

March 14, 2023

Via Federal eRulemaking Portal

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: EPPC Scholars Comment Opposing the Nine Agency Proposed Rule “Partnerships With Faith-Based and Neighborhood Organizations,” RIN 0412-AB10, 0510-AA00, 0991-AC13, 1105-AB64, 1290-AA45, 1601-AB02, 1840-AD46, 2501-AD91, 2900-AR23

Dear Secretaries Cardona, Mayorkas, Vilsack, Fudge, Walsh, McDonough, and Becerra, Assistant Administrator Allen, and Attorney General Garland:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in opposition to the nine agencies’ proposed rule “Partnerships With Faith-Based and Neighborhood Organizations” that would modify regulations for faith-based organizations that partner with the nine agencies to provide services to beneficiaries of various agency programs.¹

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Throughout this nation’s history, faith-based organizations have been vital to providing services to those in need. Indeed, in Executive Order 14015, President Biden recognized that faith-based organizations are essential to the delivery of services in our nation’s neighborhoods and emphasized the importance of strengthening the ability of such organizations to deliver services in partnership with the federal government while adhering to all applicable law.² Yet without any demonstrated need, the proposed rule would gut religious accommodation protections for faith-based organizations partnering with the agencies to serve beneficiaries. The proposed rule is contrary to law and blatantly ignores constitutional and statutory religious

¹ 88 Fed. Reg. 2395. The nine agencies are the Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, and Department of Health and Human Services.

² 86 Fed. Reg. 10007.

protections. Most egregiously, the agencies ignore the plain text of Title VII’s religious organization exemption and misstate or ignore relevant case law. The agencies also fail to take adequate notice of recent Supreme Court First Amendment government funding decisions. To the extent they acknowledge the First Amendment’s “nondiscrimination rule” rule, they fail to apply it consistently across their proposed regulations. In short, the proposed rule is a solution in search of a problem, making it arbitrary and capricious. The agencies should withdraw the proposed rule and retain the 2020 Rule.

1. The agencies fail to establish a need for this rulemaking.

For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. Here, the agencies provide two reasons for the proposed rule: (1) “it is central to the Agencies’ missions that federally funded services and programs . . . reach the widest possible eligible population, including historically marginalized communities”; and (2) “to address and correct inconsistencies and confusion raised by the 2020 Rule.”³

The agencies fail to explain how the 2020 Rule does not allow the agencies’ federally funded services and programs to “reach the widest possible eligible population, including historically marginalized communities.”⁴ No population or historically marginalized community is identified as currently not being reached by the agencies’ services and programs, much less as a result of the 2020 rule. Nor do the agencies explain how its proposal increases reach to additional populations not already served.

Regarding “inconsistencies and confusion” the agencies fail to provide evidence to justify this rationale.⁵ For example, the proposed rule states the agencies “are *concerned* that [the 2020 Rule has] engendered confusion,” the 2020 Rule “raised a *possible* misunderstanding,” “the changes *could cause* some confusion and *possible* misunderstanding.”⁶ These are merely speculative statements, not concrete evidence. The agencies fail to point to any agency, organization, or beneficiary that is confused or misunderstood the 2020 regulations, or a situation where an award was improperly granted or a beneficiary was wrongly denied a service. Further, as explained more below, the agencies misunderstand and misstate First Amendment and Title VII law, leading the proposed rule to create its own confusion and inconsistencies with law.

In sum, this proposed rule is a solution in search of a problem. The agencies have failed to demonstrate sufficient need for this rulemaking, making it arbitrary and capricious and contrary to law.

2. The agencies should not single out religious organizations in any notice and referral regulations.

Religious Discrimination Protections for Beneficiaries. The proposed rule states, “The Agencies are committed to ensuring that all beneficiaries and potential beneficiaries have access

³ 88 Fed. Reg. 2398.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2400 (emphasis added).

to federally funded services and programs without unnecessary barriers and free from discrimination.”⁷ Consistent with the 2016 Obama and 2020 Trump rules, the proposed rule would prohibit providers from discriminating against a beneficiary “on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice” in both direct and indirect aid programs.⁸ We support this prohibition.

The agencies would also retain the requirement that language detailing this nondiscrimination prohibition be included in notices and announcements of award opportunities, awards, and contracts. We support retaining this notice.

But they propose adding a requirement that both faith-based and secular partners providing social services under direct federal assistance programs give beneficiaries written notice of those nondiscrimination prohibitions. We support this nondiscrimination notice requirement applying equally to faith-based and secular partners.

Partner Provided Notice and Referral. The agencies propose modifying a requirement from the 2016 Rule (eliminated by the 2020 Rule) that required providers to inform beneficiaries that “if they were to object to the religious nature of a given provider, the provider would be required to make reasonable efforts to refer them to an alternative provider.”⁹ The proposed rule explains without such assistance, “it may be challenging” for beneficiaries to identify other service providers.¹⁰ Requiring referrals would “make it easier for beneficiaries who object to receiving services from one provider to learn about alternative providers,” increase “access to federally funded services,” and remove “barriers arising from discrimination.”¹¹ However, the 2020 Rule found that the 2016 “alternative provider notice-and-referral requirements were solutions in search of a problem because ... there is no indication anyone sought a referral under those provisions, and there is no indication anyone has ever sought a referral under a separate HHS program where a statute mandates reporting of all referral requests.”¹² The agencies concluded in the 2020 rule that based on their experience, “maintaining the referral requirements is not necessary to avoid harm to beneficiaries.”¹³

The proposed rule does not provide sufficient evidence to counter the agencies’ conclusion in the 2020 Rule, namely that beneficiaries are requesting referrals but are unable to determine other available provider options by other means. Without such evidence it would be arbitrary and capricious to require partners to provide notice and referral to beneficiaries. The 2016 notice and referral requirement should not be adopted in any final rule.

