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December 9, 2021

Tina Williams  
Director, Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
Department of Labor  
Room C-3325  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09

Dear Ms. Williams:

Thank you for the opportunity to comment on the "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09," which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register on November 9, 2021. We strongly support the proposed rule because it would rescind the rule finalized by the Trump administration titled, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption."

The Trump final rule amended the regulations implementing Executive Order 11246, unlawfully expanding its religious exemption to allow discrimination against countless workers. This proposed rule would reinstate a more narrow and accurate interpretation of the exemption, promoting clarity, equity and fairness, equal employment opportunities, certainty, and procurement efficiency and economy.

With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding the foundational American principle of separation of church and state since 1947. Our nation promises everyone the freedom to believe as they want, but our laws cannot allow anyone to use their religious beliefs to harm others.

### **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.<sup>1</sup> 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.

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<sup>1</sup> Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 27, 1941).

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.<sup>2</sup> In 1967, President Johnson added protections against sex discrimination.<sup>3</sup> In 2016, President Barack Obama extended these protections to explicitly cover sexual orientation and gender identity.<sup>4</sup>

Dating back to the first order in 1941, the government has made clear that these nondiscrimination protections serve many goals.<sup>5</sup> They benefit workers by providing equal employment opportunities. They also benefit the government and taxpayers: They increase economy and efficiency in contracting by ensuring workers are not arbitrarily excluded from the labor pool.

Unfortunately, President George W. Bush took a step back from this commitment to expanding protections against discrimination. He amended Executive Order 11246 to permit religiously affiliated nonprofit organizations that receive government contracts to discriminate in employment on the basis of religion.<sup>6</sup>

The Trump final rule dramatically expanded this already troubling exemption, wrongly claiming that allowing more employers to discriminate would serve economy and efficiency in government contracting. This was not only bad law and bad policy, but was also arbitrary and capricious in violation of the Administrative Procedures Act (APA). This sudden rejection of the prevailing policy was made without any evidence to support such claims and ignored decades of findings that demonstrate the benefits of nondiscrimination protections to workers.<sup>7</sup>

Instead of protecting American workers, the Trump final rule betrayed them.

The proposed rule would reverse the Trump administration's harmful expansion of the exemption, restore longstanding policy that actually provides equal employment opportunity for workers, and promote economy and efficiency in contracting.

### **The Proposed Rule Corrects Major Legal Errors in the Trump Final Rule**

Misapplying Title VII case law and adopting an unreasonably broad interpretation of RFRA, the Trump final rule vastly enlarged the religious exemption in Executive Order 11246 in two key ways.

First, the Trump final rule greatly expanded the kinds of employers that can use the religious exemption. It "permit[ed] a contractor whose purpose and/or character is not primarily religious

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<sup>2</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

<sup>3</sup> Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

<sup>4</sup> Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

<sup>5</sup> See, e.g., Exec. Order No. 8,802; Discrimination on the Basis of Sex; Final Rule, 81 Fed. Reg. 39,108, 39,109 (June 15, 2016).

<sup>6</sup> 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").

<sup>7</sup> See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (errors in reasoning may render an agency action arbitrary and capricious).

to qualify for” the exemption.<sup>8</sup> And, in an unprecedented move, the rule even allowed for-profit corporations to use the religious exemption.

Second, the Trump final rule “retreat[ed] from the general principle that qualifying religious employers are prohibited from taking employment actions that amount to discrimination on the basis of protected characteristics other than religion.”<sup>9</sup> This put LGBTQ people, women, religious minorities, and the nonreligious at the most risk of facing employment discrimination.

The Trump final rule made these wholesale and unreasoned changes without justification. Although the Trump rule claimed to expand access for federal contracting opportunities, it provided no credible support for its assertion that entities that want to contract with the federal government have been unable to do so because the existing religious exemption is insufficient.<sup>10</sup>

The proposed rule will allow OFCCP to “return to its traditional approach of applying Title VII case law and principles” and will reinstate its “policy of considering RFRA claims raised by contractors on a case-by-case basis.”<sup>11</sup>

### ***The Definition of “Religious Corporation, Association, Education Institution or Society” in the Trump Final Rule is Unsupported in Law***

Only a “religious corporation, association, educational institution or society,” may qualify for the religious exemption in Executive Order 11246. As acknowledged in the Trump final rule, this term is commonly understood to have the same meaning as the identical term in Title VII.<sup>12</sup> The definition adopted in the final rule, however, did not reflect any accepted understanding of the Title VII definition. In an attempt to vastly expand the scope of the existing narrow exemption, the Trump final rule created a new test out of whole cloth—one not used by OFCCP at any point prior nor one used by any federal court.

