ETHICS AND PUBLIC POLICY CENTER

August 10, 2022

EO 12866 Meeting
Final Action on Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption
RIN 1250-AA09
Comments by: Rachel N. Morrison

Thank you for the opportunity to provide comments on OIRA's review of the "Final Action on Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" ("Proposal") by the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor.

My name is Rachel Morrison. I am an attorney and Fellow at the Ethics and Public Policy Center (EPPC). I am a former attorney advisor for the general counsel at the Equal Employment Opportunity Commission (EEOC) and an expert on religious nondiscrimination in employment, including Title VII's religious organization exemption.

OMB cancelled a previous EO 12866 meeting I had scheduled for a different rule,[1] so I am glad you are willing to hear EPPC's input on this rule.

Today, there are three main points I want to share with OIRA and OFCCP. Many of these arguments were raised in the public comment I submitted to OFCCP during the public comment period.[2] I've also attached an excerpt from EEOC's Religion Guidance for your reference.

I. OFCCP's purported "need" to make its regulations "consistent with Title VII principles and case law" does not exist because the proposed changes are inconsistent with the text of Title VII, Title VII case law, and EEOC guidance.

- *Purported need.* For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. OFCCP describes the need for regulating in a single sentence in the Proposal. Specifically, it stated the proposed rescission is necessary to return to "its policy and practice of interpreting and applying the religious exemption contained in section 204(c) of Executive Order 11246 *consistent with Title VII principles and case law*." But as I explain, the Proposal actually departs from the text of EO 11246, Title VII principles and case law, as well as EEOC Religion Guidance. This departure and inconsistency undercuts OFCCP's statement of need for regulating.

[1] Rachel Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, (Oct. 8, 2021), https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] EPPC Scholars Comment Opposing "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09 (Dec. 9, 2021), https://eppc.org/wp-content/uploads/2021/12/EPPC-Scholars-Comment-Opposing-OFCCP-Proposal.pdf.

- *EO 11246's religious exemption*. Executive Order 11246 established requirements for equal employment opportunity for federal contractors. The EO contains a religious exemption in Section 204 which states: "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." Section 202 states: "Except in contracts exempted in accordance with Section 204 of this Order … the contractor agrees … [it] will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." Taking the text of Section 204 and Section 202 together, both make clear that "with respect to the employment of individuals of a particular religion" *all* of Section 202's discrimination prohibitions do not apply to a religious contractor.
- *Title VII's religious organization exemption.* Since the language of the religious exemption in EO 11246 mirrors the language governing the religious organization exemptions in Title VII, OFCCP has relied and purports to rely on Title VII principles and caselaw in interpreting EO 11246's religious exemption. However, OFCCP's interpretation in the Proposal is inconsistent with Title VII (and EOOC guidance).
    - Section 702 of Title VII (like Section 204 of EO 11246) states that "*[t]his subchapter shall not apply to* … [a qualifying religious organization] . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities" (emphasis added). Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color, sex, national origin, those prohibitions are part of "this subchapter" and do not apply with respect to "the employment of individuals of a particular religion." Employment covers the full range of the employer-employee relationship. Religion is defined broadly in Title VII to include "all aspects of religious observance and practice, as well as belief." Thus, qualifying religious organizations are permitted to make employment decisions based on religion, which includes, beliefs, observances, and practices. Even though a certain employment decision could be recharacterized as discrimination based on another protected basis, such as sex, if the employment decision was based on the religious organization's religious beliefs, observances, or practices, Title VII does not apply.
- *The Proposal would unlawfully limit employment decisions on the basis of religion.* The Proposal goes out of its way to unlawfully limit the right of religious contractors to make employment decisions based on religion. The Proposal states: "The religious exemption does not permit qualifying employers to make employment decisions about non-ministerial positions that amount to discrimination on the basis of protected characteristics other than religion, *even if those decisions are based on sincere religious beliefs and tenets*." 86 Fed. Reg. at 62120 (emphasis added). In stark contrast, EEOC's Religion Guidance explains, Title VII's religious exemptions "allow a qualifying

religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision *on the basis of religion*."[3]

- If finalized, the Proposal would leave a religious exemption in name only. It would allow OFCCP to recharacterize employment actions based on sincere religious tenets as unlawful discrimination in direct contradiction of the text, history, and purpose of the religious exemption. A religious organization's ability to make employment decisions based on its sincere religious tenets is at the heart of what it means to be a religious organization. For example, it does little good for a Catholic organization to be able to prefer a "particular religion" if that means they must accept all baptized Catholics regardless of whether they subscribe to Arian, Protestant, Albigensian, or atheist beliefs considered heresies to the Catholic organization. Worse still, no OFCCP bureaucrat can be lawfully empowered to determine what it truly means to be Catholic or any other "particular" religion without violating the Free Exercise and Establishment Clauses. Religious organization should be free to make employment decisions based on sincere religious beliefs and tenets as the law demands and without OFCCP inquisition.

