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Office of Federal Contract Compliance Programs
Division of Policy and Program Development
Department of Labor
Room C–3325
200 Constitution Avenue NW
Washington, DC 20210

Submitted Electronically

Attention: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, **RIN 1250-AA09**

Dear Acting Director Harvey D. Fort:

The National Women's Law Center ("the Center") is writing to comment on the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") proposed rule, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" ("Proposed Rule"). Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, including income security, employment, education, and reproductive rights and health, with an emphasis on the needs of low-income women and those who face multiple and intersecting forms of discrimination. To that end, the Center has long worked to secure equal employment opportunities, and to ensure that civil rights laws are interpreted correctly to include important protections against sex discrimination.

OFCCP's purpose is to "protect workers, promote diversity and enforce the law," and one of its primary roles is to ensure federal contractors' compliance with Executive Order (EO) 11246, which prohibits employment discrimination on the basis of "race, color, religion, sex, sexual orientation, gender identity, or national origin." This EO embodies the federal government's longstanding commitment to eradicating employment discrimination by federal contractors, which begin in 1941, when President Franklin D. Roosevelt ordered federal agencies to condition defense contracts on an agreement not to discriminate based on race, creed, color, or national origin. Since then, Democratic and Republican presidents have expanded these protections and promoted equal opportunity in the workplace for all Americans. If an organization has the privilege of receiving government funding through a government contract, it should not be allowed to discriminate against qualified job applicants and employees. Moreover, as the Department of Labor has said again and again in prior rules, discrimination in government contracting wastes taxpayer funds because it leads to not hiring the best talent, increased turnover, and lost productivity.

EO 11246 was amended during the George W. Bush presidency to allow religious organizations that receive federal contracts to employ only members of a particular faith—a limitation on this nondiscrimination principle that was highly controversial at the time and today—but this exemption does not allow federal contractor religious organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.

The Proposed Rule would amend the regulation that implements EO 11246 and vastly expand the religious exemption, broadening both the pool of entities OFCCP will allow to use the exemption and the scope of the exemption itself. The Proposed Rule would weaken established federal antidiscrimination protections and undermine working people's economic security and reproductive freedom. By allowing federal contractors to engage in otherwise unlawful behavior by asserting that behavior is motivated by religious beliefs, the Proposed Rule invites and sanctions taxpayer-funded discrimination on the basis of sex, including gender stereotypes, pregnancy, sexual orientation, and gender identity. Therefore, the Center strongly urges OFCCP to immediately withdraw the Proposed Rule.

I. The Proposed Rule Emboldens Discrimination Against Women.

The Proposed Rule particularly impacts women workers who may face discrimination because of their employer's religious beliefs about women's behavior or role in society, family structure, or reproductive health decisions, threatening individuals' ability to obtain and maintain employment.

Women workers have been subjected to a range of discrimination based on sex, justified by claims of religious beliefs. Religious beliefs about a woman's decisions about her private life — such as her decision whether and whom to marry, and whether, when, and how to have children — have frequently motivated employment discrimination. Women workers have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage[1] or becoming pregnant while in LGBTQ relationship, using in vitro fertilization to start a family, or having an abortion.[2] Some employers may refuse to employ women altogether based on a religious belief that women, or mothers, should not work outside the home. For instance, a religious school failed to renew a pregnant employee's contract because of a belief that mothers should stay at home with young children.[3] By permitting such religious beliefs to undermine antidiscrimination protections, the Proposed Rule would push many individuals out of the workforce or exclude them altogether.

Women workers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society. For

[1] *See, e.g.*, Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 345 (E.D.N.Y 1998) (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was "clear evidence that she had engaged in coitus while unmarried"). *See also* Dana Liebelson and Molly Redden, "A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time," Feb. 10, 2014, *Mother Jones*, https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/.

[2] NAT'L WOMEN'S LAW CTR., *Why You Can't Get Fired for Having an Abortion: The Latest Sex Discrimination Ruling From a Louisiana Federal Court*, https://nwlc.org/blog/why-you-cant-get-fired-for-having-an-abortion-louisianas-latest-sex-discrimination-ruling/

[3] Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 623 (1986).

example, a religious school denied women health insurance by providing it only to the "head of household," which it defined to be married men and single persons, based on its belief that a woman cannot be the "head of household."[4] Some individuals hold religious beliefs dictating that women should not be alone with men to whom they are not married, which, if applied in the workplace, could unlawfully compromise women's ability to do their jobs and impede women's advancement and access to mentorship, training opportunities and senior leadership positions.[5]

While federal law currently prohibits this kind of discrimination based on sex, the Proposed Rule would embolden federal contractors to cite religious beliefs in order to justify discrimination. This would turn the clock back on decades of antidiscrimination law, setting our country back, and threatening women's ability to obtain and maintain employment.