As explained by the U.S. Equal Employment Opportunity Commission, the Title VII exemption “applies only to those institutions whose ‘purpose and character are primarily religious.’”<sup>13</sup> Yet, under the Trump final rule’s definition, “a for-profit employer whose purpose and character are not primarily religious could be eligible for the Title VII religious exemption.”<sup>14</sup>

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<sup>8</sup> Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Biden NPRM), 86 Fed. Reg. 62,115, 62,117 (Nov. 9, 2021).

<sup>9</sup> *Id.* at 62,117.

<sup>10</sup> The APA, however, requires that an agency provide “findings and [] analysis to justify the choice made,” but the Trump final rule instead provided speculation. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (quotation omitted). See also *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (“conclusory statements will not do; an agency’s statement [in support of its action] must be one of reasoning”) (cleaned up).

<sup>11</sup> Biden NPRM, 86 Fed. Reg. at 62,117.

<sup>12</sup> OFCCP “generally interprets the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII” and that the exemptions in 11246 and Title VII “should be given a parallel interpretation.” Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Trump Final Rule), 85 Fed. Reg. 79,324, 79,324 (Dec. 9, 2020).

<sup>13</sup> EEOC, Questions and Answers: Religious Discrimination in the Workplace, 29 C.F.R. 1605 (July 22, 2008), available at <https://bit.ly/3ocadv5>.

<sup>14</sup> Biden NPRM, 86 Fed. Reg. at 62,119.

Different circuit courts apply slightly different factors to determine whether an entity is “primarily religious.”<sup>15</sup> The final rule’s preamble claimed to have adopted the *Spencer v. World Vision*<sup>16</sup> test, but then the rule manipulated that test beyond recognition.<sup>17</sup>

In short, the final rule:

- (1) Claimed to follow the *Spencer v. World Vision* test for determining whether an entity qualifies for the religious exemption; but then
- (2) without justification, improperly dismissed the test in the *World Vision per curiam* opinion in favor of the test used in Judge O’Scannlain’s concurring opinion; and then
- (3) renounced key parts of O’Scannlain’s test—including the crucial requirement that the entity must be a nonprofit;
- (4) dropped 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, made clear it would do little to ensure that an entity meets the remaining *World Vision* requirements.

Not only did the final rule put OFCCP on poor legal footing, it also created confusion for contractors. They were forced to somehow comply with two completely different legal standards.

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

The Trump proposed rule eliminated the *Spencer v. World Vision per curiam* test factor that an employer “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts”<sup>18</sup> and rejected the O’Scannlain concurrence requirement that “the initial consideration, whether the entity is a nonprofit, is especially significant.”<sup>19</sup> It did so without citing one single case where a court either granted the exemption to a for-profit entity or rejected the application of this prong of the test.<sup>20</sup>

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<sup>15</sup> *Spencer v. World Vision*, 633 F.3d 724, 729 (9th Cir. 2011) (O’Scannlain, J., concurring); *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); see also *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (“In applying the [religious organization exemption], we determine whether an institution’s ‘purpose and character are primarily religious’ by weighing ‘[a]ll significant religious and secular characteristics.’” (quoting *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)) (second alteration in original)); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (applying similar “primarily religious” standard); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997) (looking at specific facts to determine whether university was “religious” or “secular”).

<sup>16</sup> 633 F.3d at 724 (per curiam).

<sup>17</sup> The preamble admitted it strayed from the actual *World Vision* test: “OFCCP acknowledged that the definition it is promulgating here modified the *World Vision* test in some respects, or alternatively can be viewed as following Judge O’Scannlain’s concurrence with one addition.” Trump Final Rule, 85 Fed. Reg. at 79,332.

<sup>18</sup> 633 F.3d at 724 (per curiam).

<sup>19</sup> *Id.* at 734 (O’Scannlain, J., concurring).

