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VIA ELECTRONIC SUBMISSION

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Office of Federal Contract Compliance Programs, Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1250-AA09, Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption

Acting Director Fort:

We submit the following comments on the proposed regulation, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (hereinafter “the rule” or “the proposed rule”). The Law, Rights, and Religion Project is a law and policy think tank based at Columbia Law School that promotes social justice, freedom of religion, and religious plurality. Our mission is to ensure that laws and policies reflect the understanding that the right to free exercise of religion protects all religious beliefs and communities, including the non-religious; requires respect for religious plurality and equality principles; and must be balanced against other liberty and equality rights where they are in conflict. We submit these comments to express our concern that the proposed rule, intended to protect the right to religious liberty, will in fact erode this fundamental right while also making employees working for federal contractors more vulnerable to multiple forms of discrimination.

The proposed rule expands the religious exemption in Executive Order 11246, a longstanding EO which prohibits employment discrimination by federal contractors. The rule is “intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases.”¹ Discrimination on the basis of protected characteristics other than religion, including race, color, sex, sexual orientation, gender identity, or national origin,² ostensibly remain prohibited by the Executive Order, including for religious organizations. Nevertheless, the rule’s clear purpose is to push the boundaries of permissible religious exemptions in ways that will undoubtedly undermine the enforcement of the Order’s antidiscrimination protections overall. The

¹ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 84 Fed. Reg. 41677 (proposed Aug. 15, 2019) (to be codified at 41 CFR pt. 60-61).

² 41 CFR § 60-1.4.

proposed rule will not only leave employees more vulnerable to sex, race, and other forms of discrimination—it will also increase religious segregation in ways that will ultimately harm the very value it seeks to protect: religious liberty.

Much attention has been paid to the ways in which this rule will impact LGBTQ communities, and this is unquestionably a significant concern. This comment, however, will outline the many other ways in which the rule stands to erode important civil rights provisions that have protected both equality rights and religious liberty for decades.

By allowing for-profit contractors to discriminate on the basis of religion, the rule will increase religious segregation and harm religious liberty.

The proposed rule extends the right to discriminate on the basis of religion to for-profit corporations covered by EO 11246. This right does not appear to be limited to closely-held corporations.³ Thus, even the narrowest possible reading of the proposed rule would allow some for-profit contractors—such as construction companies, private prisons and detention centers, defense and technology companies, and other corporations—to restrict employment to members of a particular faith or denomination. Perhaps even more troubling, according to the Office of Federal Contract Compliance Programs (OFCCP), the agency responsible for enforcing the EO, employers “need not enforce an across-the-board policy of hiring only coreligionists.”⁴ It appears, therefore, that such employers could accept employees from a range of different denominations while barring members of particularly disfavored faiths, such as Muslims or Jews.

This dramatic carve-out from EO 11246’s antidiscrimination requirements stands to erode the right to religious liberty far more than protect it. An essential component of religious liberty is the right to participate in the economy and public life, regardless of one’s religious identity, without fear of discrimination. Laws and regulations banning religious discrimination, including the prohibition on religious discrimination by government contractors, have been indispensable to ensuring that people of all faiths are able to fully participate in civil society. The mutually reinforcing relationship between religious liberty and antidiscrimination principles was reflected in the early writing of James Madison: “In a free government the security for civil rights must be the same as that for religious rights.”⁵ Civil rights laws have enabled people of all faiths and no faith to find housing, work, and goods while being protected from persecution on account of their religious background, beliefs, or practices. Without such protection, some people of faith—especially those living in religiously homogenous communities—would no doubt feel pressured to hide their religious beliefs to avoid discrimination. They may, moreover, feel chilled from exercising important faith-based practices—such as wearing religious garb, eating religious diets, or engaging in prayer—while in the workplace.

³ In contrast, in *Burwell v. Hobby Lobby*, the Supreme Court limited its finding that for-profit organizations were entitled to religious exemptions under the Religious Freedom Restoration Act to closely-held organizations. *Burwell v. Hobby Lobby*, 573 U.S. 682, 719 (2014) (“For all these reasons, we hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”).