- *The Proposal's improper "primarily religious" requirement*. To determine whether a contractor qualifies for EO 11246's religious exemption, the Proposal states: "the ultimate inquiry focuses on whether the employer's purpose and character are *primarily religious*." 86 Fed. Reg. at 62118 (emphasis added). There are several significant problems with the requirement that a contractor be "primarily religious" to qualify for the religious exemption.

  - First, the text of the religious exemption in EO 11246 does not use "primarily religious" language, and neither does Title VII's religious organization exemption.

  - Second, courts have not uniformly adopted the "primarily religious" standard. The language originated in a 1988 Ninth Circuit case,[4] and a similar "primarily religious" standard was adopted by the Third Circuit in 2007.[5] However, the Eleventh Circuit as early as 1997 did not use the Ninth Circuit's "primarily religious" standard; instead, it looked at the specific facts to determine whether university was "religious" or "secular."[6] Similarly, the Sixth Circuit, while citing the Ninth Circuit, did not adopt its "primarily religious" articulation; instead, the court looked to "all the facts," "consider[ing] and weigh[ing] the religious and secular characteristics of the institution."[7]

  - Third, the "primarily religious" standard creates excessive entanglement problems. OFCCP must first determine which of an endless possible number of

[3] § 12-I-C-1, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (emphasis added).
[4] *EEOC v. Townley Engineering and Manufacturing, Co.* 859 F.2d 610, 618 (9th Cir. 1988) ("In applying the [Title VII religious organization exemption], we determine whether an institution's 'purpose and character are primarily religious' by weighing '[a]ll significant religious and secular characteristics.'"); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) (same).
[5] *LeBoon v. Lancaster Jewish Cmty. Ctr*., 503 F.3d 217, 226 (3d Cir. 2007).
[6] *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997).
[7] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000).

organizational activities it should consider relevant. Next, the agency must categorize those activities as "religious" or "secular," including some activities that do not clearly fall on one side of the line or the other. The agency's attempts to determine which side of the line those activities fall can lead to constitutionally intrusive inquiries and potential discrimination against unfamiliar or nontraditional religious groups.[8] After categorizing those activities, OFCCP would then have to determine what constitutes "primarily." Is it 51 percent, 70 percent, or 99 percent? Far from being clear, the "primarily religious" standard is ambiguous, constitutionally suspect, and open to discrimination and abuse by the agency at every step.

- Of course, it is worth noting that to qualify for a religious exemption under the EO, an employer must be engaging in religiously-motivated conduct or operating under religious principles. I am not suggesting otherwise and neither did the 2020 Rule. As EEOC's Religion Guidance explains, "[c]ourts have expressly recognized that engaging in secular activities does not disqualify an employer from being a 'religious organization' within the meaning of the Title VII statutory exemption."[9] Courts have found that Title VII's religious organization exemption applies not only to churches and other houses of worship, but also includes religious schools, hospitals, and charities, all of which have secular versions that engage in similar behavior without religious motivation (compare, for example, the Christian Samaritan's Purse to the secular Red Cross). To follow Title VII principles and case law, OFCCP must be just as solicitous for religious contractors under EO 11246's religious exemption.

- *The Proposal deletes the clarifying definition of "religious corporation, association, educational institution, or society."* OFCCP must determine whether a contractor qualifies for the religious exemption and religious applicants and contractors must know whether they qualify as well. The Proposal correctly acknowledges that there is no uniform test or set of factors that all courts use in the Title VII context. As EEOC's Religion Guidance explains, "no one factor is dispositive in determining if a covered entity is a religious organization under Title VII's exemption."
  - The 2020 Rule definition of "religious corporation, association, educational institution, or society," modelled on the factors the Ninth Circuit articulated in *Spencer v. World Vision*,[10] adopted the following factors:
    - (i) Is organized for a religious purpose;
    - (ii) Holds itself out to the public as carrying out a religious purpose;

[8] *See New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (observing the ''excessive state involvement in religious affairs'' that may result from litigation over ''what does or does not have religious meaning''); *see also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) ("We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.").

[9] § 12-I-C-1.

[10] 619 F.3d 1109 (9th Cir. 2010).

(iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and
(iv) (A) Operates on a not-for-profit basis; or (B) Presents other strong evidence that its purpose is substantially religious.

