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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: Comments and Objections to the Proposed Rule "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09/ Docket ID OFCCP-2019-0003, 41 CFR Part 60-1

Dear Mr. Fort:

The Center for Constitutional Rights ("CCR") is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that disproportionately impact lesbian, gay, bisexual, transgender, queer, and intersex communities.

Today we write in our capacity as civil rights leaders to express our grave concern about "*Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*," the proposed rule issued by the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") and published in the Federal Register on August 15, 2019.

The proposed rule as drafted drastically limits the enforcement of Executive Order 11246 ("EO 11246") of Sept. 24, 1965, as amended—an executive order adopted 50 years ago that prohibits employment discrimination on the part of federal contractors "because of race, color, religion, sex, sexual orientation, gender identity, or national origin." EO 11246 Sec. 202.

The proposed rule guts EO 11246's non-discrimination protections by bestowing individuals and entities that claim a religious affiliation a broad right to discriminate against employees and job applicants—stripping twenty percent (20%) of the nation's workforce of legal protections overnight.[1]

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[1] For an explanation of this computation, *see* Frank J. Bewkes & Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, CTR. FOR AM. PROGRESS (Sept. 3, 2019), https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/; Office of Federal Contract Compliance Programs (OFCCP), *Facts on Executive Order 11246*, DEP'T OF LABOR, https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html (last visited Sept. 9, 2019); Lee Badgett et al., *An Executive Order to Prevent Discrimination Against LGBT Workers,* CTR. FOR AM. PROGRESS & THE UCLA SCH. OF LAW WILLIAMS INST. (Feb. 19, 2013), https://williamsinstitute.law.ucla.edu/wp-

The "license to discriminate" contemplated by the proposed rule represents a tremendous dilution of the rights enjoyed by American employees. The proposed rule broadens the type of entities eligible to claim a religious exemption in an unprecedented fashion—extending the scope to encompasses corporations operating ***solely for profit***, that are ***not*** closely held. *Compare Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 717 (2014) (extending religious exemptions under the Religious Freedom Restoration Act ("RFRA") to "closely held corporations, each owned and controlled by members of a single family"). The proposed rule also jeopardizes the ability of millions of Americans to earn a living and provide for themselves and their families by authorizing employers to discriminate against them in the name of religion.

As a legal advocacy organization dedicated to seeking justice for groups that have traditionally faced discrimination and bias—including racial minorities, religious minorities, disabled individuals, and lesbian, gay, bisexual, transgender, and queer ("LGBTQ") persons—CCR has a strong interest in ensuring that American workplaces are accessible to all.

Given the unprecedented impact the proposed rule will have on the American workforce, we respectfully ask that you give due consideration to the comments and objections summarized below.

COMMENTS AND OBJECTIONS

I. The Notice and Comment Period for the Proposed Rule Is Inadequate and Defective

As a preliminary matter, CCR objects to the proposed rule because it denies members of the public a meaningful opportunity to comment. OFCCP admits that the proposed rule is a "significant regulatory action," and it effectuates a sea change to the legal regime applicable to federal contractors—upending decades of past practice.[2] The proposed rule will have an immediate impact on ***nearly half a million employers*** and millions more job applicants and employees, ***by OFCCP's own admission***.[3] The rule will also impose an excess of $20 million dollars in immediate costs.[4] Yet, OFCCP has unjustifiably limited the notice and comment period to a mere thirty days, which is completely inadequate and shortchanges the public from participating in a democratic process.

OFCCP fails to provide any justification for its unusually and unnecessarily truncated comment period, notwithstanding the fact that it deprives the public of a meaningful opportunity to comment. Given the importance of the rule, the notice and comment period for the proposed rule should have run sixty days at a minimum, as is more typical for significant rule changes.

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content/uploads/LGBTExecutiveOrder-Feb-2013.pdf; OFCCP, *Facts on Executive Order 11246*, DEP'T OF LABOR (Jan. 4, 2002), https://web.archive.org/web/20160206204951/http:/www.dol.gov/ofccp/regs/compliance/aa.htm.

[2] "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09/ Docket ID OFCCP-2019-0003, 41 CFR Part 60-1, in 84 Fed. Reg. 41677, 41686 (Aug. 15, 2019) (hereinafter "Proposed Rule").

[3] *Id.* at 41686-87 (acknowledging that 420,000 entities are currently registered as federal contractors).

[4] *Id*. at 41686-87 (calculating the familiarization costs as $20,325,900 in the first year alone).

II. The Proposed Rule Exceeds the Rulemaking Authority of OFCCP and Lacks a Valid Justification

A. The Proposed Rule Lacks a Valid Justification

As a preliminary matter, CCR objects to the proposed rule as arbitrary, capricious, and lacking a valid justification. The proposed rule effectuates a dramatic change to the existing legal regime concerning federal contractors without any showing of necessity.

