COMMONWEALTH OF PENNSYLVANIA
JOSH SHAPIRO
ATTORNEY GENERAL

STATE OF CALIFORNIA
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The Honorable Patrick Pizzella
Acting Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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

Re: **Notice of Proposed Rulemaking (RIN: 1250-AA09)**
Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

Dear Acting Secretary Pizzella and Acting Director Fort:

We write on behalf of the states of Pennsylvania, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Vermont and Washington, and the District of Columbia, to oppose the proposed rule, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (the "NPRM" or "Proposed Rule"), issued by the U.S. Department of Labor ("DOL"). The Proposed Rule would significantly expand the religious organization exemption under Executive Order 11,246, as amended ("E.O. 11,246" or "Order"), and as enforced by the Office of Federal Contract Compliance Programs ("OFCCP").[1]

For more than fifty years, E.O. 11,246 has protected employees of federal contractors and subcontractors from workplace discrimination. Issued one year after the passage of Title VII of the Civil Rights Act of 1964, E.O. 11,246 has continued to advance equal opportunity for all Americans, including a historic 2014 amendment that extended the Order's workplace protections to lesbian, gay, bisexual, and transgender ("LGBT") employees. The protections of E.O. 11,246 have co-existed with a limited religious organization exemption under section 204(c) of the Order

[1] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption ("NPRM"), 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019) (to be codified at 41 C.F.R. Pt. 60).

that, consistent with Title VII, has long been understood to apply to nonprofit religious organizations and their affiliates.

As Attorneys General, we are charged with representing and protecting the rights and interests of the people of our states. Our offices enforce laws that protect workers from discrimination, including discrimination on the basis of religion, and we recognize the importance of respecting individuals' sincerely held religious beliefs. The Proposed Rule, however, would create a new version of the religious organization exemption, broader and less defined than any previous version. It would invite virtually any employer to self-designate as religious, and would open the door for large, for-profit organizations to claim the exemption at the expense of vulnerable employees. Based on our collective experience, the Proposed Rule will weaken anti-discrimination protections for the more than twenty percent of private-sector workers nationwide who are employed by a federal contractor, harming our residents, their families, and our economies.[2] It will also generate confusion and create an unequal playing field for contractors. OFCCP is not permitted to roll back hard-won civil rights protections. For these and other reasons described below, the Proposed Rule should be withdrawn.

I. THE PROPOSED RULE IS NEITHER NECESSARY NOR APPROPRIATE TO ACHIEVE THE PURPOSE OF E.O. 11,246.

DOL may only issue regulations on E.O. 11,246 that are "necessary and appropriate" to achieve the purpose of the Order.[3] The purpose of E.O. 11,246 must be understood against the backdrop of its genesis—Title VII of the Civil Rights Act of 1964[4] and its commitment to the principle that "[i]n respect of civil rights, all citizens are equal before the law."[5] In 1964, inspired by the civil rights movement, Congress passed the landmark Civil Rights Act, which outlawed discrimination in multiple domains of American life, including, pursuant to Title VII, employment discrimination.[6] One year later, President Lyndon B. Johnson issued E.O. 11,246 to ensure that the federal government would not countenance tax-payer funded discrimination against its contracted workforce.[7] Consistent with its roots in equal opportunity principles, E.O. 11,246 was strengthened

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[2] The White House, Office of the Press Secretary, *FACT SHEET: Fair Pay and Safe Workplaces Executive Order* (July 31, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order ("The Department of Labor estimates that . . . businesses with federal contracts, employ[] about 28 million workers."); Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)* (Sept. 12, 2019), https://data.bls.gov/timeseries/CES0500000001 (estimating 128,950,000 private-sector jobs).

[3] *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), § 201 ("The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.")

[4] 42 U.S.C. §2000e, *et seq*.

[5] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The majority holding of *Plessy* was overturned in the landmark civil rights case, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), which laid the legal foundation for the Civil Rights Act of 1964. *See* Herman Pritchett, *Equal Protection & the Urban Majority,* 58 AM. POL. SCI. REV. 869, 869 (1964).

[6] Gerald Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148 (2004).

[7] Exec. Order No. 11,246, *supra* note 3.

in 1967 to prohibit discrimination on the basis of sex, and in 2014, to expressly prohibit discrimination on the basis of sexual orientation and gender identity.[8]

Today, E.O. 11,246, as amended, prohibits federal contractors from discriminating against their employees on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.[9] Its protections are implemented through OFCCP, whose mission is to "hold[] those who do business with the federal government . . . responsible for complying with the legal requirement to take affirmative action and not discriminate . . . ."[10] Currently, nearly one in four American workers falls under OFCCP's jurisdiction.[11]

The Proposed Rule flies in the face of the purpose of the Order, which is to protect civil rights rather than to cabin them. If adopted, the Proposed Rule would substantially roll back protections for millions of employees of federal contractors. By defining the Order's religious organization exemption more broadly than Title VII allows, the NPRM impermissibly seeks to evade the floor of worker protections Title VII requires. This is contrary to the mission of OFCCP, contrary to the purpose of the Order, and contrary to law.

A. The Proposed Rule would undercut anti-discrimination efforts in our states due to the scope of federal contracting and the potential for abuse.

Despite the real gains that Title VII has made in improving employment outcomes for racial and ethnic minorities,[12] and in reducing sex- and gender-based wage gaps and occupational segregation,[13] discrimination persists with startling frequency in the American workplace:

- More than one-third of African-American workers, and nearly twenty percent of Hispanic and Asian workers, report that they have been passed over for a job or promotion because of their race or ethnicity;[14]

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[8] Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (amending E.O. 11,246 to prohibit discrimination on the basis of sex); Exec. Order No. 13,672, 79 Fed. Reg. 72,985 (Dec. 9, 2014) (amending E.O. 11,246 to prohibit discrimination on the basis of sexual orientation and gender identity).

[9] Exec. Order No. 11,246, *supra* note 3, § 202.

[10] *About Us*, *OFCCP*, U.S. DEP'T OF LAB., https://www.dol.gov/ofccp/aboutof.html.

[11] FEDERAL CONTRACT COMPLIANCE MANUAL ("FCCM"), 1 (OFCCP Oct. 2014).

[12] Jonathan Leonard, *Anti-Discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity*, 19 J. OF HUM. RESOURCES 145, 152-55, 171 (1984); Kenneth Chay, *The Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972*, 51 INDUS. & LAB. REL. REV. 608, 631 (1998); Jinyong Hahn et al., *Evaluating the Effect of an Antidiscrimination Law Using a Regression-Discontinuity Design* (NBER Working Paper No. 7131, May 1999), https://www.nber.org/papers/w7131; David Neumark et al., *The Labor Market Effects of Sex and Race Discrimination Laws*, 44 ECON. INQUIRY 385, 414 (2006).

[13] Andrea Beller, *Title VII and the Male/Female Earnings Gap: An Economic Analysis*, 1 HARV. WOMEN'S L.J. 157, 160 (1978); Andrea Beller, *The Impact of Equal Opportunity Policy on Sex Differentials in Earnings and Occupations*, 72 AM. ECON. REV. 171, 172-73 (1982).

[14] Devah Pager et al., *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. OF SOC. 181, 182 (2008).

- Nearly one quarter of women report having experienced sexual harassment at work, and over half of all women report having experienced potentially sexually harassing behaviors at work;[15]
- Thirty-seven percent of gay and lesbian people report experiencing workplace harassment in the last five years, and twelve percent report losing a job because of their sexual orientation;[16]
- Ninety percent of transgender people report experiencing harassment, mistreatment, or discrimination on the job, or taking actions like hiding their identity to avoid it; forty-seven percent of transgender people report experiencing an adverse job outcome, such as being fired, not hired, or denied a promotion;[17] and
- Muslim job applicants experience the highest levels of religious discrimination, but discrimination is also reported against atheists, Catholics, and members of other religious groups.[18]

In light of the prevalence of workplace discrimination, expanding the religious organization exemption of E.O. 11,246 to lessen OFCCP's oversight will potentially result in a greater number of employers claiming the exemption in bad faith when faced with charges of discrimination on other grounds. The Proposed Rule, if finalized, would frustrate and further burden civil rights enforcement efforts.