These factors go to the heart of whether an organization is religious to qualify for a religious exemption. These factors ensure transparency, consistency, administrability, and the appropriate level of respect for religious freedom.

- The Proposal, however, provides several bad reasons for deleting the 2020 Rule's definition.
  - The Proposal incorrectly states that the definition is "inconsistent with the President's decision in Executive Order 13279 to incorporate Title VII doctrine as the touchstone for the Executive Order 11246 religious exemption" and departs from Title VII's interpretation. 86 Fed. Reg. at 62119. OFCCP also appears to suggest that the 2020 Rule itself defied presidential orders, which is preposterous given the extraordinary level of presidential support for religious freedom under the Trump administration.[11]
  - The Proposal further suggests that the 2020 Rule's definition "may decrease procurement efficiency and increase uncertainty within the contracting community about the applicability of the religious exemption." 86 Fed. Reg. at 62119. Yet the Proposal provides no evidence to support its claim, and in reality proposes to eliminate eminently clear and workable standards for subjective mush.
- The Proposal would also arbitrarily delete within the definition several examples of contractors that would and would not qualify as "religious." No explanation was given for why, or even whether, these examples incorrectly determined the organization's religious status for purposes of the exemption. Examples help to provide clarity to applicants and contractors as to which organizations qualify for the religious exemption.
- The Proposal also would delete the definition of "sincere," which is referenced in the definition of "religious corporation, association, educational institution, or society." The constitutional and statutory touchstone of whether beliefs are religious is sincerity, not bureaucratic second-guessing of the rationality or consistency of the asserted beliefs. No reason is given for this deletion.
- Not only would the Proposal delete the 2020 Rule's definition, but it would not replace it with another definition in the text of the regulations, creating less transparency and certainty. (While the preamble to the Proposal does mention the Third Circuit's *LaBoon* factors, those factors are not included in the regulations' text and, as the Ninth Circuit recognized in *Spencer v. World Vision*, some of the

[11] *See*, *e.g.*, Promoting Free Speech and Religious Liberty, Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 9, 2017) ("It shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom.").

LaBoon factors could be "constitutionally troublesome" and should not be used.[12] For example, it is not for courts to decide whether a particular "activity" is religious or secular, nor should courts determine whether a particular "product" or "service' is religious or secular.[13])

- Deleting the 2020 Rule's definition of "religious corporation, association, educational institution, or society," including the factors and examples, will increase uncertainty within the contracting community and lead to a chilling effect of religious organizations with some opting not to be government contractors.

- *The Proposal would add a baseless non-profit requirement.* The Proposal implies that for-profit organizations cannot be "religious" or qualify for the religious organization exemption *just because* they make a profit.
  - Neither caselaw nor the text of Title VII and EO 11246 exclude for-profit organizations from the religious exemptions. When discussing Title VII's religious organization exemption, EEOC Religion Guidance states: "The Title VII statutory exemption provisions do not mention nonprofit and for-profit status. Title VII case law has not definitively addressed whether a for-profit corporation *that satisfies the other factors* can constitute a religious corporation under Title VII."[14] The religious exemption in Section 204 of EO 11246 likewise does not make a distinction between nonprofit and for-profit status. Although most for-profit organizations are not religious, where a for-profit contractor is sufficiently religious *based on a consideration of all the facts* and in accord with Title VII principles and caselaw, the for-profit contractor should be allowed to qualify for the EO's religious exemption.
  - In a different context, the Supreme Court has held that for profit-corporations are not disqualified from religious freedom protections simply because they may charge for goods and services. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court rejected the argument that "'for-profit, secular corporations cannot engage in religious exercise' within the meaning of [the Religious Freedom Restoration Act (RFRA)] or the First Amendment."[15] The Court held that RFRA's protections for any "person" whose religious free exercise is substantially burdened by the government is not limited to nonprofits and includes for-profit closely held corporations providing secular goods or services because "no conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations."[16] While the Court did not address whether a for-profit corporation could qualify for Title VII's religious organization exemption (and by extension EO 11246's religious exemption), its decision demonstrates that for-profit corporations *can* exercise religion and

[12] 619 F.3d at 1115.
[13] *Id*. at 1116.
[14] § 12-I-C-1 (emphasis added).
[15] 573 U.S. 682, 702 (2014).
[16] *Id.* at 708.

supports that, in some circumstances, such for-profit organizations may qualify for religious exemptions under Title VII and EO 11246.

II. OFCCP's Proposal targets religious exercise, but the agency does not have legal authority to limit religious freedom protections under the First Amendment, the Religious Freedom Restoration Act, or Supreme Court case law.