⁴ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, *supra* note 1 quoting *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 230 (3d Cir. 2007).

⁵ The Federalist No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, p. 324.

Members of minority faiths are especially reliant on antidiscrimination laws to protect their right to religious liberty. As this organization recently noted in an *amicus* brief to the Supreme Court,⁶ “over twenty percent of the Equal Employment Opportunity Commission’s (EEOC) charges of religious discrimination in 2015 related to Muslims,⁷ yet only one percent of the U.S. population is Muslim.⁸ In addition, members of minority religions face increased rates of bullying and harassment in educational institutions, discrimination in hiring and on the job, lack of religious accommodations, and violence and criminal threats at their places of worship.”⁹ Religious adherents whose faith is publicly identifiable—such as Muslim women who wear headscarves, Jews who wear yarmulkes, or Sikhs who wear turbans—are especially vulnerable.¹⁰

We by no means question the right of clearly religious entities to select their leadership based on religious faith. There can be no serious dispute that, for example, houses of worship may favor coreligionists to perform religious functions. When this right is extended even to *government-funded, for-profit corporations*, however, the prevailing impact is no longer the protection of religious communities’ right to self-determination but rather the endorsement of religious discrimination and segregation in the public (and publicly-funded) marketplace.

Some business owners will no doubt see the proposed rule as protecting their free exercise of religion by allowing them to engage in religious discrimination while maintaining access to taxpayer funding. However, the far larger effect of the rule will be to leave approximately one-fifth of the U.S. labor force more vulnerable to being denied publicly-funded employment because of their religious identity.¹¹ This is hardly the way to protect religious plurality and harmony.

⁶ Brief for 15 Faith and Civil Rights Organizations as Amici Curiae Supporting Respondents at 23-24, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (No. 16-111) available at https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Amicus%20Briefs/Amicus_LRRP_Masterpiece_10.30.17.pdf.

⁷ EEOC, *Charges Filed on the Basis of Religion - Muslim or National Origin - Middle Eastern FY 1995 - FY 2015* available at https://www.eeoc.gov/eeoc/statistics/enforcement/religion_muslim_origin_middle_eastern.cfm.

⁸ Besheer Mohamed, Pew Research Ctr., *A new estimate of the U.S. Muslim population* (2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/>.

⁹ U.S. Dep’t of Justice, *Combating Religious Discrimination Today: Final Report 12* (July 2016). See also David Masci, *Many Americans See Religious Discrimination in U.S. – Especially Against Muslims*, PEW RESEARCH CENTER (May 17, 2019), <https://www.pewresearch.org/fact-tank/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/>.

¹⁰ AMERICAN CIVIL LIBERTIES UNION, *Discrimination Against Muslim Women*, <https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf>; Sonia Ghumman, and Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, 66 HUMAN RELATIONS 671 (Mar. 5, 2013), <https://journals.sagepub.com/doi/10.1177/0018726712469540>; Karam Dana, Nazita Lajvardi, Kassra A.R. Oskooii and Hannah L. Walker, *Veiled Politics: Experiences with Discrimination Among Muslim Americans*, CAMBRIDGE UNIVERSITY PRESS (June 13, 2018), <https://www.cambridge.org/core/journals/politics-and-religion/article/veiled-politics-experiences-with-discrimination-among-muslim-americans/A8D7933C40A9AF8016E56AD256D350DE>; NEW YORK CITY COMMISSION ON HUMAN RIGHTS, *Xenophobia, Islamophobia, and Anti-Semitism in NYC Leading Up to and Following the 2016 Presidential Election: A Report on Discrimination, Bias, and Acts of Hate Experienced by Muslim, Arab, South Asian, Jewish, and Sikh New Yorkers* at 9, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/MASAJ_S_Report.pdf (“Respondents who wore religious clothing were also at elevated risk [of physical assault] (12.3% vs. 6.7%) compared to those who did not”). See also *Xenophobia, Islamophobia, and Anti-Semitism in NYC Leading Up to and Following the 2016 Presidential Election* at 12 (“Among respondents who indicated they were seeking a job at some time since July 2016...8.6% of job seekers who wore religious clothing had been told by a prospective employer that they must give it up if they wished to take a job.”).