Singling Out Religious Providers. The notice-and-referral requirement under the 2016 rule targeted faith-based providers based on their religious character, treated faith-based organizations in a non-neutral way, and enabled and encouraged religious discrimination by beneficiaries against the faith-based providers. This was remedied in the 2020 rule, and the

⁷ *Id.* at. 2398.

⁸ *Id.*

⁹ *Id.* at 2399.

¹⁰ *Id.*

¹¹ *Id.* at 2407.

¹² 85 Fed. Reg. 82037, 82043.

¹³ 88 Fed. Reg. 82044.

agencies should not revert back to the 2016 rule. It would be religious animus for the agencies to assume at the outset that beneficiaries would object to the religious character of a faith-based organization, especially given that the services provided are not of a religious nature. Likewise, it would be religious targeting for the government to require faith-based organizations (and only faith-based organizations) to notify beneficiaries that if they object to the religious character of the organization, there are other options. For example, in the employment context, an employer cannot use customer preferences to discriminate against an employee on a protected basis. Similarly, under a notice-and-referral regime singling out faith-based providers, the government would be using beneficiaries' preferences to encourage and enable them to discriminate against those whom they receive government benefits from.

If such a notice-and-referral requirement is proposed based on demonstrated need as required by law, it should apply equally to *all* providers—religious and secular. Indeed, some beneficiaries may object to the secular nature of a given provider and may instead prefer a different secular provider or a provider that is faith-based. It would only be fair that those beneficiaries receive notice and referrals for other provider options. The notice need only inform beneficiaries that a list of other providers, with contact information for each, is available upon request.

Agency Provided Notice. The proposed modification would “encourage Agencies, when appropriate and feasible, or State agencies and other entities that might be administering a federally funded social service program” to provide notice to beneficiaries about how to obtain information about other service providers.¹⁴ The agencies acknowledge this modification would likely provide only “insignificant” cost savings to beneficiaries who would be able to receive information about alternative providers without having to investigate themselves “because the number of beneficiaries who incur costs to identify alternative providers is likely very small.”¹⁵

We applaud the agencies for finding an easy alternative to co-opting providers to give beneficiaries information about alternative provider options by doing it themselves. As such, we do not oppose the agencies providing notice to beneficiaries about all provider options available, even though there does not seem to be a significant need or benefit for such notices. We reject, however, any premise that this notice is necessary *only* in the situation where a beneficiary objects to the religious nature of a provider. Any notice should be available to all beneficiaries about all available providers.

3. The agencies cannot discriminate or encourage discrimination under the guise of “equity.”

In support of its proposed rule, the agencies point to three executive orders, including E.O. 13985, on advancing racial equity and supporting underserved communities.¹⁶ In accord with the Biden administration’s push for equity in federal programs, the agencies must be careful not to illegally discriminate or permit or encourage illegal discrimination by others. There has been a concerning trend by governments and others to illegally discriminate under the guise of

¹⁴ *Id.* at 2399.

¹⁵ *Id.* at 2407.

¹⁶ 86 Fed. Reg. 7009.

equity. For example, under HHS’s watch, multiple states’ federally funded Covid-19 vaccine distributions used racial set-asides to promote “equity” in blatant violation of Title VI and Section 1557 of the Affordable Care Act.¹⁷ Such illegal discrimination should not be permitted or encouraged by the agencies in this rule.

4. The agencies fail to apply recent developments in First Amendment jurisprudence to their proposed faith-based funding requirements, including their distinction between direct and indirect government funding.

The proposed rule would make two changes to the definition of “indirect Federal financial assistance,” which are “designed to clarify the operation of the rule.”¹⁸ First, the agencies propose to add “wholly,” “genuinely,” and “private” to the definition of “indirect Federal financial assistance.”¹⁹ The agencies claim that these changes will help the rule track more closely the Supreme Court’s decision in *Zelman v. Simmons-Harris*,²⁰ more closely and clarify that the regulations “incorporate the understanding of ‘indirect’ aid in that decision.”²¹ The agencies also state that these changes will “emphasize the private and voluntary nature of any decision to allocate indirect aid to a service provider that uses the aid for explicitly religious activities.”²²

Second, the agencies propose to add a sentence to the definition of “indirect Federal financial assistance,” “stating that the availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.”²³ The agencies suggest that adding this sentence will “eliminate any confusion about the continuing relevance of alternative secular providers in determining whether a particular aid program is indirect.”²⁴

The agencies cite to the “nondiscrimination principle” developed in recent Supreme Court decisions—*Trinity Lutheran Church of Columbia, Inc. v. Comer*²⁵ and *Espinoza v. Montana Department of Revenue*²⁶—in support of the proposed addition. Under these cases, the agencies note, “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny.’”²⁷ The agencies claim that their proposals for fixing situations where

¹⁷ 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.

¹⁸ 88 Fed. Reg. at 2399.

¹⁹ *Id.* at 2401.

²⁰ 536 639 (2002).

²¹ 88 Fed. Reg. 2401.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 137 S. Ct. 2012 (2017).

²⁶ 140 S. Ct. 2246 (2020).

²⁷ 88 Fed. Reg. 2401 (quoting *Espinoza*, 140 S. Ct. at 2244 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

“genuine and independent private choice” is lacking will not result in disqualifying religious providers or subjecting providers to religious discrimination.²⁸

The agencies’ proposals are flawed for two basic reasons. First, the background section gives inadequate attention to recent Supreme Court First Amendment government funding cases. Second, applying these cases to the agencies’ proposals shows that they are constitutionally flawed and need a substantial rewrite.

