September 16, 2019

Harvey D. Fort
Acting Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room C-3325,
200 Constitution Avenue NW
Washington, DC 20210

Re: Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption
RIN 1250-AA09

Dear Mr. Fort:

On behalf of the American Association for Access, Equity and Diversity (AAAED), herewith are our comments regarding the Notice of Proposed Rulemaking published by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) on August 15, 2019.

I. INTRODUCTION

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED is the longest-serving national not-for-profit association of professionals and institutions dedicated to the promotion of equal opportunity, compliance and diversity. AAAED has nearly forty-six years of leadership in providing professional training to members, enabling them to be more successful and productive in their careers. It also promotes understanding and advocacy of affirmative action and other equal opportunity laws to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. Nearly one-half of the association’s members work for public and private institutions of higher education, including community colleges as well as research institutions. Among our members are vice chancellors, equal opportunity professionals, chief diversity officers, equity and inclusion practitioners, labor and employment lawyers, and consultants. Also among our membership is a former Deputy Assistant Secretary for Federal Contract Compliance, OFCCP. AAAA was founded by affirmative action professionals working for colleges and universities.

AAAED’s Professional Development and Training Institute, established in 1991, provides training in Developing and Implementing an Affirmative Action Program and offers webinars on the subject. It also confers credentials entitled the Certified Affirmative Action Professional and Sr. Certified Affirmative Action and Equal Opportunity Professional. At the association’s National Conference and Annual Meeting, AAAED also provides certificate training on matters related to Executive Order 11246 as well as other laws enforced by the OFCCP. Lastly, in recent years, the association’s board of directors has met...
with the leadership of OFCCP during its annual meeting in Washington, DC and appreciates the time that the agency has taken to share its views regarding the enforcement of laws and policies under the OFCCP’s jurisdiction.

As the name of our association implies, we are committed to working in an environment that promotes equal employment opportunity. Moreover, as stewards of our institutions, we are committed to achieving compliance with both the letter of Executive Order 11246 and the spirit of the law, which is to eliminate discrimination and promote equal opportunity in the workplaces of establishments receiving federal contracts.

II. GENERAL OBSERVATIONS

We appreciate the Department’s efforts to engage in the notice and comment process and we further appreciate the opportunity to comment. We also wish to commend the Department for the considerable amount of work that was done for these proposed regulations. However, while we understand the importance of clarity and instituting a process that will ensure fairness for both religious institutions seeking federal contracts as well as others, and while we acknowledge the Department’s efforts to ensure religious freedom, we submit that any benefits incurred by these regulations will be effectively offset by the potential chilling effect and discrimination caused by many of its proposed policy changes including fundamentally extending the reach of the religious freedom exemption beyond that demanded by the case law and by the Executive Order itself. We also fail to understand why the Department chose to limit the time for comments to only thirty days when the normal comment period is sixty days. The issues raised in the proposed regulations are too ponderous and controversial to truncate the comment period to thirty days.

One can only conclude, from a careful review of these proposed regulations, that in its effort to balance the rights of potential contractors seeking exemptions from coverage for religious reasons against the rights embodied in Executive Order 11246, i.e., freedom from discrimination on the basis of race, religion, sex, national origin, sexual orientation or gender identity, the Department has gone to an unacceptable extreme, thus vitiating the fundamental reasons for the existence of Order 11246.

If promulgated, these regulations could leave the intended beneficiaries without protection and the vaunted separation of church and state could be breached. As a result, we could lose the substantial progress our institutions and members have worked diligently to achieve in the past four decades. We therefore recommend that the Department maintain its originally settled approach to Executive Order 11246 and its religious exemption and not finalize the Proposed Rule.

III. ORDER 11246 AND ITS MISSION: NONDISCRIMINATION AND EQUAL OPPORTUNITY

The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended\(^1\), Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.

\(^1\) Executive Order 11246, As Amended, [https://www.dol.gov/ofccp/regs/statutes/EO11246.htm](https://www.dol.gov/ofccp/regs/statutes/EO11246.htm)
Contractors and subcontractors are required to take affirmative action to promote equal employment opportunity. The underlying philosophy of these civil rights-era laws is that federal funds should not be used to support discrimination; they should be used to promote equal employment opportunity.

