



September 16, 2019

Harvey D. Fort
Acting Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs, Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

RE: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption RIN 1250-AA09/ Docket ID OFCCP-2019-0003

Dear Mr. Fort:

Americans United for Separation of Church and State (Americans United) submits the following comments to the proposed rule, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register on August 15, 2019.¹

OFCCP exists to "protect workers, promote diversity and enforce the law."² In particular, OFCCP is tasked with holding "those who do business with the federal government (contractors and subcontractors) responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran."³ This proposed rule defies these obligations.

Instead of protecting workers, this proposed rule would vastly expand the existing, narrow religious exemption in Executive Order 11246 that allows religiously affiliated federal contractors to employ coreligionists. It alters statutory definitions and manipulates federal case law in order to turn provisions designed to protect workers from religious discrimination into a religious exemption that allows federally funded employers to use religion to discriminate against workers, and in doing so, defies congressional intent. In particular, the proposed rule would vastly expand who can use the religious exemption—defining even for-profit corporations as eligible—and how it can be used—providing only lip service to the fact that the law prohibits employers from using the religious exemption to discriminate against other protected classes. The proposed rule would make it nearly impossible for employees to challenge discriminatory employment decisions when an employer asserts the Executive Order 11246 religious exemption because OFCCP incorrectly deems the inquiry too difficult and constitutionally suspect.

¹ Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (Aug. 15, 2019) (to be codified as 45 C.F.R pt. 60).

² Office of Federal Contract Compliance Programs (OFCCP), *About Us*, available at <https://www.dol.gov/ofccp/aboutof.html> (last visited Sept. 11, 2019).

³ *Id.*

To reach these outcomes, the rule asserts that the religious exemption in Executive Order 11246 has the same meaning as that in Title VII, but it then greatly misinterprets the Title VII religious exemption. Even though “there is no denying . . . [the Title VII exemption] should be construed ‘narrowly’,”⁴ OFCCP manipulates it to justify expanding the religious exemption in Executive Order 11246 “to the maximum extent permitted.”

The proposed rule is made all the worse because it governs federal contractors and the discrimination is taxpayer funded. It is *the government* that would be putting workers to the choice of conforming to a religious test or losing a job.⁵

The preamble makes no mention of the workers who will face discrimination, and the proposed rule itself fails to take into consideration any harm they will face.⁶ OFCCP decries requiring a large, for-profit corporation to follow non-discrimination laws in order to qualify for a government contract, but does not blink an eye at subjecting workers employed by federal contractors, who make up more than one-fifth of the American workforce,⁷ to rules that could force them to pass a religious test in order to qualify for a job. And it attempts to justify these drastic shifts in policy with only a vague reference to “feedback” OFCCP received from “some religious organizations.”

Finally, we object to the 30-day public comment period that OFCCP provided for this proposed rule. The proposed rule gave no explanation why it provided an abbreviated timeline, rather than allowing for the standard 60-day period. Given the drastic change represented by this rule and the serious costs associated with employment discrimination, 30 days is wholly insufficient. The public does not have enough time to fully analyze the rule’s potential impact and provide data to fully demonstrate the costs of the rule.

Americans United

With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding our American value of religious freedom for all people since 1947. The U.S. Constitution grants all Americans the right to believe—or not believe—without government interference or coercion. But it also ensures that no one can use religion as a justification for ignoring the laws that protect the rights of others.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease substantial, government-imposed burdens on the practice of religion. Such accommodations, however, must not foster the advancement of religion, nor may they be so

⁴ *Spencer v. World Vision Inc.*, 633 F.3d 723, 727 (9th Cir. 2011) (O’Scannlain, J. concurring) (citing *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458,460 (9th Cir.1993); see also e.g. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (“The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.”).

⁵ See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 n.15 (1987).

⁶ In addition to raising constitutional and policy concerns, this rule would also violate the Administrative Procedure Act’s requirement to adequately assess all the potential costs and benefits of the rule and adopt an approach that produces the least total burden and most benefit to society. Employment discrimination has serious costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. Yet, OFCCP completely fails to even acknowledge these potential costs.

⁷ Office of Federal Contract Compliance Programs (OFCCP), *Facts on Executive Order 11246*, available at <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html> (last visited Sept. 9, 2019).

broad as to harm third parties. Religion cannot be used to discriminate against a qualified applicant or employee who has or wants a job with a federal contractor.

History of Executive Order 11246

In 1941, President Franklin D. Roosevelt signed an executive order that prohibited all federal defense contractors from discriminating in employment on the basis of race, creed, color, or national origin.⁸ This was the first action taken by the government to promote equal opportunity in the workplace for all Americans, and the start of our longstanding, national commitment to barring private organizations that accept taxpayer funds from discriminating in hiring. In subsequent executive orders, Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Obama expanded these protections.