In fact, the Proposed Rule would broaden the religious organization exemption to such an extent that it could swallow the rule. In interpreting exemptions to laws of general application, lawmakers rely on the assumption that the exemption must not defeat the general rule. The Proposed Rule threatens this assumption. OFCCP purports to simply import the Title VII standard,[19] yet in contravention of Title VII's requirements, the Proposed Rule expressly states that it does not require a determination of whether an organization qualifies for the exemption to be based on an evaluation of the organization's actual operations, such as its primary activities, nonprofit or for-profit status, or affiliation with a recognized religious tradition.[20] Instead, the Proposed Rule relies on formalistic criteria by which any employer can self-designate as a religious

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[15] Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607, 623 (2006) (reviewing over 86,000 respondents from 55 studies).

[16] Christy Mallory et al., *Employment Discrimination against Lesbian, Gay, Bisexual, and Transgender People in Oklahoma,* UCLA: THE WILLIAMS INSTITUTE, 2 (Jan. 2011) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Herman-Badgett-OK-Emp-Discrim-Jan-2011.pdf (discussing analysis of 2008 General Social Survey, a national survey with questions regarding sexual orientation). *See also* M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination,* UCLA: THE WILLIAMS INSTITUTE, Executive Summary (2007), https://escholarship.org/uc/item/5h3731xr (reviewing over fifty studies conducted since the mid-1990s of discrimination against LGBT workers).

[17] Jaime Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 3, NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (surveying 6,450 transgender and gender non-conforming study participant from all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands).

[18] Bradley Wright et al., *Religious Affiliation & Hiring Discrimination in New England: A Field Experiment*, 34 RES. IN SOC. STRATIFICATION 111, 119 (2013); Michael Wallace et al., *Religious Affiliation & Hiring Discrimination in the American South: A Field Experiment,* 1 SOC. CURRENTS 189, 199 (2014).

[19] NPRM, *supra* note 1, at 41,678-79.

[20] *Id.* at 41,683, 41,691.

organization, such as through its corporate organizational documents, documents posted to an employer's website, or even responses to a government inquiry.[21]

The evidence shows that religious and commercial institutions are intertwined, likely stressing the boundaries of the Proposed Rule's broadened exemption. For example, for-profit organizations, both publicly traded and closely held, are increasingly asserting religious identities, even if they lack official affiliation with a church.[22] Tyson Foods, a publicly traded corporation and major government contractor, employs more than 120,000 workers.[23] Since 2008, it has received over 1,000 federal contracts totaling more than $3.5 billion.[24] The company employs ninety-eight chaplains to minister to its workforce and promote what it calls a "faith-friendly" culture.[25] So-called "parachurch" organizations that lack formal or financial ties to an established religious body, but have religiously motivated objectives, are reported to have annual revenues of anywhere from $22 to $100 billion in industries ranging from entertainment to law, aviation, and social services, to name a few.[26]

Religious groups are also increasingly adopting commercial identities.[27] Catholic hospitals account for 14.5% of the United States healthcare market, and receive tens of millions of dollars in government contracts.[28] Further blurring the boundaries, as a result of industry consolidation, a growing number of healthcare organizations—secular and religious, public and private, for-profit and nonprofit—are entering contractual commitments to abide by religious identities that apply long after any actual attachment to a church or association of religious people has ceased.[29] For-profit enterprises directly owned by faith-based groups also generate billions of dollars in annual revenues in industries as diverse as newspaper, radio, television, publishing and distribution, digital media, hospitality, insurance, and agriculture.[30]

It is a matter of economics that "[w]hen corporate identity is easy to acquire and religious exemptions are financially valuable," commercial actors whose competitors enjoy the religious

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[21] *Id.* at 41,682-83.
[22] *See also id.* at 41,684 ("[OFCCP] does not anticipate that large, publicly held corporations would seek the exemption or fall within the proposed definition."). The statement offers no explanation. Further, the NPRM overlooks the fact that the vast majority of American corporations are closely held, and that many of these closely held corporations are among the nation's largest employers. *See* JAMES D. COX ET AL., I. CORPORATIONS, § 1.20 (2d ed. 2003) ("Most of the incorporated enterprises in this country, perhaps 90 percent or more, are close corporations . . . ."); Andrea Murphy, *America's Largest Private Companies 2017,* FORBES (Aug. 9, 2017), https://www.forbes.com/sites/andreamurphy/2017/08/09/americas-largest-private-companies-2/ (noting that the 225 largest closely held companies in America employ 4.7 million people).
[23] Kim Souza, *Tyson Foods Maintains Its Top Ranking in Poultry Production,* TB & P (Mar. 20, 2019, 9:54 am), https://talkbusiness.net/2019/03/tyson-foods-maintains-its-top-ranking-in-poultry-production/.
[24] *See Recipient Profile: Tyson Foods, Inc.*, USASPENDING.GOV, https://www.usaspending.gov/#/recipient/4d42fd25-eee2-f648-45e6-b22dc65a54af-P.
[25] *Faith in the Workplace,* TYSON FOODS INC., https://www.tysonfoods.com/sustainability/workplace/faith-workplace.
[26] Thomas Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63, 67-68 (2006).
[27] Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 987 (2018).
[28] *Id.* at 934-35.
[29] *Id.* at 940-41.
[30] Alan J. Meese et al., *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons,* 127 HARV. L. REV. F. 273, 277-79 (collecting examples of for-profit corporations, publicly and closely held, asserting religious identities).

exemption "may come to self-designate as religious."[31] If anything, the risks of a growing yet invisible reliance on the religious organization exemption are particularly acute here, since the OFCCP has not required contractors to obtain pre-approval to use the religious organization exemption, permitting employers to claim it without notifying the government.[32] The Proposed Rule does not acknowledge, much less engage with these questions. Instead, it proposes to jettison Title VII's requirements in favor of its own untested and broader definition, likely facilitating discrimination in violation of its purpose.

B. The Proposed Rule would harm vulnerable populations, contractors, taxpayers, and the economy.

The negative consequences to the states, federal government, and taxpayers of weakening OFCCP's enforcement and oversight powers would be vast if a greater number and range of employers claim the exemption and use it as a means to discriminate. The consequences encompass the workers who are discriminated against, contractors that use the broadened exemption to violate the law whether out of confusion or intent,[33] the state and local taxpayers called upon to assist workers victimized by discrimination, and the economy, which suffers when those best qualified to perform a job are not permitted to do so. For the victims of discrimination, the consequences can be devastating. In the short term, discrimination can force job change and unemployment; over the long term it can reduce opportunities for on-the-job learning and advancement, lead to the abandonment of well-paying careers, and reduce lifetime earnings.[34] It also causes direct mental and physical harm. Workers who are discriminated against are more likely to experience depression, anxiety, and other mental health disorders, and are also at higher long-term risk for physical health problems.[35]

Contractors too are hurt by the Proposed Rule. Instead of simplifying the legal landscape, the Proposed Rule would foment confusion among contractors about their legal obligations. The

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[31] Sepper, *supra* note 27, at 955.
[32] *Id.* at 961-62.
[33] *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 769-70 (2014) (Ginsburg, J., dissenting) (collecting cases of attempts to cloak impermissible discrimination under the guise of religious belief, describing *Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners)).
[34] Elyse Shaw et al., *Sexual Harassment and Assault at Work: Understanding the Costs* (Institute for Women's Policy Research, Briefing Paper #B376 (2018), https://iwpr.org/publications/sexual-harassment-work-cost/.
[35] Jagdish Khubchandani et al., *Workplace Harassment and Morbidity Among US Adults: Results from the National Health Interview Survey*, 40 J. OF COMMUNITY HEALTH 555, 557-58 (2015); Kimberly Schneider et al., *Job-Related Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. OF APPLIED PSYCH. 401, 412 (1997); Brad Sears et al., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INSTITUTE (Jul. 2011) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf; David Williams et al., *Racial/Ethnic Discrimination and Health: Findings from Community Studies*, 93 AM. J. OF PUB. HEALTH 200, 200-201.

legal standards for the religious exemption under the Proposed Rule and Title VII conflict with one another,[36] and even if the Proposed Rule is finalized, the anti-discrimination requirements of both E.O. 11,246 and Title VII will continue to apply.[37] So as a practical matter, the Proposed Rule will subject federal contractors to two sets of competing legal requirements—the Title VII standard and the untested OFCCP standard. This dual standard will likely result in greater confusion, misunderstanding, and litigation.