Equal employment opportunity as a policy and law has been observed and respected by both Democratic and Republican presidents since 1941. For more than 70 years, the federal government has made an enduring commitment to eradicating employment discrimination by federal contractors. In 1941, 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.

In 1961, President John F. Kennedy's Executive Order (E.O.) 10925 used affirmative action for the first time by instructing federal contractors to take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin." He also created the Committee on Equal Employment Opportunity. In 1964, the Civil Rights Act was signed into law. This was landmark legislation prohibiting employment discrimination by large employers (over 15 employees), whether or not they have government contracts. In that year the Equal Employment Opportunity Commission (EEOC) was also established.

In 1965 President Lyndon B. Johnson issued E.O. 11246, requiring all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities. He also established the Office of Federal Contract Compliance (OFCC) in the Department of Labor to administer the order. In 1967 President Johnson amended E.O. 11246 to include affirmative action for women. Federal contractors were now required to make good-faith efforts to expand employment opportunities for women and minorities. In 2014, President Obama amended Order 11246 by signing Executive Order 13672 of July 21, 2014, by adding "sexual orientation" and “gender identity” to the list of protected groups.

On the AAAED website, we recount the history of affirmative action thusly:

In its Final Report to President Eisenhower, the President’s Committee on Government Contracts, headed by Vice President Richard Nixon, concluded:

Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color, or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.²

President Kennedy incorporated the concept of “affirmative action” into Executive Order 10925, which he issued in 1961. Executive Order 10925 imposed on all covered contractors a general obligation requiring positive steps designed to overcome obstacles to equal employment opportunity.

In 1965, President Lyndon Baines Johnson signed Executive Order 11246, which gave the Secretary of Labor responsibility for administration and enforcement of the Order mandating

² AAAED Website, “About Affirmative Action, Diversity and Inclusion,”
https://www.aaaed.org/aaaed/About_Affirmative_Action__Diversity_and_Inclusion.asp

³ AAAED Comments on OFCCP Proposed Rulemaking re Religious Exemption 9.16.19
that contractors not discriminate against any employees or qualified applicants because of race, color, religion, sex or national origin. Contractors were to take affirmative action to ensure nondiscrimination in employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

Before signing the order in September 1965, President Johnson uttered the words that continue to resonate today during his speech at Howard University’s Commencement, June 4, 1965: “Freedom is not enough. ... You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You are free to compete with all the others,’ and still justly believe that you have been completely fair.”

These words continue to ring true in 2019. While there has been much progress in the workplace for women, persons of color, individuals with disabilities, members of the LGBTQ community and others, full equality continues to be a distant dream. Moreover, incidents of hate against religious minorities and members of the LGBTQ community as well as others who have been historic victims of discrimination have increased in recent years. For that reason, Executive Order 11246 is needed more than ever, intact and with full force on behalf of its intended beneficiaries.

IV. THE FOLLOWING CONSTITUTE OUR PRIMARY CONCERNS REGARDING THE PROPOSED REGULATIONS:

A. The Federal Government should not be in the business of funding employment discrimination. To do so would contravene the purposes for which Executive Order 11246 was established. Competing for a federal contract is a privilege, not a right. Moreover, the Order was drafted to protect those who have been the historic victims of discrimination and to promote equal employment opportunity. 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 because they cannot meet a pre-defined religious requirement. Being able to do the job should be the only criterion for hiring or promoting an individual, not his or her religious practice. Until 2002, there has been a very limited exemption to this policy for religious institutions.

In 2002, President Bush arguably expanded the reach of the religious exemption by amending Order 11246 thusly:

(c) Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.  

3 Ibid.
In our view, President George W. Bush’s amendment was misguided. The Trump Administration should remove the exemption, not expand it. The addition of this language in 2002 was, and continues to be, highly controversial because it greatly extended the Title VII exemption to entities that receive federal funds and have chosen to do business with the federal government.

