

September 16, 2019

VIA Electronic Submission

Hon. Patrick Pizella, Secretary
Department of Labor
Office of Federal Contract Compliance Programs
Attention: RIN 1250-AA09
200 Constitution Avenue NW
Washington, DC 20210

Re: **Agency Notice of Proposed Rulemaking; Public Comment Request; Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption RIN 1250-AA09 – Lambda Legal Opposition**

Dear Secretary Patrick Pizella:

Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”) submits these comments in response to the U.S. Department of Labor (“DOL” or “Department”) Notice of Proposed Rulemaking (“Proposed Rule” or “NPRM”) to express our opposition to the proposed rule entitled “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” published in the Federal Register on August 15, 2019.

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education, and policy advocacy. The matters addressed in the Proposed Rule are of great concern to Lambda Legal because LGBTQ people and those living with HIV already and routinely face discrimination in employment discrimination, with a disturbing amount of that discrimination explained as being prompted by others’ religious beliefs. Lambda Legal opposes the Proposed Rule for the reasons explained in these comments. We urge the Department to rescind the rule.

I. Introduction

Religious freedom is a cherished American value. But when religiously motivated conduct is permitted without check, such unconstrained freedom inevitably infringes upon other cherished American values, such as the importance of preventing invidious discrimination in the workplace. As discussed below, courts have long recognized the need for a balanced approach to these values and have appropriately weighed requests for religious accommodations with the countervailing interests of other parties who would be harmed by an accommodation. In this proposed new rule however, the Department effectively eliminates any kind of burden analysis and significantly expands the number of employers who would be able to claim an exemption from long-settled equal opportunity rules. In so doing, the NPRM proposes improperly to issue federal contractors a broad license to discriminate that, if finalized, would allow federally-funded contractors to freely discriminate against LGBTQ workers and other vulnerable communities without consequence.

The federal government has demonstrated its strong commitment to ending employment discrimination by federal contractors for nearly 80 years—dating back to President Roosevelt’s 1941 Executive Order

prohibiting discrimination in defense contracting.¹ The Department of Labor has repeatedly reaffirmed that this commitment also serves the government's interest in reducing waste of taxpayer funds because discrimination leads to increased turnover and lost productivity.²

It is deeply concerning that the Office of Federal Contract Compliance Programs ("OFCCP"), an agency charged to protect workers and to prevent discrimination on the basis of sexual orientation, gender identity and other specified characteristics has issued an NPRM that would have the functional effect of providing virtually any employer with a religious license to discriminate against its employees.³ If finalized, the effect of this Proposed Rule would be to drastically expand the number and types of entities entitled to claim an exemption from Executive Order 11246. It would send an improper message to employers that they can discriminate against their employees and that, if an employee challenges a discriminatory workplace action, the defendant-employer can easily defend itself by claiming a religious exemption. If an entity receives federal funding through a government contract, it should not be allowed to discriminate against workers simply because they cannot meet a religious litmus test.

The NPRM seeks to solve a problem that does not exist. There is simply no evidence provided in the NPRM that federal contractors have not been attempting or have stopped doing business with the federal government as a result of the way in which the agency grants religious exemptions. Even since EO 11246 was amended to protect LGBTQ workers, the agency has not demonstrated that federal contractors have chosen to stop trying to win contracts because LGBTQ workers are protected under the law, or even because the current exemption is too narrow. Further, the NPRM certainly does not show that the government lacks an adequate supply of willing contractors to perform good quality work on behalf of the public without discriminating against their workers with the public's dime.

The Department attempts to minimize the potential harm to employees that would be caused by vastly expanding the current exemption in EO 11246 for government-funded employers to engage in employment discrimination. First, the Proposed Rule asserts that few employers would seek the proposed exemption, but cites no information about how many entities have sought it and been denied in the past. In addition, the Proposed Rule abjectly fails to consider the impact on workers who would suffer were the NPRM to be finalized.

There are almost 4 million employees who work for federal contractors, including another 1.6 million who are grantees who would be impacted by this NPRM.⁴ The loss of protections that would result from this NPRM would be especially devastating for LGBTQ employees—especially LGBTQ workers living in a state

¹ Executive Order 8802 (Prohibition of Discrimination in the Defense Industry) (June 25, 1941), *available at* <https://www.archives.gov/historical-docs/todays-doc/?dod-date=625>.

² *See, e.g.*, Government Contractors, Requirement to Report Summary Data on Employee Compensation (discussing how the NPRM can prevent individuals and their families from being placed in financial jeopardy due to employment discrimination), *available at* <https://www.federalregister.gov/documents/2014/08/08/2014-18557/government-contractors-requirement-to-report-summary-data-on-employee-compensation>.

³ U.S. Department of Labor Office of Federal Contract Compliance Programs, About Us (last visited on Sept. 14, 2019), *available at* <https://www.dol.gov/ofccp/aboutof.html>.