¹¹ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *History of Executive Order 11246*, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html> (“Today, Executive Order 11246, as amended and

The rule will limit OFCCP’s enforcement of other antidiscrimination provisions of Executive Order 11246.

The rule’s impact is likely to extend beyond explicitly religious discrimination, restricting the OFCCP’s ability to enforce other antidiscrimination provisions of Executive Order 11246. This will be especially devastating for employees who are not protected by other employment antidiscrimination laws including Title VII—for example, those working for small businesses with fewer than 15 employees. Such workers may find themselves without recourse to challenge religiously-motivated sex, race, or other forms of discrimination.

OFCCP states that “an employer may not, under Title VII or Executive Order 11246, invoke religion to discriminate on other bases protected by law.”¹² However the rule’s broad protection of discrimination on the basis of “acceptance of or adherence to religious tenets as understood by the employer” “to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act” could prevent the agency from punishing contractors that impose religiously-motivated requirements on employees—requirements that might otherwise be considered impermissible discrimination on the basis of sex or other protected characteristics—notwithstanding that such discrimination remains, in theory, prohibited.

Such requirements might include:

- Prohibitions on extramarital sex that would result in discrimination against unmarried pregnant and parenting employees, especially women.¹³
- The enforcement of religiously-influenced gender norms, such as requirements that male employees act as “initiators” while female employees act as “carers.”¹⁴ This might also include enforcement of the so-called “Billy Graham rule,” prohibiting male employees from spending time alone with female colleagues to whom they are not married—a practice that would limit mentorship and other opportunities for female employees.
- The enforcement of religiously-motivated beliefs about race or racial segregation. There is a long history of faith-based support for racial segregation.¹⁵ Only weeks ago, the owners of a wedding venue in Mississippi made the national news after they refused to rent their space

further strengthened over the years, remains a major safeguard, protecting the rights of workers employed by federal contractors—approximately one-fifth of the entire U.S. labor force...”).

¹² Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, *supra* note 1.

¹³ *Unmarried and Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color*, THE PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (now the Law, Rights, and Religion Project) (2015), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/Report_UnmarriedUnprotected_1.25.17.pdf.

¹⁴ FOCUS ON THE FAMILY, *Key Differences Between Male and Female* (2015), <https://www.focusonthefamily.com/family-qa/key-differences-between-male-and-female/>.

¹⁵ Tisa Wegner, *Discriminating in the Name of Religion? Segregationists and Slaveholders Did It, Too*, THE WASHINGTON POST (Dec. 5, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/> (“After the [Civil] war ... Preachers, politicians and pundits developed a segregationist folk theology that defended the reconstituted Southern racial order as divinely ordained: God had created the races separate and did not intend for them to mix.”).

to an interracial couple, citing their religious beliefs.¹⁶ (The owners later apologized). Even if OFCCP continues to enforce EO 11246’s antidiscrimination provisions on any employer that adopts an explicit racial segregation policy, the rule could nevertheless permit less overt forms of race-based discrimination that might otherwise be prohibited. For example, employers could require employees to attend or be members of a majority- or exclusively-white church or denomination, or share particular theological beliefs that have racial implications and/or are more common among white Christians—such as the belief that the U.S. is a “Christian nation.”¹⁷

The proposed rule is part of a larger trend of the administration singling out particular theological beliefs, particularly conservative beliefs about sex, marriage, and reproduction, for special protection.