In a letter sent to President Obama, 98 religious and civil rights organizations urged the president to rescind President Bush’s religious exemption:

> Religious freedom is one of our most cherished values, a fundamental and defining feature of our national character. It guarantees us the freedom to hold any belief we choose and the right to act on our religious beliefs within certain limits. It does not, however, provide organizations the right to discriminate using taxpayer dollars. When a religiously affiliated organization makes the decision to request a taxpayer-funded contract with the federal government, it must play by the same rules as every other federal contractor.

> Indeed, taxpayer-funded discrimination, in any guise, is antithetical to basic American values. Polls consistently show that Americans overwhelmingly understand and agree that when tax dollars are in play, discrimination is wrong. If an organization requests and receives government funding, it should not be allowed to discriminate against qualified job applicants based on who they are or what their religious beliefs may be. Yet, exempting religiously affiliated organizations that contract with the federal government from prohibitions on discrimination by federal contractors would do just that.\(^6\)

The regulations proposed by the Department today would exacerbate the exemption signed by President Bush in 2002. The justification for the Title VII exemption— to maintain the autonomy of religious organizations and independence from the government— disappears when the organizations solicit and accept government contracts, especially because the contracts necessarily involve extensive compliance with contract and other requirements. One cannot maintain autonomy from government entanglement by engaging in the myriad rules that being a government contractor entails. Most importantly, the rule of nondiscrimination in the use of taxpayer dollars is undergirded by a longstanding policy that is based on the concept of Equal Protection of the Laws.

The Constitution bars the government from directly funding or providing aid to private institutions that engage in discrimination.\(^7\) Moreover, the proposed rule ignores the fact that Congress has repeatedly rejected efforts to extend the Title VII exemption to government-funded entities.\(^8\)

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B. The Proposed Rule Violates the Establishment Clause. Religious freedom is a fundamental American value. It guarantees us the right to believe—or not—as we see fit, but it cannot be used to harm or discriminate against others. The Establishment Clause forbids religious exemptions that burden or harm third parties.\(^9\) When crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries and ensure it is “measured so that it does not override other significant interests.”\(^10\)

The proposed rule vastly expands the current exemption in EO 11246 for religious entities receiving government contracts to discriminate without considering the harms to employees affected by the exemption. For example, expanding the exemption to authorize for-profit government contractors to discriminate against their employees could harm employees who are LGBTQ, pregnant and unmarried, married to individuals of other races, or are religious minorities.

C. The Definitions Crafted by DOL regarding Religious Corporation, Association, Education Institution or Society are Unsupported in Law. While the proposed rule is correct that the term “religious corporation, association, educational institution or society,” as used in Executive Order 11246, is commonly understood to have the same meaning as that in the Title VII exemption, the proposed rule’s definition, however, does not reflect the Title VII definition.

With the goal of expanding the definition, the Department manipulates Title VII case law to create an entirely new and expansive test that it will use to determine if an entity is “religious.” The proposed rule claims to adopt the *Spencer v. World Vision* test for determining whether an entity qualifies for the religious exemption. In order to meet its goal of expanding the rule, however, OFCCP drastically modifies the test until it is unrecognizable.

- *The proposed rule drops the requirement from the World Vision per curiam decision that an entity “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”* Instead, the proposed rule explicitly permits for-profit organizations to qualify for the exemption. The Department is unable to point to one single case where a court extended the Title VII exemption to a for-profit entity.

- *The Department relies heavily on the Supreme Court’s decision in Burwell v. Hobby Lobby Stores, Inc. to justify dropping this prong.* In doing so, the OFCCP ignores several key pieces of the *Hobby Lobby* decision. 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 the Religious Freedom Restoration Act (RFRA), despite the significant harm to others. In *Hobby Lobby*, a bare majority of the U.S. Supreme Court 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 contraceptive coverage requirement for those employers. The Court’s decision in *Hobby Lobby* was restricted to “closely held corporations, each owned and controlled by

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members of a single family.” The Department, however, does not limit its proposed rule in the same way. Instead it simply says it “does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition.” Moreover, cases decided post- *Hobby Lobby* have continued to apply the requirement that a religious corporation, at a minimum, be a nonprofit entity.  