B. The Proposed Rule Exceeds OFCCP's Rulemaking Authority

CCR also objects to the proposed rule because OFCCP lacks the authority to modify the language of EO 11246 or authorize federal contractors to discriminate against applicants and employees on the basis of protected characteristics such as race, sex, gender identity, religion, sexual orientation, and national origin.

OFCCP cannot justify this sharp change of policy on decisional law for the reasons previously stated. Nor is OFCCP's vague statement that it received "feedback" from "some organizations" sufficient to establish any need for this dramatic shift in position.[5]

III. The Proposed Rule Violates the Establishment Clause of the U.S. Constitution and is Unsupported by Law

A. The Proposed Rule is Constitutionally Infirm Because of its Staggering Breadth

CCR also objects to the proposed rule because it violates the Establishment Clause and the Doctrine of Separation of Church and State due to the breadth of its religious exemption. For well over a century, the Supreme Court has held that religious freedom does not provide an unconditional right to act in accordance with one's beliefs, religious, moral, or otherwise. In *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Antonin Scalia, writing for the Court, summed up this longstanding principle, stating that the Supreme Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79.

CCR is alarmed by the creeping erosion of our fundamental American value of the separation of church and state. If the government enables employers to claim a religious exemption to anti-discrimination protections, it gives the appearance that the federal government supports religious beliefs to the detriment of those who do not share those same beliefs, which runs absolutely contrary to our nation's founding principles, and the role of the OFCCP.

Indeed, religious exemptions that burden or harm third parties implicate the Establishment Clause of the U.S. Constitution under settled law. *See, e.g.*, *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 708-11 (1985) (privileging religious prerogatives over secular concerns violates the Establishment Clause); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v.*

[5] *See generally* Bewkes, *supra* note 1 (discussing the subset of organizations that argued in favor of a new religious exemption targeting LGBTQ workers).

Grumet, 512 U.S. 687, 706 (1994) (stating that "[religious] accommodation is not a principle without limits"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n. 37 (2014) (noting in context of religious freedom exemptions the need to consider "the burdens . . . impose[d] on nonbeneficiaries.") (citations omitted).

It is well-settled that when crafting religious exemptions, 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." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005). The proposed rule unconstitutionally departs from these and other legal standards in myriad respects:

First, the proposed rule devises a new definition of the term "religious corporation, association, educational institution, or society" that greatly expands the number of employers that can engage in employment discrimination with government sanction.

As conceived, the religious exemption extends far beyond organizations and businesses that are traditionally considered to be "religious." Organizations that only nominally carry out a religious purpose would qualify for the religious exemption. And, in an unprecedented move, the proposed rule would even allow for-profit corporations to use the religious exemption.

The definition of religious organization that OFCCP seeks to incorporate is also an unprecedented one, not reflected in Title VII or elsewhere in the law. For instance, although OFCCP claims to adopt the test articulated in *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) for determining whether an entity is religious, it modifies the test beyond recognition.[6] For instance, the proposed rule eliminates the requirement that covered entities be nonprofit organizations "not engage[d] primarily or substantially in the exchange of goods or services for money beyond nominal amounts" and permits for-profit organizations to qualify for the exemption. *Id*.[7] The definition of "particular religion" contained within the rule also sweeps too broad.

Second, the proposed rule also eliminates the requirement found in existing caselaw that covered entities be "engaged primarily in carrying out" the religious purpose for which they were organized. *World Vision*, 633 F.3d at 724; *accord LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*,

[6] For instance, the *per curiam* opinion states that an entity meets the definition if it (1) is organized for a religious purpose, (2) is engaged primarily in carrying out that religious purpose, (3) holds itself out to the public as an entity for carrying out that religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. 633 F.3d at 724. However, the proposed rule rejects important aspects of this test, including a prong that prohibits for-profit entities from qualifying for religious exemptions.

[7] Even Judge O'Scannlain's concurring opinion, which the proposed rule relies upon heavily, states that "the initial consideration, whether the entity is a nonprofit, is especially significant." *World Vision*, 633 F.3d at 734 (O'Scannlain, J., concurring).

503 F.3d 217, 226 (3d Cir. 2007) (before granting an exemption, courts must ascertain whether the entity's "purpose and character are primarily religious.") (citation omitted).[8]

Next, the proposed rule renders the requirement that covered entities operate for purposes of "carrying out [a] religious purpose" practically meaningless. In contrast to the fact-specific inquiry laid out in *World Vision*, 633 F.3d at 738-39, the proposed rule deems entities qualified based on mere self-attestation.[9]

As a result, under this proposed rule, 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 notice to taxpayers, employees, or applicants that the religious exemption may be applied.