<sup>20</sup> The preamble to the Trump proposed rule relied heavily on *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), to justify dropping the nonprofit prong of the *World Vision* test. But *Hobby Lobby* analyzed the scope of the Religious Freedom Restoration Act (RFRA) not Title VII. RFRA applies to

In response to public comments criticizing the removal of this prong, the Trump final rule reinserted the nonprofit factor, but then undermined its correction by making it optional. The Trump final rule stated that the contractor must “operate[] on a not-for-profit basis; or present[] other strong evidence that its purpose is substantially religious.”<sup>21</sup> Providing an alternative nullified the nonprofit requirements. In addition, the “strong evidence” alternative greatly lowered the bar on the test overall—in a test devised to determine whether an entity is *primarily* religious, the Trump final rule allowed a for-profit entity to meet the test with “other evidence” that it was “*substantially* religious.”

### *The Final Trump Rule Eliminated 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.<sup>22</sup> The Trump final rule, however, dropped this key component of the *World Vision* test, and replaced it with the mere requirement that the entity “engages in activity consistent with, and in furtherance of, that religious purpose.”<sup>23</sup>

The preamble in the final rule wrongly asserted that OFCCP could not inquire into whether an entity was primarily religious because it could not engage in an inquiry that requires a “comparison between the amount of religious and secular activity at any organization.”<sup>24</sup> This conclusion ran contrary to the substantial body of Title VII case law that has applied the “primarily religious test.”

### *The Trump Final Rule’s Definition Violated the APA by Creating Confusion Rather Clarity*

Speculating that contractors were confused by the long-established definition of religious employer, the preamble to the Trump final rule created a whole new definition to provide “clarity.”<sup>25</sup> It was beyond unreasonable to assume, however, that imposing a made-up legal standard, would resolve any confusion. In addition, the Trump final rule required contractors to comply with two completely different legal standards—one for Executive Order 11246 and one for Title VII. Moreover, the Trump final rule did not address the confusion the new standard

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“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.” *Id.* at 707-08. 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.” *Id.* at 708. 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, five years after *Hobby Lobby*, the same federal appeals court that decided *World Vision* continued to apply the requirement that a religious corporation, at a minimum, be a nonprofit entity. *Garcia*, 918 F.3d at 1004 (determining 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.”).

<sup>21</sup> 41 C.F.R. § 60-1.3 (emphasis added).

<sup>22</sup> *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.”).

<sup>23</sup> 41 C.F.R. § 60-1.3.

<sup>24</sup> Trump Final Rule, 85 Fed. Reg. at 79,336.

<sup>25</sup> *E.g.*, *id.* at 79,325, 79,331.

created for employees who would not know if they were protected from workplace discrimination.<sup>26</sup>

Thus, one of the many benefits of the proposed rule is that it would eliminate this conflict and provide clarity to contractors and employees.

### ***The Definition of “Religion” in the Trump Final Rule Was Too Broad in the Context of an Employer Exemption***

The Trump final rule adopted a broad definition of “religion” that would “include[] all aspects of religious observance and practice, as well as belief.” Although this definition is used in Title VII, it is used in an entirely different context. Utilizing this definition for the exemption was inappropriate—it upended the protections in place for employees by allowing employers 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 . . . .”<sup>27</sup> The Title VII religious exemption, in contrast, protects *employers*, allowing religious employers a narrow exemption to prefer coreligionists in hiring.<sup>28</sup> Using Title VII’s broad definition of religion in the context of employers expanded 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.”<sup>29</sup>

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.”<sup>30</sup> 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.<sup>31</sup>

The Trump final rule, however, dropped the second part of Title VII’s definition of religion. It left a broad, almost unlimited term. This means that, although the accommodation language still

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<sup>26</sup> The unreasonable justifications for the Trump final rule were arbitrary and capricious in violation of the APA.

<sup>27</sup> 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.”).

<sup>28</sup> *Spencer*, 633 F.3d at 727 (O’Scannlain, J. concurring).

<sup>29</sup> *Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991).

<sup>30</sup> 42 U.S.C. § 2000e(j) (emphasis added).

<sup>31</sup> 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).

governs *employees'* religious exercise, when the term religion was applied to *employers'* religious beliefs there was no equivalent limitation. Such an extension of a broad definition of religion to apply to employers was inappropriate and constitutionally problematic.