⁴ Paul C. Light, *The True Size of Government* (Oct. 5, 2017), *available at* <https://www.volckeralliance.org/true-size-government>.

without explicit statutory or case law protections. There are an estimated 8.1 million LGBTQ workers and about half of those live in states without explicit statutory protections against sexual orientation and gender identity discrimination in employment.⁵ There are an estimated 4.5% of American adults are LGBTQ,⁶ and an estimated 37% of lesbian and gay people and 47% of bisexual people report experiencing discrimination at work because of their sexual orientation and almost half (46%) of LGBTQ workers report actively concealing their identity out of fear of discrimination.⁷ Of the 1.4 million transgender people in the United States,⁸ research indicates that more than 75% who had a job in the past year took steps to hide or delay their gender transition from fear of discrimination.⁹

In addition, the numbers of discrimination complaints filed by employees against federal contractors on the basis of gender identity and sexual orientation has skyrocketed in the last 5 years.¹⁰ This trend is consistent with the complaint data from the Equal Employment Opportunity Commission (“EEOC”) which received 1,412 anti-LGBTQ discrimination complaints in 2015, a number that increased to 1,811 in 2018.¹¹ As outlined in the Cost and Benefit section below, the NPRM fails completely to account for the costs of discrimination and long term negative outcomes associated with discrimination.

It is evident that the NPRM seeks to allow almost any entity to claim a religious exemption that would allow a federal contractor to claim a right to fire a person, deny health benefits or other forms of discriminatory action for marrying a same-sex partner, or to fire an employee, deny health benefits or other forms of discriminatory action against an applicant or employee who is or comes out as transgender, or who the employer or would-be employer discovers is transgender, for living in accordance with their gender identity.¹²

The NPRM would also have a harmful impact on women and religious minorities. Although federal law currently prohibits discrimination based on sex (including sex stereotypes, gender identity, sexual

⁵ LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes, UCLA School of Law, Williams Institute (March 2019), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-March-2019.pdf>.

⁶ See LGBT Data & Demographics, UCLA School of Law, Williams Institute (Jan. 2019), available at <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density>.

⁷ Jennifer Pizer *et al.*, *Evidence of Persistent Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Mallory-Sears-Hunter-ENDA-LLR-2012.pdf>.

⁸ A.R. Flores *et al.*, *How Many Adults Identify as Transgender in the United States* (The Williams Institute, UCLA School of Law, 2016), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁹ S.E. James *et al.*, *The Report of the 2015 U.S. Transgender Survey*, p. 148 (National Center for Transgender Equality, 2016), available at www.ustranssurvey.org/.

¹⁰ There was a total of 6 complaints on the basis of sexual orientation and gender identity in 2015, there were 16 complaints in 2016, 23 complaints in 2017, 85 complaints in 2018 and 60 as of Q3 of 2019. See U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, *OFCCP By The Numbers*, available at <https://www.dol.gov/ofccp/BTN/index.html>.

¹¹ U.S. Equal Employment Opportunity Commission, *LGBT-Based Sex Discrimination Charges* (data from 2013-2018), available at https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm.

¹² See, e.g., *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

orientation, and pregnancy and related medical conditions), years of case law addressing religion-based sex discrimination indicate that the NPRM would embolden federal contractors to cite religious beliefs in order to justify otherwise forbidden discrimination. For example, expanding the religious exemption creates a problematic likelihood of wrongfully facilitating federal contractors' claims of a right to fire women who use birth control or who are pregnant and unmarried. Women workers already have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage or while in an LGBTQ relationship, using in vitro fertilization to start a family, or having an abortion.¹³

Some employers may refuse to employ women altogether based on a religious belief that women, or at least 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.¹⁴ 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 example, a religious school denied women health insurance by providing it only to the "head of household," defined to be married men and single persons, based on its belief that a woman cannot be the "head of household."¹⁵ Some individuals hold religious beliefs dictating that women should not be alone with men to whom they are not married, which unavoidably would impede women's advancement and access to mentorship, training opportunities and senior leadership positions in the workplace, contrary to basic sex discrimination standards.¹⁶

The existing exemption in EO 11246 already allows certain government-funded contractors to discriminate in hiring on the basis of religion. This proposed rule would make that troubling exemption even broader. No one should be disqualified from a taxpayer-funded job because they are the "wrong" religion or are nonreligious. The federal government should not choose to spend federal taxpayers' money to hire contractors that fire or refuse to hire qualified people because they do not regularly attend particular religious services, do not adhere to the boss's religious practices, or aren't the "right" religion.

¹³ See, e.g., *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014); *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*, Mother Jones, Feb. 10, 2014, available at <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>; *Ducharme v. Crescent City Déjà Vu, L.L.C.*, No. 2:2018cv04484 (E.D. La. 2019) (woman fired from her job for having an abortion; court held that federal and state anti-discrimination laws prohibit employers from firing employees for having an abortion).

¹⁴ *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

¹⁵ *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

¹⁶ See Joanna L. Grossman, *Vice President Pence's "never dine alone with a woman" rule isn't honorable. It's probably illegal*, Vox, Dec. 4, 2017, available at <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*, Bloomberg, Dec. 3, 2018, available at <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>; Ben Kessler, *North Carolina Police Officer Fired for Following the 'Billy Graham Rule,' Lawsuit Says*, NBC News, Aug. 23, 2019, available at <https://www.nbcnews.com/news/us-news/north-carolina-police-officer-fired-following-billy-graham-rule-lawsuit-n1045706>.