The Nondiscrimination Principle Clarifies and Simplifies Government Funding Rules. The agencies have failed to adequately account for the doctrinal developments in recent Supreme Court cases regarding religious organizations and access to government funding. Starting with *Trinity Lutheran Church of Columbia, Inc. v. Comer*,²⁹ the Court has focused less on what kinds of government funding was *permitted* by the Establishment Clause and more on what sort of equal access to government funds is *required* by the Free Exercise Clause. In *Trinity Lutheran*, the Court held that under the First Amendment’s Free Exercise Clause, an applicant could not be excluded from a state grant program simply because of the applicant’s religious nature. Three years later, *Espinoza v. Montana Department of Revenue*,³⁰ the Court held that the Free Exercise Clause required that a state program using state income tax credits aid benefit K-12 schools could not be denied to certain private schools based on their religious status. In 2021, the Supreme Court held in *Fulton v. City of Philadelphia, Pennsylvania*,³¹ that the Free Exercise Clause required government to provide a regulatory accommodation to a funded, faith-based foster care placement agency. Last term, the Court held in *Kennedy v. Bremerton School District*,³² that concerns about violating the Establishment Clause did not justify a public school taking actions against a football coach that violated his right to neutral treatment under the Free Exercise and Free Speech Clauses. Also, last term, in *Carson v. Makin*,³³ the Court held that the principle of Free Exercise neutrality required state aid to be provided on equal terms to public and private high school students, including students attending “sectarian” schools.

The bottom line from these recent cases is that “A government policy will not qualify as neutral if it is specifically directed at ... religious practice.”³⁴ In other words, when selecting service providers for government programs, the government must treat religious and secular providers the same. This neutral approach respects religious groups’ Free Exercise rights, and respecting Free Exercise rights does *not* violate the Establishment Clause. The school district in *Kennedy* contended that though Coach Kennedy’s prayers “might have been protected by the Free Exercise and Free Speech Clauses,” those rights had to “yield” where they were in “direct tension” with the “competing demands of the Establishment Clause.”³⁵ But the Supreme Court

²⁸ 88 Fed. Reg. at 2399.

²⁹ 137 S. Ct. 2012 (2017).

³⁰ 140 S. Ct. 2246 (2020).

³¹ 141 S. Ct. 1868 (2021).

³² 142 S. Ct. 2407 (2022).

³³ 142 S. Ct. 1987 (2022).

³⁴ *Kennedy*, 142 Sup. Ct. at 2422 (cleaned up).

³⁵ *Id.* at 2426.

squarely rejected this approach as inconsistent with the “natural reading” of the First Amendment, which indicates that its enumerated rights are “complementary,” not competing.³⁶

The key question, then, that the agencies should be asking in establishing and administering their funding programs, is whether their rules are forcing faith-based social service providers “to choose between participation in a public program and their right to free exercise of religion.”³⁷ When government puts religious groups to this choice, it violates the Free Exercise Clause. Furthermore, the government does not violate the Establishment Clause when it respects Americans’ Free Exercise rights.

Proposals Violate the Nondiscrimination Rule. While the proposed rule properly affirms the First Amendment’s nondiscrimination principle, it is incumbent on the agencies to consistently apply this doctrine across all aspects of their regulations for faith-based organizations. The First Amendment nondiscrimination principle has clarified and simplified First Amendment doctrine. By applying it consistently, the agencies can clarify and simplify their rules for faith-based organizations.

At present, however, several aspects of the proposed rule need to be reexamined in light of the Supreme Court’s clear and consistent message that the government funding programs that discriminate on the basis of religion are subject to strict scrutiny.

First, and most importantly, these recent cases do not support the agencies’ strict distinction between direct and indirect funding programs. Faith-based providers’ free exercise rights remain the same whether the government program they are applying to makes funds available directly or indirectly. To the extent the agencies contend otherwise, they must justify their continued reliance on the direct/indirect distinction in light of the recent First Amendment cases cited above. If the agencies cannot do so (which we do not think they can), the First Amendment requires that they abandon the direct/indirect distinction and create a single set of rules for all faith-based providers.

Second, recent First Amendment cases do not support the agencies’ proposed change that stresses “the availability of adequate secular alternatives” as “a significant factor” for determining whether a program complies with the Establishment Clause.³⁸ While the agencies represent that that this test will not be used to “disqualify[] religious providers” or to justify “any other kind of religious discrimination,” that promise is not sufficient: the test itself is contrary to law.³⁹ This is a test that is applied to faith-based providers but not secular providers. The test therefore violates “the nondiscrimination principle in *Trinity Lutheran* and *Espinoza*” and “trigger[s] the most exacting scrutiny.”⁴⁰ As the Court has made clear, government cannot justify violating Free Exercise rights on the basis that it was trying to avoid an Establishment Clause

³⁶ *Id.*

³⁷ *Trinity Lutheran*, 137 S. Ct. at 2026.

³⁸ 88 Fed. Reg. at 2401.

³⁹ *Id.*

⁴⁰ *Id.* (quoting *Espinoza*, 140 S. Ct. at 2244).

problem, so the agencies' proffered justification for using a discriminatory test gets them nowhere.

Third, the "adequate secular alternatives" standard is fundamentally problematic. The standard is fraught with unanswered questions. What criteria will be used to make such a determination? Who will make it? How far away does an alternative have to be before it is not considered an "adequate" alternative? How "secular" does an alternative have to be before it is considered an "adequate" alternative? What does "adequate" mean? Is this determined by number of providers, location of providers, size of providers, etc.?

These undefined parameters render this standard arbitrary and capricious. The standard should therefore be abandoned. To the extent the agencies insist on retaining it, it is incumbent on the agencies to commit themselves to concrete, workable answers to these important questions.

Fourth, even if the agencies could provide adequate answers to these questions, their efforts to reach "adequate" numbers of "secular alternatives" would also be subject to First Amendment scrutiny. Creating new incentive programs, new funding streams, or recruiting programs that are intentionally limited to secular social service providers would violate the nondiscrimination principle no less than the programs struck down in *Trinity Lutheran* and *Espinoza*.