Taken together, the proposed rule and its broad definitions effectuate an unprecedented expansion to EO 11246's religious exemption—extending a license to discriminate to all types of entities that receive federal funds and virtually all facets of life.

B. The Proposed Rule Runs Counter to Decisional Law

The expansion of the religious freedom doctrine contemplated by the rule is not dictated or supported by Supreme Court caselaw, as OFCCP ultimately concedes.[10] Although OFCCP relies heavily on the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), to justify its actions, the Supreme Court in *Hobby Lobby* expressly declined to do what OFCCP seeks here: promulgate a rule authorizing for-profit corporations that willingly enter into contracts with the federal government and receive taxpayer funds to discriminate against workers because of who they are.

Rather, in *Hobby Lobby*, a bare majority of the U.S. Supreme Court determined that a small subset of American companies—"closely held corporations, each owned and controlled by members of a single family"—could be considered "persons" entitled to protection under RFRA. *Hobby Lobby*, 573 U.S. at 717.[11] OFCCP, in contrast, does not limit its proposed rule in the same

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[8] The proposed rule replaces this prong with the mere requirement that the entity "engages in exercise of religion consistent with, and in furtherance of, a religious purpose." Proposed Rule at 41691.

[9] Proposed Rule at 41683 (allowing an entity to satisfy the standard if it merely "affirm[s] a religious purpose in response to inquiries from a member of the public or a government entity.").

[10] Proposed Rule at 41679 (admitting that the caselaw cited to justify the proposed rule "are not specific to the federal government's regulation of contractors.").

[11] Notably, RFRA, which *Hobby Lobby* concerns, is an entirely different statutory scheme and its application is centered on the definition of "persons," which in the RFRA context means "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id*. at 707-08 (citations omitted). *Hobby Lobby* also rested, in part, on an analysis of the effect an exemption would have on women who are entitled to seamless access to contraception. Indeed, Justice Kennedy, in a concurring opinion, specifically noted that respecting religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 739 (Kennedy, J., concurring). Yet OFCCP entirely ignores the harms that this expansive religious exemption would have on workers across the country.

way.[12] This runs counter to cases decided post-*Hobby Lobby*, which have continued to apply the requirement that a religious corporation, at a minimum, be a nonprofit entity. *See, e.g.*, *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019).

Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court declined to adopt a blanket rule exempting employers with religious beliefs or affiliations from complying with generally-applicable non-discrimination law. To the contrary, the Court noted:

> [W]hile those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

Id. at 1727.

Likewise, OFCCP's reliance on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and the "ministerial exception" is also misplaced because of its incredibly limited scope, which extends only to ministers. The proposed rule sweeps far more broadly because it seeks to insulate federal contractors from the employment discrimination claims of ministers and non-ministers alike. Indeed, most federal contractors are unlikely to have ministers (i.e. those who preach or teach the faith) on staff, meaning the ministerial exception addressed in *Hosanna-Tabor* "would rarely, if ever, apply."[13]

OFCCP also distorts the extraordinarily narrow holding of *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017) to justify its expansive definition of the phrase "particular religion," while overlooking the fact that it did not pertain to the competitive award of taxpayer funds.[14]

As such, the proposed rule is wholly unsupported by existing law.

IV. The Proposed Rule Authorizes Invidious Discrimination in the Name of Religion

CCR also objects to the rule because it gives employers that receive federal funds virtually unchecked power to discriminate against American workers. Even though EO 11246 was adopted to address the persistent and pernicious problem of employment discrimination, the

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[12] Instead, OFCCP simply says it "does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition." Proposed Rule at 41684.

[13] *See* 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), at 33, *available at* https://www.justice.gov/olc/page/file/936211/download (hereinafter "2000 OLC Memo").

[14] 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. *See* 2000 OLC Memo.

proposed rule gives employers a wide berth to discriminate against employees and job applicants under the guise of religion. As a result, the proposed rule allows taxpayer dollars to be conditioned on passing a religious litmus test—contradicting decades of caselaw establishing that religious concerns and objections cannot trample on the rights of others to live free from discrimination on the basis of their sex, sexual orientation, gender identity, and other protected characteristics.

By authorizing discrimination under the guise of religion, the proposed rule eviscerates the rights of minority groups. The proposed rule also is at odds with the core purpose of EO 11246 and the OFCCP, which is to prevent state-sponsored discrimination and the misuse of taxpayer dollars.

A. The Proposed Rule Makes Discrimination Against Racial and Ethnic Minorities Easier

CCR further objects to the proposed rule because it jeopardizes the hard-earned rights of racial and ethnic minorities to live and work free of discrimination and bias. Religion has long been used to justify invidious racial discrimination, as OFCCP itself acknowledges.[15] However, courts have refused to give "religiously-motivated" discrimination state sanction, and repeatedly held that religious doctrine cannot be used to justify discrimination based on race, sex, or other protected grounds. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *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); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982).