- *The Proposal targets religion.* While claiming to following the law, the Proposal violates it to the detriment of religious contractors. The Proposal seeks to narrow the rights of religious contractors to make employment decisions on the basis of sincere religious beliefs and tenets in violation of EO 11246, Title VII, its case law, and EEOC Religion Guidance. As explained above, the Proposal seeks to limit religious protections for religious employers that are or wish to be federal contractors by unlawfully limiting which religious employers qualify for a religious exemption. Second, it would unlawfully prohibit qualifying religious employers from making employment decisions based on sincere religious beliefs and tenets. Third, it would limit religious freedom protections under the First Amendment and the Religious Freedom Restoration (RFRA), which OFCCP has neither the authority nor ability to do, as discussed below.

- *The government's interest in equal employment opportunity does not extend to religious contractors' religious employment decisions.*

    - The Proposal claims a broad religious exemption is "inconsistent with the government's interest in ensuring equal employment opportunity by federal contractors." 86 Fed. Reg. at 62120. But per presidential mandate in EO 11246 and Congressional direction in Title VII, that interest does not extend to the "employment of individuals of a particular religion" by qualifying religious contractors and organizations, respectively. As EEOC Religion Guidance makes clear a "particular religion" is determined by the *employer's* sincere religious beliefs and tenets, not merely the denominational affiliation of an employee.[17]

    - OFCCP cannot disclaim an interest in, or its obligation to ensure, the free exercise of religion under the First Amendment and other laws protecting religious exercise—including employment decisions by religious organizations based on sincere religious beliefs and tenets. (While there is support for treating race discrimination as a special case,[18] that is not at issue in the Proposal which uses a broad brush to sweep away the harmonious live-and-let-live approach that has both respected the law of religious freedom and served our pluralistic nation well.[19])

    - Building on Supreme Court decisions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[20] and *Espinoza v. Montana Dept. of Revenue*,[21] the Supreme Court in *Carson v. Makin*[22] reiterated that the government cannot disadvantage faith-based organizations because of their religious character or exercise of religion.

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[17] § 12-I-C-1.
[18] *See Bob Jones University v. United States*, 461 U.S. 574 (1983).
[19] *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
[20] 582 U.S. ___ (2017).
[21] 140 S. Ct. 2246 (2020).
[22] No. 20-1088, slip op. 7-10 (U.S. Jun. 21, 2022).

Similarly, religious organizations should not be disadvantaged in the government contract process because of their religious character or exercise of religion in making employment decisions based their sincere religious beliefs and tenets.

- *The Proposal seeks to unlawfully limit the application of RFRA.* The Proposal would delete: "(e) Broad interpretation. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb et seq." OFCCP provides no justification for not interpreting RFRA to apply here. Indeed, RFRA explicitly applies to every federal law, *See* 42 U.S.C. § 2000bb-3.
    - The Proposal states it is a "return to its policy of considering any RFRA claims raised by contractors on a case-by-case basis and refraining from applying any regulatory requirement to a case in which it would violate RFRA." 86 Fed. Reg. at 62121. I agree that RFRA is a fact-specific analysis determined on a case-by-case basis. But the proposal to delete the provision on RFRA's interpretation does not prevent such an analysis. Moreover, a case-by-case determination does not alleviate OFCCP of RFRA's obligations, which explains, "*Government shall not substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability," except if it is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1 (emphasis added).
    - The Proposal cites *Fulton v. City of Philadelphia*[23] to support its argument that RFRA should not be considered in the context of rulemaking. 86 Fed. Reg. at 62120–21. But *Fulton* stands for the proposition that government *must* take steps to ensure that it does not violate the law prior to a challenge. Indeed, the *Fulton* Court found comments from policy makers before they ratified their unlawful actions as indicative of discrimination. Under other laws, such as the Hatch Act and the Anti-Deficiency Act, the federal government regularly imposes non-statutorily required obligations on employees and agencies to affirmatively comply with legal obligations rather than merely wait for back-end challenges after a violation has occurred.[24]
    - Even in *Bostock v. Clayton County*[25]—where the Supreme Court held that Title VII's prohibition against sex discrimination means an employer cannot make hiring and firing decisions based on an individual's homosexuality or transgender status—the Court recognized that Title VII's religious organization exemption (in addition to the First Amendment's ministerial exception and the Religious Freedom Restoration Act (RFRA)), could apply in appropriate cases.

[23] 141 S. Ct. 1868 (2021).
[24] *Cf.* Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 162 (June 29, 2007) ("We conclude that RFRA is reasonably construed to require that such an accommodation be made for World Vision, and that OJP would be within its legal discretion, under the JJDPA and under RFRA, to exempt World Vision from the religious nondiscrimination requirement of section 3789d(c)(1).").
[25] 140 S. Ct. 1731, 1754 (2020).

