

VIA ELECTRONIC SUBMISSION

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Director, Division of Policy and Program Development

Office of Federal Contract Compliance Programs, Room C-3325

200 Constitution Avenue NW

Washington, DC 20210.

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

Director Williams,

We submit the following comments in support of the “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (hereinafter “the proposed rule”). The proposed rule would rescind the final rule titled “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (hereinafter the “current” or “existing” rule) which took effect on January 8, 2021.

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 pluralism. 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 support of the rescission of the expanded religious exemption in Executive Order 11246. Many commenters—including the Law, Rights, and Religion Project—provided detailed comments when the existing rule was proposed in the fall of 2019. OFCCP should explicitly include all comments on that rule in the record for its rescission of the rule in order to ensure the agency has as complete a record as possible. We believe withdrawing the 2019 rule represents an important step towards restoring religious freedom and ending discrimination.

The current rule expanded the religious exemption in Executive Order 11246 and was “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 was to push the boundaries of permissible religious exemptions in ways that undoubtedly undermine the enforcement of antidiscrimination protections overall. The existing rule not only leaves employees more vulnerable to sex, race, and other forms of discrimination—it also threatens to increase religious segregation in ways that harm

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.

the very value it seeks to protect: religious liberty. This comment will outline the many ways in which the current rule stands to erode important civil rights protections that have safeguarded both equality rights and religious liberty for decades.

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

The existing regulation extends the right to discriminate on the basis of religion to for-profit corporations covered by Executive Order 11246. This right does not appear to be limited to closely-held corporations.³ Thus, even the narrowest possible reading of the current 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) employers “need not enforce an across-the-board policy of hiring only coreligionists.”⁴ It appears, therefore, that such employers could at present accept employees from a range of different denominations while barring members of particularly disfavored faiths, such as Muslims or Jews.

This current dramatic carve-out from antidiscrimination law 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 anti-discrimination 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.

Members of minority faiths are especially reliant on antidiscrimination laws to protect their right to religious liberty. As this organization once noted in an *amicus* brief to the Supreme Court,⁶

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.

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

“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 dispute 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 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 likely see the current 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 continues to leave approximately one-fifth of the U.S. labor force vulnerable to being denied publicly-funded employment because of their religious identity.¹¹ This is hardly the way the United States should protect religious plurality and harmony.

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_mu_slim_origin_middle_eastern.cfm.

⁸ Besheer Mohamed, Pew Research Ctr., New estimates show U.S. Muslim population continues to grow (2018), <https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/>; 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 Ghuman, 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 Lajevardi, 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/MASAJIS_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 current rule could be interpreted to limit OFCCP’s enforcement of other antidiscrimination provisions of Executive Order 11246.

The current rule’s impact extends beyond explicit discrimination on the basis of religion, and could restrict the federal government’s ability to enforce other antidiscrimination provisions of Executive Order 11246. 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 current rule’s broad protection of discrimination on the basis of “acceptance of or adherence to religious tenets as understood by the employer” prevents 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 could include:

- Prohibitions on extramarital sex that would result in discrimination against unmarried pregnant and parenting employees, especially women.
- The enforcement of religiously-influenced gender norms, such as requirements that male employees act as “initiators” while female employees act as “carers.”¹³ 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.¹⁴ In 2019, the owners of a wedding venue in Mississippi made the national news after they refused to rent their space to an interracial couple, citing their religious beliefs.¹⁵ (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

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

¹⁴ 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.”).

¹⁵ 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>.

implications and/or are more common among white Christians—such as the belief that the U.S. is a “Christian nation.”¹⁶

Religious exemptions from antidiscrimination laws and policies have had a real, substantial, and detrimental impact on workers and others.

The concrete harm of weakening antidiscrimination provisions is not mere speculation. In a wide range of contexts, allowing religious exemptions from civil rights law and policies has had severe consequences for those who would otherwise be protected from discrimination in the workplace, marketplace, housing, and institutions of education. A recent report by the Law, Rights, and Religion Project lists dozens of cases from across the country that reveal this impact.¹⁷ Institutions—including both non- and for-profits—have relied on religious exemptions like the one in the current rule in order to justify the denial of jobs and services to religious minorities and atheists as well as LGBTQ people, unmarried couples and parents, women, people with disabilities, and others.

While the results of such cases have been mixed, many religiously motivated denials of equal treatment have been permitted. In 2019, an Arizona calligraphy company won the right to refuse to sell wedding invitations to same-sex couples.¹⁸ Teachers have been granted a religious right to refuse to call trans students by their requested names and pronouns.¹⁹ Religious employers have been allowed to maintain a work environment hostile to LGBTQ employees.²⁰ In an ongoing case, a government-funded child welfare agency in South Carolina is defending its ability to refuse to place children (who are wards of the state) with Catholics.²¹ The agency has also turned away Jews.²² Numerous entities have been permitted to fire pregnant, unmarried employees, with other cases ongoing.²³ In 2019, a North Carolina police officer who was fired after refusing to train a female colleague argued that he was religiously obliged to follow the “Billy Graham rule,”

¹⁶ 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.prii.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.”).

¹⁷ LAW, RIGHTS, AND RELIGION PROJECT, *PARADING THE HORRIBLES* (2021), <https://lawrightsreligion.law.columbia.edu/content/parading-horribles-risks-expanding-religious-exemptions>.

¹⁸ *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59 (Ariz. Ct. App. 2018).

¹⁹ *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

²⁰ *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021).

²¹ *AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, MADONNA v. DEPT. OF HEALTH AND HUMAN SERVICES* (2020), <https://www.au.org/tags/madonna-v-dept-of-health-and-human-services>.

²² Lydia Currie, *I was Barred from Becoming a Foster Parent Because I Am Jewish*, JEWISH TELEGRAPHIC AGENCY (Feb. 5, 2019), <https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish>.

²³ LAW, RIGHTS, AND RELIGION PROJECT, *UNMARRIED AND UNPROTECTED* (2017), <https://lawrightsreligion.law.columbia.edu/unmarriedandunprotected>; Tracey Tully, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired*, THE NEW YORK TIMES (Jun. 28, 2021), <https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html>.

mentioned above.²⁴ The case was later settled. These cases relied on a variety of religious exemption laws and principles, from state Religious Freedom Restoration Acts to the Free Exercise Clause of U.S. Constitution—but all are part of the same trend of expanding the right of religious entities to deny jobs and services to the broader public.

Thus, there is no reason to believe that the religious exemption in the current rule will be applied or interpreted narrowly. Rather, we can expect that, if maintained, it will be used—as religious exemptions have been used in so many other contexts—in ways that will severely diminish the rights of religious and other minority communities to a safe and equitable workplace.

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 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.”²⁵ The Law, Rights, and Religion Project supports the proposed rule to rescind the current expanded religious exemption in Executive Order 11246 because the current 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 or Candace Bond-Theriault, Director of Racial Justice Policy and Strategy, Center for Gender and Sexuality Law, at candace.bond-theriault@law.columbia.edu.

²⁴ Ben Kessler, *North Carolina Police Officer Fired for Following the ‘Billy Graham Rule,’ Lawsuit Says*, NBC NEWS (Aug. 23, 2019), <https://www.nbcnews.com/news/us-news/north-carolina-police-officer-fired-following-billy-graham-rule-lawsuit-n1045706>.

²⁵ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1732 (2018).