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Submitted via www.regulations.gov

December 9, 2021

Tina Williams

Director, Division of Policy and Program Development

Office of Federal Contract Compliance Programs

Department of Labor

Room C-3325

200 Constitution Avenue, NW

Washington, DC 20210

Re: Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, RIN 1250-AA09

Dear Ms. Williams,

On behalf of ADL (the Anti-Defamation League), we are writing to submit the following comment in support of the proposed rule, "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register on November 9, 2021. The proposed rule would rescind the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which took effect on January 8, 2021.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Rooted in a community that has experienced millennia of religious persecution, ADL has been an ardent advocate for religious freedom for all Americans for more than a century – whether they hold majority or minority religious beliefs. Among our core principles is strict adherence to the separation of church and state effectuated through both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in the United States and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when: all individuals are able to practice their faith or choose not to observe any faith; government neutrally accommodates religion but does not favor any particular religion; and religious belief is

not used by government or other actors in the public marketplace to harm or infringe on the rights of individuals.

The Current Rule Is Fundamentally Unlawful, Unfair, and Unconstitutional

The current rule, implemented on December 9, 2020 by the previous administration, purportedly paralleling Title VII's Section 702 religious employer exemption, vastly expanded the scope of the religious exemption for federal contractors. It is far broader than the Section 702 exemption, effectively making any federal contractor eligible to discriminate in hiring and firing on the basis of religion. This leaves countless workers in taxpayer-funded roles vulnerable to discrimination in the name of religion, with religious minorities, LGBTQ+ people, women, and the nonreligious at the greatest risk of facing employment discrimination.

The current rule's definition of religious corporation, association, education institution or society is unsupported in law

The current rule added four definitions to the federal contractor exemption. *See* 41 CFR § 60-1.5. It amended 41 CFR § 60-1.3 by adding definitions of: (1) "Particular religion"; (2) "Religion"; (3) "Religious corporation, association, educational institution, or society"; and (4) "Sincere." The third definition results in an overly broad religious exemption far beyond the scope and purpose of Title VII's. This definition is also incorporated by reference into the definition of "Particular religion."

To fall within the third definition, a contractor must have a sincere religious belief and must be an entity that: (1) is organized for "a religious purpose"; (2) "holds itself out to the public as carrying out a religious purpose"; (3) "engages in activity consistent with, and in furtherance of, that religious purpose"; and (4) "operates on a not-for-profit basis" or "presents other strong evidence that its purpose is substantially religious." (emphasis added).

The current rule's standard for determining whether a religious corporation, association, educational institution, or society falls within the exemption heavily relies on the *per curiam* decision in *Spencer v. World Vision, Inc.*, which set forth a new Ninth Circuit standard for the Title VII religious employer exemption. *See* 633 F.3d 723 (9th Cir. 2011).¹ Yet the rule drastically modifies the test to the point of being unrecognizable and vastly more broad. As the Notice of Proposed Rulemaking (NPRM) explains, "No court has ever applied a standard under which a for-profit employer whose purpose and character are not primarily religious could be eligible for the Title VII religious exemption."² Despite the prior administration's claims to the

¹ "[A]n entity is eligible for the [Title VII] section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." 633 F.3d at 724.

² Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 62,115, 62,119 (November 9, 2021).

contrary, the current rule does not reflect either the *per curiam* test or the Judge O’Scannlain concurrence in *Spencer v. World Vision*. Rather, it mixes and matches provisions from each opinion, modifies some provisions, and eliminates others. In short, the rule created a new test that has never before been applied by any court.

Indeed, the NPRM for the current rule eliminated the *Spencer v. World Vision per curiam* test factor that an employer “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts” and rejected the O’Scannlain concurrence requirement that “the initial consideration, whether the entity is a nonprofit, is especially significant.” 633 F.3d at 734.

Notably, Judge Kleinfeld’s concurrence states:

*Accordingly, I would reformulate Judge O'Scannlain's test as this: To determine whether an entity is a "religious corporation, association, or society," determine whether it is organized for a religious purpose, **is engaged primarily in carrying out that religious purpose**, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.* (emphasis added). *Id.* at 748.