Available Non-Discriminatory Alternatives. Instead of judging service providers based on their religiosity, the agencies should instead develop neutral metrics to determine whether an area has adequate social services available—regardless of whether the existing providers are faith-based or secular. The agencies have at their disposal many constitutional, nondiscriminatory means to address such situations and should consider the following alternatives. First, the agencies could create incentives to draw new service providers into the area, or to prompt existing providers to add needed services or service areas. This approach would likely result in new secular service providers, without the government taking any steps that would discriminate against faith-based providers on the basis of religion. Second, the government is always free to establish new government-run programs that would provide the needed services. The availability of such alternative non-discriminatory solutions makes clear that any government efforts to selectively recruit secular providers would fail strict scrutiny.⁴¹

5. The agencies gut religious accommodation rights for faith-based organizations.

Unsupported Claims of Confusion and Misimpression. The proposed rule claims "the 2020 Rule introduced confusion regarding the protections the law affords to faith-based organizations and others" by creating "the misimpression" that the agencies would be required to make religious accommodations to program requirements for faith-based organizations.⁴¹ Nothing in the 2020 Rule mandated that the agencies were required to provide religious

⁴¹ 88 Fed. Reg. 2401.

accommodations not required under federal law. The agencies fail to point to specific language in the 2020 Rule that caused this alleged misimpression or provide any evidence of actual misimpression by any agency, individual, or organization.

The proposed regulations would “decouple[e]” faith-based organizations’ religious nondiscrimination protections from the question of accommodations.⁴² But there is no need for this decoupling; an accommodation is a form of religious nondiscrimination.

Minimizing Religious Exercise Protections. The agencies would delete from their regulations references to “religious exercise” and the requirement that the agencies will not disqualify a faith-based organization “because such organizations are motivated or influenced by religious faith to provide social services, because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations’ religious exercise.”⁴³ In its place the agencies claim that they will state “more directly” that when the agencies select service providers, they will not “discriminate on the basis of an organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization such as one that has the same capacity to effectively provide services.”⁴⁴ This proposal guts the religious nondiscrimination and accommodation protections to which faith-based organizations are entitled under law. It is no protection to ignore a religious organization’s free exercise rights and merely view such organizations’ conduct in the same light as secular organizations.

Deleting References to Laws Protecting Religious Freedom. Further, the agencies propose deleting language in the regulations that clarify which provisions of law could require an accommodation, such as The Religious Clauses of the Constitution, the Religious Freedom Restoration Act, the Weldon Amendment, and other conscience protection laws. This proposed deletion is not explained, and it would induce confusion, not clarity, making the agencies’ proposal arbitrary and capricious.

Consideration of Religious Accommodation Requests. Regarding accommodations from program requirements for faith-based organizations, the agencies “will continue to consider requests for accommodations, on a case-by-case basis,” in accordance with law, yet they arbitrarily and capriciously delete specific references to those laws.⁴⁵ The agency would not automatically disqualify a faith-based organization for indicating it may request an accommodation. If, however, the agency determined that it would not grant an accommodation and the faith-based organization indicated that it could not comply with program requirement but for an accommodation, the agency would deny the application. In this way, the agencies explain, a faith-based organization “would be treated the same as any other organization that decided for nonreligious reasons that it could not or would not comply with the terms and conditions of the program.”⁴⁶

⁴² *Id.* at 2402.

⁴³ *Id.* at 2412.

⁴⁴ *Id.* at 2402.

⁴⁵ *Id.*

⁴⁶ *Id.*

We ask that the agencies clarify how accommodation determinations will be made and who will be making such determinations. We request that any decision-maker have relevant legal and religious nondiscrimination expertise. We also ask that the agencies provide a written explanation for any accommodation denial determination and provide an expedited appeal process for any accommodation denials *before* the agency finalizes partnership determinations to ensure that religious organizations are provided appropriate accommodations and are properly considered partners by each agency. In this rulemaking, the agencies should clearly explain the protections and process for faith-based organizations' legally required religious accommodations.

6. The agencies articulation of the scope of Title VII's religious organization exemption is contrary to law.

Generally, agencies have recognized that receipt of direct or indirect federal financial assistance does not lead religious organizations to lose protections under Title VII's religious organization exemption. Claiming to follow the text of the statute and caselaw, the agencies view the Title VII religious organization exemption as "limited," merely allowing religious organizations "to hire only people of a particular religion in the absence of any inconsistent statutes."⁴⁷ As the proposed rule explains, the "Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees' sex)."⁴⁸ As such, the agencies propose removing text from the 2020 Rule that "could mistakenly suggest that Title VII permits religious organizations that qualify for the Title VII religious exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question."⁴⁹ This text reads: "An organization qualifying for [a religious] exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."⁵⁰

The text from the 2020 Rule should be retained. The agencies misinterpret or ignore the plain text of Title VII, relevant caselaw, and EEOC's religion guidance, making this proposal contrary to law and arbitrary and capricious.

Plain Text of Title VII. Title VII provides: "This 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 by such [religious organization] of its activities."⁵¹ "This subchapter" includes Title VII's prohibitions against discrimination on the basis of race, color, religion, sex, and national origin. Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

sex, national origin, those nondiscrimination prohibitions do not apply with respect to “the employment of individuals of a particular religion.”⁵²

Employment covers the full range of the employer-employee relationship, and religion is defined broadly in Title VII to include “all aspects of religious observance and practice, as well as belief.”⁵³ As such, Title VII permits religious organizations to make employment decisions based on religion, which includes beliefs, observations, and practices. This understanding is recognized by numerous courts.⁵⁴

Further, 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, under the plain reading of the statutory text, Title VII does not apply.⁵⁵ Indeed, several courts, including to federal circuit courts have recognized Title VII’s religious organization exemption as a defense to a sex discrimination claim because the employer asserted a religious rationale for the challenged employment decision.⁵⁶ Even in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020)—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, indicating that Title VII’s religious organization exemption could serve as a valid defense to a sex discrimination claim. Other courts have recognized that the religious organization exemption acts as a bar to Title VII retaliation claims.⁵⁷ As Seventh Circuit Judge Frank Easterbrook wrote in a

⁵² *Id.*

⁵³ Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, Section 2000e. j.