Courts have also held that a religiously affiliated employer's religious motivation for discriminatory conduct does not transform unlawful discrimination into permissible religious conduct. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012); *EEOC v. Fremont Christian Sch.,* 781 F.2d 1362, (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). Collectively, these cases show that although religious freedom is a bedrock principle in the U.S. Constitution, it does not bestow corporations or individuals a broad license to discriminate based on their faith.[16]

OFCCP pays lip service to this caselaw but ultimately eviscerates it by allowing federal contractors to bypass anti-discrimination laws when religion is used to justify their discriminatory employment actions.

By removing existing safeguards against discrimination in the guise of religion, the proposed rule opens the flood gates of discrimination in a manner that harms *all* workers—including racial and ethnic minorities.

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[15] Proposed Rule at 41680.

[16] For purposes of EO 11246, this includes "race, color, religion, sex, sexual orientation, gender identity, or national origin." EO 11246 Sec. 202.

B. The Proposed Rule Jeopardizes the Status of Women in the Workplace

CCR also objects to the proposed rule because it will undermine the ability of women[17] to get and keep employment. For example, expanding the religious exemption seems aimed at allowing federal contractors to claim a right to fire a woman who uses birth control or who is pregnant and unmarried.

Women workers have long been subjected to a range of discrimination based on sex, justified by claims of religious beliefs. For instance, female employees have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage, using in vitro fertilization to start a family, or seeking an abortion. *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").[18]

Other employers have tried to deny employment to women altogether, based on a religious belief that women, or mothers, should not work outside the home. This includes religious schools failing to renew a pregnant employee's contract because of a belief that mothers should stay at home with young children. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

Women have also been discriminated against in the workplace in terms of pay and benefits and working conditions by employers who harbor 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." *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364-65 (9th Cir. 1986).

Without OFCCP oversight on account of the proposed rule, employers could adopt even more draconian policies. For instance, they could begin dictating that women should not be alone with men to whom they are not married, impede women's access to leadership positions or promotions, or even segregate women into certain workplace roles—actions that are presently unlawful but the proposed rule ostensibly protects.[19]

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[17] Here, CCR addresses women who are cisgender and heterosexual. The impacts on women who identify as LGBTQ are addressed below in Section IV. C.

[18] *See also* Dana Liebelson & Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, MOTHER JONES (Feb. 10, 2014), 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 at her job for having an abortion; court held that federal and state anti-discrimination laws prohibit employers from firing employees for having an abortion).

[19] *See, e.g.,* Ben Kesslen, *North Carolina Police Officer Fired for Following the 'Billy Graham Rule,' Lawsuit Says,* NBC NEWS (Aug. 23, 2019), https://www nbcnews.com/news/us-news/north-carolina-police-officer-fired-following-billy-graham-rule-lawsuit-n1045706; 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), https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination.

C. The Proposed Rule Authorizes Discrimination Against LGBTQ People and Increases the Vulnerability and Marginalization They Face

Furthermore, CCR objects to the proposed rule because it will give federal contractors a *license* to discriminate against LGBTQ employees and job seekers—a group which is already incredibly marginalized within in the United States.

1. LGBTQ People Already Face Rampant Discrimination & Harassment in the Workplace

11.3 million adults in the United States—or an estimated 4.5 percent of the adult population—identify as LGBTQ.[20] This figure includes 1.4 million transgender and gender non-conforming or non-binary individuals and traverses racial and ethnic groups.[21] Despite being a large percentage of the American population, LGBTQ people presently face pervasive discrimination when seeking employment to support themselves and their families.

Thirty percent (30%) of transgender people surveyed in a nationwide study reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace related to their gender identity or expression, such as being harassed or attacked even though they frequently took active steps to avoid mistreatment, such as hiding or delaying their gender transition or quitting their job.[22] Similar biases exist towards people who are lesbian, gay, or bisexual ("LGB"): in a nationally representative survey conducted in 2008, 12 percent (12%) of LGB respondents had lost a job because of their sexual orientation.[23] A 2017 study also showed that job applicants who were openly LGBTQ were invited for interviews thirty percent (30%) less often than their non LGBTQ-peers.[24]

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[20] *Adult LGBT Population in the United States* THE UCLA SCH. OF LAW WILLIAMS INST., (Mar. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf.

[21] *Id. See also* Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, THE UCLA SCH. OF LAW WILLIAMS INST. at 2–3 (June 2016), https://williamsinstitute.law.ucla.edu/research/how-many-adults-identify-as-transgender-in-the-united-states/.

[22] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY at 147 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (hereinafter "2015 U.S. Transgender Survey").

[23] Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive 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, 721 (2012); Brad Sears & Christy Mallory, *Documented Evidence Of Employment Discrimination & Its Effects on LGBT People*, THE UCLA SCH. OF LAW WILLIAMS INST. 2 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July20111.pdf.