Executive Order 11246, signed by President Lyndon B. Johnson in 1965, prohibits discrimination on the basis of race, color, religion, and national origin, in virtually all government contracts.⁹ In 1967, President Johnson added protections against sex discrimination.¹⁰ In 2016, President Barack Obama extended these protections to explicitly cover sexual orientation and gender identity.¹¹

Unfortunately, these employment protections, for which we as a nation can be proud, have been tarnished. President George W. Bush amended Executive Order 11246 to permit religiously affiliated nonprofit organizations that receive government contracts to discriminate in employment on the basis of religion.¹² This exemption took our nation in the wrong direction and is antithetical to basic American values: A federal contractor that accepts taxpayer funding should not be allowed to discriminate against qualified job applicants because they are the “wrong” religion. This religious exemption, although problematic in any form, is narrow: “it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, “such as race, color, national origin, or sex, including sexual orientation or gender identity.”¹³

Instead of rescinding the exemption, the Trump Administration is now dramatically expanding it.

The Proposed Rule’s Broad Exemption Will Hurt Workers

The proposed rule vastly expands the scope of the religious exemption for federal contractors, contradicting the very intent of Executive Order 11246, which was adopted and amended over the years to address serious and continuing problems of employment discrimination. If finalized, LGBTQ people, women, religious minorities, and the nonreligious would be at the most risk of

⁸ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

⁹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

¹⁰ Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

¹¹ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

¹² Exec. Order No. 13,279, 67 Fed. Reg. 77,139 (Dec. 12, 2002) (“to prefer individuals of a particular religion when making employment decisions relevant to the work connected with its activities”).

¹³ EEOC Compliance Manual, Section 12-I-C-1 No. 915-003 (July 22, 2008). Executive Order 11246, as amended states: “Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.” Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279. See also, e.g., *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982) (“Every court that has considered Title VII’s applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin.”).

facing this discrimination.¹⁴ Federal contractors should not be permitted to subject their employees and potential employees to a religious litmus test.

The existing exemption is already problematic. It permits a Christian organization to accept federal dollars and then tell a Jewish job applicant: “We don’t hire people of your faith.”¹⁵ And it allows a Christian relief organization to accept Muslim workers as temporary and volunteer workers, but then deny them full-time jobs.¹⁶ Now, under these proposed rules, a for-profit corporation could post a job announcement that says “Catholics, Latter-day Saints, Jehovah’s Witnesses, Jews, Muslims, Hindus, Sikhs, or Atheists need not apply.”

Rather than remedy these harms to religious minorities and the nonreligious, the proposed rule, based on specious reasoning, stretches the religious exemption even further.

This proposed rule would make it easier for federal contractors to discriminate against women under the guise of religion. For example, it appears OFCCP would not enforce Executive Order 11246 protections when an employer cites religion to fire a woman who used birth control or in vitro fertilization, who was pregnant and unmarried, or who had an abortion.¹⁷ Nor would OFCCP enforce it when an employer refuses to hire a woman based on the religious belief that a mother should stay at home¹⁸ or provides inadequate pay or benefits to a woman employee because the employer believed a man should be the “head of the household.”¹⁹

The proposed rule would also make it easier for federal contractors to use religion as a pretext to discriminate against LGBTQ people. It appears OFCCP would not enforce Executive Order 11246 protections when an employer claims a right under the religious exemption to fire a man who marries his same-sex partner,²⁰ deny employment or health benefits to married same-sex

¹⁴ Efforts to use religion to undermine civil rights are nothing new. Indeed, religion has previously been used to justify discrimination on the basis of race. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (upholding the denial of tax-exempt status to colleges with racially discriminatory policies, notwithstanding that the policies were based on sincere religious beliefs); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting claim of business owner that he had religious right to discriminate against customers in violation of federal civil rights law as “patently frivolous”); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (striking down anti-miscegenation law that state supreme court had cited religion to uphold). These efforts continue today. In September 2019, the owner of a Mississippi wedding venue initially refused to host the wedding of an interracial couple citing her “Christian belief” against “mixed-race weddings.” Sarah Fowler, *Mississippi Wedding Venue Cites ‘Christian Belief’ in Refusing Interracial Couple*, USA Today, Sept. 3, 2019, available at <https://www.usatoday.com/story/news/nation/2019/09/03/mississippi-wedding-venue-refuses-interracial-couple/2198769001/>.

¹⁵ See, e.g., Prepared Statement of Alan Yorker, *Faith-Based Initiatives: Recommendations of the President’s Advisory Council on Faith-Based and Community Partnerships and Other Current Issues*; Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 226 (Nov. 18, 2010), available at <https://www.govinfo.gov/content/pkg/CHRG-111hhrg62343/html/CHRG-111hhrg62343.htm>.

¹⁶ See, e.g., Lornet Turnbull, *World Relief Rejects Job Applicant Over His Faith*, SEATTLE TIMES, Mar. 10, 2010, available at <https://www.seattletimes.com/seattle-news/world-relief-rejects-job-applicant-over-his-faith/>.

¹⁷ See, e.g., *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998).

¹⁸ See *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986).

¹⁹ See *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

²⁰ See *Billard v. Charlotte Catholic High Sch.*, No. 3:17-cv-0011 (W.D.N.C. filed on Jan. 11, 2017).

couples, fire an employee who the employer discovers is transgender, or refuse to allow transgender employees to dress and utilize facilities consistent with their gender identity.²¹

OFCCP should protect workers, not find ways to make it easier for employers to discriminate.