Finally, it is important to understand the impact of the rule in the larger context in which the current federal administration has sought to advance and protect religious beliefs that comport with its own political views while quashing religious beliefs that conflict with those views. The administration has issued numerous regulations, proposed regulations, and policy documents that provide religious exemptions to those who share the administration’s opposition to reproductive and LGBTQ rights. These include:

- A proposed rule published by the Department of Housing and Urban Development that would allow religiously-affiliated homeless shelters to turn away transgender people;¹⁸
- The regulation “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” promulgated by the Department of Health and Human Services (HHS). This rule vastly expands the right of health care professionals and facilities to refuse to provide sexual and reproductive health care, but fails to protect the right of health care professionals and facilities to *provide* this care in accordance with their religious beliefs.¹⁹
- An HHS rule allowing employers and universities to cut off access to birth control coverage for their employees and students—regardless of their own religious or moral beliefs—if

¹⁶ Karen Zraick, *Mississippi Event Hall Refuses to Host Interracial Wedding, Then Apologizes*, THE N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/03/us/mississippi-interracial-couple-wedding.html>.

¹⁷ Alex Vandermaas-Peeler, Daniel Cox, Maxine Najle, Molly Fisch-Friedman, Rob Griffin, and Robert P. Jones, *Partisan Polarization Dominates Trump Era: Findings from the 2018 American Values Survey*, PUBLIC RELIGION RESEARCH INSTITUTE (Oct. 29, 2018), <https://www.pri.org/research/partisan-polarization-dominates-trump-era-findings-from-the-2018-american-values-survey/> (“About half of white Catholics (53%), Hispanic Protestants (50%), white evangelical Protestants (48%), Hispanic Catholics (47%), and white mainline Protestants (44%) hold this view. Less than four in ten (38%) black Protestants and...say that America was previously and still remains a Christian nation.”).

¹⁸ Veronica Stracqualursi, *HUD Proposes Rule that Would Roll Back Protections for Transgender Homeless*, CNN.COM (May 24, 2019), <https://www.cnn.com/2019/05/23/politics/hud-rule-transgender-homeless-shelters-ben-carson/index.html>; Revised Requirements Under Community Planning and Development Housing Programs, 24 Fed. Reg. 5 (received Apr. 24, 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>.

¹⁹ Letter from the Public Rights/Private Conscience Project (now the Law, Rights, and Religion Project) to the U.S. Department of Health and Human Services Office for Civil Rights, *Re: Conscience NPRM, RIN 0945-ZA03* (Mar. 27, 2018), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Policy_HHSRule_3.27.18.pdf.

allowing this coverage would violate the religious or moral beliefs of the employer/university;²⁰

- An HHS rule which encourages medical providers that place religious restrictions on the provision of reproductive health care to nevertheless participate in the Title X national family planning program;²¹
- A proposed HHS rule inserting broad religious exemptions into a non-discrimination provision of the Affordable Care Act;²²
- HHS recently granted a request from South Carolina Governor Henry McMaster to allow foster care agencies in the state to violate antidiscrimination laws while remaining eligible for federal funding.²³

In addition to these regulations, the Department of Justice has issued a guidance document promising to protect religious freedom “to the greatest extent practicable and permitted by law.”²⁴ It has also filed a large number of friend-of-the-court briefs in federal lawsuits involving religious liberty issues—largely in support of conservative Christian claimants, including a bakery that

²⁰ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57536 (effective Jan. 14, 2019), <https://www.federalregister.gov/documents/2018/11/15/2018-24512/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the>. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592 (effective Jan. 14, 2019), <https://www.federalregister.gov/documents/2018/11/15/2018-24514/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable>. The religious, but not the moral exemption applies to publicly-traded companies. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Fact Sheet: Final Rules on Religious and Moral Exemptions and Accommodation for Coverage of Certain Preventive Services Under the Affordable Care Act* (Nov. 7, 2018), <https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html>. The rule is currently the subject of numerous legal challenges. Katie Keith, *ACA Litigation Round-Up: Contraceptive Coverage Mandate*, HEALTH AFFAIRS (May 22, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190522.119710/full/>.

²¹ Kinsey Hasstedt, *What The Trump Administration’s Final Regulatory Changes Mean For Title X*, HEALTH AFFAIRS (Mar. 5, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20190304.267855/full/>; Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (effective May 3, 2019), <https://www.federalregister.gov/documents/2019/03/04/2019-03461/compliance-with-statutory-program-integrity-requirements>.