⁵⁴ See *Kennedy v. St. Joseph’s Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) (“Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices.... [P]ermission 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.”); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have “been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer”); see also *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons “of a particular religion” under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Serv.*, 456 F. Supp. 2d 1021, 1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough*, 2015 WL 759478, *12-13 (citing *Little* and *Saeemodarae* for the same proposition).

⁵⁵ Of course, other nondiscrimination and relevant laws are not subject to Title VII’s religious organization exemptions, which only apply to Title VII. Thus, there may be other ways a nondiscrimination requirement could be imposed, such as in the race context, that does not run afoul of Title VII, RFRA, or the Constitution.

⁵⁶ See *Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986), *aff’d in part on other grounds, vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

⁵⁷ *Kennedy*, 657 F.3d at 193-94; *Curay-Cramer*, 450 F.3d 130; *Saeemodarae*, 456 F. Supp.2d at 1041; *Lown v. Salvation Army, Inc.*, 393 F. Supp.2d 223, 254 (S.D.N.Y. 2005); *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019).

concurrence, “when the [adverse employment] decision is founded on the employer’s religious belief, then all of Title VII drops out.”⁵⁸

Ignoring these precedents, the proposed rule incorrectly states, “numerous courts have held, the Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees’ sex).”⁵⁹ In support, the agencies cite to three cases: *Kennedy v. St. Joseph’s Ministries, Inc.*,⁶⁰ *Cline v. Catholic Diocese of Toledo*,⁶¹ and *DeMarco v. Holy Cross High Sch.*⁶² But these cases fall short. *Kennedy* involved only claims of religious discrimination, harassment based on religion, and retaliation, and explicitly recognized that “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.”⁶³ *Cline* is incorrect because it failed to adhere to the plain language of the statute stating “This title shall not apply to an employer...”⁶⁴ *Bostock*’s direction to apply the plain statutory text of Title VII undercuts *Cline*’s non-textual holding. Finally, *DeMarco* was an Age Discrimination in Employment Act case, not a Title VII case.⁶⁵

OFCCP Legal Errors. The agencies should not repeat the legal errors in the recently finalized rule by Department of Labor Office of Federal Contract Compliance (OFCCP), which ignores the plain text of Title VII contrary to *Bostock* and misstates Title VII caselaw.⁶⁶

Ignoring EEOC Religion Guidance. Further, the proposed rule is at odds with the 2021 religion guidance⁶⁷ issued by the Equal Employment Opportunity Commission (the federal agency tasked with enforcing Title VII), which the agencies should consider and follow. For reference, in Attachment 1, we provide the excerpt of EEOC’s religion guidance discussion on the scope of the religious organization exemptions.

⁵⁸ *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring).

⁵⁹ 88 Fed. Reg. 2402.

⁶⁰ 657 F.3d 189, 192 (4th Cir. 2011).

⁶¹ 206 F.3d 651, 658 (6th Cir. 2000).

⁶² 4 F.3d 166, 173 (2d Cir. 1993).

⁶³ 657 F.3d at 191, 196.

⁶⁴ 206 F.3d 651.

⁶⁵ 4 F.3d at 168.

⁶⁶ See 88 Fed. Reg. 12842. For a detailed explanation of why OFCCP’s conclusions are contrary to law, see EPPC’s comment on the proposal (which did not change upon finalization) in Attachment 2. If the agencies seek to opine on other aspects of Title VII’s religious organization exemption, not mentioned in the proposed rule, such as the alleged “primarily religious” or non-profit requirements to qualify as a religious organization, we direct the agencies to EPPC’s comment on the OFCCP proposal and incorporate those arguments here. 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>.

⁶⁷ EEOC, Compliance Manual: Religious Discrimination §12 (2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>. EEOC’s religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC’s positions and contains extensive footnotes to caselaw in support.

Citing relevant case law, the EEOC guidance explains that Title VII’s religious organization 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.”⁶⁸ It would be inappropriate for the agencies to espouse a different interpretation and applications of Title VII, and arbitrary and capricious for the agencies to ignore EEOC’s religion guidance.

Unlawfully Targeting Faith-Based Partners. The agencies go out of their way to unlawfully limit the right of faith-based partners to make employment decisions based on religion. The proposed rule states: “Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, *even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees’ sex).*”⁶⁹ 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.*”⁷⁰

If finalized, the proposed rule would leave a religious exemption in name only. It would allow the agencies 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, Albigenian, or atheist beliefs considered heresies to the Catholic organization.⁷¹ Worse still, no federal agency 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 organizations should be free to make employment decisions based on sincere religious beliefs and tenets as the law demands and without agency inquisition.⁷²

⁶⁸ § 12-I-C-1.

⁶⁹ 88 Fed. Reg. 2402. (emphasis added).

⁷⁰ § 12-I-C-1 (emphasis added).

⁷¹ *Cf. Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980) (rejecting argument that Title VII religious organization exemption permitted school affiliated with LDS Church only to hire co-religionists and did not permit school to discriminate among various Mormon applicants), *aff’d*, 1982 WL 20024 (10th Cir. 1982), *cert. denied*, 464 U.S. 849 (1983); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (explaining Title VII’s religious organization exemption “allows religious institutions to employ only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities.”).

⁷² *See Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (explaining evaluation of whether teacher’s conduct made her unfit for her religious employer’s mission was not suited to resolution by a civil court based on excessive entanglement concerns).