The negative consequences of discrimination reverberate beyond workers and contractors to communities. Individuals who lose their jobs due to discrimination suffer reduced income, loss of health insurance, and housing instability. As a result, not only do federal, state, and local governments lose tax revenue, they also incur financial losses when those same workers seek out public benefits programs that they would not otherwise require—cash and public assistance programs for food, health, disability, income, job placement, and housing assistance, to name a few.[38] Given the size and scale of the in-state workforces employed by federal contractors,[39] increased costs in a single state attributable to the Proposed Rule could reach into the tens of millions of dollars.[40]

Finally, businesses and the economy as a whole are harmed when the most qualified workers are prevented from exercising their skills and talents in the workplace. A recent study from the University of Chicago examined the economic impact of growing workplace equity in the United States over the last half-century with regard to race and gender.[41] The researchers estimated that the impact of moving individuals previously excluded on the basis of race and gender into professions for which they had innate talents accounted for one quarter of the nation's increase in productivity output per person between 1960 and 2010.[42] Changes in law like the Proposed Rule, which would pull back these federal anti-discrimination protections, place such

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[36] *See infra,* II.B & C.

[37] Specifically, E.O. 11,246 applies to all federal contractors who do over $10,000 in government business in one year. *See* 41 C.F.R. § 60-1.5(a)(1). Title VII applies to all federal contractors with 15 or more employees. *See* 42 U.S.C. § 2000e(b). Because the vast majority of federal contractors will satisfy these two thresholds, they will be covered by both standards.

[38] Jody L. Herman, *The Cost of Employment Discrimination Against Transgender Residents of Massachusetts,* THE WILLIAMS INSTITUTE (Apr. 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-MA-TransEmpDiscrim-Apr-2011.pdf.

[39] During fiscal year 2018 alone, the amount of federal contracts performed in our respective jurisdictions were: $57.6 billion in California, $33.7 billion in Maryland, $23.3 billion in the District of Columbia, $16.9 billion in Pennsylvania, $15.2 billion in Massachusetts, $15.1 billion in Connecticut, $14.3 billion in Washington, $13.1 billion in Minnesota, $11.5 billion in New York, $11 billion in Illinois, $7.5 billion in New Jersey, $6.8 billion in Michigan, $6.2 billion in North Carolina, $3.0 billion in Nevada, $2.3 billion in Hawaii, $568 million in Vermont, and $315 million in Delaware. *See State Profiles,* USASPENDING.GOV, https://www.usaspending.gov/#/state.

[40] For example, it is estimated that in Massachusetts, the cost to the state in Medicaid and Commonwealth Care alone for transgender employees who suffer employment discrimination totals $3 million annually. This does not include income tax revenues, other public assistance expenditures and costs. It is estimated that .5 percent of the population of Massachusetts is transgender. Given the larger numbers of individuals falling under other protected categories and the prevalence of workplace discrimination, it is likely that the costs to taxpayers of discrimination against all protected categories could easily reach into the tens of millions of dollars, depending on the state. *See* Herman, *supra* note 38, at 1, 4.

[41] Chang-Tai Hsieh et al., *The Allocation of Talent & U.S. Economic Growth,* (Becker Freidman Institute Working Paper, Jun. 28, 2019), https://bfi.uchicago.edu/working-paper/the-allocation-of-talent-and-u-s-economic-growth/.

[42] *Id.*

growth at risk and needlessly amplify the negative private and public consequences of discrimination.

II. THE PROPOSED RULE IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS.

If enacted, the Proposed Rule would be unlawful for several reasons. First, the Proposed Rule would distort the meaning and context of Supreme Court decisions.[43] Second, the Proposed Rule conflicts with Title VII's statutory requirements. Third, the NPRM fails to provide a satisfactory explanation for the Proposed Rule, offers no evidence in support of its conclusions, and ignores evidence that contradicts its conclusions. For all of these reasons, DOL should withdraw the Proposed Rule.

A. The Proposed Rule distorts the meaning and context of Supreme Court decisions.

The NPRM highlights four Supreme Court decisions that OFCCP claims address "the freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the U.S. Constitution and federal law."[44] The NPRM distorts the meaning and context of these decisions, all of which have narrower holdings than the NPRM suggests, and none of which remotely justify the Proposed Rule.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[45] the Supreme Court found that because the state civil rights commission had shown hostility to the religious views of a baker seeking a religious exemption to an anti-discrimination law, the Commission's order that the baker had engaged in unlawful discrimination against his customers, a same-sex couple, must be set aside.[46] *Masterpiece Cakeshop*'s holding that the government, in evaluating entitlement to religious exemptions, must do so "in a manner that is neutral to religion" goes to the process by which entitlement to such exemptions must be evaluated.[47] It does not, as the NPRM suggests, implicate the scope of such exemptions. If anything, *Masterpiece Cakeshop* expressly cautions against overly broad religious objections to civil rights laws of general applicability, powerfully stating, "while . . . religious and philosophical objections are protected, *it is a general rule that such objections do not allow business owners and other actors in the economy and society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law*."[48] In making this assertion, the Court cited to *Newman v. Piggie Park Enterprises, Inc.*,[49] a challenge to the Civil Rights Act of 1964 in which the Supreme Court rejected

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[43] NPRM, supra note 1, at 41,679.
[44] *Id.*
[45] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
[46] *Id.* at 1724.
[47] In *Masterpiece Cakeshop,* the Court concluded that the Commission had failed to evaluate the baker's claim for a religious exemption in a manner neutral to religion based on a commissioner's comments that the baker's faith was "one of the most despicable pieces of rhetoric that people can use" and that compared the baker's religious beliefs to slavery and the Holocaust. *Id.* at 1729. The Court emphasized that the record indicated that none of the other commissioners objected to these remarks at the time they were made, nor did the Commission ever disavow the remarks in subsequent proceedings. *Id.* at 1729-30.
[48] *Id.* at 1727 (emphasis added).
[49] *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.5 (1968).

a business owner's free exercise claim that his religious beliefs entitled him to an exemption from the Act's requirements that he serve African-American customers. *Masterpiece Cakeshop* and its reference to *Piggie Park* buttress the principle that the existence of a religious belief, in and of itself, does not provide a constitutional shield against compliance with generally applicable civil rights laws.

The NPRM's reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[50] is similarly misplaced. In *Trinity Lutheran*, the Supreme Court struck down on free exercise grounds a state policy that denied grants to any applicant owned or controlled by a religious entity.[51] In plain disregard of *Trinity Lutheran's* narrow holding, which the Court expressly limited to "playground resurfacing" rather than "religious use of funding or other forms of discrimination,"[52] the NPRM cites *Trinity Lutheran* for the general proposition that the government violates the Free Exercise Clause when it conditions the receipt of a generally available public benefit on an entity forfeiting its religious character.[53] But *Trinity Lutheran* carefully distinguished situations where a benefit is denied to an entity based solely on the recipient's religious identity—i.e. based on what an entity *is*—and situations involving neutral and generally applicable laws that restrict what an entity *does*.[54] Generally, while free exercise challenges are upheld with respect to the former, they are denied with respect to the latter.[55] E.O. 11,246, like Title VII, is a neutral and generally applicable law that restricts what a religious organization "does," i.e. discriminate against its workers. Unlike the policy that was struck down in *Trinity Lutheran,* E.O. 11,246 does not expressly prohibit the government from contracting with faith-based organizations. Thus, the neutral application of the Order's anti-discrimination provisions is directed towards the discriminatory conduct of the religious organization, not its status as a religious organization *per se.* Reading the religious organization exemption narrowly so that only truly religious organizations may take advantage of it, and only to the extent that they may prefer to hire coreligionists, protects the free exercise of religion without unduly exempting the organization from the neutral and generally applicable nondiscrimination requirements of E.O. 11,246.

The NPRM also relies on *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*[56] and *Burwell v. Hobby Lobby Stores, Inc*.,[57] neither of which justifies the Proposed Rule.[58] As the NPRM acknowledges, in *Hosanna-Tabor*, the Supreme Court recognized the ministerial exception to Title VII, which is a constitutionally based exception separate from the statutorily based, Title VII religious organization exemption from which the exemption at issue here is derived.[59] The ministerial exception permits organizations to select their ministers without government interference, while, in contrast, the Title VII religious organization exemption applies to all employees of a qualifying religious organization, and is limited to preferences for a

[50] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).
[51] *Id.* at 2023.
[52] *Id.* at 2024, n. 3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").
[53] NPRM, *supra* note 1, at 41,679.
[54] *See Trinity Lutheran*, *supra* note 50, at 2020-21.
[55] *Id.*
[56] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).
[57] *See Hobby Lobby*, *supra* note 33.
[58] NPRM, *supra* note 1, at 41,679.
[59] *See Hosanna-Tabor*, *supra* note 56, at 188.