This Sweeping Religious Exemption Violates the Establishment Clause

As explained above, the proposed rule would vastly expand the existing religious exemption, resulting in many more workers facing discrimination. The Establishment Clause, however, prohibits the government from granting religious exemptions that would detrimentally affect any third party.²² Thus, when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries²³ and ensure it is “measured so that it does not override other significant interests.”²⁴ In short, the government may not make a person bear the costs of another person’s religion.²⁵

In *Estate of Thornton v. Caldor*,²⁶ the United States Supreme Court (in an 8-1 opinion) struck down a Connecticut law granting employees “an absolute and unqualified right not to work on their Sabbath.” In finding an Establishment Clause violation, the Court focused on the fact that the right not to work was granted “no matter what burden or inconvenience this imposes on the employer or fellow workers.”²⁷ The law provided “no exception,” no account of “the imposition of significant burdens,” and “no consideration as to whether the employer has made reasonable accommodation proposals.”²⁸ The “unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses,” and is unconstitutional.²⁹

The proposed rule places the weight of the religious beliefs of an employer above all other interests. It crafts a broad, blanket religious exemption for employers that takes no account of the burdens it places on employees, which, as explained above would be significant. This violates the Constitution and undermines key principles of religious freedom. The government should only grant religious exemptions when they are necessary to protect religious exercise and not when they are part of a scheme to broadly deny rights to other groups.

²¹ See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

²² *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”).

²³ *Cutter*, 544 U.S. at 720, 722; see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

²⁴ *Cutter*, 544 U.S. at 710.

²⁵ Every member of the Court in *Hobby Lobby* reaffirmed that the burden on third parties must be considered when examining the constitutionality of a religious exemption. 573 U.S. at 693 (holding that RFRA afforded certain employers an accommodation from the Affordable Care Act’s contraceptive coverage requirement, the Court concluded that the accommodation’s effect on women who work at those companies “would be precisely zero.”); *id.* at 739 (Kennedy, J., concurring) (emphasizing that an accommodation must not “unduly restrict other persons, such as employees, in protecting their own interests.”); *id.* at 745 & n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

²⁶ 472 U.S. 703, 710-11 (1985).

²⁷ *Id.* at 708-09.

²⁸ *Id.* at 709-10.

²⁹ *Id.* at 710.

The Government Should Never Fund Employment Discrimination

In December 2002, frustrated by Congress's rejection of his faith-based initiative, President George W. Bush added a religious exemption to Executive Order 11246 that allowed federal contractors to discriminate "with respect to the employment of individuals of a particular religion." This move was, and continues to be, highly controversial because it extended the Title VII exemption to government-funded entities, resulting in government-funded discrimination.³⁰

Title VII was adopted at a time when no one in Congress would have imagined that religious organizations that would qualify for the Title VII exemption would also qualify for government funding, let alone be granted the religious exemption when taking government funds.³¹ And from 2001 until now, Congress has rejected efforts to explicitly allow government-funded entities to use religion discriminate in hiring numerous times.³²

Extending the Title VII religious exemption to government-funded entities is bad policy. First, the justification for the Title VII exemption—to maintain the autonomy of religious organizations and independence from the government—disappears when the organizations solicit government contracts. Second, the government should not award government contracts to employers that discriminate against qualified job applicants because they cannot meet a religious litmus test.

Extending the Title VII religious exemption to federally funded entities also raises constitutional concerns: "[T]he Constitution prohibits the state from aiding discrimination."³³ The government has a "constitutional obligation" to "steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."³⁴

It also violates the Establishment Clause's prohibition on government promotion or advancement of religion. In *Corporation of Presiding Bishop v. Amos*, the Supreme Court explained that the Title VII exemption allows "churches to advance religion," which does not violate the Constitution.³⁵ The case would have been different had "the government itself . . . advanced religion through its own activities and influence."³⁶ Government funding of the entity

³⁰ Letter from 98 Nat'l Religious & Civil Rights Orgs. to Pres. Barack Obama (July 16, 2014), available at <https://www.au.org/sites/default/files/LGBT%20EO%20sign-on%20letter%20add'l%20signers.pdf>; Mary Leonard, *President Eases Way for Religious Charities, Seeks to Promote Contracts, Grants*, BOSTON GLOBE, Dec. 13, 2002.

³¹ See, e.g., Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 4-5 (2002).

³² Each time it was considered, legislation containing such a provision was either left in the House of Representatives without a vote from the Senate, or left out of the conference committee report. See, e.g., CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://www.congress.gov/bill/107th-congress/house-bill/7>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 1094, available at <https://www.congress.gov/bill/114th-congress/house-bill/4909>.

³³ E.g., *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974); see also *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2986 (2010); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011).

³⁴ *Norwood*, 413 U.S. at 467.

³⁵ 483 U.S. 327, 337 (1987).