III. The Proposal has a flawed cost-benefit analysis that ignores its significant costs and wrongly claims benefits that will not follow for its proposed changes.

- *The Proposal is a significant regulation.* Since the Proposal "creates serious inconsistency or otherwise interferes with an action taken or planned by another agency" (here, caselaw and EEOC Religious Guidance interpreting Title VII's religious organization exemption), it is subject to OMB review under EO 12866. OIRA also determined that is proposal is a "significant regulatory action."
- *The Proposal has a flawed cost-benefit analysis.* Of particular concern for OIRA, the Proposal's cost-benefit analysis is deeply flawed. In the Proposal, OFCCP ignores costs associated with rescinding the clarifying language from the 2020 Rule, ascribes to the Proposal benefits it cannot claim, and ignores transfers that would result.
- *The Proposal ignores significant costs.* The Proposal stated it "does not include any costs" because it would not add any new compliance requirements for contractors. 86 Fed. Reg. at 62121. This is incorrect as there are many costs associated with the proposed rescission of the 2020 Rule. These costs include:
    - Administrative costs on religious organizations to determine whether they qualify for the exemption under the proposed opaque standard.
    - The costs to a religious organization of being forced violate their religious beliefs by not being able to make employment decisions based on religion or forgo government contracts.
    - The costs to the government and American taxpayers associated with losing current and prospective federal contractors, which may produce goods and services more efficiently, effectively, or at a lower price for the federal government.
    - The cost to religious contractors of being excluded and stigmatized by the federal government based not on their ability to do the work required under the government contract, but solely on their desire to act in accord with their sincere religious beliefs and tenets.
    - The costs of increased uncertainty within the contracting community.
    - The costs of the chilling effect on religious organizations where they preemptively opt to leave or not even apply for government contracts.
    - The cost of irreparable loss of First Amendment freedoms and free exercise rights protected by RFRA by removing religious protections for religious organizations contracting with the federal government.[26]
    - Costs of the government not acknowledging that RFRA applies from the outset, which will result in wasted taxpayer dollars, time, and resources, to defend against RFRA claims at the back end.

[26] *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

- *The Proposal wrongly claims benefits.* The Proposal incorrectly claims five benefits. 86 Fed. Reg. at 62121.

  (1) It would promote economy and efficiency in federal procurement by preventing the arbitrary exclusion of qualified and talented employees on the basis of characteristics that have nothing to do with their ability to do work on government contracts.

  (2) It would ensure that taxpayer funds are not used to discriminate.

  (3) It would ensure that federal contractors provide equal employment opportunity on all protected bases.

  (4) It would provide clarity and consistency for contractors and would-be contractors that are religious organizations regarding their eligibility for the exemption.

  (5) It would promote "equity and fairness."

  - As explained above, the Proposal's contradictions and inconsistencies with Title VII, EEOC Guidance, and Sections 202 and 204 of EO 11246, will decrease consistency and stability for religious contractors and would-be contractors. As a result, religious employers may self-exclude themselves as federal contractors, resulting in the exclusion of qualified and talented contractors solely on the basis of religion and not based on their ability to do work on government contracts. However, if the 2020 Rule is rescinded, religious employers will have *less* clarity and certainty over whether their employment decisions based on their sincere religious beliefs and tenets are protected.
  - The Proposal would lead to government funds being used to exclude from government contracts, and thus discriminate against, religious organizations based solely on their desire to live out their faith and make employment decisions based on their sincere religious beliefs and tenets. Religious organizations that exercise religious exemptions are not engaged in invidious discrimination. A Catholic church that only "hires" men as priests and women as nuns is not a den of bigotry as the OFCCP Proposal would suggest. It's a Catholic church. Similarly, save the most compelling of reasons, OFFCP should not and cannot impose its vision of what a religious organization's personnel policies should look like when they can otherwise fully provide the product or service the government is contracting for. As such, the Proposal would not promote equity or fairness for religious contractors. In the administration's push for equity in federal programs (as directed by President Biden in Executive Order 13985), OFCCP must be careful not to illegally discriminate based on religion. There has been a concerning trend by governments and others to illegally discriminate under the guise of equity. For example, HHS allowed multiple states' federally-funded Covid-19 vaccine distributions to use racial set asides to promote "equity" in blatant violation of Title VI and Section 1557 of the Affordable Care Act.[27]

[27] *See* Complaint for Race, Color, and National Origin Discrimination in Violation of Section 1557 and Title VI by New Hampshire et al. in COVID-19 Vaccine Distribution, https://eppc.org/wp-content/uploads/2021/09/OCR-Complaint-for-Unlawful-Racial-Set-Asides-in-NH-COVID-Vaccine-Distribution_Redacted.pdf.