²² MaryBeth Musumeci, Jennifer Kates, Lindsey Dawson, Alina Salganicoff, Laurie Sobel and Samantha Artiga, *HHS’s Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557*, HENRY J. KAISER FAMILY FOUNDATION (July 1, 2019), <https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/>.

²³ Letter from Steven Wagner, Principal Deputy Assistant Secretary, HHS Administration for Children and Families to South Carolina Governor Henry McMaster, *Re: Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c)* (Jan. 23, 2019) available at <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>. Governor McMaster’s request was made on behalf of Miracle Hill Ministries, a government-funded Christian foster care agency that has refused to place children with Jewish, Catholic, and same-sex families. Laura Meckler, *Trump Administration Grants Waiver to Agency that Works Only with Christian Families*, THE WASHINGTON POST (Jan. 23, 2019), https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html.

²⁴ Memorandum from the Attorney General for All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Dep’t of Justice Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

refused to serve a same-sex couple, an anti-abortion clinic that objected to certain state health regulations, and a college club that discriminated against a gay student.²⁵

Yet the DOJ and other government agencies have simultaneously subjected other religious communities to aggressive surveillance and even criminal prosecution for adherence to their deeply-held religious beliefs. The DOJ has repeatedly prosecuted faith-based activists affiliated with the Unitarian organization No More Deaths/No Más Muertes for providing food, water, and other services to migrants in the Arizona desert in accordance with their religious beliefs.²⁶ Federal agencies have subjected Kaji Douša, a Christian pastor, to surveillance and harassment on account of her ministry to immigrants and refugees in Mexico and undocumented people in New York City.²⁷ The administration has continued to pursue the construction of a gas pipeline on the property of a Catholic religious community, the Adorers of the Blood of Christ, despite the Adorers' claim that they have a religious obligation to protect their land from environmental degradation.²⁸ And perhaps most notably, the administration in 2017 issued an Executive Order that was widely seen as targeting migrants from Muslim-majority nations and preventing them from entering the U.S.²⁹

One of the most foundational rules of religious liberty law is that it must be applied neutrally to people of all faiths. This principle of neutrality is protected by both religion clauses of the First Amendment, and was reaffirmed most recently by the Supreme Court in its 2018 opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which stated: “The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.”³⁰ The Law, Rights, and Religion Project is deeply troubled by the administration's consistent pattern of using the force of the federal government to extend broad protections to religious believers who share the administration's views on LGBTQ and reproductive rights while failing to protect—or worse, prosecuting—people of faith from other religious traditions. We believe the proposed rule continues this concerning trend. Furthermore, by allowing religious discrimination by publicly-funded, for-profit corporations, we believe the rule will harm rather than shield the right to religious liberty.

For questions regarding this comment, please contact Elizabeth Reiner Platt, Director of the Law, Rights, and Religion Project, at ep2801@columbia.edu or 212-854-8079.

²⁵ Adiel Kaplan, David Mora, Maya Miller and Andrew R. Calderon, *Trump Admin Files More Briefs in Religious Liberty Cases Than Obama, Bush*, NBC NEWS (Feb. 24, 2019), <https://www.nbcnews.com/politics/justice-department/trump-admin-files-more-briefs-religious-liberty-cases-obama-bush-n974531>.

²⁶ *United States v. Warren*, 2018 WL 6809430 (D. Ariz. 2018); *United States v. Hoffman*, 2018 WL 2464115 (D. Ariz. 2018); *United States v. Deighan*, 2018 WL 2464113 (D. Ariz. 2018).

²⁷ Complaint for Declaratory and Injunctive Relief, *Dousa v. U.S. Department of Homeland Security*, No. 19CV1255 LAB KSC (S.D. Cal. 2019).

²⁸ *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, 897 F.3d 187 (3rd Cir. 2018).

²⁹ Proclamation No. 9645, 82 Fed. Reg. 45,161 (September 24, 2017).

³⁰ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1732 (2018).