³⁶ *Id.*; see also *id.* at 340-41 (Brennan, J., concurring) (Discrimination in employment creates coercive pressure on job applicants and employees to "conform[] to certain religious tenets" or risk "losing a job opportunity [or] a promotion.").

that discriminates transforms Title VII’s religious exemption into an unconstitutional advancement of religion.³⁷

The Proposed Definition of “Religious Corporation, Association, Education Institution or Society” Is Unsupported in Law

The preamble is correct that the term “religious corporation, association, educational institution or society,” as used in Executive Order 11246, is commonly understood to have the same meaning as that in the Title VII religious exemption. The definition in the proposed rule, however, has been manipulated beyond recognition and does not reflect any accepted understanding of the Title VII definition. In an attempt to vastly expand the scope of the existing narrow exemption, OFCCP creates a new test out of whole cloth—one not proposed or used by any federal court.

In short, the proposed rule would:

- (1) “adopt” the *Spencer v. World Vision*³⁸ test for determining whether an entity qualifies for the religious exemption; but then
- (2) without justification, improperly dismiss the test in the *World Vision per curiam* opinion in favor of the test used in Judge O’Scannlain’s concurring opinion—a test rejected by the two other judges on the panel; and then
- (3) renounce key parts of O’Scannlain’s test—including the crucial requirement that the entity must be a nonprofit;
- (4) drop the requirement that the entity be “engaged primarily in carrying out” the religious purpose for which it was formed; and
- (5) even after greatly manipulating the terms of the *World Vision* test to suit its interests, make clear it would do little to ensure that an entity meets the remaining *World Vision* requirements.

Not one of the four prongs in the *World Vision per curiam* test is properly reflected in the proposed rule.³⁹

In Direct Contradiction to World Vision, the Proposed Rule Allows For-Profit Corporations to Qualify for the Exemption

The proposed rule claims to adopt the *World Vision* test for determining whether an entity qualifies for the religious exemption, but then it would eliminate the requirement in the *World Vision per curiam* opinion that the entity “not engage primarily or substantially in the exchange

³⁷ See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, *4 (S.D. Miss. Jan. 9, 1989); Green, *supra* note 31 at 48-52; Vikram Amar & Alan Brownstein, *The “Charitable Choice” Bill That Was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, Findlaw, Legal Commentary (May 13, 2005), available at <https://supreme.findlaw.com/legal-commentary/the-charitable-choice-bill-that-was-recently-passed-by-the-house-why-supreme-court-precedent-renders-it-unconstitutional.html>.

³⁸ 633 F.3d at 724 (per curiam).

³⁹ It is also worth noting that the second sentence of this definition, which the preamble notes is meant to provide clarity to the agency for easy administration, actually creates more confusion. Rather than provide concrete parameters, it offers a list of qualifications that “may or may not” be relevant.

of goods or services for money beyond nominal amounts.”⁴⁰ Instead, it permits for-profit corporations to qualify for the exemption. It does so without citing one single case where a court either granted a for-profit entity the exemption or rejected the application of this prong of the test. Even Judge O’Scannlain, whose concurring opinion the Department has heavily relied upon to craft this definition, ruled that “the initial consideration, whether the entity is a nonprofit, is especially significant.”⁴¹

OFCCP wrongly cites *Amos*, to dismiss the nonprofit requirement. *Amos*, which upheld the Title VII exemption, relied upon the fact that the entities in that case involved nonprofits.⁴² The District Court had struck down the Title VII exemption as a violation of the Establishment Clause, expressing “fear that sustaining the exemption would permit churches with financial resources to extend their influence and propagate their faith by entering the commercial, profit-making world.”⁴³ The Supreme Court dismissed that concern because the question before it was limited to “whether applying the” Title VII exemption to “the secular nonprofit activities of religious organizations violates” the Constitution.⁴⁴ Even though the issue was not before the Court, four concurring Justices still stated that their analysis would be different for for-profit corporations.⁴⁵

OFCCP also misapplies *Burwell v. Hobby Lobby Stores, Inc.*⁴⁶ to justify dropping this key component of the *World Vision* test. It is true that in *Hobby Lobby* the Supreme Court held that closely held for-profit corporations could utilize the Religious Freedom Restoration Act (RFRA). But RFRA is based upon an entirely different statutory scheme. RFRA applies to “persons,” which the Court, relying on the Dictionary Act, interpreted to mean “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁴⁷ The Court ruled that the RFRA definition encompassed for-profit entities because the Dictionary Act did not specify that “persons” applied only to “some but not all corporations.”⁴⁸ The Title VII exemption, in contrast does not apply to “persons.” And it explicitly applies to *some* but not all corporations—it applies only to “religious corporations,” and courts have consistently held these are limited to nonprofit corporations. Indeed, the Ninth Circuit, whose case law OFCCP relies upon to create this definition, decided *Garcia v. Salvation Army*⁴⁹ five years after the *Hobby*

⁴⁰ *World Vision*, 633 F.3d at 724.