The Trump final rule clearly placed the rights of employers over those of employees. For example, to protect the rights of 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.<sup>32</sup> In contrast, the Trump final rule could have resulted in government-funded employers requiring employees to sign a statement of faith or adhere to religious dictates as a condition of continued employment.

The proposed rule will eliminate this problematic definition and return to the traditional approach of applying Title VII case law. It will ensure that the definition of religion, which was designed to protect employees, is not misused to cause them harm.

### ***The Trump Final Rule's Definition of "Particular Religion" Misapplied Case Law and Invited the Use of Religion to Discriminate Against Other Protected Classes***

The Trump final rule's definition of "particular religion" is extremely broad and seemed intended to allow employers to discriminate against other protected classes. Although the preamble to the final rule acknowledged that the Executive Order itself and Title VII do not excuse discrimination by religious employers on grounds other than religion, it gave short shrift to relevant 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 favor 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.<sup>33</sup> 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.<sup>34</sup> Indeed, when debating the Civil Rights Act of 1964 and amendments in 1972, Congress considered and rejected blanket exemptions that would allow religious employers to discriminate against other protected classes.<sup>35</sup>

The preamble, however, stated that the exemption permitted contractors to "condition employment on acceptance of or adherence to religious tenets as understood by the employing

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<sup>32</sup> U.S. Dep't of Labor, *Religious Discrimination and Accommodation in the Federal Workplace*, available at <https://bit.ly/3EBmBLr>.

<sup>33</sup> *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), 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).

<sup>34</sup> *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

<sup>35</sup> See *Pac. Press*, 676 F.2d at 1276-77 (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

contractor.”<sup>36</sup> Yet 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.”<sup>37</sup> 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.<sup>38</sup>

In conflict with decades of case law, the preamble to the final rule claimed that courts have not resolved whether religious employers can discriminate on the basis of protected characteristics when that discrimination is motivated by religion.<sup>39</sup> The final rule then purported to resolve the matter by invoking RFRA, reaching the astounding conclusion that a federal contractor could use religion to discriminate against, for example, women and LGBTQ people.<sup>40</sup> Effectively, the Trump rule tried to create a blanket exemption through regulation even though it conflicted with the text and intent of the executive order it implemented.<sup>41</sup>

The proposed rule will eliminate this problematic and unnecessary definition and have the benefit of promoting clarity, equity, fairness, and equal employment opportunity.

### ***The Trump Final Rule Misinterpreted the Religious Freedom Restoration Act (RFRA)***

There is no doubt that Executive Order 11246 does not excuse discrimination by religious employers on grounds other than religion.<sup>42</sup> But the Trump final rule wrongly asserted that contractors could use RFRA to get around the bar on discrimination against other protected characteristics. The preamble to the final rule made this clear: An employer could use RFRA to excuse discrimination where the employer was “motivated ‘solely’ by its sincerely held religious

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<sup>36</sup> Trump Final Rule, 85 Fed. Reg. at 79,344. The Trump rule mistakenly relied on *Trinity Lutheran Church of Columbia, Inc. v. Comer* to bolster its point. *Trinity Lutheran* says that the government cannot deny a religious entity a grant “solely because of its religious character.” 137 S. Ct. 2012, 2024 (2017). But the government can refuse to fund a religious organization because of what it proposes to do with the funds. *Id.* at 2023 (distinguishing *Locke v. Davey*, 540 U.S. 712 (1984), 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.”). 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.

<sup>37</sup> *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); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 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).

<sup>38</sup> *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).

<sup>39</sup> Trump Final Rule, 85 Fed. Reg. at 79,349.

<sup>40</sup> See *id.* at 79,364.

<sup>41</sup> 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, Inc. v. Bullock*, 480 U.S. 1, 8 (1989)).

<sup>42</sup> The text of Executive Order 11246 explicitly states that “such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.” E.O. 11,246 § 204(c).

tenets, even when the contractor's actions violate another nondiscrimination prohibition of EO 11246 (other than race[])."<sup>43</sup>

The interpretation of RFRA to allow discrimination that was set forth in the preamble to the final rule was both sweeping and unsupported. Especially troubling was the determination that OFCCP "has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race."<sup>44</sup> This conflicted with the text of the religious exemption itself and Title VII case law, which treat all protected classes on equal terms.