II. LGBTQ Workers Will Be Harmed by the Limitation of Antidiscrimination Protections Invited by the Proposed Rule.

The Proposed Rule vastly expands the scope of the religious exemption for federal contractors, subjecting countless LGBTQ workers to discrimination in the name of religion. It will exacerbate already rampant discrimination against LGBTQ workers and threatens their economic security. A study by the National Center for Transgender Equality found that 27 percent of transgender individuals who held or applied for a job reported being fired, denied a promotion, or not hired for a job they applied for because of their gender identity or expression.[6] An aggregation of a number of studies found that found that 16 to 68 percent of lesbian, gay or bisexual respondents reported experiencing employment discrimination, and seven to 41 percent of lesbian, gay or bisexual workers were verbally/physically abused or had their workplace vandalized as a result of their sexual orientation.[7]

The Proposed Rule is the latest attempt in a prolonged campaign by this Administration to sanction discrimination against women, LGBTQ individuals, and others, under the guise of moral or religious beliefs. Expanding the religious exemption will allow federal contractors to discriminate against LGBTQ employees, undermining Title VII's prohibition against sex discrimination, including discrimination based on sexual orientation and gender identity. Federal contractors could claim a right under the Proposed Rule to refuse to hire or to fire an employee who comes out as transgender, or who they discover is transgender, for living in accordance with their gender identity.[8] The Proposed Rule would allow federal contractors to deny crucial employment and health benefits to married same-sex couples but provide them to married opposite-sex couples.

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[4] EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986).

[5] *See* Joanna L. Grossman, "Vice President Pence's "never dine alone with a woman" rule isn't honorable. It's probably illegal," Dec. 4, 2017, *Vox*, https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination; Gillian Tan and Katia Porzecanski, "Wall Street Rule for the #MeToo Era: Avoid Women at All Cost," Dec. 3, 2018, *Bloomberg*, https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost.

[6] James, S. E., et al., NATIONAL CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 148 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[7] Badgett, M.V.L., *et al*., THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf

[8] *See, e.g.*, E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

Instead of acknowledging and addressing the challenges facing LGBTQ workers, OFCCP proposes to expand opportunities for federal contractors to discriminate against these workers while receiving taxpayer dollars.

III. OFCCP Cherry Picks from the Supreme Court's *Hobby Lobby* Decision to Support Its Extreme Expansion of the Religious Exemption.

OFCCP relies heavily on the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*.[9] to justify its harmful proposed rule. In particular, OFCCP cherry picks from the case to support its proposal to create an expansive religious exemption. In doing so, the agency ignores several key pieces of the *Hobby Lobby* decision.

First, in *Hobby Lobby*, a bare majority of the U.S. Supreme Court—in a closely-divided decision—determined that a small subset of certain "closely held" for-profit companies could be considered "persons" under the Religious Freedom Restoration Act (RFRA), invalidating the Affordable Care Act's (ACA) contraceptive coverage requirement for those employers. In reaching this conclusion, the Court's decision was restricted to "closely held corporations, each owned and controlled by members of a single family."[10] Although OFCCP acknowledges that *Hobby Lobby* was limited to closely-held for profits ("*Hobby Lobby* answered the question whether a for-profit closely held corporation can exercise religion"[11]), OFCCP does not limit which for-profit entities can be eligible for the Proposed Rule's religious exemption. Instead, in the preamble, OFCCP simply notes in passing that it "does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition."[12]

Thus, while OFCCP claims to rely on the *Hobby Lobby* decision to create an expansive religious exemption that reaches for-profit commercial entities, it refuses to narrow the proposed definition to the type of entities that asserted objections in that very case. Indeed, it is both absurd and circular for OFCCP to acknowledge that its proposed definition could include entities beyond the scope of *Hobby Lobby*, but then dismiss the problem by simply assuming that certain entities would not fall into the definition.[13] Because the Proposed Rule fails to put any limitations on which for-profit entities could claim a religious exemption, it is certainly possible that a publicly held corporation or another entity that is not a closely-held, family-run business could use the exemption as a justification to charges of discrimination.