[24] *See* Emma Mishel, *Discrimination against Queer Women in the U.S. Workforce: A Résumé Audit Study*, SOCIUS: SOCIOLOGICAL RESEARCH FOR A DYNAMIC WORLD (2016) (for purposes of the study, the researcher created two fictitious women's resumes similar in quality and experience, with one including an LGBTQ indicator—a leadership position at an LGBTQ student organization).

Nor is the discrimination that LGBTQ employees face limited to the hiring process: many transgender employees suffer hardship or job loss after coming out as LGBTQ to their long-time employers. For instance, Aimee Stephens, a well-respected funeral home director who had worked at her company for nearly 6 years, was fired from

Moreover, LGBTQ people who successfully obtain jobs frequently face discriminatory treatment that makes it difficult for them to remain in the workplace.[25] Examples include being passed up for promotions; being removed from client-facing positions; and being called bigoted names and slurs; as well as being disciplined for one's gender expression; being barred from gender-appropriate restrooms; being referred to using incorrect gender pronouns; and having personal medical information disclosed without consent in the case of transgender persons—conduct which renders the workplace inaccessible and unsafe.[26]

LGBTQ employees also experience high levels of workplace harassment, assault, and abuse. Fifteen percent (15%) of transgender people surveyed in 2015 reportedly were verbally harassed, physically attacked, or sexually assaulted in the workplace because of their sex or gender expression within the prior year.[27] LGB people also face workplace harassment at rates as high as 37 percent (37%).[28] For example, Yolanda Boone, a lesbian forklift operator from Baltimore, Maryland, was repeatedly harassed by management and told statements like "I want to turn you back into a woman," "I want you to like men again," and "[a]re you a girl or a man?"[29] Two thirds of LGBTQ workers (62%) reported hearing jokes about gay or lesbian people, and they were four times more likely to be criticized for their gender expression or told that they should be more feminine or masculine in their style.[30]

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her job solely because she disclosed that she was transgender. James Esseks, *Aimee Stephens Was Fired Because She Is Transgender. That's Sex Discrimination,* AM. CIVIL LIBERTIES UNION (Oct. 24, 2018), https://www.aclu.org/blog/lgbt-rights/transgender-rights/aimee-stephens-was-fired-because-she-transgender-thats-sex.

Similarly, Kimberly Hively, a lesbian from Indiana, was an adjunct professor for 14 years, was denied fulltime employment and promotions, and was eventually terminated because of her identity. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).

[25] 2015 U.S. Transgender Survey at 153; *see also* MAKE THE ROAD N.Y., TRANSGENDER NEED NOT APPLY: A REPORT ON GENDER IDENTITY DISCRIMINATION (May 2010), www.maketheroadny.org/pix_reports/TransNeedNotApplyReport_05.10.pdf; HUMAN RIGHTS CAMPAIGN FOUND., U.S. LGBTQ PAID LEAVE SURVEY: REPORT ON THE EXPERIENCES OF TRANSGENDER AND NON-BINARY RESPONDENTS (2018), www.hrc.org/resources/2018-us-lgbtq-paid-leave-survey-report-on-the-experiences-of-transgender.

[26] 2015 U.S. Transgender Survey at 153 (highlighting that nearly one-quarter of respondents reported experiencing one or more of those actions in the prior year because of their transgender status).

[27] *Id*. at 148, 155.

[28] Pizer, *supra* note 23, at 721. This is consistent with a 2013 study of women in construction in which 37% of LGBTQ women reported "constant or frequent discrimination and harassment based on their sexual orientation." *See* CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT WOMEN IN AMERICA at 10 (2015), http://www.lgbtmap.org/file/paying-an-unfair-price-lgbt-women.pdf (hereinafter "Paying an Unfair Price").

[29] See Complaint, *EEOC v. Pallet Cos*., No. 1:16-cv-00595-RDB (D. Md. Mar. 1, 2016), ECF No. 1, ¶ 15.

[30] Deena Fidas & Liz Cooper, *The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers,* HUMAN RIGHTS CAMPAIGN FOUND. (May 2014), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Cost_of_the_Closet_May2014.pdf.

2. Legalizing Discrimination Against LGBTQ People Will Cause Devastating Harm

Employment discrimination against LGBTQ people wreaks dire social consequences that will only be exacerbated by the proposed rule. LGBTQ people are far more likely to be unemployed and living in poverty than the general population due to the bias and discrimination they face.[31] Transgender individuals experience unemployment at three times the rate of the general population—a rate that climbs to four times that of the general population for transgender people of color.[32] Similarly, LGB people are twice as likely to be unemployed than people of other backgrounds.[33]

Employment discrimination against LGBTQ people also results in lower wages, increasing their economic precarity.[34] Transgender people are four times more likely to meet the threshold for extreme poverty—i.e. having a household income under $10,000 per year.[35] LGB people—particularly LGB women—are also more likely to be poor, receive public assistance, and experience economic hardship.[36]

LGBTQ people in the United States also experience disproportionate rates of homelessness because of the barriers they face when trying to access employment.[37] Jade, a 59-year-old transgender woman from San Francisco, has been homeless for half of her life because discrimination and her lack of employment history prevented her from securing jobs.[38] She

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[31] 2015 U.S. Transgender Survey at 6, 147.