- *The Proposal does not consider transfers*. The Proposal does not consider any distributional effects of federal funds transferring from religious organizations that leave or forgo government contracts under the regulations to other contractors.
- *Alternatives*. OFCCP should consider the alternative of not regulating, especially as its purported need to regulate does not exist.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld and that the Proposed Rescission has sufficient analysis that is rational, reasoned, and sufficiently supported by actual need, and not political, rushed, or prejudged.

Attachment

Excerpt from EEOC, Compliance Manual: Religious Discrimination §12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination

SECTION 12: RELIGIOUS DISCRIMINATION

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12-I COVERAGE

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C. Exceptions

1. Religious Organizations

What Entities are "Religious Organizations"? Under sections 702(a) and 703(e)(2) of Title VII, "a religious corporation, association, educational institution, or society," including a religious "school, college, university, or educational institution or institution of learning," is permitted to hire and employ individuals "of a particular religion . . . ."[57] This "religious organization" exemption applies only to those organizations whose "purpose and character are primarily religious," but to determine whether this statutory exemption applies, courts have looked at "all the facts," considering and weighing "the religious and secular characteristics" of the entity.[58] Courts have articulated different factors to determine whether an entity is a religious organization, including (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity

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[57] Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides:

> [Title VII] shall not apply to . . . 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.

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides:

> [I]t shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other 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.

The Americans with Disabilities Act (ADA) also provides religious entities with two defenses to claims of discrimination that arise under Title I, the ADA's employment provisions. The first provides that "[t]his subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. § 12113(d)(1). The second provides that "[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2).

[58] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see alsoGarcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) ("In applying the [religious organization exemption], we determine whether an institution's 'purpose and character are primarily religious' by weighing '[a]ll significant religious and secular characteristics.'" (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)) (second alteration in original)); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (applying similar "primarily religious" standard); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997) (looking at specific facts to determine whether university was "religious" or "secular").

participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up of coreligionists.[59] Depending on the facts, courts have found that Title VII's religious organization exemption applies not only to churches and other houses of worship, but also to religious schools, hospitals, and charities.[60]

Courts have expressly recognized that engaging in secular activities does not disqualify an employer from being a "religious organization" within the meaning of the Title VII statutory exemption. "[R]eligious organizations may engage in secular activities without forfeiting protection" under the Title VII statutory exemption.[61] The Title VII statutory exemption provisions do not mention nonprofit and for-profit status.[62] Title VII case law has not

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[59] *LeBoon*, 503 F.3d at 226; *but see Spencer v. World Vision, Inc.*, 633 F.3d 723, 730-33 (O'Scannlain, J. concurring) (expressing concern that "several of the *LeBoon* factors could be constitutionally troublesome if applied to this case").

[60] In *Hall*, 215 F.3d at 624-25, the Sixth Circuit, looking to "all the facts," found that a college of health sciences was a Title VII religious organization because it was an affiliated institution of a church-affiliated hospital, it had a direct relationship with the Baptist church, and the college atmosphere was permeated with religious overtones. In *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam), the Ninth Circuit held that an entity is "eligible" for the exemption, at least, if the entity (1) is organized for a religious purpose; (2) is engaged primarily in carrying out that religious purpose; (3) holds itself out to the public as an entity for carrying out that religious purpose; and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. One judge in *Spencer* took the view that the exemption is met if the entity is a non-profit and satisfies the first three factors, *id.* at 734 (O'Scannlain, J., concurring), and another judge took the view that the Salvation Army, for example, would satisfy the "nominal amounts" standard of the fourth factor, notwithstanding that it generates a large-dollar amount of sales revenue, because it "gives its homeless shelter and soup kitchen services away, or charges nominal fees." *Id.*at 747 (Kleinfeld, J., concurring). In *Garcia*, 918 F.3d at 1003-04, the Ninth Circuit held that the Salvation Army is a religious organization under Title VII by applying the *Spencer* test under either judge's formulation. In *LeBoon*, 503 F.3d at 226-29, the Third Circuit found that a Jewish community center was a Title VII religious organization where, among other factors, the center "identified itself as Jewish," relied on coreligionists for financial support, offered instructional programs with Jewish content, began its Board of Trustees meetings with biblical readings, and involved rabbis from three local synagogues in its management). *See also Killinger*, 113 F.3d at 199-200 (university founded as a theological institution by the Alabama Baptist State Convention qualified as a "religious educational institution" under Title VII; the court noted that all Trustees must be Baptist, the Convention is the university's largest single source of funding, and the school's charter designates its chief purpose as "the promotion of the Christian Religion throughout the world by maintaining and operating … institutions dedicated to the development of Christian character in high scholastic standing.").