⁴¹ *Id.* at 734 (O’Scannlain J., concurring); *see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (“whether the entity operates for a profit” is the very first factor commonly used *LeBoon* test.”). OFCCP chose the *World Vision* instead the *LeBoon* test, but then attempts to use the *LeBoon* test to undermine the *World Vision* test requirement that the entity be a nonprofit. This circular reasoning is disingenuous. It is particularly troubling when a main factor in the *LeBoon* test is whether the entity is a nonprofit entity and when no for-profit entity has ever qualified for the exemption under the *LeBoon* test. In other cases, courts have ruled that for-profit companies do not qualify as “religious corporations” under Title VII. *See, e.g., EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988).

⁴² 483 U.S. at 337.

⁴³ *Id.*

⁴⁴ *Id.* at 330, 337.

⁴⁵ *Id.* at 344 (Marshall, J., concurring) (contrasting nonprofit and for-profit entities); *Id.* at 348 (O’Connor, J., concurring) (“It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization.”).

⁴⁶ 573 U.S. at 707-09.

⁴⁷ *Id.* at 707-08.

⁴⁸ *Id.* at 708.

⁴⁹ 918 F.3d 997, 1004 (2019).

Lobby decision and continued to apply the requirement that a religious corporation, at a minimum, be a nonprofit entity.⁵⁰

The Proposed Rule Eliminates the Requirement That the “Entity Must Be Engaged Primarily in Carrying Out That Religious Purpose”

The *per curiam* decision in *World Vision* requires that an entity be “engaged primarily in carrying out” the religious purpose for which it was organized.⁵¹ The proposed rule drops this key component of the *World Vision* test, however, and replaces it with the mere requirement that the entity “engages in exercise of religion consistent with, and in furtherance of, a religious purpose.”⁵² Of course, the rule also adopts an extremely broad definition of “engage in religious exercise” to further water down this prong of the test.⁵³ A contractor could engage in a few minor activities that are tangential to its core business and meet this portion of the test, rather than primarily performing functions related to its religious purpose. It is unclear how much an employer would have to do to meet this test— for example, would it be enough that an employer places religious tracts in the break room for employees to browse or that an employer throws a company-wide Christmas party every year? Dropping this prong of the *World Vision* test could vastly expand the entities that qualify for the exemption.

The Proposed Rule Renders the Final Two Prongs of the World Vision Test Toothless

The proposed rule keeps two prongs of the *World Vision per curiam* test intact, but its application of these prongs strip them of their meaning. First, entities must “be organized for a religious purpose.” Judge O’Scannlain, for example, would require that the religious purpose be evidenced by “Articles of Incorporation or similar foundational documents.”⁵⁴ The proposed rule, in contrast, says “a religious purpose can be shown by articles of incorporation or other founding documents, *but that is not the only type of evidence that can be used.*”⁵⁵ If a religious purpose is not documented in *any* of the entity’s foundational documents, it likely was not organized for a religious purpose.

The *World Vision per curiam* test also requires that entities hold themselves out to the public as carrying out their religious purpose. The court found that World Vision met this prong of the test by demonstrating that it displayed its religious logo, religious iconography, and religious text across its campus; distributed Christian Messaging Guidelines that governed their external communications; and included a religious statement on every piece of communication.⁵⁶ Indeed, the nonprofit instructed its employees that “Christian witness should be communicated as part of everything World Vision does.”⁵⁷

In contrast, the proposed rule would allow an entity to meet this test if it merely “affirms a religious purpose in response to inquiries from a member of the public or a government entity.”

⁵⁰ The court determined that the entity was a nonprofit and it does not “engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Id.*

⁵¹ *World Vision*, 633 F.3d at 724; *see also LeBoon*, 503 F.3d at 226 (explaining that its nine factor test is designed to answer the question of whether the entity’s “purpose and character are primarily religious.”).

⁵² It is noteworthy that this modified factor doesn’t even match that in the O’Scannlain concurrence. It is watered down even from his more lenient test.

⁵³ The definition would use the term as understood by RFRA, which is incredibly broad, and is, as explained earlier, an entirely different statutory scheme.

⁵⁴ *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring).

⁵⁵ Emphasis added.

⁵⁶ *World Vision*, 633 F.3d at 738-39.

⁵⁷ *Id.* at 739.

Imagine that OFCCP receives a complaint from an employee about a corporation that has, at that point, made no public showing of a religious purpose. Under this proposed rule, if OFCCP calls an official at the corporation to ask if it is religious and the official says “yes,” that corporation will have met this prong of the proposed rule’s test.

The proposed rule’s definition of “religious corporation, association, education institution or society” is so broad it could sweep in countless entities that would never—and should never—qualify for the Title VII exemption. It should be rejected.

The Definition of “Religion” Is Too Broad in the Context of an Employer Exemption

The proposed rule adopts a broad definition of “religion” that would “include[] all aspects of religious observance and practice, as well as belief.” OFCCP asserts that it is simply adopting the definition used in Title VII, but the change in context, combined with the proposed modifications that broaden it, make using this definition for the exemption inappropriate. It would upend the protections in place for employees by providing employers an unchecked ability to discriminate on the basis of religion.