II. The NPRM Grossly Mischaracterizes U.S. Supreme Court Precedents to Justify Improperly Expanded Religious Exemptions.

The NPRM cites four recent U.S. Supreme Court cases that the agency itself concedes “are not specific to the federal government’s regulation of contractors,” but that “remind” the agency of its duty to protect religious exercise upon which the agency rests its breathtaking expansion of the law.¹⁷ The NPRM generalizes that the U.S. Supreme Court has “affirmed” the importance of protecting religious liberty and that the NPRM is affirming the “principles,” laid out in the four cases. But the Department should not be engaging in formal rulemaking ostensibly justified by vague “principles” represented by U.S. Supreme Court precedents, when the cited cases address contexts not relevant to the NPRM and contain key limitations which the NPRM ignores. Moreover, the Department similarly must remain “reminded” of both the U.S. Supreme Court precedents underscoring the constraints imposed on government by the Establishment Clause and the Department’s duty to protect workers from discrimination. Listed below is a more detailed explanation of why the referenced Supreme Court decisions do not justify the NPRM.

A. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

To support the Proposed Rule, the Department of Labor relies on a gross mischaracterization of the *Masterpiece Cakeshop v. Colorado Civil Rights Commission*¹⁸ ruling. To get where the NPRM apparently wants to go, it ignores key limiting language and facts in the case. First, the decision does not stand for the proposition that the business owner’s religious beliefs entitled him to an exemption from the nondiscrimination law. Instead, the Court found that statements made during a hearing suggested some government actors had hostility to the business owner’s beliefs, meaning that the administrative process potentially had violated the defendant’s rights, not the law itself. Thus, contrary to the Department’s characterization of the decision as a mandate to allow for broad religious exemptions for individual contractors, the Court actually said the opposite: “While ... religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” Moreover, *Masterpiece Cakeshop* also confirmed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”¹⁹ The decision did not overturn or even address the case law teaching how Title VII should be understood, let alone the decisions holding that the Title VII religious exemption should be narrowly construed. As explained further below, it is unreasonable for the Department to interpret the narrow holding in *Masterpiece* in order to institute a new balancing test structured always to weigh in favor of a would-be religious employer based on vague “principles” or to exponentially expand the number of entities that seemingly are invited to claim a religious accommodation.

¹⁷ 41679 (“[a]lthough these decisions are not specific to the federal government’s regulation of contractors, they have reminded the federal government of its duty to protect religious exercise—and not to impede it.”)

¹⁸ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

¹⁹ *Id.* at 1727.

B. *Trinity Lutheran Church of Columbia, Inc. v. Comer*

The Department also relies inappropriately on *Trinity Lutheran Church of Columbia, Inc. v. Comer* to justify its interpretation of “particular religion.” But, *Trinity Lutheran* concerned adverse treatment of a religious applicant for a public grant, where the applicant agreed to follow the eligibility rules, including the nondiscrimination provision.²⁰ Its holding is inapplicable in programs where funding is awarded on a competitive basis as it is with federal contracting,²¹ and where the contractor intends not to comply with governing nondiscrimination rules.

C. *Hosanna Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*

The Department points to the “ministerial exception” in its preamble to the Proposed Rule to demonstrate why its ability to investigate claims of discrimination are limited. Although it is true that the ministerial exception bars ministers from bringing employment discrimination cases, employers must still follow the law in their interactions with their other employees. Most federal contractors are unlikely to have ministers, those who preach or teach the faith, on staff, let alone paid to provide religious education or other religious functions for the federal government. Accordingly, “the ministerial exception would rarely, if ever, apply.”²²

D. *Burwell v. Hobby Lobby Stores, Inc.*

A striking aspect of the NPRM’s mischaracterization of Supreme Court precedent is its reliance on the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*²³ to justify its expansion of eligibility for a religious exemption from religious nonprofit organizations to include any sort of for-profit corporation. Contrary to the meaning the NPRM improperly imputes to it, the *Hobby Lobby* decision only approved religious exemptions for commercial entities in which the owners could be said to be exercising religion through their management of their businesses because the businesses were “closely held corporations, each owned and controlled by members of a single family.”²⁴

The Proposed Rule also ignores the counterbalancing analysis the Supreme Court conducted in *Hobby Lobby*, when it examined whether the companies’ employees would be harmed if the employers’ religious interests were accommodated. Where the *Hobby Lobby* majority concluded that the impact on the employees would be “precisely zero” before approving the employer’s requested religious exemption,²⁵ the Department gives

²⁰ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2024 n.3 (2017).

²¹ The Supreme Court has often distinguished between programs where funding is generally available to applicants meeting certain neutral criteria and programs where funding is awarded on a competitive basis. Memorandum from Randolph D. Moss, Ass’t Att’y Gen., Office of Legal Counsel, for William P. Marshall, Deputy Counsel to the President, “Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the “Community Renewal and New Markets Act of 2000” (Oct. 12, 2000), *available at* <https://www.justice.gov/olc/page/file/936211/download>.