7. The agencies should clarify that the definition of “federal financial assistance” does not include indirect funding or tax-exempt status.

The agencies seek comment on the appropriate definition of “federal financial assistance.”⁷³ We have two comments. First, under the agencies programs at issue in this rulemaking, “federal financial assistance” should not include indirect aid or when a vendor of goods or services receives federal financial assistance merely because a beneficiary acquires a good or service with financial assistance the beneficiary received from the government.⁷⁴ Second, the agencies should clarify that “federal financial assistance” does not include mere nonprofit or tax-exempt status.⁷⁵ Last year, two district courts held that a private school that is tax-exempt and did not otherwise receive federal financial assistance was nevertheless receiving federal financial assistance based on its tax-exempt status and thus subject to Title IX.⁷⁶ This is absurd. Under these strained rulings, any organization that Congress does not choose to tax could be subject to all federal spending legislation. The agencies should preemptively foreclose such a strained understanding in any final rule.

8. The agencies should reject the proposal to eliminate a provision allowing religious organizations with religious objections to applying for tax-exempt status to qualify as a nonprofit organization for purposes of the regulations.

“[T]o enhance clarity and reduce confusion,” the agencies propose removing an alleged “confusing and unnecessary” provision from the 2020 Rule that allowed applicants that hold “a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code” to demonstrate nonprofit status by providing “evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization.”⁷⁷ (The Department of Housing and Urban Development (DHS) proposes “a slightly different standard” where an entity may provide evidence that “the DHS awarding agency determines to be sufficient” to establish that it would otherwise qualify as a nonprofit.)⁷⁸ The agencies fail to provide evidence that this provision was confusing or that it was not clear. Indeed, it is very straightforward and not complicated. Further, we suspect very few organizations would fall under the scope of this provision making its removal gratuitous and discriminatory towards those few groups with religious objections to applying for tax-exempt status. In short, the agencies fail to provide sufficient justification for this proposal, making it arbitrary and capricious. The agencies should drop this proposal.

⁷³ 88 Fed. Reg. 2403.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *E.H. v. Valley Christian Acad.*, 2:21-cv-07574-MEMF, 10 (C.D. Cal. Jul. 25, 2022) (“Accordingly, the Court holds that Valley Christian’s tax-exempt status confers a federal financial benefit that obligates compliance with Title IX.”); *Buettner-hartsoe v. Balt. Lutheran High Sch. Ass’n*, No. RDB-20-3229, 6 (D. Md. Jul. 21, 2022) (“The tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX.”).

⁷⁷ 88 Fed. Reg. 2404.

⁷⁸ *Id.*

9. The agencies must consider the rule’s costs and transfers, especially those related to the religious accommodation regulations.

Costs and Transfers. OIRA determined that this is an economically significant rule that requires meaningful economic analysis under EO 12866 and OMB Circular A-4.⁷⁹ The agencies should consider the following costs and transfers associated with its proposed modifications of the religious accommodation process.

- The effect of the regulations on existing faith-based providers leaving each program under all nine agencies and new faith-based providers not joining in the future.
- The availability of alternative providers to fill any gaps in service.
- The harms to beneficiaries who are unable to receive services from a provider.
- Any irreparable harm of the loss of First Amendment and religious free exercise rights, including by an incorrectly denied accommodation or lack of appeal process.
- Any distributional effects of federal funds transferring from faith-based providers that leave the program under the regulations to new providers.

Comment Period. We recognize that the Department gave the public 60 days to provide meaningful public comment on such a major and significant proposed rule. This has unfortunately not been the norm for many proposed rules under the current administration⁸⁰ and we applaud the agencies for not following that trend for this proposed rule.

Conclusion

We urge the agencies to withdraw the proposed rule and retain the 2020 Rule.

Sincerely,

Rachel N. Morrison, J.D.
Fellow and Director
HHS Accountability Project
Ethics and Public Policy Center

Eric Kniffin, J.D.
Fellow
HHS Accountability Project
Ethics and Public Policy Center

⁷⁹ EO 12866 states: “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless, essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

⁸⁰ For example, HHS’s Centers for Medicare & Medicaid Services (CMS) published a 145-page, triple-columned notice of proposed rulemaking on January 5 with a public comment deadline on January 27—a mere 22 days to provide input on a complex, major, and economically significant proposed rule.

Attachment 1

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

SECTION 12: RELIGIOUS DISCRIMINATION

....

12-I COVERAGE

....

C. Exceptions

1. Religious Organizations

....

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.”⁸¹ 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.⁸² However, sections 702(a) and 703(e)(2)⁸³ 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.⁸⁴ The definition of “religion” found in section 701(j) is applicable to the use of the term in sections

⁸¹ 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).

⁸² 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).

⁸³ 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 . . .”).

⁸⁴ 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).

702(a) and 703(e)(2), although the provision of the definition regarding reasonable accommodations is not relevant.⁸⁵

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.⁸⁶ 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.⁸⁷ 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.⁸⁸

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 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."⁸⁹ 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.⁹⁰

⁸⁵ "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).

⁸⁶ 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).

⁸⁷ 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'").

⁸⁸ *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).

⁸⁹ *Fremont Christian Sch.*, 781 F.2d at 1366 (quoting *Miss. Coll.*, 626 F.2d at 485).

⁹⁰ 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)).

The religious organization exemption is not limited to jobs involved in the specifically religious activities of the organization.⁹¹ 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.’”⁹² 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.⁹³ 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.”⁹⁴ 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.⁹⁵

⁹¹ 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.”).

⁹² *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 remarriage).

⁹³ 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”).

⁹⁴ *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).

⁹⁵ 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).