"particular religion." *Hosanna-Tabor*'s analysis has no bearing on the legal necessity or appropriateness of the Proposed Rule.

Hobby Lobby is similarly inapplicable. The NPRM cites *Hobby Lobby* for the proposition that the Religious Freedom Restoration Act ("RFRA")[60] applies to federal regulation of closely held, for-profit corporations, suggesting that similar organizations should be covered under the religious organization exemption.[61] However, as the NPRM acknowledges, the Court's analysis in *Hobby Lobby* hinged on a statutory analysis of RFRA.[62] The religious organization exemption in E.O. 11,246 is derived from Title VII, which has its own distinct history, language, and intent. The Court unequivocally stated that *Hobby Lobby* provides "no . . . shield" for employers that engage in discrimination "cloaked as religious practice to escape legal sanction."[63] The Court also distinguished its statutory analysis of RFRA and Title VII, and noted that in contrast to RFRA, the Title VII religious organization exemption shows that "Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations."[64] Far from justifying the Proposed Rule's expansion to for-profit organizations, *Hobby Lobby* militates against it.

B. The Proposed Rule conflicts with Title VII requirements and legal precedent, and thus exceeds the authority of OFCCP.

E.O. 11,246 and Title VII form a coherent statutory and administrative scheme under which OFCCP is obligated to enforce anti-discrimination protections for federal contractor employees that are at least coextensive with Title VII's protections, or more protective of workers, as the Order requires. All evidence points to an indissoluble link between Title VII and E.O. 11,246. As we show below, the Proposed Rule ignores the identical text of the provisions, the lack of delegation of rulemaking authority by Congress, Equal Employment Opportunity Commission (the "EEOC") and judicial interpretations, and OFCCP's own longstanding policy in order to substantially broaden the religious organization exemption and undercut Title VII worker protections.

First, the Proposed Rule offers a regulatory interpretation of an executive order provision derived from Title VII, not of Title VII directly. In contrast to the "many established principles" for evaluating agency interpretations of legislation, there appear to be relatively "few such principles" to apply in evaluating agency interpretations of executive orders.[65] However, one principle is clear: "[T]he interpretation of an Executive Order begins with its text, which must be construed consistently with the Order's object and policy."[66] The link between the scope of the exemption in E.O. 11,246 and Title VII is rooted in the plain language of the two exemptions.

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[60] 42 U.S.C. § 2000bb, *et seq*.
[61] NPRM, *supra* note 1, at 41,679.
[62] *Id.*
[63] *See Hobby Lobby*, *supra* note 33, at 733.
[64] *Id.* at 717.
[65] *Cf. City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018) (collecting cases). *See also Cty. of Santa Clara v. Trump,* 267 F. Supp. 3d 1201, 1209 (N.D. Cal. 2017) (rejecting DOJ's interpretation of executive order as not "accurate and credible" without providing a clear legal framework for the level of deference owed an agency interpretation of an executive order).
[66] *City and Cty. of San Francisco, supra* note 65, at 1238 (internal quotation marks and citation omitted).

Specifically, the exemption in E.O. 11,246, as amended in 2002,[67] is drawn directly from Title VII and, as the NPRM observes, the language in the two exemptions is virtually identical.[68] Such similar language is "a strong indication that the two [exemption] provisions should be interpreted pari passu," i.e., with worker protections that are at least co-extensive with one another.[69] The general principle applies even more forcefully here because Title VII and E.O. 11,246 "share a common raison d'etre."[70] Through Title VII, "[C]ongress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination . . . and ordained that its policy of outlawing such discrimination should have the highest priority."[71] Similarly, E.O. 11,246 requires federal contractors to "not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin" and "to take affirmative action to ensure that applicants are employed, and that employees are treated . . . without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin."[72]

The coextensive nature of the two exemptions is also evidenced by their joint implementation by the respective agencies. E.O. 12,067 explicitly charges the EEOC with the duty of leading and coordinating "the efforts of Federal departments and agencies to enforce all [equal employment opportunity] Federal statutes, Executive orders, regulations, and policies . . . ."[73] This duty clearly encompasses leading and coordinating OFCCP's efforts under E.O. 11,246. E.O. 12,067 further requires the EEOC to "strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency" among federal equal opportunity departments and agencies.[74] This overriding principle is reinforced in a Memorandum of Understanding ("MOU") between DOL and the EEOC.[75] Under the MOU, complaints of discrimination in employment with OFCCP are considered dual filed with the EEOC if they allege a Title VII basis.[76] OFCCP shall receive and process them as the EEOC's agent, "in a manner consistent with Title VII principles . . . ."[77] The principle of EEOC primacy, leadership and coordination is paramount. Nowhere is it contemplated that OFCCP should engage in actions that would undermine the EEOC's efforts, as would occur under the Proposed Rule, which takes positions contrary to the EEOC.

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[67] Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 4 (Dec. 12, 2002) ("Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order."); 42 U.S.C. § 2000e-1(a) (substituting "employer" for "Government contractor" but otherwise same).
[68] NPRM, *supra* note 1, at 41,678 (citing *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)).
[69] *Id.*
[70] *See Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam).
[71] *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)) (internal citations omitted).
[72] Exec. Order No. 11,246, *supra* note 3, § 202.
[73] Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (Jun. 30, 1978), § 1-201.
[74] *Id*.
[75] Memorandum of Understanding Between EEOC & OFCCP (Nov. 9, 2011), § 7, https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.
[76] *Id.* at §§ 5, 7.
[77] *Id.* at § 7(a), (d).

OFCCP reinforces this principle through its promulgation of a Federal Contracting Compliance Manual ("FCCM"), that ties OFCCP interpretations of its anti-discrimination duties to Title VII, as enforced by the EEOC. The FCCM adopts an explicit policy "in conducting analyses of potential discrimination issues . . . under the Executive Order, to follow the principles of [Title VII], which the [EEOC] enforces."[78] Consistent with the FCCM policy, administrative law judges and the DOL Administrative Review Board have followed Title VII standards in analyzing violations of E.O. 11,246.[79] Indeed, these policies are so well established that in other regulatory filings, OFCCP has described them as "longstanding."[80] Clearly, the Proposed Rule would depart from these policies.

Finally, the NPRM's attempts to justify evasion of these requirements based on the executive branch's "authority over federal contractors specifically" are unconvincing.[81] The executive power over procurement is not limitless. The executive branch may not issue orders or regulations implementing procurement policy "as if no other statutes in the U.S. Codes existed."[82] To do so would "raise serious constitutional delegation issues."[83] The ineluctable fact remains that "[t]he Executive is bound by the express prohibitions of Title VII."[84] The Proposed Rule falls within the executive branch's authority only if Title VII's congressional enactments do not prohibit its provisions.[85] The NPRM should not be permitted to do indirectly what the law directly prohibits. Congress intended the courts to formulate the definitive contours of Title VII's protections, including the religious organization exemption.[86] OFCCP cannot overstep its bounds by interpreting E.O. 11,246, directly derived from Title VII, in a manner that conflicts with the floor of worker protections established by Title VII and the courts.

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[78] FCCM, *supra* note 11, §§ 1M, 2H01.

[79] *See Greenwood Mills, Inc.*, Case No. 89-OFC-0039, 2000 WL 34601379 (U.S. Dep't of Labor Feb. 24, 2000); *see also Frito-Lays, Inc.*, Case No. 10-OFC-00002, 2010 WL 3211718 (U.S. Dep't of Labor Jul. 23, 2010) (relying on case law that determined the scope of the EEOC's power to investigate under Title VII to determine OFCCP's power to investigate under EO 11,246); Nan D. Hunter, et al., *The Relationship between the EEOC's Decision that Title VII Prohibits Discrimination Based on Gender Identity and the Enforcement of Executive Order 11246*, THE WILLIAMS INSTITUTE (2012), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Hunter-Mallory-Sears-EEOC-EO11246-May-2012.pdf, (collecting cases).

[80] Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11,246; Notice of Proposed Rescission, 76 Fed. Reg. 62 (proposed Jan. 3, 2011) (to be codified at 41 C.F.R. Pt. 60).

[81] NPRM, *supra* note 1, at 41,683.

[82] *See Chamber of Commerce of U.S. v. Reich,* 83 F.3d 439, 440 (D.C. Cir. 1996).

[83] *Id.*

[84] *See Contractors Ass'n of E. Pa. v. Sec'y of Labor,* 442 F.2d 159, 171 (3d Cir. 1971).