²² See 2000 OLC Memo.

²³ 573 U.S. 682, 134 S.Ct. 2751 (2014).

²⁴ *Id.* at 2774.

²⁵ *Id.* at 2760.

no analogous consideration to the burden that would-be contractors' religious commitments would impose on employees who would experience discrimination if the Proposed Rule were finalized. The Department also ignores how Justice Kennedy's concurring opinion in *Hobby Lobby* underscored that respecting religious exercise must not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."²⁶

Finally, federal contracting is unlike the *Hobby Lobby* context. Rather than concerning a broadly applicable requirement of all insurance plans, the NPRM only concerns entities that voluntarily seek contracts with the federal government. For all these reasons, *Hobby Lobby* does not support the gross expansion of religious exemption eligibility that the NPRM proposes.

III. Definitions

A. The Definition of "Religion" in the NPRM is Impermissibly Vague.

Title VII was enacted at a time when no one in Congress would have dreamed that religious organizations that would qualify for the Title VII exemption would also seek to contract with the federal government, let alone be given a broad right to discriminate based on religion while accepting federal funding.²⁷ The need to maintain religious autonomy as an entity that is independent from the government in the Title VII context disappears when entities solicit and accept government contracts, especially because the contracts necessarily involve extensive compliance with contract and other requirements.

The NPRM proposes to import the definition of "religion" from Title VII.²⁸ But the NPRM fails to acknowledge that this definition is used in the context of protecting *employees* from religious discrimination, not *employers*. The NPRM makes no attempt to identify, import or justify the elimination of the second part of the definition of "religion," which mandates that a religious accommodation be accommodated "unless an employer demonstrates that he is unable to reasonably accommodate" the employee.²⁹ Employees can only expect to be accommodated if there is a minimal cost associated with the exemption.³⁰ In the Title VII context, an employee is only granted a religious exemption if the accommodation does not impose a significant cost on an employer, but the NPRM untethers this exemption for federal contractors by eliminating any consideration whatsoever of the burdens and harms to employees as a result of an employer's exemption. Indeed, the NPRM would create an almost limitless exemption allowing contractors to impose their tenets on their employees without considering or balancing the resulting harms to employees who could lose their income or livelihood, endure harassment, or experience other forms of

²⁶ *Id.* at 2787 (Kennedy, J., concurring).

²⁷ Ira. C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *The Rise of Corporate Religious Liberty* 373, 389 (Micah Schwartzman *et al.* eds., 2016) (noting that, at that time, "the Establishment Clause barred government support for entities that engage in worship and explicitly religious instruction.").

²⁸ 42 U.S.C. 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observances or practices without undue hardship on the conduct of the employer's business.")

²⁹ *Id.*

³⁰ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that Title VII does not require religious accommodations that impose more than a minimal cost to an employer).

harm. The proposed, exponential expansion of “religion” taken out of the context of Title VII’s limitations would impermissibly expand the exemption far beyond the cited supporting authorities.

B. The Definition of “Particular Religion” is Unsupported in Law.

EO 11246’s existing religious exemption is narrow. It states that its nondiscrimination protections “shall not apply to a” religious entity, “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.”³¹

The proposed definition of “particular religion” would expand the scope of the exemption and explicitly state that contractors can condition employment on adherence to religious tenets. But the NPRM fails to acknowledge the limitations within the case law that safeguard workers who suffer from discrimination on the basis of their sex, sexual orientation, gender identity, or other protected characteristic under the pretext of a religious tenet.

Courts have held that religious employers can never be provided a *carte blanche* license to discriminate on the basis of race, national origin, or sex.³² Discrimination based on a protected characteristic is unlawful and a religious employer’s religious motivation for its discriminatory conduct does not convert unlawful discrimination into permissible religious discrimination.³³ Troublingly and tellingly, the NPRM ambiguously attempts to address this point but fails to cite sexual orientation and gender identity in the NPRM—the protected characteristics most likely to be impacted by the NPRM’s proposed rule changes.

C. The Definition of “Religious Corporation, Association, Education Institution or Society” is Unsupported in Law.

The NPRM creates a broad definition of “religious corporation, association, educational institution, or society” not found in existing law that could apply to virtually any entity that nominally holds itself out to the public as carrying out a religious mission.

In its evident drive to create an almost limitless religious exemption, the Department chooses to ignore Congressional intent and Title VII case law. For example, the NPRM distorts the analysis set out in *Spencer v. World Vision, Inc.*, a Ninth Circuit decision considering whether an entity qualifies for a religious exemption. That decision considered the following factors:

- (1) whether the entity is organized for a religious purpose;
- (2) whether the entity is engaged primarily in carrying out that purpose;
- (3) whether the entity holds itself out to the public as carrying out that purpose; and

³¹ EO 11,246 Sec 204 (c).

³² *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *E.E.O.C. v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982).

³³ See *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 163 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014).