The proposed rule rightly reaffirms the government's deep-rooted position that combatting discrimination is a compelling interest: "It is beyond dispute that the government's interests in preventing and remedying the harms of discrimination, and in ensuring equal employment opportunity, are 'weighty.'"<sup>45</sup>

Moreover, the preamble of the Trump final rule vastly expanded the religious exemption by adopting a categorical approach to RFRA in place of the previous case-by-case application.

The preamble of the proposed rule states that OFCCP will return to its long-established policy of applying RFRA on a case-by-case basis. This is the correct approach. It finds support both in the text of RFRA<sup>46</sup> and in Supreme Court jurisprudence. Just this year, the Court reemphasized that a compelling interest must be assessed on a case-by-case basis, looking at the specific facts presented by particular religious claimants.<sup>47</sup>

RFRA requires a careful, individualized review. When claims under RFRA are advanced, the government must inquire into the circumstances underlying the claim. Such inquiries should be conducted in a manner that respects and does not evaluate the merits of the religious beliefs. The government must ensure that:

- there is a logical tie between the asserted burden and a religious belief<sup>48</sup>;
- the religious belief is sincerely held<sup>49</sup>;

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<sup>43</sup> Biden NPRM, 86 Fed. Reg. at 62,120.

<sup>44</sup> Trump Final Rule, 85 Fed. Reg. at 79,355.

<sup>45</sup> Biden NPRM, 86 Fed. Reg. at 62,120-21 (citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021)).

<sup>46</sup> See S. Rep. No. 103-111, at 9 (1993) ("The Religious Freedom Restoration Act would establish one standard for testing claims of Government infringement on religious practices. This single test, however, should be interpreted with regard to the relevant circumstances in each case.") (discussing application of RFRA in prison context).

<sup>47</sup> *Fulton*, 141 S. Ct. at 1881.

<sup>48</sup> See, e.g., *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). For example, a business owner who explains his religious beliefs about gender and sex but then states that the business fired a transgender employee because he thought her presence would be bad for business and drive away customers has nothing whatsoever to do with the owner's religious beliefs.

<sup>49</sup> Agencies may make inquiries into the sincerity of the beliefs, but not the nature of those beliefs. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (In a case brought under RFRA's sister statute, RLUIPA, Court emphasized it was proper to investigate whether inmate is using religious claim to "cloak illicit conduct."); see also EEOC Compliance Manual on Religious Discrimination, §§ 12-I(A)(2)-(A)(3) (2021) (explaining employers may inquire into sincerity of religious beliefs of employees or applicants who request religious accommodation).

- the burden is “substantial” as a legal matter<sup>50</sup>; and
- the requested accommodation is tailored to address the burden.

Thus, under RFRA, the government may not take a contractor at its word without any review, nor may it create blanket exemptions for hypothetical burdens. Doing so would unconstitutionally favor religion.<sup>51</sup>

A categorical approach to using RFRA also prevents the government from considering the harms that an exemption under RFRA may cause. Indeed, the proposed rule explains that a case-by-case analysis is necessary because it is not possible in rulemaking to properly weigh “governmental and third-party interests in a particular case.”<sup>52</sup>

The government’s ability to provide religious exemptions—including under RFRA—is not unlimited. RFRA is bound by the Establishment Clause and the effect a religious exemption may have on third parties is key to the constitutional analysis. Any exemption “must be measured so that it does not override other significant interests”<sup>53</sup> or “impose unjustified burdens on other[s].”<sup>54</sup> The government may not grant exemptions that have a harmful, discriminatory impact on others.<sup>55</sup>

## **The Trump Final Rule Must Be Rescinded**

Rescinding the Trump rule will not only correct legal mistakes, but also promote important policy outcomes.

First, correcting the previous rule’s legal mistakes will provide clarity to contractors and employees as well as to OFCCP staff. The Trump rule misapplied Title VII law and created an entirely new legal test, sowing confusion for anyone trying to follow or implement the rule. Thus

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<sup>50</sup> See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff’d by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims were not at issue in Supreme Court case) (“Most circuits . . . have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged.”); see also, e.g., *Bowen v. Roy*, 476 U.S. 693, 702-03 (1986); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (while it “is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, . . . [we] have doubts whether the alleged burden imposed . . . is a substantial one”).