[85] *Id.*

[86] Title VII does not authorize any agency—or the President—to issue substantive regulations interpreting its provisions. Instead, the EEOC may issue only procedural regulations and sub-regulatory guidance, which the courts have afforded only persuasive weight. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (superseded by statute on other grounds); *accord E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *see also* 42 U.S.C. § 2000e-12 ("The Commission shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.") (emphasis added). *Compare Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65-72 (2006) (examining EEOC guidance materials and considering persuasive the EEOC's interpretation of a statutory provision) *with Vance v. Ball State Univ.*, 570 U.S. 421, 442 (2013) (finding EEOC's definition of a supervisor to be "a study in ambiguity" and instead adopting its own standard).

C. The Proposed Rule's definitions are contrary to law.

The federal courts have set forth the parameters of the Title VII religious organization exemption, providing a substantive floor of anti-discrimination protections for workers. The NPRM contradicts the principles established by the federal courts, and expands the religious organization exemption to lower worker protections beyond what the plain language and congressional purpose of Title VII permit. The Proposed Rule exceeds OFCCP's authority and is inappropriate.

1. Religion

The Proposed Rule's definition of "religion"—which "includes all aspects of religious observance and practice, as well as belief"—imports the first half of the Title VII definition of religion into the Order's regulations, but not the second.[87] As the NPRM acknowledges, Title VII and the Order are afforded parallel interpretations based in part on nearly identical language.[88] Thus, far from providing clarification, a partial transfer of a Title VII definition would only unnecessarily muddy the waters.

2. Particular Religion

The E.O. 11,246 religious organization exemption applies to qualifying government contractors and permits them to express preferences with respect to "the employment of individuals of a particular religion."[89] Because neither Title VII nor the Order define "particular religion," adjudicators have looked to Title VII case law for guidance, as well as to EEOC and OFCCP policy. While the circuit courts have been in dialogue regarding the precise parameters of "particular religion,"[90] even the NPRM acknowledges that the well-established enforcement policy of both the EEOC and OFCCP has been that the term refers to a religious employer's right to exercise a preference by hiring members of the same faith, i.e., co-religionists.[91] This view is supported by a line of circuit court precedent that has long held that the Title VII religious organization exemption provides a "limited exemption . . . in favor of co-religionists."[92] The Proposed Rule departs from this understanding, introducing a new definition that would allow employers to "condition employment on [a worker's] acceptance or adherence to religious tenets

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[87] NPRM, *supra* note 1, at 41,679.
[88] *Id.* at 41,678.
[89] Exec. Order No. 11,246, *supra* note 3, § 204, subd. (c) (emphasis added).
[90] *Compare Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) ("[Exemption] merely indicates that [exempt] institutions may choose to employ members of their own religion without fear of being charged with religious discrimination.") *and E.E.O.C. v. Pac. Press. Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) ("Title VII provides only a limited exemption enabling [exempt employers] to discriminate in favor of co-religionists."), *abrogated on other grounds as recognized by Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668, 675 (9th Cir. 2010), *with Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) ("[T]he permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."). However, nothing in *Little* suggests exempt religious employers are permitted to discriminate against their employees on the basis of another protected characteristic.
[91] NPRM, *supra* note 1, at 41,680.
[92] *See e.g., Pac. Press. Pub. Ass'n*, *supra* note 90, at 1276. *See also Boyd*, *supra* note 90, at 413 ("[E]xemption merely indicates that [exempt] institutions may choose to employ members of their own religion without fear of being charged with discrimination.").

as understood by the employing contractor."[93] The NPRM's proposed definition contradicts the text and legislative intent of Title VII.

Both in 1964 when Congress introduced the Title VII religious organization exemption, and again in 1972 when Congress amended it, Congress specifically rejected proposals to entirely exempt religious organizations under the Act.[94] Instead, Congress drafted the plain language of the exemption to cover employer preferences based only on a "particular religion."[95] Congress was emphatic that the religious organization exemption was not a license for an employer to discriminate against its workforce based on the employer's personal religious values.[96] Instead, the exemption only allows qualifying religious employers to discriminate on the basis of a "particular religion."[97] Thus, even religious employers that qualify for the exemption cannot broadly discriminate on the basis of religion; for example, religious employers cannot single out religions from which they refuse to hire (e.g., "Jews and Muslims Need Not Apply"). Instead, employers can only prefer to hire members of their own particular religion.

Consistent with the statute's plain language, which solely permits preferences on the basis of a "particular religion," Title VII is equally clear that employers that qualify for the religious organization exemption are prohibited from discriminating against their workers based on other protected categories.[98] Importantly, this principle applies with equal force regardless if one understands the term "particular religion" to encompass only preferences for "co-religionists" or, as the NPRM more broadly proposes, religious tenets as understood by the employer.

Consequently, even if an employer holds a sincere religious belief against pregnancy outside of marriage, same-sex relations, or women in leadership positions,[99] an employer who discriminates against an employee based on his or her sex, sexual orientation, or gender identity, or another protected category, will still be liable under E.O. 11,246.[100] Thus, an employer's religious belief that only a male husband can be the head of household does not immunize it from Title VII liability for a workplace policy that denies health insurance exclusively to married women.[101] Similarly, a religious school that implements a religiously motivated anti-pregnancy policy still violates Title VII because restrictions on pregnancy "by definition" discriminate on the

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[93] NPRM, *supra* note 1, at 41,679 ("Particular religion means the religion of a particular individual . . . , including acceptance of or adherence to religious tenets, as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.").
[94] *See Pac. Press Pub. Ass'n*, *supra* note 90, at 1276.
[95] *Id.* at 1277.
[96] *Id.*
[97] 42 U.S.C.§ 2000e-1(a).
[98] *See Pac. Press Pub. Ass'n*, *supra* note 90, at 1277.
[99] Of course, it remains to be seen whether an employer would raise such an argument, and if it did so, if the employer could show this belief was sincere and not a pretext for some other motivation, such as economic or fear of liability.
[100] *See Pac. Press Pub. Ass'n*, *supra* note 90, at 1277 ("Every court that has considered Title VII's applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex, or national origin.") (collecting cases).
[101] *See E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1362, 1364, 1366 (9th Cir. 1986) (finding Title VII religious exemption did not cover employer's policy of denying health insurance to married women based on its religious belief that only the male husband may be the head of household).

basis of sex.[102] Nor does a religious employer's belief that its members should not bring lawsuits against the church shield it from a Title VII retaliation claim.[103]

Although the NPRM acknowledges these principles in passing,[104] the Proposed Rule's definition does not, and other statements in the NPRM arguably undercut these principles. For example, the NPRM suggests that "[the "particular religion" definition seeks] to clarify that the religious organization exemption allows religious contractors . . . to condition employment on acceptance of or adherence to religious tenets as understood by the contractor."[105] Title VII jurisprudence and case law contain the nuanced limitations and fact-dependent inquiry that the law requires in determining whether a religious employer discriminated against a worker based on his or her "particular religion" or on another protected basis. The definition in the Proposed Rule does not, and therefore, is contrary to law and should be withdrawn.

3. Related Definitions of "Religious Corporation, Association, Educational Institution, or Society," "Exercise of Religion," and "Sincere"

The Proposed Rule's definition of a "religious corporation, association, educational institution or society" is assembled from a number of diverse statutes and judicial precedents. The result is a wholly new definition, recognizable in neither statute nor case law that distorts Title VII and its jurisprudence. We begin by describing the definition's multiple components.

First, the Proposed Rule modifies the term "religious corporation, association, educational institution, or society" to include a "college, university, or institution of learning."[106] This phrase appears nowhere in the religious organization exemption. Instead, it originates in Title VII's educational institution exemption, which has its own set of qualifying criteria.[107] Next, the Proposed Rule lays out a three-factor test for whether an entity qualifies for the religious organization exemption, namely, whether the organization: (1) is organized for a religious purpose; (2) holds itself out to the public as carrying out a religious purpose; and (3) engages in an exercise of religion consistent with, and in furtherance of, a religious purpose.[108] These three factors are stand-alone, and if satisfied, entitle an entity to the religious organization exemption.[109] The Proposed Rule also explicitly lists three criteria that are not required for OFCCP to determine whether a contractor qualifies, namely, whether the organization: (1) has a mosque, church,

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[102] *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (noting that because restrictions on pregnancy are "discriminatory by definition" religious schools cannot discriminate on the basis of sex).
[103] *See Pac. Press Pub. Ass'n*, *supra* note 90, at 1280-81 (9th Cir. 1982) (rejecting religious employer's claim that its religious belief prohibiting lawsuits by members against the church immunized it from a Title VII retaliation claim).
[104] NPRM, *supra* note 1, at 41,680.
[105] *Id.* at 41,679.
[106] *Id.* at 41,681.
[107] 42 U.S.C. § 2000e-2(e)(2) ("[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such . . . educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion."). *See also* 41 C.F.R. § 60-1.5(a)(6) (OFCCP regulation containing similar language).
[108] NPRM, *supra* note 1, at 41,682-83.
[109] *Id.* at 41,693.

synagogue, temple, or house of worship; (2) is a nonprofit; and (3) is supported by, affiliated with, identified with, or composed of individuals sharing any single religion, sect, denomination, or other religious tradition.[110] One of the Proposed Rule's most consequential effects is that it would open the door to for-profit businesses unaffiliated with a single religious tradition to claim the religious organization exemption.