(4) whether the entity does not engage primarily in the exchange of goods or services.³⁴

The Department purports to accept this test as its starting place, but then proceeds to concoct a new test by cobbling various elements together—deleting elements here and modifying elements there—until it eventually creates, like Frankenstein’s monster, a new *World Vision* test. The NPRM’s new test requires only that an entity:

- (1) is organized for a religious purpose;
- (2) holds itself out to the public as carrying out a religious purpose; and
- (3) engages in exercise of religion consistent with, and in furtherance of, a religious purpose.³⁵

The NPRM’s proposed definition improperly broadens the religious exemption and is inconsistent with congressional intent and existing case law which all intended the exemption to be narrow. Congress twice considered and rejected blanket exemptions from all of Title VII’s protections against employment discrimination. Yet OFCCP is attempting to craft a blanket exemption with this proposed rule and give contractors a catch-all defense to discrimination complaints. Section 2000e-2(e)(2) was added as an amendment by Representative Purcell who clarified that the amendment was “limited to church affiliated colleges and universities, part of whose mission, I am sure, is to propagate the belief of the denomination that is supporting that educational institution.”³⁶ The understanding that the exemption should be construed narrowly was repeatedly reaffirmed in the existing case law.³⁷ Even the concurrence upon which the *World Vision* test is modeled clarified that the exemption should be narrow.³⁸

As discussed above, perhaps the most striking aspect of the NPRM’s new *World Vision* test is the aggressive broadening of the rule to include all types of for-profit entities. First, the Department’s reliance on *Burwell v. Hobby Lobby*³⁹ to justify this expansion is misplaced because *Hobby Lobby* only concerned closely held corporations where the family-member owners all engaged in the same religious practices. In addition, the OFCCP ignores the balancing analysis the Supreme Court did in *Hobby Lobby*, where the Court only approved the requested religious exemption after concluding that the employees in that case would not be

³⁴ *Spencer v. World Vision, Inc.* 633 F.3d 723, 724 (9th Cir. 2011) (per curiam).

³⁵ 41691

³⁶ 110 Cong. Rec. 2585-86 (Feb. 8, 1964), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1964-pt2/pdf/GPO-CRECB-1964-pt2-9-1.pdf>.

³⁷ “The debate over Representative Purcell’s amendment does indicate, however, that Congress’s conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.” *E.E.O.C. v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 617–18 (9th Cir. 1988); “We stated in *Townley* that § 2000e–1 does not exempt an institution that is “merely ‘affiliated’ with a religious organization.” *Id.* at 617. We also observed, “Congress’s conception of the scope of [§ 2000e–1] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm.” *Id.* at 618.4 *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993), as amended on denial of reh’g (May 10, 1993).

³⁸ “The test I propose also ensures that the section 2000e–1 exemption will remain “narrow[.]” *Spencer v. World Vision, Inc.*, 633 F.3d 723, 735 (9th Cir. 2011) (Judge O’ Scannlain concurrence).

³⁹ 573 U.S. 682 (2014).

harmful. Finally, cases decided since *Hobby Lobby* have required that companies seeking the exemption be religious or at least a nonprofit entity.⁴⁰

The Proposed Rule also ignores that the Establishment Clause analogously forbids religious exemptions that burden or harm third parties.⁴¹ Thus, when crafting an exemption, the government “must take adequate account of the burdens” an accommodation would place on others and ensure it is “measured so that it does not override other significant interests.”⁴²

Turning to the NPRM’s new *World Vision* test, note that the NPRM maintains the prong that an entity must be “organized for a religious purpose” but renders it essentially meaningless. The NPRM does so by stating that a purpose can be demonstrated by articles of incorporation or other foundation, but goes on to clarify that “that is not the only type of evidence that can be used.” The NPRM thus fails to articulate any kind of standard to demonstrate a religious purpose even measured by Judge O’Scannlain’s requirement that such purpose be shown through articles of incorporation or other foundational documents.

The NPRM also maintains the requirement that an entity must hold itself out to the public as an entity for carrying out that religious purpose, but renders this requirement practically meaningless as well. In contrast to the fact-specific inquiry made in *World Vision* to determine that the entity held itself out to the public as a religious entity,⁴³ the Proposed Rule would allow an entity to meet this prong if it merely “affirms a religious purpose in response to inquiries from a member of the public or a government entity.” As a result, under this approach, an entity could make no public showing of a religious purpose, yet could meet this prong of the test by merely answering a call from an OFCCP employee and answering “yes” to the question of whether or not it is religious. This would provide no true limitation on which entities should qualify for an exemption, let alone provide notice to taxpayers, employees, or applicants that the religious exemption may be applied.

⁴⁰ See *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019). OFCCP’s reliance on *Hobby Lobby* to broadly expand this 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 significant harms to others. For example, the Administration has relied on RFRA in granting a waiver so foster care agencies in South Carolina may turn away non-Christian families in violation of non-discrimination protections. Similarly, the Administration has relied on RFRA to expand the number of employers that can claim an exemption from the ACA’s contraceptive coverage benefit. And the Administration has relied on RFRA as grounds for rolling back protections against discrimination in health care. In each of these instances, the Administration has misread *Hobby Lobby* and ignored the Court’s own acknowledgment that religion-based refusals should not harm third parties.

⁴¹ See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985). See also *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (“accommodation is not a principle without limits”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on non-beneficiaries”); *Burnwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014).