Second, in relying on the *Hobby Lobby* decision to create the expansive religious exemption, OFCCP ignores the fact that the *Hobby Lobby* decision rested on an analysis of not only the effect on objecting employers' religious beliefs, but also the effect on those who would be harmed—in that case, the women who would lose seamless access to contraception. Indeed, Justice Kennedy separately wrote a concurrence explaining his support of the majority's

[9] 573 U.S. 682 (2014).
[10] *Id*. at 717.
[11] OFCCP Proposed Rule, at 41684.
[12] OFCCP Proposed Rule, at 41684.
[13] The Administration similarly applied an unsupported expansive reading of the *Hobby Lobby* decision and RFRA in finalizing the broad exemption to the ACA contraceptive coverage requirement. The Third Circuit has enjoined those rules, concluding that the rules were not supported by the law. *Pennsylvania v. President of the United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019).

decision, specifically noting that respecting religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[14] In the Proposed Rule and repeated mentions of *Hobby Lobby*, OFCCP never acknowledges this integral part of the Supreme Court's holding. Instead, OFCCP ignores the harm that this expansive religious exemption would have on employees across the country. This is simply not allowed under *Hobby Lobby*.

Finally, while the *Hobby Lobby* decision dealt with a general requirement on all non-grandfathered insurance plans, the Proposed Rule deals with businesses that willingly enter contracts with the federal government. An entity does not have a right to a contract that it is unwilling to perform.

OFCCP's reliance on *Hobby Lobby* to broadly expand the religious exemption is just the latest of many attempts by this Administration to misuse and unlawfully expand the reach of the *Hobby Lobby* decision and RFRA, despite the significant harm to others.[15]

IV. OFCCP Grossly Mischaracterizes the *Masterpiece Cakeshop* Decision to Justify the Proposed Rule.

To justify the Proposed Rule, OFCCP relies on a gross mischaracterization of *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*[16] that ignores key limiting language and facts in the case. OFCCP's claim that this case requires the federal government to grant expansive exemptions to federal contractors is incorrect.

The Supreme Court declined to hold that the bakery in *Masterpiece Cakeshop* was entitled to a religious exemption from a general nondiscrimination law. Rather, the Court's narrow decision found that statements made during a hearing suggested some government actors had hostility to the baker's beliefs, concluding that the process violated the baker's rights, not the law itself. The Court expressly held that, "[w]hile those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[17]

OFCCP's characterization of the decision fails to recognize its narrow nature and its reliance on very specific facts. Instead, the Proposed Rule cites the case as a mandate from the Court to allow for broad religious exemptions for individual contractors.

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[14] 573 U.S. at 739.

[15] For example, the Administration has relied on RFRA in granting an exemption to a foster care agency in South Carolina, allowing it to turn away potential parents and volunteers who cannot meet their religious test in violation of non-discrimination protections. Similarly, the Administration has relied on RFRA to vastly expand the number of employers that can claim an exemption to the ACA contraceptive coverage requirement. And the Administration has relied on RFRA as one of its bases for rolling back protections against discrimination in health care. In each of these instances, the Administration has willfully misread *Hobby Lobby* and ignored the Court's own analysis of the accompanying harm a refusal based on religious objections will have on third parties.

[16] 584 U.S. ___,138 S.Ct. 1719 (2017).

[17] 138 S.Ct. at 1727.

V. By Adopting a But-For Standard of Causation, the Proposed Rule Makes It Harder for Employees to Challenge Discrimination, Abandons OFCCP Policy, and Creates a Dangerous Inconsistency between Title VII and EO 11246.

OFCCP has long sought to ensure that its interpretations of EO 11246 are consistent with Title VII. But in evaluating whether a claim of discrimination is based in religion or is based on a protected basis other than religion, OFCCP now proposes to apply a standard of causation at odds with that applied to Title VII discrimination claims. By abandoning the motivating factor standard of causation in favor of a but-for standard, the Proposed Rule would impose a higher burden on employees seeking to prove discrimination and create a dangerous inconsistency between EO 11246 and Title VII.

Under a motivating factor standard, an employee can show that an action was discriminatory by proving that action was even partially motivated by a protected characteristic (such as race, sex, or national origin). In contrast, under the but-for standard that OFCCP now seeks to apply, an employee can only establish that an action was discriminatory by proving that, but for the protected characteristic, it would not have happened. It is much more difficult for an employee challenging discrimination to prevail under the but-for standard.

The Proposed Rule represents an unwarranted departure from OFCCP policy. Congress explicitly adopted the motivating factor test for discrimination claims in the Civil Rights Act of 1991.[18] And OFCCP rejected the but-for causation standard for discrimination claims in 2015, adopting instead the motivating factor test that is consistent with Title VII and the Civil Rights Act of 1991.[19] Moreover, the two cases OFCCP cites in the Proposed Rule to support this change are inapposite because the claims arose in contexts other than Title VII discrimination claims. *Gross v. FBL Financial Serv., Inc.*[20] involved a disparate treatment discrimination claim pursuant to the Age Discrimination in Employment Act (ADEA). *Univ. of Texas Southwestern Med. Ctr. v. Nassar*[21] involved retaliation in response to a Title VII claim of a racially hostile work environment. Neither of these cases supports the proposed change to the standard of causation for Title VII or EO 11246 claims.