First, the Title VII definition of religion was designed to broadly protect *employees* from discrimination. Indeed, “the ‘primary objective’ of Title VII is to bring employment discrimination to an end”⁵⁸ The Title VII religious exemption, in contrast, protects *employers*,⁵⁹ allowing religious employers a narrow exemption to prefer coreligionists in hiring.⁶⁰ Using Title VII’s broad definition of religion in the context of employers expands the reach of the exemption far beyond its intent. In fact, in *Little v. Wuerl*, the Third Circuit rejected the use of this definition in the context of the Title VII exemption, explaining: Title VII’s definition of religion “seems intended to broaden the prohibition against discrimination—so that religious practice as well as religious belief and affiliation would be protected. There appears to be no legislative history to indicate that Congress considered the effect of this definition on the scope of the exemptions for religious organizations.”⁶¹

Second, even in the context of employees where the definition was intended to be broad, it has a backstop: Religion “includes all aspects of religious observance and practice, as well as belief, *unless* an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observances or practices without undue hardship.”⁶² Employees are granted protections to exercise their religion only to the extent that an employer can reasonably accommodate the religious practice with no more than a *de minimis* cost.⁶³

⁵⁸ See, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (“The ‘primary objective’ of Title VII is to bring employment discrimination to an end”); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) (“The dominant purpose of the title, of course, is to root out discrimination in employment.”); see also *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001) (“What is clear from the law itself, its legislative history, and Congress’ subsequent actions, is that the goal of Title VII was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”).

⁵⁹ The proposed rule would impute the broad definition of religion to the term “particular religion” and create an imbalance in favor of employers’ religious beliefs.

⁶⁰ *World Vision*, 633 F.3d at 727 (O’Scannlain, J., concurring); see also, e.g., EEOC Compliance Manual, *supra* note 13.

⁶¹ 929 F.2d 944, 950 (3d Cir. 1991).

⁶² 42 USC § 2000e(j) (emphasis added).

⁶³ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (Title VII does not require religious accommodations that impose more than “de minimis” costs to an employer).

The proposed rule, however, drops the second part of Title VII's definition of religion. What is left is a broad, almost unlimited term. OFCCP states that it is omitting the accommodation limitation in its definition because it is redundant to language that currently exists in a separate section of the regulations.⁶⁴ This means that, although the accommodation language still governs employees' religious exercise, when the term religion is applied to *employers'* religious beliefs there is no equivalent limitation. Such an extension of a broad definition of religion to apply to employers is inappropriate and constitutionally problematic.

For example, to protect the rights of their employees, employers most often need only provide accommodations like flexible schedules, shift changes, or waivers for religious attire or grooming, as long as those accommodations do not require more than a *de minimis* cost.⁶⁵ In contrast, the proposed rule could require employees to sign a statement of faith or adhere to all of the religious tenets of their government-funded employer with the consequence of noncompliance being the loss of their job. OFCCP is clearly placing the rights of employers over those of employees.⁶⁶

The Proposed Definition of “Particular Religion” Misapplies Case Law and Risks Allowing Entities to Use Religion to Discriminate Against Other Protected Classes

OFCCP has proposed a definition of “particular religion” that is extremely broad and seems intended to allow employers to discriminate against other protected classes. Although the preamble acknowledges that the Executive Order itself and Title VII do not excuse discrimination by religious employers on grounds other than religion, it ignores Title VII case law and congressional intent in an effort to widen the scope of the executive order's religious exemption.

The Title VII exemption, like the exemption in Executive Order 11246, is narrow. Religious employers may consider religion—and only religion—in their employment practices. The Title VII exemption “does not confer upon religious organizations a license to make those [employment] decisions” on the basis of race, national origin, or sex.⁶⁷ The exemption “merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with” discrimination on another protected basis.⁶⁸ Indeed, when debating the Civil Rights Act of 1964 and amendments in 1972, Congress considered and rejected blanket

⁶⁴ 41 CFR § 60-50.3.

⁶⁵ U.S. Dep't of Labor, *Religious Discrimination and Accommodation in the Federal Workplace*, <https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/religious-discrimination-accommodation> (last visited Aug. 28, 2019).

⁶⁶ As explained above, this runs afoul of the Establishment Clause, which prohibits granting religious accommodations that would detrimentally affect a third party. *E.g.*, *Hobby Lobby*, 573 U.S. at 729 n.37 (citing *Cutter*, 544 U.S. at 720); *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly*, 489 U.S. at 18 n.8 (may not “impose substantial burdens on nonbeneficiaries”).

⁶⁷ *Rayburn*, 772 F.2d at 1166, *cert. denied*, 478 U.S. 1020 (1986); *see also*, *e.g.*, *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999); *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *accord* EEOC Compliance Manual, *supra* note 13.