⁴² *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

⁴³ See *World Vision*, 633 F.3d at 738-39. World Vision met this prong through demonstrating that it displayed its religious logo, religious iconography, and religious text across its campus; distributed Christian Messaging Guidelines that governed their external communications; and included a religious statement on every piece of communication.

D. The Definition of “Exercise of Religion” is Improperly Broad.

This definition adds yet another square to the crazy quilt the Department has concocted for determining whether an entity is eligible for a religious exemption. The Department draws the definition of “exercise of religion” not from the Title VII exemption or from any existing case law, but from an entirely different statute, this time choosing the Religious Freedom Restoration Act.⁴⁴ The term, as with almost every other aspect of the NPRM, is a blatant attempt to exponentially broaden the number and type of entities eligible for an exemption. The Department replaces the prong in Judge O’Scannlain’s test that examines whether an entity is “engaged primarily” in furtherance of a religious purpose, with an examination of whether an entity simply “engages in exercise of religion consistent with, and in furtherance of a religious purpose.” Such a major expansion of the eligibility test is contradicted by existing law.

E. The Definition of “Sincere” is Improperly Broad.

As with the definition of a “religious corporation,” the proposed definition of “sincere” is unsupported legally and does not make sense as a practical matter. The NPRM’s definition states that “sincere” means sincerity “under the law applied by the courts” when ascertaining the sincerity of a belief, but the NPRM’s preamble suggests that sincerity often should be stipulated and fails to provide any kind of standards for demonstrating or assessing sincerity. Such stipulations, if operationalized by the agency, would contradict the independent assessment indicated by the definition and would violate federal law. While courts have proven to be deferential regarding “sincerity,” they have not “stipulated” this analysis altogether. Furthermore, questions of sincerity have arisen most often in the context of whether an employer should grant a worker’s requested accommodation. Such a determination makes sense when considering one individual, but is not readily applicable to many organizations, especially to large and publicly held corporations.

IV. The NPRM Improperly Adopts a Causation Standard Inconsistent with Existing Law.

The NPRM seeks to apply a “but-for” standard of causation rather than the “motivating-factor” standard when evaluating whether a claim of discrimination is based on religion or is based on a protected basis other than religion. As the Department acknowledges but fails to address, this standard is much more deferential to employers and would impose a much higher legal burden on employees to prove improper discrimination. The “standard of causation” determines what must be proved in order to establish that an employer’s action was caused by unlawful discrimination. 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 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 to make his or her case under the “but-for” standard.

The Department cites two cases in support of this change, but these cases simply do not adopt a but-for causation requirement for Title VII or EO 11246 cases.⁴⁵ For example, the NPRM characterizes *Univ. of Tex.*

⁴⁴ 42 U.S.C. sec. 2000cc-5

⁴⁵ See *Univ. of Tex. Sw. Med. Ctr. v. Nasser*, 570 U.S. 338, 357 (2013) (distinguishing between status-based discrimination claims, which are analogous to claims under EO 11246, and unlawful retaliation claims, requiring a “but-for” standard only for the latter

Sw. Med. Ctr. v. Nasser as a decision supporting this change in standard, but the Court in that case held that the “motivating factor” standard should be applied for status-based claims and that a “but-for” analysis should be applied for retaliation claims. The Department has clearly misinterpreted or miscited existing law as justification for this change. In addition, this question has been asked and answered both in Congress and in the Department already. Congress explicitly adopted the “motivating factor” test in 1991.⁴⁶ And the OFCCP rejected the but-for causation standard in 2015, adopting instead the motivating-factor test that is consistent with Title VII and the Civil Rights Act of 1991.⁴⁷

OFCCP also falsely claims it must adopt the “but-for” standard because it eliminates the need to “evaluate the nature of a sincerely held religious belief” and it purportedly is improper for OFCCP to make such an evaluation. For decades, however, the courts have resolved claims of employment discrimination by religious organizations without running afoul of the limitations OFCCP repeatedly points to now. OFCCP’s concerns about these inquiries are overblown and there is no concern about impermissible entanglement.⁴⁸ Under the NPRM, claims of discrimination would be evaluated differently under Title VII than under EO 11246. This inconsistency is troubling and would create ambiguity in the law for employers and for employees alike, and is contrary to OFCCP policy.

When proposing to make significant policy changes to an existing rule through the rulemaking process, federal agencies are required to provide a reasoned explanation for the change.⁴⁹ The Department has simply failed to provide a reasonable explanation for why it is necessary for the Department to overrule its previous position on this standard, and for the breathtaking changes in scope of the NPRM more generally.

V. The Department Failed to Justify the Need for the NPRM.

The NPRM is a significant departure from the Department’s settled interpretations of Executive Order 11246, and the Equal Employment Opportunity Commission’s parallel interpretations of Title VII of the 1964 Civil Rights Act. Until August 2018, the Department consistently interpreted the Executive Order’s religious exemption narrowly, permitting preferences for coreligionists by certain religious organizations, and offered to provide further guidance to any contractor who needed it. The radical departure OFCCP now proposes from these interpretations is without the justifications required to sustain the NPRM.