- **The Proposed Rule Eliminates the Requirement that the “Entity Must Be Engaged Primarily in Carrying out that Religious Purpose.”** The proposed rule also drops the requirement from the test in the *World Vision per curiam* decision that an entity be “engaged primarily in carrying out” the religious purpose for which it was organized.  

- **The Proposed Rule Keeps the Prong that an Entity Must Be “Organized for a Religious Purpose” but Renders it a Nullity.** 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 proposed rule, an entity 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.

**D. The Proposed Rule Makes It Harder for Employees to Challenge Discrimination Where Religion Is Used as a Pretext.** When evaluating whether a claim of discrimination is based in religion or is based on a protected basis other than religion, the proposed rule would “apply a but-for standard of causation” rather than the “motivating factor” standard. The “but-for” standard is more deferential to employers and would impose a higher burden on employees to prove improper discrimination. Congress explicitly adopted the “motivating factor” test in 1991. Moreover, 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.  

- 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).  

- 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 win under the “but-for” standard.  

**E. The Department’s Reliance on the cited Supreme Court Cases is erroneous.** The OFCCP’s Directive 2018-03 and proposed rule cite three recent Supreme Court cases to justify its

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11 See Garcia v. Salvation Army, 918 F. 3d 997, 1004 (9th Cir. 2019).
12 See also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, 503 F.3d 217, 226 (3d Cir. 2007) (explaining that its nine-factor test is designed to answer the question of whether the entity’s “purpose and character are primarily religious.”).
13 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”).

7 AAAED Comments on OFCCP Proposed Rulemaking re Religious Exemption 9.16.19

- We would argue that the most relevant of the three cases is the *Hobby Lobby* case that makes clear the religious exemption to the nondiscrimination protections under Title VII and presumably Executive Order 11246 can apply to for-profit corporations under the right, albeit limited circumstances and that for-profit status is not an absolute bar to granting an exemption citing religious freedom.

- The decision in the *Masterpiece Cakeshop* case was arguably very narrow and did not expressly grant the right of the bakeshop owner to discriminate on the basis of sexual orientation under the civil rights laws. In that case the Court upbraided the Colorado Civil Rights Commission for its hostility to the sincerely held religious beliefs of the baker and emphasized the importance of neutrality by the Commission.\(^{14}\)

- In *Trinity Lutheran Church*, the Supreme Court held that a church may not be denied an otherwise generally available public benefit like a government grant because of its religious status under the First Amendment. One could interpret this holding as allowing religious affiliated institutions to compete for and receive federal contracts. It would not be reasonable however, to conclude that these institutions could ignore the antidiscrimination laws altogether.\(^{15}\)

**F. The Department should delay the promulgation of any religious exemption rule until the Supreme Court decides the three cases before it this term.** Two cases before the Supreme Court in the next term - *Bostock v. Clayton County, Ga.*, and *Altitude Express Inc. v. Zarda* are more relevant to the question of whether sexual orientation is covered under Title VII and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* will address the question of the coverage of gender identity under Title VII. EEOC has reportedly chosen to take the position of inclusion, while the Department of Justice takes the opposing view. Reportedly, EEOC has not signed on to the Department of Justice brief before the Supreme Court.


**G. The promulgation of the Department’s proposed rule may cause significant harm to individuals protected by Order 11246.**

- *LGBTQ Community.* Despite the clear language of the Order as amended to protect against discrimination on the basis of sexual orientation and gender identity, this rule could allow “religious” contractors to bar the hiring of individuals who are gay, lesbian or transgender or who have, for example, same sex partners. So, to allow a contractor to cite religious beliefs in order to exclude an applicant based on his or her marriage to a same-sex partner squarely contradicts the order itself.
  - *Executive orders 13087* and *13672* explicitly prohibit discrimination against LGBTQ people in federal contracting. Additionally, numerous federal lawsuits have sided with the EEOC interpretation that gender identity is protected


under sex discrimination in the 1964 Civil Rights Act. However, the proposed regulations may make these points moot.16

- **Women.** While Title VII and Order 11246 prohibit discrimination on the basis of pregnancy, being an unmarried pregnant woman or a woman who takes birth control or who lives in an unmarried relationship may be excludable given the breadth of the Department’s interpretation of the government’s deference to religious exercise.
  
  o In addition, pregnancy related medical implications are protected under the Americans with Disabilities Act and the subsequent Amendments in 2008.17 However, under the current directive, women who are pregnant or who have recently become mothers may face losing their jobs due to religious exemptions.