Similarly, the standard set forth by Judge Berzon would require a finding of “whether an organization is ‘primarily religious.’” *Id.* at 752. Thus, a majority of the Ninth Circuit would have found that for an employer to be covered by the Title VII exemption, there must be a determination that the employer is primarily religious. Additionally, in 2007 the U.S. Court of Appeals for the Third Circuit ruled that there must be a finding of an organization’s being primarily religious to fall within the Title VII exemption. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 229 (3rd Cir. 2007). However, the current rule explicitly rejects this criterion, creating instead a lowered standard in the form of the “strong evidence” alternative: in a test devised to determine whether an entity is primarily religious, the current rule allows a for-profit entity to meet the test with “other evidence” that it is “substantially religious.” 41 CFR § 60-1.3.

Judge O’Scannlain’s concurrence in *World Vision* found that an entity’s being non-profit “is especially significant” in determining whether the Title VII exemption applies because it is a neutral factor bolstering a claim that the employer’s purpose is “non-pecuniary.” 633 F.3d at 734. While Judge Kleinfeld agreed that considering non-profit status “would facilitate free exercise of religion,” he expressed a concern that relying on it “would also allow people to advance discriminatory objectives outside the context of religious exercise by means of mere corporate paperwork.” *Id.* at 742. According to his concurrence, a focus on non-profit corporate status is incorrect because there are some religious assemblies without corporate status, and “[a]bsence of corporate papers” should not defeat the purpose of the exemption. *Id.* at 745.

Emphasizing this factor “would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment.” *Id.* To Judge Kleinfeld, charitable motive should be the focus. He distinguished between a religious motive and a monetary motive for work that serves others. *Id.* at 747. For example, he drew a distinction between a religious hospital that receives money for valuable services at the market rate and the Salvation Army which gives away or provides services at a nominal rate. *Id.* at 746-47. As a result, the factor which Judge Kleinfeld adopted was providing services at no-cost or for a nominal fee. *Id.* at 748. The current rule rejects both factors.

In response to public comments decrying the removal of this prong in the NPRM for the current rule, including from ADL,³ the final rule added the non-profit factor, but then fully undermined the requirement by making the prong optional. The final rule states that the entity must “operate[] on a not-for-profit basis; **or** present[] other strong evidence that its purpose is substantially religious.” (emphasis added). In short, there is still no actual requirement that a contractor be a nonprofit organization in order to qualify as a “religious corporation.”

The current rule erroneously pointed to the Supreme Court *Burwell v. Hobby Lobby Stores, Inc.* decision to justify dropping the non-profit prong of the test. However, the context of that case was entirely different from that which is contemplated here.⁴ *Hobby Lobby* involved a challenge to the Affordable Care Act’s contraception mandate under the federal Religious Freedom Restoration Act (RFRA), which is distinct and operates far differently than the Title VII exemption. Significantly, the Supreme Court held only that RFRA could apply to for-profit closely held corporations. *See* 573 U.S. at 683. Moreover, in the context of government health insurance mandates, the Court also held that the protections of RFRA may not apply to closely held, for-profit corporations in all circumstances. *Id.* at 730. Yet, as discussed *supra*, the current rule’s exemption could apply to virtually any for-profit private or public corporation.

Critically, the Court in *Hobby Lobby* explicitly distinguished the challenge to the contraception mandate from “discrimination in hiring, *for example* on the basis of race, [being] cloaked as religious practice to escape legal sanction.” *Id.* at 733 (emphasis added). According to the Court: “The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Id.* The decision’s use of the phrase “for example” does not limit this *dicta* to employment discrimination based on race. Moreover, in the context of employment discrimination, the Court indicated that even a for-profit closely held corporation could not invoke RFRA’s free exercise protections.

³ ADL comments submitted to the Department of Labor, Office of Federal Contract Compliance Programs against proposed expansion of religious exemptions in federal contracting, <https://www.adl.org/media/13526/download>, Sept. 16, 2019 (last visited Dec. 6, 2021).

⁴ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 85 Fed. Reg. 79,324, 79,324 (Dec. 9, 2020).

Furthermore, cases addressing the Title VII religious exemption decided since *Hobby Lobby* have continued to apply the requirement that a religious corporation be a non-profit entity or, at minimum, have a charitable motive. For example, in *Garcia v. Salvation Army*, the 9th Circuit rejected the plaintiff's argument that the Salvation Army does not qualify for Title VII's religious organization exemption because it does not satisfy the fourth factor of *World Vision*'s test. 918 F.3d 997, 1004 (9th Cir. 2019). The court specifically applied Judge O'Scannlain's approach and found that the Salvation Army easily meets the fourth prong of the test because it is a non-profit organization. It also considered Judge Kleinfeld's approach of considering whether the organization has a charitable motive, but concluded that the Salvation Army would also meet that standard given that he specifically cited it as an example.