[32] 2015 U.S. Transgender Survey at 6, 141.

[33] *See generally* Kerith J. Conron et al., *Sexual Orientation And Sex Differences In Socioeconomic Status: A Population-Based Investigation In The National Longitudinal Study Of Adolescent To Adult Health*, 72 J. EPIDEMIOL CMTY. HEALTH, 1016-1026 (2018).

[34] See, e.g., Pizer, *supra* note 23, at 737 (showing that lesbians earn less than heterosexual or gay men); Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Nebraska*, THE UCLA SCH. OF LAW WILLIAMS INST. at 6 (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/NE_discrimination_Aug_2017.pdf (state-wide study of LGBTQ employees in Nebraska in 2017, showing that women in same-sex couples earn less than individuals in other types of unions).

[35] Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (hereinafter "2011 U.S. Transgender Survey"). Rates of extreme poverty are even higher among transgender people of color and transgender people with disabilities, ranging from 18 to 21 percent of survey respondents. *See* 2015 U.S. Transgender Survey at 144 (finding that 21% of people with disabilities, 19% of Black respondents, and 18% of Latino/a respondents reported a household income below $10,000).

[36] Conron, *supra* note 33, at 1016-1026.

[37] 2015 U.S. Transgender Survey at 174 (revealing that 30% of respondents experienced homelessness, and the rate was nearly twice as high among those who lost their jobs because of their gender identity or expression and transgender women of color); *see also* M.V. Lee et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, THE UCLA SCH. OF LAW WILLIAMS INST. (June 2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf; Paying an Unfair Price, *supra* note 28.

[38] *See generally* 2011 U.S. Transgender Survey.

exemplifies a broader trend: 30% of respondents in the 2015 U.S. Transgender Survey experienced homelessness in their lifetime for reasons related to their gender, and 12% experienced homelessness in the past year.[39] Rates of homelessness were even higher among transgender people of color—especially transgender women of color—as a majority of Native American, Black, and multiracial women surveyed reportedly experienced homelessness.[40]

The widespread incidence of workplace discrimination and bias also restricts the ability of LGBTQ people to leave unsafe and undesirable jobs. For instance, 26% of transgender respondents surveyed in 2015 said they stayed at a job they would have preferred to leave for fear of encountering discrimination elsewhere.[41] Transgender people face heightened vulnerability to exploitation and trafficking for similar reasons.[42]

The discrimination that LGBTQ people routinely face has also given rise to a "discrimination-to-incarceration pipeline" that pushes LGBTQ people into underground economies for survival, and ultimately into prisons and jails.[43] According to one survey, one out of six transgender people (or 16%) have been incarcerated at some point in their lives—a rate that skyrockets to 47% among Black transgender people—most frequently for poverty-related offenses that stem from being denied economic opportunities.[44] Similar trends exist among LGB

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[39] 2015 U.S. Transgender Survey at 178.

[40] *Id.* (finding that 59% of Native American women, 51% of Black women, and 51% of multiracial women had experienced homelessness).

[41] *Id*. at 154 (reporting even higher rates for Native American, Black, Latinx, and disabled individuals).

[42] *See* Lynly S. Egyes, *Borders and Intersections: The Unique Vulnerabilities of LGBTQ Immigrants to Trafficking*, in BROADENING THE SCOPE OF HUMAN TRAFFICKING, at 181–82 (Eric C. Heil & Andrea J. Nichols, eds., 2016).

[43] *See, e.g.*, CTR. FOR AM. PROGRESS, ET AL., UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR, (Aug. 2016), www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf (hereinafter "Unjust"); Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, WILLIAMS INST. (Mar. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf.