⁶⁸ *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

exemptions that would allow religious employers to discriminate against other protected classes.⁶⁹

The preamble, however, states that the exemption permits “qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions.” In explaining the scope of the exemption, the preamble completely ignores case law that makes clear religious employers do not get a license to discriminate on other grounds, even when motivated by religion. For example, courts have consistently held that it is “fundamental that religious motives may not be a mask for sex discrimination in the workplace.”⁷⁰ Therefore, even though a religious employer may demand that its employees adhere to a particular religious code of conduct, “Title VII requires that this code of conduct be applied equally” to all employees regardless of sex.⁷¹

The obvious omissions demonstrate an intent to allow religion to be used to discriminate on other grounds. OFCCP, however, cannot create a blanket exemption through regulation when it would conflict with the text and intent of the executive order it is implementing.⁷²

OFCCP mistakenly relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer*⁷³ to bolster its point. But, the holding of *Trinity Lutheran* is extraordinarily narrow. The plurality opinion of the Court, which is controlling, explained that the decision was limited to the specific facts of the case: “This case involves express discrimination based on religious identity with respect to playground resurfacing.”⁷⁴ This proposed rule, however, would attempt to extend *Trinity Lutheran* to the funding of federal contractors.⁷⁵

⁶⁹ See *Pac. Press*, 676 F.2d at 1276-77 (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

⁷⁰ *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 250 (E.D.N.Y. 1998; see also, e.g., *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *Fremont Christian*, 781 F.2d at 1367 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christin Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992). The EEOC provides the following examples: (a) “a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races;” and (b) “a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.” EEOC Compliance Manual, *supra* note 13.

⁷¹ *Boyd*, 88 F.3d at 414; see also, e.g., *Cline* 206 F.3d at 658; *Ganzy*, 995 F. Supp. at 348; *Dolter v. Wahlert High Sch.*, 483 F. Supp 266, 270 (N.D. Iowa 1980).

⁷² In addition, “to exempt [a]ll [f]orms of discrimination . . . would itself raise first amendment problems,” because it would effectively be a government preference of religious employers over secular employers. *Dolter*, 483 F. Supp. at 269 (citing *King’s Garden Inc. v. FCC*, 498 F.2d 51, 54-57 (D.C. Cir. 1974)); see also *EEOC v. First Baptist Church*, No. S91-179M, 1992 WL 247584, at *11 (N.D. Ind. June 8, 1992) (citing *Texas Monthly*, 489 U.S. at 8).

⁷³ 137 S. Ct. 2012 (2017).

⁷⁴ *Id.* at 2024 n.3 (2017) (Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3. Justices Kennedy, Alito and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except as to footnote 3.).

⁷⁵ The case is distinguishable on other grounds as well. For example, under *Trinity Lutheran*, the grant would serve the goal of “increasing access to the playground for all children.” *Id.* at 2018. The proposed rule, on the other hand, would *decrease* employment opportunities because contractors would impose a religious test on employees and applicants.

Trinity Lutheran says that the government cannot deny a religious entity a grant “solely because of its religious character.”⁷⁶ But the government can refuse to fund a religious organization because of what it proposes to do with the funds.⁷⁷ Religious organizations already are eligible to compete for contracts and the *Trinity Lutheran* ruling does not require anything more. It certainly does not authorize, let alone require, the government to allow federal contractors to use religion to discriminate in hiring.

The “But For” Test Is More Deferential to Employers Than the “Motivating Factor” Test

The rule not only defines “particular religion” broadly, but also makes it more difficult to demonstrate religious organizations are using the religious exemption to get away with discrimination against their employees on another protected basis.

The proposed rule would adopt the “but-for” standard to evaluate “claims of discrimination by religious organizations based on protected characteristics other than religion,” even though in 1991, Congress explicitly adopted the “motivating factor” test for status-based claims under Title VII.⁷⁸ By bucking Congress and applying a standard more deferential to employers, OFCCP would impose a higher burden on parties challenging improper discrimination.

The proposed rule erroneously relies on *University of Texas Southwest Medical Center v. Nassar* and *Gross v. FBL Financial Services, Inc.* to support its proposed use of the “but-for” test. Neither case, however, supports the use of the “but-for” test in status-based discrimination cases under Title VII, which are analogous to claims under Executive Order 11246. *Nassar* distinguished between status-based discrimination claims and unlawful retaliation claims, requiring a “but-for” standard only for the latter category.⁷⁹ And *Gross* addressed claims brought under the ADEA not Title VII.⁸⁰

The adoption of the “but-for” test also runs counter to the Department’s own prior policy. When OFCCP issued regulations to implement Executive Order 13665, which amended Executive Order 11246, it explicitly rejected the “but-for” test and adopted the “motivating factor” test instead, determining it was consistent with Title VII principles and the Civil Rights Act of 1991.⁸¹

Furthermore, under the proposed rule, status-based discrimination claims based on identical conduct would be evaluated according to different standards of proof depending on whether an employer is subject to claims under Title VII or EO 11246. This inconsistency is troubling for employers and employees alike.

⁷⁶ *Id.* at 2024.

⁷⁷ *Id.* at 2023 (distinguishing *Locke v. Davey*, in which the plaintiff “was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry.”).

⁷⁸ See Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)) (amending Title VII to mandate that an “unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”).

⁷⁹ 570 U.S. at 357 (“Congress has in explicit terms altered the standard of causation for one class of claims but not another . . .”).