The changes made by the current rule to the definition of religious corporation, association, education institution or society are dissonant from the law, do not meaningfully address the concerns raised during the rulemaking process, and continue to leave the door open for effectively unchecked workplace discrimination amongst government contractors.

The current rule sanctions discrimination under the guise of religious freedom

Title VII's Section 702 exemption was never intended to provide the basis for government-funded discrimination. Rather, it was enacted to prevent entanglement between government and religious institutions. In 1987, the U.S. Supreme Court upheld the right of religious organizations under Section 702 to discriminate on the basis of religion in hiring staff with their own funds because doing so is intrinsic to their ability to define and carry out their religious mission. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The exemption most certainly was not intended to encompass secular or for-profit employers. Yet, as discussed *supra*, the current rule's overly broad exemption does exactly that. Assessing the scope of a far narrower construction of the Title VII exemption, Judge Kleinfeld's concurrence in *World Vision* warned that an overbroad interpretation "would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." 633 F.3d at 745. The same warning must also apply to for-profit employers. And the Judge's admonition was made in the context of private employment. Given that in *Hobby Lobby* the Court found that anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace, it is axiomatic that for publicly-funded employment that interest is amplified. Thus, applying the Title VII exemption in the public employment context undermines the statute's goal and its anti-discrimination prohibitions.

Certainly, the current rule's exemption also encompasses actual houses of worship and religious institutions. ADL supports the right of a church, synagogue, mosque, or other religious organization to use its own private funds to hire only co-religionists for positions that advance its

religious mission. However, religious discrimination in hiring for government-funded programs is a wholly different circumstance. No one should be barred from a taxpayer-funded job based on their faith, lack of faith, sexual orientation, gender identity, or other protected status. Such discrimination violates the American ideals of equality and meritocracy.

The current rule is unconstitutional

The current rule raises significant constitutional concerns. First, this rule constitutes government support for particular religious missions in violation of the Establishment Clause to the First Amendment. *See* U.S. Const. amend. I. Second, it runs afoul of the “no-religious-tests clause” of the U.S. Constitution. *See* U.S. Const., art. VI, cl. 3 (“no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

The Establishment Clause’s requirements are straightforward: “an accommodation must be measured so that it does not override other significant interests”⁵ or “impose unjustified burdens on other[s].”⁶ The government may not grant exemptions that have a harmful, discriminatory impact on others.⁷ The current rule creates a regime that allows just that.

Notwithstanding that an Establishment Clause violation would preempt an application of RFRA, the current rule’s reliance on that statute is misplaced. Citing the U.S. Supreme Court decisions in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Cemetery Protective Ass’n*, 485 U.S. 439 (1988), the Senate Committee Report on RFRA stated: “pre-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government’s own property or resources.” *See* S. REP. 103-111, 1892, 1998 (1993). Moreover, in construing the scope of internal government affairs, the U.S. Supreme Court found in 2011 that “the Government’s interest in as ‘proprietor’ in managing its operations does not turn on” the formality of whether an individual is a civil servant or a contract employee. *NASA v. Nelson*, 562 U.S. 134, 150 (2011) (internal citations omitted). Even if strict scrutiny did apply, the interest in public workplace equality achieved through anti-discrimination prohibitions would meet that standard.

⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interests” violates Constitution).

⁶ *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

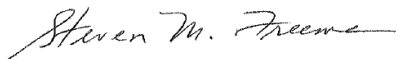
⁷ *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (the religious accommodation would have “precisely zero” impact on third parties); *see also Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (accommodation “would not detrimentally affect others”).

ADL Supports The Proposed Rule

The current rule broadly allows federal contractors to use the guise of religious belief to harm or infringe on the rights of individuals, in violation of both federal law and case law. The proposed rule would rightfully rescind the current rule. This rescission would result in a return to the prior narrower approach, which would ensure that substantially more federal-contractor employees are protected from discrimination in the workplace. ADL urges the Department of Labor to adopt the proposed rule.

Please do not hesitate to contact us with questions or for further information.

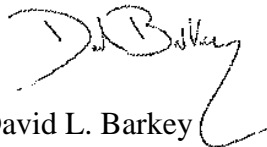
Sincerely,



Steven M. Freeman
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Karen Levit
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Chelsea Parsons
Director of Government Relations, Civil Rights