified using freedom of religion and conscience. Commission Chair Glendon has a long history of positions staunchly against same-sex marriage and abortion, grounded in religious freedom.¹⁰ Commissioner Berkowitz criticized the 2003 Supreme Court rule overturning sodomy laws as “dangerous” and based on “moral and political judgments.”¹¹ Commissioner Carozza has characterized the inclusion of contraception and abortion in health insurance plans as a violation of the right to freedom of religion¹² and has sat on anti-choice panels.¹³ Commissioner Tollefsen, who chairs the Commission’s Terms and Concepts

⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (right to sexual and reproductive health (Art. 12)), UN Doc. E/C.12/GC/22 (March 4, 2016).

⁹ Following Ken Roth’s testimony on January 10, Commissioners Berkowitz, Carozza, Tollefsen, Tse-Chien Pan, and Lantos Swett criticized Roth’s assertion that the rights of women and girls to receive sexual and reproductive healthcare, including access to abortion, should not be absolutely subjugated to the rights of those who would deny such care on the basis of their religious beliefs. In contrast, none of the Commissioners suggested that Mr. Roth’s position had merit, though it is understood to be an accurate representation of international human rights law by human rights advocates and experts. Complaint, *Robert F. Kennedy Human Rights et al. v. Pompeo*, No. 1:20-cv-02002, ¶¶ 84-85 (S.D.N.Y. filed March 6, 2020) available at <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.

¹⁰ See Tom Fitzsimons, *Trump administration’s new human rights commission alarms LGBTQ advocates*, NBC News, (July 10, 2019), <https://www.nbcnews.com/feature/nbc-out/trump-administration-s-new-human-rights-commission-alarms-lgbtq-advocates-n1028276>.

¹¹ See Peter Berkowitz, *Contribution to symposium: Has the Supreme Court gone too far?*, *Commentary Magazine*, (October 2003), <http://www.peterberkowitz.com/articles/commentarysymposium.html>.

¹² See Terence P. Jeffrey, *Notre Dame Faculty to Obama: This is a Grave Violation of Religious Freedom and Cannot Stand*, CNSNews.com, (February 12, 2012), <https://www.cnsnews.com/news/article/notre-dame-faculty-obama-grave-violation-religious-freedom-and-cannot-stand>.

¹³ Commissioner Carozza joined the Notre Dame Right to Life Club’s panel on Thursday, November 17, 2016. See <https://ndsmcobserver.com/2016/11/right-to-life/>

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Working Group, has written extensively on anti-choice matters¹⁴ and has elevated questions during the public meetings that mirror his writing. He has also written that being transgender is “a matter of mental illness or some pathology.”¹⁵ Commissioner Yusuf has claimed that marriage equality was “one of the signs of the End Times”¹⁶ and characterized abortions as an assault by a “profane hand.”¹⁷ Commissioner Rivers, much like Commissioners Glendon and Carozza, has appeared on anti-choice panels¹⁸ and she has signed onto letters that declare same-sex marriage to be a “parody” and a “fiction.”¹⁹ Commissioner Soloveichik has supported anti-LGBTQI literature,²⁰ participated in anti-choice events, including the March for Life, and he has opposed access to contraception based on religious arguments, endangering rights to reproductive healthcare for people across the globe.²¹

Similar to the views documented above, the lines of questioning and comments during the Commission’s open meeting on January 10, 2020, illustrate that the vast majority of commissioners feel there are few, if any, limits on the freedom of religion or conscience. Following Ken Roth’s testimony, Commissioners Berkowitz, Carozza, Tollefsen, and Tse-Chien Pan criticized the assertion that the rights to receive sexual and reproductive healthcare, including access to abortion, should be respected. Their questions instead illustrated that the right to health should be subjugated to the rights of those who would deny such care on the basis of their religious beliefs. Commissioner Katrina Lantos Swett, in her own criticism of Roth’s testimony, specifically cited Article 18 of the UDHR as the definition of the right to religious freedom during the Commission’s meeting, noting specifically that there is no “limitation in Article 18” and that it represents “a broad expression” of the right of religious freedom and belief, disregarding the ICCPR. She went on to flippantly deem the refusal of abortion services resulting in traveling hundreds of miles for alternative access to this critical healthcare service, as a mere “inconvenience” in the face of a medical provider’s religious conscience. We have real concerns that the trajectory of this Commission and its recommendations to the

¹⁴ See Christopher O. Tollefsen, *Embryos and Five-Year-Olds: Who to Rescue*, Public Discourse, (October 19, 2017), <https://www.thepublicdiscourse.com/2017/10/20332/> and Christopher O. Tollefsen, *Marco Rubio is Right: The Life of a New Human Being Begins at Conception*, Public Discourse, (August 18, 2015), <https://www.thepublicdiscourse.com/2015/08/15520/>.

¹⁵ See Christopher O. Tollefsen, *Gender Identity*, Public Discourse, (July 14, 2015), <https://www.thepublicdiscourse.com/2015/07/15308/>.

¹⁶ Available at <https://www.youtube.com/watch?v=iXRnWTB2FRg&app=desktop>.

¹⁷ See Hamza Yusuf, *When Does a Human Fetus Become Human?*, Renovatio: The Journal of Zaytuna College, (June 22, 2018), <https://renovatio.zaytuna.edu/article/when-does-a-human-fetus-become-human>

¹⁸ Commissioner Rivers joined Harvard Law Students for Life on a 2017 Harvard anti-choice panel alongside Commissioner Glendon. See <https://mirrorofjustice.blogs.com/mirrorofjustice/2017/10/why-we-are-pro-life-harvard-law.html>.