Transgender people—particularly transgender women of color—are routinely arrested on mere suspicion that they are sex workers, pursuant to archaic anti-loitering statutes that effectively criminalize people for "walking while transgender." Chinyere Ezie, *Rainbow Police*, WASHINGTON POST (Jun. 20, 2019), www.washingtonpost.com/graphics/2019/opinions/pride-for-sale/ (explaining that transgender women in New York State have been arrested for as little as waving, "wearing a skirt" or "standing somewhere other than a bus stop or taxi stand."); *accord* Ginia Bellafante, *Poor, Transgender and Dressed for Arrest*, N.Y. TIMES (Sept. 30, 2016), www.nytimes.com/2016/10/02/nyregion/poor-transgender-and-dressed-for-arrest.html; MAKE THE ROAD N.Y., TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS (Oct. 2012), www.maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

[44] *See* 2011 U.S. Transgender Survey at 163; AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (Sept. 21, 2005), https://www.amnesty.org/en/documents/AMR51/122/2005/en/; CATHERINE HANSSENS, ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV (2014), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_recommendations.pdf.

women: despite being just 3.4% of the U.S. population, LGB women make up 42% of the incarcerated population in female prisons and jails.[45] Once in prison, LGBTQ people face tremendous abuse and depravity from inmates as well as from the state, with transgender people suffering particularly egregious forms of mistreatment.[46]

The discrimination that LGBTQ people experience has public health implications as well. A number of studies have also shown that employment discrimination in the United States negatively impacts LGBTQ people's wellbeing, leading to a higher prevalence of poor self-esteem, anxiety, anger, post-traumatic stress, other symptoms of depression, psychological distress, mental disorder, suicidality, and deliberate self harm.[47]

Considering the profoundly negative impact employment discrimination is already having on LGBTQ people, the additional rollbacks contemplated by the proposed rule will be nothing short of devastating for the LGBTQ community. The impacts on LGBTQ communities of color will likely be even more pronounced, given existing trends.[48] Therefore, the vulnerability that LGBTQ people—particularly people of color—will experience under the rule cannot be overstated.

D. The Proposed Rule Will Have a Devastating Impact on Atheists and Religious Minorities

CCR also objects to the proposed rule because it will negatively impact religious minorities and deprive them of economic opportunity. Judeo-Christian religious beliefs pervade the United States, meaning that a rule which privileges religious belief will automatically disadvantage people who hail from different faiths—including Islam—or no religion at all.

The existing exemption in EO 11246 already allows certain government-funded contractors to discriminate in hiring on the basis of religion. This proposed rule will make that troubling exemption even broader.

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[45] I.H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 AM. J. OF PUBLIC HEALTH 234-39 (2017); G.J Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INST. (2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

[46] *See generally* Unjust at 24–32; Jason Lydon et al., *Coming Out of Concrete Closets: A Report on Black & Pink's National LGBTQ Survey*, BLACK & PINK (Oct. 2015), www.blackandpink.org/coming-out-of-concrete-closets.

Transgender women are almost uniformly placed in men's prisons, which leads to unconscionable levels of violence: according to data collected by the Bureau of Justice Statistics at the Department of Justice, 40% of transgender people in state and federal prisons had been sexually assaulted by other inmates or by facility staff in the previous year alone—more than ten times the rate in the general population in prisons and jails. *See, e.g.*, Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Dec. 2014), www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf; Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men's Prison*, N.Y. TIMES (Apr. 5, 2015), www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison html.

[47] Pizer, *supra* note 23, at 738–741 (listing studies and results).

[48] 2015 U.S. Transgender Survey at 144, 150 (discussing disproportionate impact of discrimination on LGBTQ persons).

The government should not allow federal contractors to fire or refuse to hire a qualified person because they do not regularly attend religious services or aren't the "right" religion. Federal contractors should not be allowed to hang a sign that says "Jews, Sikhs, Catholics, Latter-day Saints need not apply."

Exemptions like this 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.[49]

Similarly, 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."[50]

No one should be disqualified from a taxpayer-funded job because they are the "wrong" religion or are nonreligious; accordingly, the rule should be withdrawn for yet another reason.

V. The Proposed Rule Will Make It Harder For *All* Employees to Challenge Discrimination

CCR also objects to the proposed rule because it allows religion to serve as a pretext for discrimination, and creates roadblocks for individuals seeking to bring claims of discrimination against federal contractors. For example, the proposed rule displaces the "motivating factor" test for proving claims of discrimination expressly adopted by Congress in 1991[51] and replaces it with a "but-for" causation standard that imposes a much higher burden of proof upon litigants. Not only does this erect an unnecessary barrier for plaintiffs asserting employment discrimination claims,[52] it reverses a 2015 decision by the OFCCP to expressly adopt the

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[49] Lornet Turnbull, *World Relief Rejects Job Applicant Over His Faith*, SEATTLE TIMES (Mar. 10, 2010), https://www.seattletimes.com/seattle-news/world-relief-rejects-job-applicant-over-his-faith/.

[50] 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.

[51] *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").