<sup>51</sup> Granting a religious exemption without first objectively determining that there exists a substantial, government-imposed burden on the claimant’s religious exercise would violate the Constitution by favoring and promoting religion over nonreligion. See *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987). It would impermissibly “single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief.” *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987).

<sup>52</sup> Biden NPRM, 86 Fed. Reg. at 62,121.

<sup>53</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interests” violates Constitution).

<sup>54</sup> *Cutter*, 544 U.S. at 726. See also *Texas Monthly*, 480 U.S. at 18 n.8 (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

<sup>55</sup> See *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (the religious accommodation would have “precisely zero” impact on third parties); see also *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (accommodation “would not detrimentally affect others”).

returning to OFCCP’s longstanding approach of following Title VII case law will allow for one, consistent legal test.

Second, rescinding the Trump rule promotes equity, fairness, and equal opportunity. Although it’s clear that the religious exemption in Executive Order 11246, like that in Title VII, is meant to be narrow, the Trump final rule called for a “broad” interpretation, to the “maximum extent permitted.” At the same time, the Trump rule “retreats from the general principle that qualifying religious employers are prohibited from taking employment actions that amount to discrimination on the basis of protected characteristics other than religion.”<sup>56</sup> The rule’s broad exemption and sanctioning discrimination in the name of religion meant more employees would suffer harm without recourse. The proposed rule’s return to the more narrow and correct interpretation of the exemption will protect employees and prevent discrimination.

Third, the proposed rule will promote economy and efficiency in government procurement. Under the Trump final rule, qualified and talented workers were at risk of being arbitrarily excluded from the workforce.

### ***Rescinding the Trump Final Rule Reduces Harms to Workers***

OFCCP exists to “protect workers, promote diversity and enforce the law.”<sup>57</sup> 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.”<sup>58</sup>

Yet the Trump rule’s expansive religious exemption jeopardized these protections against workplace discrimination. Although the Trump rule stated that “the religious exemption does not permit discrimination on the basis of other protected categories,”<sup>59</sup> the rule clearly did: It allowed federal contractors to make discriminatory employment decisions relying on “sincerely held religious tenets regarding matters such as marriage and intimacy.”<sup>60</sup> The Trump final rule neither acknowledged nor justified the harms of the rule detailed in numerous comments.<sup>61</sup>

The Trump rule made it easier to use religion as a pretext for discrimination against LGBTQ people, which is already widespread.<sup>62</sup> Of LGBTQ workers reporting that they have faced discrimination at work, more than half shared that an employer or co-worker did or said something to indicate that the unfair treatment was motivated by religious beliefs.<sup>63</sup>

For LGBTQ workers living in a state without explicit statutory protections against discrimination, the Trump rule’s potential impact could be even more devastating. For example, contractors

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<sup>56</sup> Biden NPRM, 86 Fed. Reg. at 62,117.

<sup>57</sup> Office of Federal Contract Compliance Programs (OFCCP), *About Us*, available at <https://bit.ly/3rWI267I>.

<sup>58</sup> *Id.*

<sup>59</sup> Trump Final Rule, 85 Fed. Reg. at 79,329.

<sup>60</sup> *Id.* at 79,364.

<sup>61</sup> The failure to do so is arbitrary and capricious in violation of the APA.

<sup>62</sup> A 2021 study found that 30% of lesbian, gay, and bisexual employees, and nearly 50% of transgender employees, reported that they were fired or not hired because of their sexual orientation or gender identity. Williams Institute, *LGBT People’s Experiences of Workplace Discrimination and Harassment* (Sept. 2021), <https://bit.ly/3lpwjJn>.

<sup>63</sup> *Id.*

could claim a right to fire a man who marries a same-sex partner, or fire an employee who comes out as transgender for living in accordance with their gender identity. Contractors and grantees might cite the religious exemption to deny married same-sex couples the same employment or health benefits they provide to married opposite-sex couples. And some contractors might assert the exemption to deny a transgender employee health care benefits provided to other employees, or to force a transgender employee to wear a uniform that is not consistent with their gender identity.