[61] *LeBoon*, 503 F.3d at 229 (holding that a Jewish community center was a religious organization under Title VII, despite engaging in secular activities such as secular lectures and instruction with no religious content, employing overwhelmingly Gentile employees, and failing to ban non-kosher foods, and noting that a religiously affiliated newspaper and a religious college had also been found covered by the exemption). However, in *LeBoon*, the court did state that "the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity." *LeBoon*, 503 F.3d at 229; *see also Townley Eng'g & Mfg. Co.*, 859 F.2d at 619 (holding that evidence the company was for profit, produced a secular product, was not affiliated with a church, and did not mention a religious purpose in its formation documents, indicated that the business was not "primarily religious" and therefore did not qualify for the religious organization exemption). In *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019), the court cited *Townley* as the governing precedent for defining a religious organization.

[62] In *Hobby Lobby*, a case interpreting the term "person" under RFRA, the Supreme Court briefly referenced Title VII's religious organization exemption in response to the U.S. Department of Health and Human Services' (HHS) argument that "statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not-for-profit corporations." 573 U.S. at 716. The Court did not expressly agree with HHS's characterization but

definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII.[63]

Where the religious organization exemption is asserted by a respondent employer, the Commission will consider the facts on a case-by-case basis; no one factor is dispositive in determining if a covered entity is a religious organization under Title VII's exemption.

Scope of Religious Organization Exemption. Section 702(a) states, "[t]his subchapter shall not apply to … 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."[64] Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and may not engage in related retaliation.[65] However, sections 702(a) and 703(e)(2)[66] allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or

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noted that other statutes "*do* exempt categories of entities that include for-profit corporations from laws that otherwise require these entities to engage in activities to which they object on grounds of conscience." *Id*. "If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations." *Id.* at 717. It should be noted that, despite HHS's assertion in its *Hobby Lobby* brief, section 702(a) does not expressly distinguish "religious" entities based on for-profit or nonprofit status.

[63] *Cf. id.* at 702, 708 (in a non-Title VII case, rejecting the argument that "'for-profit, secular corporations cannot engage in religious exercise' within the meaning of [the Religious Freedom Restoration Act (RFRA)] or the First Amendment," and holding that RFRA's protections for any "person" whose religious free exercise is substantially burdened by the government is not limited to nonprofits and includes for-profit closely held corporations providing secular goods or services because "no conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations"); *see Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring) (recognizing that it is an open question regarding application of Title VII's religious organizations exemption under section 702 to for-profit organizations, specifically mentioning possible Establishment Clause issues with respect to for-profit organizations).

[64] 42 U.S.C. § 2000e-1(a). The Supreme Court, in dicta in a case focused on religious discrimination, has characterized section 702 by stating it "exempts religious organizations from Title VII's prohibition against discrimination on the basis of religion." Amos, 483 U.S. at 329. Section 703(e)(2) states, "it shall not be an unlawful employment practice" for certain schools, colleges, universities, or other educational institutions "to hire or employ employees of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

[65] *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption "does not … exempt religious educational institutions with respect to all discrimination"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin"); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); *cf. Garcia*, 918 F.3d at 1004-5 (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by religious organization exception, but adjudicating disability discrimination claim on the merits).

[66] 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of [Title VII], it shall not be an unlawful employment practice for [certain religious educational organizations] . . . to hire and employ employees of a particular religion . . . .").

retaliation that it made the challenged employment decision on the basis of religion.[67] The definition of "religion" found in section 701(j) is applicable to the use of the term in sections 702(a) and 703(e)(2), although the provision of the definition regarding reasonable accommodations is not relevant.[68]

Courts have held that the religious organization's assertion that the challenged employment decision was made on the basis of religion is subject to a pretext inquiry where the employee has the burden to prove pretext.[69] Courts also have held that any inquiry into the pretext of a religious organization's rationale for its decision must be limited to "sincerity" and cannot be used to challenge the validity or plausibility of the underlying religious doctrine.[70] For example, one court has held that a religious organization could not justify denying insurance benefits only to married women by asserting a religiously based view that only men could be the head of a household when evidence of practice inconsistent with such a belief established "conclusive[ly]" that the employer's religious justification was "pretext" for sex discrimination.[71]

In *EEOC v. Mississippi College*, the court held that if a religious institution presents "convincing evidence" that the challenged employment practice resulted from discrimination on the basis of

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[67] Courts take varying approaches regarding the causation standard and proof frameworks to be applied in assessing this defense. *See Kennedy*, 657 F.3d 189 at 193-94 (holding that plaintiff's claims of discharge, harassment, and retaliation based on religion were covered by section 702(a) religious exemption and thus barred); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) ("Thus, we will not apply Title VII to [plaintiff's sex discrimination] claim because Congress has not demonstrated a clear expression of an affirmative intention that we do so in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision."); *DeMarco*, 4 F.3d at 170-71 ("[T]he [McDonnell Douglas] inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding race and sex discrimination claims barred by section 702 exemption where religious employer presents "convincing evidence" that employment practice was based on the employee's religion).