¹⁹ See Evangelicals and Catholics Together, *The Two Shall Become One: Reclaiming Marriage*, First Things, (March 2015), <https://www.firstthings.com/article/2015/03/the-two-shall-become-one-flesh>.

²⁰ See National Organization for Marriage, *The Best Arguments Against Same-Sex Marriage*, NOM Blog (November 8, 2012), <http://www.nomblog.com/30843>. Please note that the National Organization for Marriage is a documented anti-LGBT hate group, which has promoted hate and discrimination against the LGBT community

²¹ See Yair Rosenberg, *GOP Convention’s Rabbi-in-Chief*, Tablet News, (August 27, 2012), <https://www.tabletmag.com/jewish-news-and-politics/110309/gop-conventions-rabbi-in-chief>. Furthermore, during the Commission’s second meeting (held 11/1/2019), Commissioner Soloveichik pushed back against Professor Cass Sunstein’s assertion that the founding generation recognized certain economic rights as “unalienable,” noting that economic rights, such as the right to healthcare, can “clash with individual liberty” such as freedom of religion.

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Department will mirror these public positions of commissioners, all of which undermine individuals' human rights and destroy decades of human rights precedent.

Furthermore, we are strongly concerned that the Commission has flouted the procedural requirements imposed by the Federal Advisory Committee Act (FACA), which states that the composition of a Commission must be "fairly balanced in its membership in terms of the points of view represented."²² While there is overwhelming evidence that the Commission is composed of those who oppose sexual and reproductive health and rights for the most vulnerable populations, there are no commissioners that work in issues related to gender equity and equality, reproductive rights and justice, climate justice, indigenous rights, or refugee and asylee rights – and very few have any experience as a practitioner of human rights work in the field.

At the same time, the Commission has disregarded FACA statutes that require it to conduct its work in a transparent manner. In addition to failing to release all advisory committee documents to ensure meaningful public participation before the public meetings, the Commission has also failed to provide accurate minutes from all of the meetings, documents that commissioners used to prep for each of the open meetings, and external submissions to the Commission.²³ Alarming, based on comments made by commissioners during the public meetings themselves, we have determined that the Commission has held "closed preparatory sessions" and "working group" meetings that are closed to the public.²⁴ As the final product of the Commission's work is a report and recommendations, it appears that the bulk of the work is being completed in these working groups, which have lacked any public participation and oversight, and yet may have large impact on setting the policy of the Department and the human rights that it recognizes and protects.

AJWS is also concerned about the Commission's impact on international diplomacy. In particular, the Commission's mandate duplicates and interferes with the Department's current work through the Bureau of Democracy, Human Rights, and Labor, which has held the expertise and authority for the practice of human rights in U.S. foreign policy for over four decades. The creation of this additional body may create policies that contradict or undermine the congressionally-mandated bureau from carrying out its vital job of human rights promotion and protection. At the same time, we have seen that this

²² See 41 CFR § 102-3.30, "What policies govern the use of advisory committees?," available at <https://www.law.cornell.edu/cfr/text/41/102-3.30>.

²³ 5 U.S.C. App. 2 § 10(b).

²⁴ Chairwoman Glendon has openly acknowledged the existence of several "working groups," which she has interchangeably referred to as "subcommittees," each of which is comprised of a subset of commissioners and tasked with composing a specific component of the Commission's final written product. According to the published minutes of the first meeting, Chairwoman Glendon publicly announced during the meeting that Commissioner Hanson would join the "Terms and Concepts" Working Group, chaired by commissioner Tollefsen. See U.S. Dep't of State Commission on Unalienable Rights Minutes (Oct. 23, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes/>. The public minutes of the third meeting also include a specific reference to commissioner Carozza's chairmanship of a "working group that will focus on the international human rights principles the U.S. has ascribed since World War II. See U.S. Dep't of State Commission on Unalienable Rights Minutes (Dec. 11, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

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Commission may also open the door to authoritarian regimes across the globe that, much like the U.S., hopes to redefine and narrow human rights and make unilateral decisions about their prioritization in violation of international norms. This has already occurred in public meetings of the Commission, most notably with the participation of a member of Brazil’s diplomatic delegation which applauded the Commission for its efforts to redefine the human rights system and called on commissioners to reject “new human rights” that are “anti-human.”²⁵

In conclusion, we fear that the Commission’s work and its proposed report will only damage human rights policies and norms across the globe. As a result, we see no other option than to call for this Commission to be disbanded. We also seek to remind the Administration that it would be well-served to review its own track record on human rights, domestically and abroad, at this time. AJWS is appalled by the Administration’s demonization and abhorrent treatment of refugees and immigrants, denial of sexual and reproductive health and rights to the most marginalized people, praise of authoritarian leaders who commit human rights violations against their citizens, and ongoing attempts to delegitimize the United Nations and its human rights bodies.

The Department of State should uphold, protect, and promote human rights norms for all people, especially the most vulnerable. This includes women, girls, LGBTQI people, and other marginalized identities who bear the brunt of discrimination and inequality within their societies. The United States must recommit itself to the international human rights framework contained in the Universal Declaration of Human Rights and in subsequent human rights treaties. The U.S. must also recognize the robust and expert sources within the United Nations human rights and treaty bodies, as well as career officials already serving in the Department of State. We call upon the Department of State and other agencies of this Administration to underscore that all human rights are interdependent, interrelated, and equal in importance. It is only by upholding international human rights and ensuring the rights of the most vulnerable that we can create a more just world for all.

Sincerely,

Rori Kramer
Director of U.S. Advocacy
American Jewish World Service

²⁵ On December 11, Brazil’s National Family Secretary presented these statements in the open question portion of the meeting. The public minutes of this meeting include a reference to her statements. See U.S. Dep’t of State Commission on Unalienable Rights Minutes (Dec. 11, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

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