Attachment 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>

December 9, 2021

Via Federal eRulemaking Portal

Jenny R. Yang
Director
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

Re: EPPC Scholars Comment Opposing “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09

Dear Ms. Yang:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the “Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (Proposal). 86 Fed. Reg. 62115. EPPC Scholar Roger Severino was the Director for the Office for Civil Rights at the U.S. Department of Health and Human Services from 2017–2021. EPPC Scholar Rachel Morrison is a former attorney advisor for the general counsel of the Equal Employment Opportunity Commission (EEOC) and an expert on issues related to religious discrimination in employment, including Title VII’s religious organization exemption.

While claiming to following the law, the Proposal violates it to the detriment of religious contractors. First, 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. Finally, OFCCP ignores costs associated with rescinding the clarifying language from the 2020 Rule and ascribes to the Proposal benefits it cannot claim. We address each of these issues in turn.

I. The Proposal Seeks to Unlawfully Limit the Religious Employers that Qualify for a Religious Exemption

Executive Order 11246 established requirements for equal employment opportunity for federal contractors. The EO contains a religious exemption 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 of the Order contains the requirement that contracts “will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” Thus, for contractors that qualify for the religious exemption, they are not subject to the nondiscrimination requirements “with respect to the employment of individuals of a particular religion.” Because the language of the religious exemption for contractors mirrors the language governing religious organization exemptions in Title VII of the Civil Rights Act of 1964, OFCCP has relied on Title VII principles and caselaw in interpreting EO 11246’s religious exemption.

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. The first is that the text of the religious exemption in EO 11246 does not use that language, and neither do the religious organization exemptions in Title VII.

Second, courts have not uniformly adopted the “primarily religious” standard. The language comes from a 1988 Ninth Circuit case, *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). The Third Circuit in 2007 also applied a similar “primarily religious” standard. *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007).

In contrast, the Eleventh Circuit in 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.” *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997). Similarly, the Sixth Circuit while citing *Townley*, did not adopt its “primarily religious” articulation; instead, the court looked to “all the facts,” and “consider[ing] and weigh[ing] the religious and secular characteristics of the institution.” *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000).

Third, the “primarily religious” standard creates excessive entanglement problems. OFCCP must first determine which of an endless possible number of organizational activities it should consider as relevant. Next, the agency must categorize those activities as “religious” or “secular.” But some activities 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. *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.”). 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, to qualify for the religious exemption, an employer must be engaging in religiously-motivated conduct or operating under religious principles. No one is 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.” § 12-I-C-1.¹ Courts have found that Title VII’s religious organization exemption applies not only to churches and other houses of worship. These include religious schools, hospitals, and charities, all of which have secular versions that engage in similar behavior without religious motivation (compare the Christian Samaritan’s Purse to the secular Red Cross). *Id.* The OFCCP regulations should be just as solicitous for religious contractors under EO 11246’s religious exemption.

Clarifying definition “religious corporation, association, educational institution, or society” needed. The Proposal correctly acknowledges that there is no uniform test or set of factors that all courts use. 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.” § 12-I-C-1. Yet the federal government must still determine whether a contractor qualifies for the religious exemption and religious applicants and contractors must know whether they qualify as well. To clarify the standard, the 2020 Rule included a definition of “religious corporation, association, educational institution, or society” which adopted the following factors:

- (i) Is organized for a religious purpose;
- (ii) Holds itself out to the public as carrying out a religious purpose;
- (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.

¹ <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

These factors go to the heart of whether an organization is sufficiently religious to qualify for a religious exemption. Yet the Proposal would delete the definition of a qualifying religious organization, including the clear, administrable, and lawful factors above. 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 appears to suggest that the 2020 Rule defied Presidential orders, which is preposterous, given the extraordinary level of presidential support for religious freedom throughout the federal government. *See 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.”).

As to the merits, the 2020 Rule’s definition was modelled on the factors the Ninth Circuit articulated in *Spencer v. World Vision*, 619 F.3d 1109 (9th Cir. 2010), to determine whether an organization qualified for Title VII’s religious organization exemption. To ensure transparency, consistency, administrability, and the appropriate level of respect for religious freedom, the 2020 Rule’s factors should be retained.

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. This is absurd. The Proposal provides no evidence to support its claim, and as just discussed, proposes to eliminate eminently clear and workable standards for subjective mush.

While the Proposal would delete the 2020 Rule’s definition, including the factors, it would not replace it with anything in the text of the regulations, creating less transparency and certainty. The preamble to the Proposal does mention the Third Circuit’s *LaBoon* factors, but those factors are not included in the regulations’ text and, as the Ninth Circuit recognized in *Spencer v. World Vision*, some of the *LaBoon* factors could be “constitutionally troublesome” and should not be used. 619 F.3d at 1115. For example, it is not for courts to decide whether a particular “activity” is religious or secular, nor should court determine whether a particular “product” or “service” is religious or secular. *Id.* at 1116. OFCCP should not rely on constitutionally suspect factors, even in a preamble.

At the very least, under case law it would be arbitrary and capricious for OFCCP to not wait for further guidance from the Supreme Court’s upcoming *Carson v. Makin*, No. 21-1088, decision given that it will decide whether, and if so, how, a bureaucratic body can divine an organization’s level of religiosity for funding purposes.

The Proposal would also delete within the definition several examples of contractors that would and would not qualify as “religious.” No explanation is given for why, or even whether, these examples incorrectly determined the organization’s religious status for purposes of the

exemption. This is arbitrary. Examples help to provide clarity to applicants and contractors as to which organizations qualify for the religious exemption. The Proposal's deletion of the 2020 Rule's examples will increase uncertainty within the contracting community and lead to a chilling effect of religious organizations leading some to opt not to be government contractors.

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. There is no reason to delete this definition and it should also be retained.

The 2020 Rule definition of "religious corporation, association, educational institution, or society," including its factors and examples, should be retained.

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. However, when discussing Title VII's religious organization exemption—which OFCCP purports to follow for EO 11246's religious 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." §12-I-C-1 (emphasis added).