The NPRM acknowledges its divergence from Title VII, but argues that its expansion of the Proposed Rule regarding for-profits is justified by the Supreme Court's decision in *Hobby Lobby*.[111] But *Hobby Lobby's* holding that for-profit organizations are authorized to bring claims under RFRA was based on the Court's statutory analysis of RFRA; in dicta the Court indicated that a statutory analysis of Title VII would likely go the other way.[112] Moreover, in the wake of *Hobby Lobby*, it has not been established whether the reach of RFRA's so-called "sister statute," the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[113] extends to for-profits.[114] Given Title VII's remote relationship to RFRA in terms of its text and legislative history, RFRA is an extraordinarily weak basis for justifying a drastic expansion of the religious organization exemption. Nor is the Proposed Rule's treatment of for-profit organizations justified by the executive branch's contracting authority. As discussed *supra*,[115] executive authority over procurement must be exercised within the boundaries of Title VII's prohibitions. Further, as we show below, the Proposed Rule's definition of a religious organization violates Title VII.

a. Three-Factor Test

The Proposed Rule claims its three-factor test is rooted in the test for religious organizations in Judge O'Scannlain's concurring opinion in *Spencer v. World Vision, Inc*., 633 F.3d 723 (9th Cir. 2011), "with some modifications."[116] In fact, the Proposed Rule dramatically alters Judge O'Scannlain's test and departs from EEOC policy, Title VII, and its jurisprudence. As a result, it is substantially less protective of workers than Title VII requires.

The NPRM's statement that there has been "variation" in federal courts' tests for establishing entitlement to the Title VII religious organization exemption[117] overlooks the fundamental reality that while not every opinion is identical, the courts have developed certain uniform principles consistent with Title VII's statutory requirements. First, no circuit court, nor the Supreme Court, has ever promulgated a test for the exemption that allows an organization to qualify solely based on its own self-designation as a religious entity. Instead, all courts and the EEOC Compliance Manual require a holistic evaluation of the organization's overall activities,

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[110] *Id.* at 41,684 ("[T]he proposed definition also identifies a number of features that are not required for OFCCP to determine that a contractor is religious."), 41,691 ("To qualify as religious an [entity] may or may not . . . [listing three factors not required for consideration] . . . .").
[111] *Id.* at 41,684.
[112] *See Hobby Lobby*, *supra* note 33, at 716.
[113] 42 U.S.C. § 2000cc, *et seq.*
[114] *See Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (referring to RFRA and RLUIPA as "sister statute[s]"); Ross Campbell, *Hobby Lobby As A Land Use Case: Charting for-Profit RLUIPA Claims*, 10 NYU J.L. & LIBERTY 884, 888-91 (2016) (noting that the question of whether RLUIPA claim may be brought by for-profit institutions still remains unresolved).
[115] *Supra,* at II.B.
[116] NPRM, *supra* note 1, at 41,682.
[117] *Id.* at 41,678.

i.e., a factual inquiry into what the organization actually does.[118] The Proposed Rule's test prohibits such a commonsense inquiry and instead restricts the analysis to a stand-alone, three-factor test of how an organization formally composes itself (whether it is organized for a religious purpose), how it proclaims its religiosity (whether it holds itself out to the public as carrying a religious purpose), and whether it engages in "exercises of religion" (eschewing the term "activities") consistent with its purpose.[119]

Second, in determining whether an employer qualifies for the religious organization exemption, no court has ever restricted or outright not required consideration of an employer's nonprofit versus for-profit status, its connection (or lack thereof) with a church or similar organization, or its affiliation (or lack thereof) with a religious tradition. In fact, it is clear these are considered at least pertinent, and in some cases dispositive, considerations.[120] In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, two concurring opinions questioned whether there were any circumstances under which a for-profit entity could qualify for the Title VII religious organization exemption.[121] Justice O'Connor's concurring opinion even raised Establishment Clause concerns regarding the appearance of government endorsement of religion if the religious organization exemption were extended to for-profits.[122] Such concerns would seem to be exacerbated in the federal contracting context given the high degree of discretion and subjectivity the government exercises over its selection of contractors.

The Judge O'Scannlain opinion, on which the Proposed Rule is purportedly based, recognized the import of these concerns. In response to criticism that his test for an organization to qualify for the exemption was too broad, Judge O'Scannlain cited two criteria that would limit his test to a reasonable scope. The first, which he described as "especially significant," was a

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[118] *See* E.E.O.C. COMPLIANCE MANUAL, § 12-I.C (Jul. 22, 2008) (stating that significant factor is whether organization's "day-to-day operations" are religious)*; Fike v. United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286, 290 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983) (finding organization did not qualify for exemption when its day-to-day operations were not religious in nature); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 479, 485 (5th Cir. 1980) (noting the nature of the college's operations and ultimately concluding it did not qualify for the religious exemption); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 221 (3d. Cir. 2007) (including organization's activities in nine-factor, non-exclusive test to determine qualifications for religious exemption); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (endorsing the concept that the court must evaluate "all facts" and "weigh the religious and secular characteristics of the institution"); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997) ("look[ing] at all the circumstances" to determine if the organization qualified for the religious exemption); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (requiring, among other factors, that the organization be "engaged primarily" in carrying out a religious purpose).

[119] NPRM, *supra* note 1, at 41,682-83.

[120] *See* E.E.O.C. COMPLIANCE MANUAL, § 12-I.C (stating that significant factor is whether organization is a "not-for-profit" or "supported by a church or other religious organization"); *Fike*, *supra* note 118, at 288-89 (considering organization's affiliation and funding in evaluation of exemption); *Mississippi Coll.*, *supra* note 118, at 479 (considering ownership, operation, and affiliation for purpose of exemption); *LeBoon*, *supra* note 118, at 221 (considering nonprofit vs. for-profit status, ownership, and affiliation in a non-exhaustive nine-factor test for exemption); *Hall*, *supra* note 118, at 624-25 (considering affiliation and ownership in evaluating exemption); *Killinger, supra* note 118, at 199 (considering affiliation and funding in evaluating exemption); *World Vision, Inc.*, *supra* note 118, at 724 (requiring, among other factors, that qualifying organization "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts").

[121] *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring); *id.* at 349 (O'Connor J., concurring).

[122] *Id.* at 349 (O'Connor J., concurring). *See also Hobby Lobby*, *supra* note 33, at 753 (Ginsburg, J., dissenting) (stating, in the context of Title VII, "by law, no religion-based criterion can restrict the workforce of for-profit corporations.").

requirement the organization must be a "nonprofit," because nonprofit status bolsters an organization's nonpecuniary, i.e. religious purpose.[123] The second was the "market check" that would come from requiring an organization to hold itself out to the public as religious.[124] Presumably, such an identity could come at a cost in terms of broader public support.[125] The NPRM jettisons both limitations. It expressly does not require a consideration of an organization's nonprofit versus for-profit status.[126] It also dilutes the requirement that an organization hold itself out to the public as religious to the point that an "affirm[ation of] a religious purpose in response to inquiries from a member of the public or a government entity" would be sufficient.[127]

It has long been understood that when Congress enacted Title VII's religion-based exemptions, they were generally intended to be limited to churches and other religious nonprofit institutions.[128] The exemptions' boundaries are rooted in the statute's plain language. Title VII contains two religion-based exemptions, a religious organization exemption under 42 U.S.C. § 2000e-1(a), and a second exemption for religious educational institutions under 42 U.S.C. § 2000e-2(e)(2), which permits hiring preferences for members of a particular religion if the educational institution is wholly or partly supported "by a particular religion, or by a particular religious corporation, association, or society." The expansive interpretation of the religious organization exemption contemplated under the Proposed Rule would render the educational exemption redundant, and it is a canon of construction that one must avoid interpretations of a provision that would render another superfluous or unnecessary.[129]

Title VII's plain language is also consistent with its legislative history, which shows that when Title VII was enacted, Congress added the religious educational institutions exemption because it understood that not all such institutions would qualify for the religious organization exemption, as they were insufficiently related to churches.[130] Obviously, if the religious organization exemption were as broad as the NRPM suggests, there would have been no need for a separate educational institution exemption. The NPRM's proposed definition flouts the statutory and jurisprudential requirements of Title VII.