OFCCP's assertion that it must adopt the but-for standard because it eliminates the need to "evaluate the nature of a sincerely held religious belief" and it is improper for OFCCP to make such an evaluation is unsupported. For decades the courts have resolved claims of employment discrimination by religious organizations without running afoul of the limitations cited by OFCCP. OFCCP's concerns about these inquiries are overstated and there is no concern about impermissible entanglement.

OFCCP offers no credible justification for the Proposed Rule's departure from longstanding agency policy, and invites an ill-advised inconsistency in the evaluation of discrimination claims under Title VII and EO 11246.

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[18] 42 U.S.C.§ 2000e-2(m).

[19] *See* U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions; Final Rule*, FED. REG. 54934, 54944 (Sept. 11, 2015), https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf.

[20] 557 U.S. 167 (2009).

[21] 570 U.S. 338 (2013).

VI. The 30-Day Comment Period is Inadequate and Should Be Extended.

OFCCP fails to provide any justification for the unusually short 30-day comment period. Given that the Proposed Rule represents substantial shifts in OFCCP's enforcement approach in several critical respects, the comment period on the Proposed Rule should be extended to a minimum of 60 days to provide adequate time to comment on the numerous legal issues presented and the potential harms the Proposed Rule will cause.[22]

VII. OFCCP Fails to Adequately Consider the Potential Costs of the Proposed Rule and Exaggerates the Potential Benefits.

Under the Administrative Procedure Act and relevant Executive Orders, OFCCP must adequately assess all the potential costs and benefits of the Proposed Rule and adopt an approach that produces the least total burden and most benefit to society. EO 11246 was adopted and amended over the years to address serious and continuing problems of employment discrimination. Employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. Yet OFCCP completely fails to acknowledge the potential costs the Proposed Rule could generate by promoting increased employment discrimination, and exaggerates any possible benefits.

The purpose of EO 11246 and of OFCCP is to ensure equal employment opportunity in order to safeguard our nation's values and responsibly steward taxpayer funds. OFCCP has long recognized that employment discrimination wastes taxpayer dollars, because it leads to contractors missing out on the best talent and experiencing unnecessary and costly employee turnover. OFCCP fails to address how the Proposed Rule will affect that mission.

As previously discussed, the Proposed Rule is likely to encourage contractors to engage in employment discrimination, which carries many potential costs unaccounted for by OFCCP. For instance, the Proposed Rule fails recognize the economic and non-economic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to the negative mental and physical health consequences of discrimination.

Discrimination also results in costs for taxpayers in the form of federal contractors' decreased productivity, because contractors do not obtain the best talent and experience unnecessary and costly employee turnover. In addition, taxpayers may bear increased health care costs related to employment discrimination and increased social stigma toward LGBTQ, women, religious minorities, and other vulnerable workers.

Taxpayer-funded employment discrimination reduces equity, fairness, and personal freedom; the ability of workers to make deeply personal decisions regarding expression of their gender identity or sexual orientation, relationships and families, or regarding medical treatment;

[22] *See* The Leadership Conference on Civil and Human Rights, *et al*, Letter to Acting Secretary of Labor Pizzella and Acting Director Leen requesting extension of the comment period for the Notice of Proposed Rulemaking under the RIN number 1250-AA09, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Aug. 28, 2019, https://civilrights.org/resource/ofccp-nprm-rin-1250-aa09-religious-exemption-letter-from-civil-rights-groups-to-extend-comment-period/.

protection of employees' personal privacy regarding protected characteristics; and respect for the dignity and rights of stigmatized minorities.

OFCCP also exaggerates proposed benefits of the rule. The Proposed Rule provides less, not more clarity for employers and employees because it departs from OFCCP's settled interpretations in favor of vague new standards and multi-factor tests. OFCCP also presents no evidence that the Proposed Rule will result in an increased number of bona fide competitive bids for federal contracts.

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By allowing federal contractors to engage in otherwise unlawful behavior by asserting religious beliefs, the Proposed Rule invites and sanctions discrimination on the basis of sex and undermines antidiscrimination law. Accordingly, the Center strongly urges OFCCP to withdraw the Proposed Rule. Please contact Emily J. Martin (emartin@nwlc.org) with any questions.

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