First, the Department lacks authority to expand that exemption or grant any new exemption for discrimination on the basis of race, color, national origin, or sex, including sexual orientation or gender

category); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (noting that “We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”).

⁴⁶ See Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (amending Title VII to mandate that an “unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”).

⁴⁷ See 80 FR 54934, 54944-46; see also RIN 1250-AA09 at fn. 10.

⁴⁸ See, e.g., *DeMarco v. Holy Cross High Sch.*, 4 3d 166, 169-70 (2d Cir. 1993); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328-30 (3d Cir. 1993); *Fremont Christian*, 781 F.2d at 1370; *Pac. Press*, 676 F.2d at 1282; *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992).

⁴⁹ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120, (2016).

identity. The Department's reliance on case law unrelated to employment discrimination laws or the text of Executive Order 11246 cannot justify this abrupt change of policy. Nor is the Department's vague statement that it received "feedback" from "some organizations" sufficient to establish any need for this dramatic shift in position. There is no evidence⁵⁰ that organizations that otherwise would have provided competitive bids on federal contracts were unable to obtain contracts based on the Department's settled interpretation of the law.

The Department also fails to provide any justification for the unusually short 30-day comment period. Given that the Proposed Rule represents substantial shifts in the Department's EEO enforcement approach in several respects, the comment period should be a minimum of 60 days long to provide adequate time for comments on the numerous legal issues presented and the diverse harms the proposed rule would cause.

VI. The NPRM Fails to Adequately Assess of the Potential Costs and Benefits of the Rule.

Under the Administrative Procedure Act, agencies must adequately assess all the potential costs and benefits of a proposed rule and adopt an approach that produces the least total burden and most benefit to society.⁵¹

Executive Order 11246 was adopted and has been amended over the years to address serious and continuing problems of employment discrimination. Its purpose and that of OFCCP's enforcement practices is to ensure equal employment opportunity in order to safeguard our nation's values and responsibly steward taxpayer funds.

Allowing and facilitating employment discrimination via this Proposed Rule would lead to extensive costs for workers, their families and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. Workplace discrimination can be costly. A Center for American Progress report estimates that workplace discrimination costs the economy \$64 billion every year.⁵² The study arrived at this estimate by multiplying replacement costs for a worker by the number of workers who leave their job due to discrimination each year. OFCCP completely fails to acknowledge the potential costs the NPRM could generate for employers, the government and taxpayers by promoting increased employment discrimination. And it exaggerates any possible benefits.

The Department has long recognized that employment discrimination wastes taxpayer dollars because it leads to contractors not obtaining the best talent and experiencing unnecessary and costly employee turnover. The Department fails to address how this proposed rule would affect that mission. Yet it is self-evident that the rule would likely encourage contractors and subcontractors to engage in employment

⁵⁰ Frank J. Bewkes and Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, Center for American Progress (Sept. 3, 2019) (focusing on a subset of organizations whose employees publicly argued in favor of a new religious exemption targeting LGBTQ workers, this analysis indicates that among those entities that were federal contractors at the time that EO 13672 went into effect, all but one continued to receive new contracts and at least one allocation under those contracts in the 12 months following the EO), available at <https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/>.

⁵¹ See, e.g., Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993); Exec. Order No. 13563, 75 Fed. Reg. 3821 (2011).

⁵² Crosby Burns, *The Costly Business of Discrimination*, Center for American Progress (March 22, 2012), available at www.americanprogress.org/issues/lgbt/reports/2012/03/22/11234/the-costly-business-of-discrimination/.

discrimination, which carries many potential costs for which the Department fails to account. Economic and non-economic costs to employees would come in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination.

Costs for taxpayers would come in the form of decreased productivity in the performance of federal contractors, because contractors would not obtain the best talent and would experience unnecessary and costly employee turnover. In addition, there would be increased health care costs related to employment discrimination and increased social stigma toward LGBTQ people, women, religious minorities, and other minority workers.⁵³

In addition, there would be intangible costs because employment discrimination using taxpayer dollars reduces equity, fairness, and personal freedom; limits the ability of workers to make deeply personal decisions regarding expression of their gender identity or sexual orientation, relationships and families, or medical treatment; diminishes protection of employees' personal privacy regarding protected characteristics; and abridges the dignity and rights of stigmatized minorities.

The Department also grossly exaggerates proposed benefits of the rule. The NPRM provides less, not more clarity for employers and employees because it departs from the Department's settled interpretations in favor of vague new standards and multi-factor tests that are simply not grounded in the law. But the law remains, and this ambiguity would spark more litigation because it creates uncertainty as contractors mistakenly would believe they can discriminate as a result of the NPRM. There also would be no benefit achieved through an additional number of contractors. As already discussed, the Department presents zero evidence that the agency has lost contracts or would-be contractors as a result of the current religious exemption, and zero evidence that an increased number of competitive bids for federal contracts would result if the Proposed Rule were to be finalized.