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[123] *See World Vision, Inc.*, *supra* note 118, at 734-35.
[124] *Id.* at 735.
[125] *Id.*
[126] NPRM, *supra* note 1, at 41,683-84 (discussing for-profit organizations), 41,684 ("[T]he proposed definition also identifies a number of features that are not required for OFCCP to determine that a contractor is religious."), 41,691 (proposed definition of "religious corporation, association, educational institution, or society").
[127] *Id.* at 41,683.
[128] *See, e.g.,* 42 U.S.C. § 2000e-1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities"); *see* 1A FLETCHER CYC. CORP. § 80 (noting that "religious corporations" are a "special class of nonprofit corporation[]").
[129] *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (citing "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").
[130] *See E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617-18 (9th Cir. 1988).

b. Exercise of Religion

In the third prong of its proposed religious organization exemption test, the NPRM replaces the term "activity" with "exercise of religion," as defined under RFRA, i.e., "whether an organization engages in an exercise of religion consistent with, and in furtherance of, a religious purpose." In so doing, the NPRM restricts the exemption's inquiry into whether an organization is acting consistently with its religious purpose to whether an organization's exercises of religion, as opposed to its overall activities, are consistent with that purpose. This maneuver betrays a deeper confusion about the fundamental difference between the nature of the religious organization exemption and RFRA.

RFRA establishes a statutory right to relief only if the exercise of religion by an individual or organization has been "substantially burdened" by the government.[131] It does not require that the entire organization be "religious," and the breadth of its "religious exercise" definition is tempered by its substantial burden requirement.[132] The religious organization exemption is different in kind. It does not contain any substantial burden limitation. Instead, by its plain language, it applies only to religious (not secular) organizations, and is triggered when the organization's exercise of religion rises to such a level of significance that the organization's overall identity becomes religious, therefore entitling it to an exemption. The Proposed Rule misses this distinction. The Proposed Rule places a disproportionate emphasis on whether an organization engages in exercises of religion, while de-emphasizing the big picture reality of whether the organization's activities constitute a comprehensive religious identity that qualifies for an exemption to a law of general applicability. The Proposed Rule's attempts to broaden the religious organization exemption raise the specter cautioned against by the Supreme Court in *Employment Div. of Dep't of Human Res. of Oregon v. Smith*, of allowing "professed doctrines of religious belief" to become "superior to the law of the land and in effect, permit every citizen to become a law unto himself."[133]

c. Sincere Exercise

The NPRM seeks to expand RFRA's already broad definition of "exercise of religion," by adding that "[a]n exercise of religion need only be sincere."[134] The NPRM then defines "sincere" in a circular fashion, stating, "[s]incere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief."[135] This definition does not reduce confusion, but merely shifts the lines of controversy to a new battlefield under a new organizational test without Title VII precedent to guide courts or litigants. Under RFRA's sister statute, RLUIPA, there is already an emerging line of case law that questions whether certain types of actions can ever be considered sincere exercises of religion, or whether, objectively, they are too inherently commercial in nature.[136] The question of how a for-profit

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[131] 42 U.S.C. § 2000bb–1(a).
[132] *Id.*
[133] *See Employment Div. of Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 879 (1990).
[134] NPRM, *supra* note 1, at 41,690.
[135] *Id.* at 41,691.
[136] *See, e.g., Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W. 2d 734, 746 (2007) (addressing the sincerity issue *arguendo* and reasoning that "[g]enerally, the building of an apartment complex would be considered a commercial exercise, not a religious exercise."); *see also* Campbell, *supra* note 114, at 898 (collecting cases).

organization can demonstrate that its exercise of religion is sincere is largely untested, and is likely to become heavily litigated.[137] Instead of the NRPM's promised clarity, contractors will now have to contend with all of these questions, in addition to their obligations under Title VII.

d. Broad Interpretation

The NPRM proposes that "[t]his subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act . . . ."[138] The NPRM purports to protect religious exercise, but does not identify whose religious exercise it is protecting. The fact is that for every employer that claims the religious organization exemption based on the employer's "exercise of religion," employees, who may also claim rights to the "exercise of religion," will be forced to ascribe to their employer's religious tenets regardless of their own beliefs, to say nothing of employers who make use of the exemption as pretext to discriminate on other grounds. The general rule is "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity."[139] This applies with particular force to Title VII and other remedial legislation, whose protections—not exemptions—must be construed broadly in favor of protecting workers.[140] To the extent that the Proposed Rule reverses this fundamental statutory principle by implying that the religious organization exemption be construed broadly, it exceeds statutory and judicial limits.

D. OFCCP proposes a "but-for" standard of causation that is contrary to Title VII.

OFCCP proposes to reverse course from its 2015 rulemaking implementing Executive Order 13,665 and institute a "but-for" causation standard, rather than a "motivating-factor" standard, if there is a dispute over whether an exempt religious contractor discriminated against an employee based on religion or some other protected characteristic.[141] In previous rulemaking, OFCCP acknowledged that it follows Title VII cases in applying the anti-discrimination provisions of E.O. 11,246.[142] Now the NPRM proposes a higher standard of proof in status-based discrimination cases involving exempt religious employers, reasoning that a motivating-factor standard would impermissibly entangle the government with religion. The proposed but-for

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[137] Ben Adams et al., *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 63-64 (2014) ("Claims of religious sincerity are ultimately questions of fact, and courts have a wealth of experience weighing witness credibility . . . . A religious claimant must convincingly explain in court the basis for his objection, and he can be pressed on inconsistencies. Neither the government nor the court has to accept the defendants' mere say-so.").

[138] NPRM, *supra* note 1, at 41,691 (citation omitted).

[139] *See United States v. Lee*, 455 U.S. 252, 261 (1982).

[140] *See Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) ("[I]t has been long established that Title VII, as remedial legislation, is construed broadly.").

[141] A "but-for" standard requires that a complainant show the challenged employment action would not have happened "but for" a discriminatory motive; in contrast, a motivating-factor standard requires that a complainant show an impermissible basis motivated, at least in part, the decision. *Compare* NPRM, *supra* note 1, at 41,685 (proposing a but-for standard) *with* Exec. Order No. 13,665, 80 Fed. Reg. 54,934, 54,944-46 (Sept. 11, 2015) (implementing a motivating factor standard).

[142] Exec. Order No. 13,665, *supra* note 141, at 54,944.

standard is contrary to law, exceeds OFCCP's authority and is arbitrary and capricious because it impermissibly interprets the anti-discrimination provisions of E.O. 11,246.

There can be no doubt that Title VII requires a motivating factor standard. Thirty years ago, in *Price Waterhouse v. Hopkins*, the Supreme Court addressed the issue of causation in the context of a Title VII status-based discrimination suit in a plurality opinion that embraced a mixed-motive test.[143] Congress subsequently amended Title VII to codify the prohibition of mixed-motive employment action based, in part, on an impermissible protected factor.[144]

The NPRM posits that the heightened but-for causation standard is necessary to avoid the "[c]onstitutionally-suspect minefield of having to evaluate the nature of a sincerely held belief, which could result in the inappropriate encroachment upon the organization's religious integrity."[145] This explanation reveals the arbitrary and capricious nature of the Proposed Rule; it is hard to imagine how an inquiry into the motives for an allegedly discriminatory employment action could impermissibly encroach on an entity's religious freedom. In fact, the federal courts have addressed this issue head-on in cases involving religious employers accused of using religion as a pretext for discrimination on other protected grounds.[146] The Court of Appeals for the Third Circuit stated: "A conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice and, further, implies very little even about the good faith with which the doctrine was advanced to explain the dismissal."[147] The but-for test suggested by OFCCP is unsupported by law and should be withdrawn.

E. The Proposed Rule is internally inconsistent and inadequately explained.

The NPRM claims that the Proposed Rule is warranted because it will "increas[e] clarity for both contractors and for OFCCP enforcement," "reduce the risk of non-compliance to contractors," "reduce the number and costs of enforcement proceedings" and promote "equity, fairness, and religious freedom."[148] None of these claims justifies the Proposed Rule.