[68] "For the purposes of this subchapter … [t]he term "religion" includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

[69] *See Curay-Cramer*, 450 F.3d at 141 (distinguishing the case "from one in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct"); *DeMarco*, 4 F.3d at 171 (stating pretext inquiry "focuses on . . . whether the rule applied to the plaintiff has been applied uniformly"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 n.1 (9th Cir. 1986) (finding that Title VII's exemption did not apply when the religious employer's practice and justification were "conclusive[ly]" a pretext for sex discrimination).

[70] *See Curay-Cramer*, 450 F.3d at 141 ("[T]he existence of [section 702(a)] and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of [Catholic] Church doctrine."); *DeMarco*, 4 F.3d at 170-71 ("The district court reasoned that, where employers proffered religious reasons for challenged employment actions, application of the McDonnell Douglas test would require 'recurrent inquiry as to the value or truthfulness of church doctrine,' thus giving rise to constitutional concerns. However, in applying the McDonnell Douglas test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action." (citations omitted)); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in determining whether an agency rule contravened a closely held corporation's rights under the Religious Freedom Restoration Act, "it is not for the Court to say that . . . religious beliefs are mistaken or unreasonable"; rather the Court's "'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction'").

[71] *Fremont Christian Sch.*, 781 F.2d at 1367 n.1; *see also Miss. Coll.*, 626 F.2d at 486 (if evidence disclosed that the college "in fact" did not consider its religious preference policy in determining which applicant to hire, section 702 did not bar EEOC investigation into applicant's sex discrimination claim).

religion, section 702 "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[72] Despite the court's use of "jurisdiction" here, it has been held in light of the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, that Title VII's religious organization exemptions are not jurisdictional.[73]

The religious organization exemption is not limited to jobs involved in the specifically religious activities of the organization.[74] Rather, "the explicit exemptions to Title VII . . . enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[75] In addition, the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs.[76] Consistent with applicable EEO laws, the prerogative of a religious organization to employ individuals "'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."[77] Some courts have held that the religious organization exemption can still be established notwithstanding actions such as holding oneself out as an equal employment opportunity employer or hiring someone of a different religion for a position.[78]

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[72] *Fremont Christian Sch.*, 781 F.2d at 1366 (quoting Miss. Coll., 626 F.2d at 485).

[73] *See Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organizations exemption is not jurisdictional and can be waived if not timely raised in litigation). "Because Congress did not rank the religious exemption as jurisdictional, this Court will 'treat the restriction as nonjurisdictional in character.'" *Smith v. Angel Food Ministries, Inc.*, 611 F. Supp. 2d 1346, 1351 (M.D. Ga. 2009) (quoting Arbaugh, 546 U.S. 500, 515 (2006)).

[74] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (addressing the issue of whether the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment, the Court held that "as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("The revised [religious organization exemption] provision, adopted in 1972, broadens the exemption to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature.").

[75] *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding religious organization exemption barred religious discrimination claim by parochial school teacher who was discharged for failing to follow church canonical procedures with respect to annulment of a first marriage before remarrying).

[76] *See* 42 U.S.C. § 2000e(j) (defining religion to include "all aspects of religious observance and practice, as well as belief"); *see also Little*, 929 F.2d at 951 (concluding that "the 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").

[77] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see, e.g.*, *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (holding that under religious organization exemption School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership); *Little*, 929 F.2d at 951 (holding that religious organization exemption barred religious discrimination claim challenging parochial school's termination of teacher who had failed to validate her second marriage by first seeking an annulment of her previous marriage through the canonical procedures of the Catholic church).

[78] *See Hall*, 215 F.3d at 625 (finding that Title VII's religious organization exemption was not waived by the employer's receipt of federal funding or holding itself out as an equal employment opportunity employer); *Little*, 929 F.3d at 951 (finding that Title VII's religious organization exemption was not waived by Catholic school knowingly hiring a Lutheran teacher); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organization exemption is not jurisdictional and can be waived).