- **Racial Minorities.** Discrimination on the basis of race, notwithstanding the deference to religious freedom, may be the most difficult to justify given the fundamental purpose of Executive Order 11246 and related civil rights laws. That said, it is possible that if the Department chooses to give total deference to religious freedom, the First Amendment may be viewed by DOL as trumping the Thirteenth, Fourteenth and Fifteenth Amendments and related civil rights statutes. The NAACP Legal Defense Fund reminds us in its brief in the *Masterpiece Cake Shop* case that the landmark decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) established the fact that nondiscrimination on the basis of race in public accommodations was prohibited under Title II of the Civil Rights Act of 1964. See the LDF brief at [https://www.naacpldf.org/files/about-us/16-111%20bsac%20NAACP%20Legal%20Defense%20%26%20Educational%20Fund%2C%20Inc..pdf](https://www.naacpldf.org/files/about-us/16-111%20bsac%20NAACP%20Legal%20Defense%20%26%20Educational%20Fund%2C%20Inc..pdf). In that case, Maurice Bessinger, the owner of the restaurant “Piggie Park,” held the belief that serving Black customers or contributing to racial mixing in any way “contravene[d] the will of God.” This brief recites the long history of the use of religion as a basis for race discrimination in the United States. While unlikely that DOL will permit a contractor to discriminate on the basis of race in direct contravention of the purposes of Executive Order 11246, it is possible that such an occurrence may happen. One would think that race discrimination in public accommodations was a distant practice but a recent news report shows how there are some who continue to share Mr. Bessinger’s beliefs about “race mixing.” A mixed-race couple was recently denied the use of a hall for a wedding due to the owner’s “Christian belief.” [http://www.deepsouthvoice.com/index.php/2019/09/01/no-mixed-or-gay-couples-mississippi-wedding-venue-manager-says-on-video/](http://www.deepsouthvoice.com/index.php/2019/09/01/no-mixed-or-gay-couples-mississippi-wedding-venue-manager-says-on-video/) After the story went viral, the owner reportedly recanted her belief that the Bible supported her views.

- **Religious Minorities.** Providing broad exemptions in the name of religious freedom may impair the exercise of religion of others, including employees working for entities receiving such exemptions. For example, the majority of LGBTQ Americans are people 16 See the National Center for Transgender Equality’s Federal Law Guidelines: [https://transequality.org/know-your-rights/employment-federal](https://transequality.org/know-your-rights/employment-federal)
of faith. Moreover, exemptions involving the hiring or inclusion of religious minorities in federal programs have already caused harm. For example:

- An Iraqi refugee, who served as an interpreter in Iraq for the U.S. government, volunteered with a religiously affiliated organization in Seattle for six months to help resettle fellow Iraqi refugees. A manager encouraged him to apply for a permanent job with the organization, which gets taxpayer funding to run several programs, as an Arabic-speaking caseworker. He was soon told, however, that he could not be hired because he was not Christian.18
- A taxpayer-funded child welfare agency asked job applicants to identify their religion and church membership. When a Jewish applicant indicated he is Jewish and wrote down his synagogue, the person conducting his job interview told him, “We don’t hire people of your faith.”19

V. Conclusion

We who have worked as champions of equal opportunity understand the importance of the Constitution, including the First Amendment. We also understand the importance of the Thirteenth, Fourteenth and Fifteenth Amendments and the time-tested nondiscrimination policies underlying Executive Order 11246. As President Johnson reminds us, “We seek equality as a right and equality as a result.”20 It is not the time to upend the goals of this Order on the altar of presumed religious freedom nor should the federal taxpayer’s funds be used to promote or underwrite discrimination.