Finally, as repeatedly stated in this comment, the Department exceeds its authority by moving from interpreting the law to creating the law in the Proposed Rule. The NPRM not only ignores and supersedes existing case law precedent, it also ignores the fact that Congress has rejected efforts since 2001 to extend the Title VII exemption to government-funded entities numerous times.⁵⁴ In addition, the Constitution bars the government from directly funding or providing aid to private institutions that engage in discrimination.⁵⁵

⁵³ For example, the 2015 U.S. Transgender Survey found that 16% of transgender workers had lost a job because of their transgender status in their lifetime, while 30% of those employed in the past year face mistreatment on the job because they were transgender, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

⁵⁴ Each time it was considered, legislation containing such a provision was either left in the House of Representatives without a vote from the Senate, or left out of the conference committee report. *See, e.g.*, CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://www.congress.gov/bill/107th-congress/house-bill/7>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 1094, available at <https://www.congress.gov/bill/114th-congress/house-bill/4909>.

⁵⁵ *E.g.*, *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); *see also Christian Legal Society v. Martinez*, 561 U.S. 661, 682 (2010).

VII. Conclusion

The Proposed Rule is inconsistent with the governing law and would result in many types of harm – from employees’ lost livelihoods and adverse health impacts to diminished quality of goods and services provided to the public. Those most affected by these harms would be employees who already are vulnerable at work – religious minorities, LGBTQ people, women, people of color, and people living with low incomes – and the beneficiaries of public programs who already are marginalized – again, religious minorities, LGBTQ people, women, people of color, and people experiencing homelessness and poverty. Given the agency’s mandate under the governing statutes and case law, the Proposed Rule is not defensible.

Moreover, this NPRM is just one more in a series of proposed policy changes plainly designed to facilitate discrimination on the basis of religion, specifically including against LGBTQ people. In addition to the many recent examples of state and federal legislation seeking to permit discrimination against LGBTQ people,⁵⁶ there have been nonstop efforts by the Trump Administration to erode or eliminate protections for LGBTQ workers, students, patients, those needing housing and many others under the guise of religious liberty. President Trump’s Executive Order regarding free speech and religious liberty served as a catalyst and justification for many of these efforts.⁵⁷ Following his Executive Order, the Department of Justice responded to its call by issuing a list of religious liberty principles and creating a “Religious Liberty Task Force.”⁵⁸ Perhaps the most aggressive agency actions of this type have come from the Department of Health and Human Services (“HHS”). As with the Department of Labor’s current, misplaced solicitude for employers rather than employees, HHS is attempting to prioritize the religious interests of health care providers over the medical needs of patients. Indeed, HHS recently issued a final rule that grossly expands the ability of health care providers to deny care to LGBTQ people and women based on a purported surge of health-worker conscience violations. The administrative record, however, has revealed that the “surge” justification was shockingly baseless and has been referred to in litigation as “a lie.”⁵⁹

HHS then issued an NPRM withdrawing the sex discrimination protections and creating a religious exemption in the Affordable Care Act’s nondiscrimination regulatory framework, both of which

⁵⁶ See, e.g. Child Welfare Provider Inclusion Act of 2019 (Enzi) (allowing federally funded child welfare agencies to discriminate based on their beliefs), available at <https://www.congress.gov/bill/116th-congress/senate-bill/274/text?q=%7B%22search%22%3A%5B%22senator+lee+religious%22%5D%7D&r=2&s=3>; First Amendment Defense Act (Lee) (protecting individuals and institutions from punitive action by the government for discriminating against same-sex couples), available at <https://www.congress.gov/bill/115th-congress/senatebill/2525?q=%7B%22search%22%3A%5B%22first+amendment+defense+act%22%2C%22%5C%22First+amendment+defense+act%5C%22%22%5D%7D&s=4&r=1>.

⁵⁷ 82 FR 21675 (May, 9, 2017).

⁵⁸ Office of the Attorney General, Memorandum for all Executive Department and Agencies, *Principles of Religious Liberty* (Oct. 6, 2017), available at <https://www.justice.gov/opa/press-release/file/1001891/download>.

⁵⁹ <https://www.federalregister.gov/documents/2018/01/26/2018-01226/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>; See Memorandum of Law in Support of Plaintiff’s Cross-Motion for Summary Judgement, *State of New York v. HHS* (Sept. 5, 2019) (explaining that, “As the administrative record has revealed, the justification for the Rule was a lie. HHS claimed it was acting due to a surge of complaints of conscience violations, yet the record shows—and the agency’s counsel now all but admits—that these claims were false.”).



unavoidably would facilitate significant harm to LGBTQ patients.⁶⁰ The current OFCCP NPRM continues this sustained administrative assault on LGBTQ people. And, like the new HHS rules, this Proposed Rule seeks to solve a problem that does not exist while promising diverse, substantial and unjustifiable harms.

For all the reasons stated above, we urge the Department not to finalize the NPRM and instead immediately to withdraw it.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Sasha Buchert at sbuchert@lambdalegal.org if further information would be of assistance.

Most respectfully,

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⁶⁰ Centers for Medicare and Medicaid Services, Office for Civil Rights, Office of the Secretary, HHS, *Nondiscrimination in Health and Health Education Programs or Activities* (June 14, 2019), available at <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.