The religious exemption in Section 204 of EO 11246 does not make a distinction between nonprofit and for-profit status. Neither caselaw nor the text of Title VII and EO 11246 exclude for-profit organizations from the religious exemptions, and neither should OFCCP. Although most for-profit organizations are not religious, where a for-profit contractor is sufficiently religious *based on a consideration of all the facts*, it should be allowed to qualify for the federal contractor religious exemption.

Moreover, 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." 573 U.S. 682, 702 (2014). 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." *Id.* at 708. 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 supports that, in some circumstances, such for-profit organizations may be sufficiently religious to qualify for religious exemptions under Title VII and EO 11246.

II. The Proposal Seeks to Unlawfully Limit the Scope of the Religious Exemption

Inconsistencies with current law. The Proposal seeks to narrow the rights of religious contractors to make employment decision on the basis of sincere religious beliefs and tenets in violation of EO 11246, Title VII, its caselaw, and EEOC Religion Guidance.

Section 204(c) of EO 11246 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.” Taken together, both sections 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.

Similarly, as 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*.” § 12-I-C-1 (emphasis added).

Despite this clear language, 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).

If adopted, 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 statutory 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. 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.

Government’s interest in equal employment opportunity does not extend to religious contractors’ religious employment decision. 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” at qualifying religious contractors. And 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. § 12-I-C-1.

OFCCP cannot disclaim an interest in, or its obligation to ensure, the free exercise of religious 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, *see Bob Jones University v. United States*, 461 U.S. 574 (1983), 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. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

III. 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.” This proposed change is arbitrary and capricious. We cannot think of a single justification for not interpreting RFRA, which explicitly applies to every federal law, to apply here. 42 U.S. Code § 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. We agree RFRA is a fact-specific analysis determined on a case-by-case basis. But the interpretation provision the proposal wants to delete does not prevent such an analysis. Moreover, a case-by-case determination does not alleviate OFCCP of RFRA’s obligation on the government: “*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.

The Proposal cites *Fulton v. City of Philadelphia* to support its argument that RFRA should not be considered in the context of rulemaking. 86 Fed. Reg. at 62120–21. This is nonsensical. *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 rather than merely wait for back-end challenges after a violation has occurred.

From a policy perspective, OFCCP will incur costs by not acknowledging that RFRA applies from the outset, and will result in wasted taxpayer dollars, time, and resources, to defend against RFRA claims at the back end. But more than anything, it will result in OFCCP violating people's rights under RFRA. *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 JJDP Act and under RFRA, to exempt World Vision from the religious nondiscrimination requirement of section 3789d(c)(1).").

The broad interpretation language from the 2020 Rule should be retained.

IV. The Proposal Has a Flawed Cost-Benefit Analysis

The Proposal ignores significant costs. The Proposal's cost-benefit analysis is deeply flawed. It states the proposal "does not include any costs" because it would not add any new compliance requirements for contractors. 86 Fed. Reg. at 62121. This is absurd. There are many costs associated with the proposed rescission of the 2020 Rule. The Proposal ignores the costs on religious organizations in determining whether they qualify for the exemption under its opaque standard, the costs of not being able to make employment decisions based on religion, and the costs 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. Moreover, there is a cost to the religious contractors excluded and stigmatized by the federal government based not on their ability to do the work required by the government contract, but solely on their desire to act in accord with their sincere religious beliefs and tenets. *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 states that there are "comparatively few" religious contractors or potential contractors. 86 Fed. Reg. at 62118. Yet the Proposal is ignoring the fact that the 2020 Regulations have not had sufficient time to affect the universe of potential contractors who submit their bids in cycles. Yet it seeks to remove the religious protections to which those religious organizations that are already serving the American people well are entitled. Religious contractors or potential contractors will be forced to choose between partnering with the federal government to serve others and giving up their sincere religious beliefs and tenets concerning their internal personnel policies. Such a choice will chill religious organizations from even applying to be federal contractors.

The Proposal claims benefits it does not have. While wrongly disclaiming any costs, the Proposal incorrectly claims the following benefits: (a) 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; (b) it would ensure that taxpayer funds are not used to discriminate; (c) it would ensure that federal contractors provide equal employment opportunity on all protected bases; and (d) it would provide clarity and consistency for contractors and would-be contractors that are religious orgs re eligibility of exemption. 86 Fed. Reg. at 62121.

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. Further, the Proposal's contradictions of 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.

Further, 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.

We urge OFCCP to reanalyze the costs and benefits of the Proposal.

V. The Proposal's Inconsistency with Law Undermine the Necessity of the Rescission and Requires OMB Review

Inconsistency with Title VII and the EEOC undermines stated need for Proposal. The Proposal states 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 explained above, the proposal departs from Title VII principles and case law, as well as EEOC Religion Guidance, undercutting OFCCP's stated rationale for the Proposal.

Serious Inconsistencies with Title VII and EEOC guidance requires OMB review. Since the Proposal "creates serious inconsistency or otherwise interferes with an action taken or planned by another agency"—here the EEOC Religious Guidance and caselaw interpreting Title VII's religious organization exemption—it is subject to OMB review under EO 12866. OFCCP

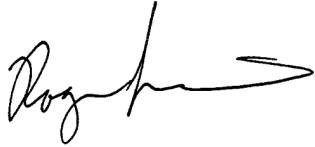
can best make its Proposal consistent with Title VII and EEOC's Religion Guidance by withdrawing the Proposal all together.

VI. Conclusion

Regardless of what the Proposal purports to do, OFCCP lacks the authority to limit religious freedom protections under the First Amendment, the Religious Freedom Restoration Act, Title VII, or EO 11246. Nevertheless, these protections should be fully recognized by OFCCP and the clarifying language from the 2020 rule should be retained.

In sum, we urge OFCCP to withdraw the proposal to rescind the 2020 rule.

Sincerely,



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