The Trump rule also made it easier to discriminate against women under the guise of religion. Although federal law prohibits discrimination based on sex—including sex stereotypes, gender identity, sexual orientation, and pregnancy and related medical conditions—discrimination against women workers remains widespread.<sup>64</sup> This discrimination extends to their wages. On average, white working women are paid about 83 cents for every dollar that men are paid.<sup>65</sup> That pay gap is even wider for women of color: Black women make about 64 cents, Native American women 60 cents, and Latina women 57 cents, for every dollar paid to white, non-Hispanic men.<sup>66</sup> Allowing federal contractors to assert a religious exemption to justify sex discrimination would turn back the clock on decades of progress and further threaten women’s ability to get jobs and keep them.

As with LGBTQ discrimination, religious beliefs have often been used to subject women workers to a range of sex-based discrimination. For example, women workers have been fired for becoming pregnant outside of marriage,<sup>67</sup> using in vitro fertilization or artificial insemination to start a family, or for using birth control.<sup>68</sup> Expanding the religious exemption in the Trump rule seemed squarely aimed at allowing federal contractors to claim a right to discriminate against a woman worker for these intimate decisions. But that is not the bounds of the religious exemptions that contractors could claim. Employers have refused to employ mothers altogether based on a religious belief that mothers should not work outside the home,<sup>69</sup> and provided inadequate pay or benefits to women workers because the employer believed a man should be the “head of the household.”<sup>70</sup>

While the existing exemption in E.O. 11246 already allows certain contractors to discriminate in hiring on the basis of religion, Trump’s rule made that problematic exemption even broader and expanded it to more contractors. The existing exemption would permit a Christian organization to accept federal dollars and then tell a Jewish job applicant: “We don’t hire people of your

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<sup>64</sup> In 2017, 42% of working women in the United States reported experiencing workplace discrimination because of their gender. Kim Parker & Cary Funk, Pew Res. Ctr., *Gender Discrimination Comes in Many Forms for Today’s Working Women* (Dec. 14, 2017), <https://pewrsr.ch/3Ec5lMr>.

<sup>65</sup> See Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why, and What to Do 1* (Sept. 2021), available at <https://bit.ly/3opYolP>.

<sup>66</sup> *Id.*; Jasmine Tucker, Nat’l Women’s Law Ctr., *Native American Women Need Action That Closes the Wage Gap 1* (Sept. 2021), available at <https://bit.ly/3de1gvv>.

<sup>67</sup> See, e.g., *Herx*, 48 F. Supp. 3d 1168; *Ganzy*, 995 F. Supp. at 345 (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was “clear evidence that she had engaged in coitus while unmarried”).

<sup>68</sup> Nat’l Women’s Law Ctr., *States Take Action to Stop Discrimination Against Women for Their Reproductive Health Decisions* (Aug. 2019), available at <https://bit.ly/3oKblBH>.

<sup>69</sup> *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986) (a religious school failed to renew a pregnant employee’s contract because of a belief that mothers should stay at home with young children).

<sup>70</sup> See *Fremont Christian Sch.*, 781 F.2d 1362.

faith.”<sup>71</sup> And it would allow a Christian relief organization to accept Muslim workers as temporary and volunteer workers, but then deny them full-time jobs.<sup>72</sup> A contractor that is a religious employer could refuse to hire an applicant who is nonreligious.<sup>73</sup> Under Trump’s rule, even a for-profit corporation could have posted a job announcement that says “Catholics, Latter-day Saints, Jehovah’s Witnesses, Jews, Muslims, Hindus, Sikhs, or Atheists need not apply.”

Giving religious exemptions without concern for how it affects workers not only harms marginalized communities, but also the principle of religious freedom itself. In the name of religious freedom, Trump’s rule actually increased the likelihood that employees would face religious discrimination. The rule favored the interests of contractors that would discriminate over the individual workers and applicants being discriminated against.

The Trump rule put LGBTQ people, women, religious minorities, and the nonreligious most at risk of facing this discrimination. It follows that these individuals and communities will benefit most from its rescission. In finalizing this proposed rule, OFCCP should emphasize its policy preference for preventing and combating discrimination and ensuring equal employment opportunity. OFCCP should also include even more detail in the final rule about what these protections mean for employees of federal contractors.<sup>74</sup>

### **The Biden Administration Should Eliminate the Religious Exemption in Executive Order 11246**

Religious freedom is a fundamental American value. It guarantees us the right to believe as we choose, but it cannot be used to harm or discriminate against others. If an organization gets taxpayer funding through a government contract, it should not be allowed to discriminate against qualified job applicants and employees because they cannot meet the contractor’s religious litmus test.