While there are few data to date given the paucity of OFCCP compliance review and complaint information, we are concerned that a deleterious outcome is possible if the proposed rule is interpreted liberally and supersedes the nondiscrimination provisions of Executive Order 11246 and other laws enforced by OFCCP. First, given the litigation that has led to the OFCCP’s proposed rule, the most vulnerable population affected by the enforcement of this policy will be the LGBTQ community. The EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., case, while not an OFCCP matter, is an excellent example of how the rule, if final, may be invoked to justify the termination of a transgender employee. Since OFCCP follows the Title VII case law when interpreting Executive Order 11246, the outcome of this case, currently before the Supreme Court, will be instructive. Unlike Title VII, however, the Executive Order, as amended in 2014, specifically covers discrimination on the basis of sexual orientation and gender identity. There is no question about its coverage of the LGBTQ community. So, to provide an exemption in the name of religious freedom will literally overrule one of the explicit nondiscrimination requirements of Executive Order 11246.

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19 Prepared Statement of Alan Yorker, Faith-Based Initiatives: Recommendations of the President’s Advisory Council on Faith-Based and Community Partnerships and Other Current Issues; Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 226 (Nov. 18, 2010), available at https://www.govinfo.gov/content/pkg/CHRG-111hhrg62343/html/CHRG-111hhrg62343.htm
20 For a video excerpt of President Johnson’s speech, go to: http://www.bing.com/videos/search?q=johnson+speaks+at+howard+commencement+1965&form=R5VR11#view=detail&mid=6734B34311E9DE6C1DB6734B34311E9DE6C1DB
The LGBTQ community is not alone however. Using the cover of religious beliefs or practices, employers may also seek exceptions to the hiring of applicants of other faiths, national origins, and virtually all bases now covered by the civil rights laws including sex, race, and disability. Moreover, there is reason to be concerned that actions occurring in non-employment areas may well become an issue in the employment context. For example, earlier this year, the Department of Health and Human Services granted to South Carolina an exemption to the nondiscrimination requirements in federally-funded child welfare programs. Families who were not of the religion of the program managers were not allowed to participate in a foster care and adoption program. The basis for the exemption for this flagrantly discriminatory policy was reportedly the Religious Freedom Restoration Act.

The October 6, 2017 policy memorandum issued by the Attorney General on “Federal Law Protections for Religious Liberty” is rife with potential to trammel the civil rights protections enforced by equal employment agencies such as the OFCCP. The final provision of this expansive memorandum specifically covers federal contractors.21

One has to ask why this memorandum was necessary when there already exist provisions for religious freedom in hiring and religious accommodations in both Title VII and Executive Order 11246? If the South Carolina exemption, and the Hobby Lobby and R.G. & G.R Harris Funeral Homes, Inc. cases are instructive, there is enough potential for employment discrimination in the name of religious liberty to extinguish the civil rights protections that minorities and women have enjoyed since the 1960s.

It is axiomatic that this nation was founded on the principle of religious liberty. It is also a fact that the principle of the separation of church and state undergirds the foundation upon which this nation stands. Moreover, religious freedom as a justification for discrimination is a centuries-old rationale used to defend slavery, the denial of women’s suffrage, Jim Crow laws, and segregation. These potential outcomes are shockingly reminiscent of the discrimination that led to the lunch counter demonstrations in the 1960s. Tisa Wenger of the Washington Post wrote:

“In short, religious freedom should not be granted this much power. If a bakery or an adoption agency can deny their services to same-sex couples on religious freedom grounds, then what prevents other businesses and organizations who may sincerely profess Christian white supremacy from refusing to serve African Americans or Jews, as they have done before?”22

Federal agencies responsible for enforcing equal employment laws should not have to defend such laws against professed encroachments based on a religious pretext. As we wrote in response to the Department of Education’s Notice of Proposed Rulemaking on Title IX Sexual Harassment and Assault Regulations, “Taking a sword to a problem that requires at best a pen is not the approach we would endorse.”

We strongly recommend that the Department of Labor withdraw this proposed regulation, restore the original and more narrow religious exemption, and take more time to consider the implications of reversing decades of civil rights enforcement -- which is its primary function, in the name of “religious freedom.”

Respectfully submitted,

Shirley J. Wilcher

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