First, the Proposed Rule would subject federal contractors and OFCCP staff to two separate legal standards—one under Title VII and one under the Order. The Proposed Rule will also likely not reduce the risk of non-compliance. To maintain a level playing field, DOL staff and adjudicators will need to engage in case-by-case line drawing of these organizations' qualifications for the exemption, without a body of established law to guide them. The NPRM's new test, which departs sharply from precedent, will increase legal uncertainty about which organizations qualify, likely increasing non-compliance.

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[143] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion).
[144] 42 U.S.C. § 2000e-2(m); *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (describing relief for unlawful, mixed-motive employment practices).
[145] NPRM, *supra* note 1, at 41,685 n.10.
[146] *See Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 329 (3d Cir. 1993) (concluding that "pretext" case where the dispute was if the religious school's adverse employment action was based on a permissible (religion) or impermissible motive (age) did not raise significant entanglement concerns).
[147] *Id.* at 330.
[148] NPRM, *supra* note 1, at 41,687.

Nor will the Proposed Rule reduce the number and costs of enforcement proceedings. Employees denied protection from OFCCP may simply seek legal relief elsewhere, likely through the EEOC, thus diverting, but not reducing, federal enforcement actions. Further, because OFCCP does not appear to have any mandatory procedures for how and when an employer must raise its claim to the religious organization exemption, the Proposed Rule could strain OFCCP's limited resources as employers, on the front end, request determinations of whether they are exempt, and on the back-end, challenge the applicability of OFCCP enforcement actions that are already well underway.

Finally, the NPRM asserts that the Proposed Rule will promote equity, fairness, and religious freedom. However, as protectors of religious freedom have presciently observed, expanding the religious organization exemption too widely increases the risk that faith-based organizations will begin to lose their institutional claim to specialness, undermining the rationale for the religious organization exemption at all.[149] Moreover, under the Proposed Rule, any increase in the employer's religious freedom comes at the direct loss of the religious freedom of employees who may be forced to abide by their employers' religious beliefs at the expense of their own.[150]

The NPRM's proposed justifications for its rulemaking are not supported. Because the Proposed Rule is "internally inconsistent and inadequately explained," a final rule would be arbitrary and capricious.[151]

F. The Department of Labor lacks sufficient evidence to analyze the potential impact of the Proposed Rule.

Under *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, the Supreme Court rejected an agency's explanation as arbitrary where "there [was] no direct evidence in support of the agency's finding. . . ."[152] An agency rule also must be rejected if the agency fails to reflect upon contrary evidence to the rule or treats contrary evidence in a conclusory fashion.[153] The NPRM cites no evidence to support the purported benefits of the Proposed Rule, and also fails to engage with evidence directly contradicting its purported benefits. Similarly, the NPRM cites no evidence to support its calculations for the Proposed Rule's purported costs, and turns a blind eye to the most obvious and profoundly disturbing cost—the workers, families, taxpayers, and states that would be forced to bear the heavy burdens of increased employment discrimination.

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[149] Sepper, *supra* note 27, at 933 ("As religious institutions blur the lines between for-profit and nonprofit, commercial and noncommercial, and sacred and secular, the category of religious institution loses its specialness."). *See also* Frank S. Ravitch, *Be Careful What You Wish For: Why Hobby Lobby Weakens Religious Freedom,* 2016 B.Y.U. L. REV. 55, 88 (2016) ("The less the public views RFRA as being about protecting the rights of religious people, and the more it views RFRA as being a license for those making money to harm third parties, the greater the risks to religious freedom for those traditionally protected by RFRA – religious individuals and entities – will be.").

[150] Of course, the employer may not use religion as a pretext to discriminate against the employee on the basis of another protected category. *See supra*, II.C.2.

[151] *Cf. Gen. Chem. Corp. v. United States,* 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) (holding agency action to be arbitrary because its analysis was "internally inconsistent and inadequately explained"); *see also Dist. Hosp. Partners, L.P. v. Burwell,* 786 F.3d 46, 59 (D.C. Cir. 2015) (collecting cases).

[152] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

[153] *See Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding agency lacked a reasoned explanation for its conclusory dismissal of empirical data that was a critical factor in its decision).

The NPRM claims it will benefit the federal government's interest in the "efficient fulfillment" of contracts because the alleged lack of clarity in the religious organization exemption is discouraging religious contractors from bidding.[154] Yet, the NPRM cites no evidence this is actually happening; instead, it only states that it "expects" this is the case, and that the number of religious contractors "may increase" as a result of the Proposed Rule.[155] The Administrative Procedure Act ("APA")[156] requires rulemaking to be based on actual evidence, not on agency assumptions.[157] Moreover, the actual evidence contradicts the agency's assumptions. For more than fifteen years since the religious organization exemption was imported into E.O. 11,246,[158] OFCCP has relied on EEOC guidance and Title VII jurisprudence to interpret the exemption. Even in the absence of regulations, by objective indicators, the number of faith-based groups contracting with the federal government is flourishing. As recently as 2016, Oklahoma Representative Steve Russell testified before Congress that more than 2,000 federal government contracts per year were being awarded to religious organizations and contractors.[159] A sample from the government's spending database shows numerous, high-dollar value contracts being awarded over the last twelve months to an array of faith based groups.[160] Clearly, even in the absence of the Proposed Rule, contracts being awarded to faith-based groups are substantial.

Just as the NPRM lacks evidence to support the purported benefits of the Proposed Rule, it also ignores evidence of the Proposed Rule's likely harms. In an act of complete omission, the NPRM fails to consider the harm the Proposed Rule would cause to workers who would suffer greater workplace discrimination. The closest the NPRM comes to recognizing this possibility is the following: "[The NPRM] seeks comment on the costs, benefits, and distributional impacts on contractors and their employees."[161] The consequences of workplace discrimination are devastating, with direct spill-over effects on states and taxpayers easily extending into the tens of millions of dollars, while also remaining, for those who directly suffer from such discrimination, acutely personal and incalculable.[162] The NPRM proposes a solution to a problem that it has no evidence exists. If finalized as proposed, DOL's failure to examine the evidence and consider the readily apparent harms would render the regulation arbitrary and capricious.

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[154] NPRM, *supra* note 1, at 41,683, 41,687.
[155] *Id.* at 41,687.
[156] 5 U.S.C. § 551, *et seq.*
[157] *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (requiring agency to provide a justification based on actual evidence and that goes beyond "a conclusory statement").
[158] *See supra,* note 67.
[159] 162 Cong. Rec. H3288-3290 (daily ed. May 26, 2016) (statement of Rep. Russell), https://www.congress.gov/congressional-record/2016/05/26/house-section/article/H3288-2.
[160] These groups include: Saint Vincent's Catholic Medical Centers of New York ($94.6 million), The Salvation Army World Service Office ($27.5 million), Mercy Hospital Springfield ($14.4 million), Young Women's Christian Association of Greater Los Angeles California ($10.2 million), City of Faith Prison Ministries ($5.2 million), Riverside Christian Ministries, Inc. ($2.7 million), Jewish Child and Family Services ($2.1 million), Catholic Charities, various affiliates (over $1 million in sum total), to name a few. *See* USASPENDING.GOV, https://www.usaspending.gov/#/recipient (last checked Sept. 16, 2019).
[161] NPRM, *supra* note 1, at 41,687.
[162] *See supra,* I.B.

III. CONCLUSION

The signatory states oppose the Proposed Rule and urge DOL to withdraw it. The rule, as proposed, will dramatically expand the religious organization exemption beyond its congressionally intended parameters. Instead of promoting religious freedom in government contracting, which is already protected, it will result in greater discrimination against millions of workers nationwide. As a significant driver of our state economies, federal contractors and their employees are critical to our growth.

The Proposed Rule will harm workers by opening the door to employment discrimination based on impermissible factors, increasing the risk that bad actors will be shielded from liability by claiming the exemption inappropriately. If finalized, the Proposed Rule would also likely fail to meet the requirements for reasoned agency decision-making under the APA, and will be subject to legal challenges once promulgated. The NPRM lacks reasoned explanation, relies on little evidence in its favor, and ignores substantial evidence counseling against the proposed course. The Proposed Rule is contrary to law, conflicting with plain statutory text, judicial precedent, and the intent of Title VII and the Order. For all these reasons, DOL should withdraw the Proposed Rule.

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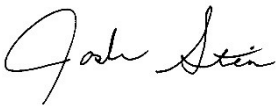

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