⁸⁰ 557 U.S. at 174 (“We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”).

⁸¹ See 80 Fed. Reg. 54934, 54944-46.

Fears of Entanglement and Intrusion Are Overblown and Used to Undermine Worker Protections

The preamble repeatedly argues that the Department's ability to even inquire about whether an employer is entitled to the exemption or to claims of discrimination is prevented by the Constitution and a fear of entanglement.⁸² But, OFCCP's reliance on this theory not only runs counter to Title VII case law, it leaves employees with little recourse in the face of potential discrimination.

The Supreme Court has explained that the government "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."⁸³ Courts have repeatedly held that employees may challenge employment discrimination they have faced at the hands of religious organizations. There is an important "distinction between pervasive supervision [of religious organizations] and simple prohibition [of employment discrimination]."⁸⁴ Courts are concerned about the "potential for ongoing entanglement or continuous supervision of church affairs by the government's regulations,"⁸⁵ but in employment discrimination cases, the relationship is quite limited because courts investigate an isolated employment-related decision.

A conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since the conclusion implies nothing about the validity of the religious doctrine or practice, and further, implies very little even about the good faith with which the doctrine was advanced to explain the dismissal.⁸⁶

Thus, the preamble's assertion that it needs to use the "but-for" test when an employer "claims that its challenged employment action was based on religion" so as to avoid evaluating "the

⁸² For example, the preamble's reliance on the "ministerial exception" is misplaced. The "ministerial exception" bars courts from considering employment discrimination claims brought by ministers because the government may not interfere with the internal governance or ecclesiastical decisions of a church. The Department posits, without justification, that this principle should apply beyond the limited circumstances involving employees who are "ministers." As the Office of Legal Counsel explained in the context of grants for substance use disorder programs: "the ministerial exception would rarely, if ever, apply." Memorandum from Randolph D. Moss, Ass't Att'y Gen., Office of Legal Counsel, for William P. Marshall, Deputy Counsel to the President, *Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000"* (Oct. 12, 2000), available at <https://www.justice.gov/olc/page/file/936211/download>. Most federal contractors are unlikely to have ministers (those who preach or teach the faith) on staff.

⁸³ *Dayton Christian Sch.*, 477 U.S. at 628.

⁸⁴ *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324, 328 (3d Cir. 1993).

⁸⁵ *Pac. Press*, 676 F.2d at 1282; see *EEOC v. Miss. College*, 626 F.2d 477, 488 (5th Cir. 1980) ("Although the College is a pervasively sectarian institution, the minimal burden imposed upon its religious practices by the application of Title VII and the limited nature of the resulting relationship between the federal government and the College cause us to find that application of the statute would not foster excessive government entanglement with religion.").

⁸⁶ *Geary*, 7 F.3d at 330.

nature of a sincerely held⁸⁷ belief” is misplaced. And OFCCP’s failure to properly enforce the nondiscrimination protections will result in discrimination against other protected classes.

Bottom line, the concerns about impermissible entanglement are overblown.⁸⁸ Failure to engage in any investigation at all simply because an employer is religious would render the nondiscrimination protections for employees meaningless.

Conclusion

Citing unsupported claims that some religious organizations had been dissuaded from seeking contracts, OFCCP would extend the existing regulation to for-profit corporations and make it easier to use religion as a pretext for discrimination against other classes. This proposed rule has myriad flaws: It manipulates federal case law, ignores congressional intent, exceeds constitutional constraints, and offends the principle that the government not support discrimination. For the many reasons explained above, OFCCP should reject this proposed rule.

Sincerely,



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⁸⁷ The proposed definition of “sincere” and explanation do not shed much light on this concept. Whether a belief is sincerely held is a question of fact, determined by weighing the strength of evidence. Sincerity most often arises in the context of determining whether an employer must accommodate a worker’s religious exercise. The factors to determine sincerity for an individual may not be applicable to a corporation that employs staff, including a large publicly held for-profit corporation. And even then, the preamble’s equivocal views, for example, on the existence and implementation of policies to demonstrate the sincerity of an adverse employment action, raises concerns about whether OFCCP will even weigh these factors.

⁸⁸ See, e.g., *Geary*, 7 F.3d at 328-30; *DeMarco v. Holy Cross High Sch.*, 4 3d 166, 169-70 (2d Cir. 1993) (quoting *Hernandez v. Comm’ner*, 490 U.S. 60, 696-67 (“‘routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no ‘detailed monitoring and close administrative contact’ between secular and religious bodies” are permissible); *Pac. Press*, 676 F.2d at 1282; *Bollard*, 196 F.3d at 949-50 (no danger of entanglement in allowing sex-based harassment Title VII suit to proceed); *Vigars*, 805 F. Supp. at 809; *Dolter*, 483 F. Supp at 269-71 (“expansive scrutiny into the day-to-day administration of defendant’s school would not in the least be required in this case”); *Fremont Christian*, 781 F.2d at 1370 (“churches are not—and should not be—above the law,” and “employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church’s spiritual functions”) (quoting *Rayburn*, 772 F.2d at 1171).