President George W. Bush was wrong to add this religious exemption to EO 11246 in 2002 and the Trump administration should not have expanded it. The addition of this language in 2002 was,<sup>75</sup> and continues to be,<sup>76</sup> highly controversial because it extended the Title VII exemption to entities that take federal funds and have chosen to do business with the federal government.

Title VII was enacted at a time when no one in Congress would have imagined religious organizations that would qualify for the Title VII exemption would also contract with the

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<sup>71</sup> 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://bit.ly/3rWfqKe>.

<sup>72</sup> See, e.g., Lornet Turnbull, *World Relief Rejects Job Applicant Over His Faith*, *Seattle Times*, Mar. 10, 2010, available at <https://bit.ly/31JDuFc>.

<sup>73</sup> Nonreligious people frequently encounter discrimination in the workplace because of their beliefs. A 2019 survey found that more than one in five (21.7%) participants had negative experiences in employment because of their nonreligious beliefs. Somjen Frazer, A. El-Shafei, & Alison Gill, *Reality Check: Being Nonreligious in America*, *American Atheists* (2020), available at [www.secularsurvey.org](http://www.secularsurvey.org).

<sup>74</sup> Commenters provided much relevant information in response to the proposed 2020 Rule; we encourage OFCCP to explicitly include the record for the 2020 rulemaking in the record for the proposed rescission.

<sup>75</sup> Mary Leonard, *President Eases Way for Religious Charities, Seeks to Promote Contracts, Grants*, *Boston Globe*, December 13, 2002.

<sup>76</sup> Letter from 98 Nat’l Religious & Civil Rights Orgs. to Pres. Barack Obama (July 16, 2014), available at <https://bit.ly/2IG0JL6>.

government, let alone be permitted to discriminate based on religion while taking government funds.<sup>77</sup> Furthermore, the justification for the Title VII exemption—to maintain the autonomy of religious organizations and independence from the government—disappears when the organizations solicit and accept government funds and agree to comply with extensive contract requirements.

Extending the Title VII religious exemption to federally funded entities also raised constitutional concerns. First, “the Constitution prohibits the state from aiding discrimination.”<sup>78</sup> The government has a “constitutional obligation” to “steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.”<sup>79</sup>

Second, the Constitution bars the government from advancing 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.<sup>80</sup> The case would have been different had “the government itself has advanced religion through its own activities and influence.”<sup>81</sup> Government funding of the entity that discriminates transforms Title VII’s religious exemption into an unconstitutional advancement of religion.<sup>82</sup>

## Conclusion

The Trump final rule vastly expanded the narrow religious exemption in Executive Order 11246 that allows religiously affiliated federal contractors to employ coreligionists. In particular, the final rule vastly expanded who could use the religious exemption—defining even for-profit corporations as eligible—and how it can be used—providing lip service to the fact that the law prohibits employers from using the religious exemption to discriminate against other protected

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<sup>77</sup> See Ira. C. Lupu & Robert W. Tuttle, Religious Exemptions and the Limited Relevance of Corporate Identity, in *The Rise of Corporate Religious Liberty* 373, 389 (Micah Schwartzman et al. eds., 2016) (Noting that, at that time, “the Establishment Clause barred government support for entities that engage in worship and explicitly religious instruction.”). Furthermore, from 2001 until now, numerous legislative efforts to allow government-funded entities to use religion to discriminate in employment have failed. Legislation 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://bit.ly/3FWbAEA>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://bit.ly/3roUYBC>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://bit.ly/3l7DXSj>; National Defense Authorization Act for Fiscal Year 2017, available at <https://bit.ly/3lb4FcA>.

<sup>78</sup> 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).

<sup>79</sup> *Norwood*, 413 U.S. at 467.

<sup>80</sup> 483 U.S. 327, 337 (1987).

<sup>81</sup> *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.”)

<sup>82</sup> See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, \*4 (S.D. Miss. Jan. 9, 1989); Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 *Hastings Const. L.Q.* 1, 48-52 (2002); 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://bit.ly/3lQikfX>.

classes but still allowing it. The rule made these changes without considering the harm workers will face.

We support the proposed rule because it would reinstate a more narrow and accurate interpretation of the exemption, promoting clarity, equity and fairness, equal employment opportunities, certainty, and procurement efficiency and economy.

Sincerely,



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