[52] *See Univ. of Tex. Sw. Med. Ctr. v. Nasser*, 570 U.S. 338 (2013) (distinguishing between status-based discrimination claims analogous to claims under EO 11246 that require discrimination be only a "motivating factor," and unlawful retaliation claims, requiring the higher "but-for" standard).

motivating-factor test and harmonize its approach to enforcement with the requirements set forth by Title VII, as amended.[53]

Although OFCCP claims that adoption of the "but-for" standard is necessary because OFCCP cannot properly ascertain "the nature of a sincerely held religious belief," that claim is unsupported. Courts have resolved claims of employment discrimination by religious organizations without running afoul of the limitations OFCCP repeatedly points to. OFCCP's concerns about these inquiries are unwarranted and there is no concern about impermissible entanglement.[54]

VI. The Proposed Rule Will Burden the Constitutional Right of Privacy

CCR additionally objects to the proposed rule because it will burden the constitutional rights of privacy enshrined in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), that extend to people's sexual and reproductive choices. Specifically, the proposed rule will burden and discourage members of the public from exercising their constitutionally-protected reproductive rights.

Under the proposed rule, anyone who has been sexually active outside the context of a heterosexual marriage, become pregnant, sought an abortion, or sought contraception can be discriminated against by employers who object to their choices—thereby giving sanction to yet another form of invidious discrimination. The consequences of the discrimination authorized by the rule will be borne most heavily by job seekers in small or disadvantaged job markets, including women and transgender people of color living in poverty or in rural areas, or Native American people living on reservations. Linking people's ability to find work to their reproductive choices will simultaneously burden their constitutional rights and exacerbate the already sky-high rates of maternal mortality that exist among Black and Native American women.[55]

As such, the rule will have a particularly negative impact on women, pregnant persons, and individuals who choose to terminate a pregnancy for myriad reasons.

VII. The Proposed Rule Chills Speech and Conduct Protected by the First Amendment

The proposed rule also has the effect of creating a set of special protections privileging speech and conduct in opposition to same-sex marriage, sex outside of marriage, transgender

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[53] *See* Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54934, 54944-46 (Sept. 11, 2015) (OFCCP adopting the "motivating factor" causation test applicable under the Civil Rights Act of 1991 and Title VII, as amended); *see also* Proposed Rule at 41685 n. 10 (acknowledging OFCCP's longstanding formulation of causation).

[54] *See, e.g., DeMarco v. Holy Cross High Sch*., 4 F.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 Sch.*, 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); *Dolter v. Wahlert High Sch.*, 483 F. Supp 266, 269-71 (N.D. Iowa 1980).

[55] Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/health/pregnancy-deaths-.html.

identity, and abortion and contraception, above speech on other issues. The proposed rule would further undermine enforcement of laws prohibiting discrimination, harassment, and violence in the workplace on the basis of race, sex, religion, national origin, disability, sexual orientation, and gender identity. At the same time, given the proposed rule's license to discriminate generally, combined with this particular provision privileging the speech and conduct of employers' so-called religious practices, those such as nonreligious people who speak their minds outside the workplace, as well as religious individuals who speak out in opposition to other issues— including, for instance, the administration's deplorable actions on asylum and immigration— in a manner deemed inconsistent with their employer's "exercise of religious faith" will be vulnerable to termination and reprisal, and will enjoy reduced protection for their speech and beliefs.

VIII. The Proposed Rule is Arbitrary and Capricious Because It Imposes Tremendous Costs on the American Public that OFCCP Failed to Properly Consider

Finally, CCR objects to the proposed rule because OFCCP failed to conduct a proper analysis of costs as mandated by federal law including the Administrative Procedure Act and various Executive Orders. *See, e.g.*, Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993) ("EO 12866"); Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011). These rules collectively require agencies to adequately assess all the potential costs of a rule and adopt them only where it has been shown they will produce the least burden while maximizing the benefits to society. *See* EO 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (requiring agencies to "assess *all* costs and benefits" and "select those approaches that maximize *net* benefits") (emphasis added). The Supreme Court has also repeatedly held that agencies "must examine the relevant data" in adopting a regulation, and emphasized that failing to "consider an important aspect of the problem" can render agency action arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The proposed rule as drafted will impose a tremendous cost on the American public because it dramatically expands the religious exemption applicable to contractors regulated by EO 11246. The proposed rule effectively grants half a million employers a license to discriminate against otherwise qualified individuals. In addition to imposing repugnant social costs, the proposed rule imposes financial costs as well since unemployment leads to waste and expends taxpayer dollars. Specifically, it denies employment opportunities to millions of well-qualified job seekers— opportunities that would allow them to provide for themselves and their families without being dependent on the welfare state.

Employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health, as research has shown.[56] For LGBTQ people, these costs will be even more severe given the extent to which they experience employment discrimination, unemployment and underemployment, and

[56] *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, STRESS IN AMERICA: THE IMPACT OF DISCRIMINATION (Mar. 2016), https://www.apa.org/news/press/releases/stress/2015/impact; R.A. Hahn et al., *Civil Rights As Determinants Of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM POPUL HEALTH 17–24 (Apr. 2018).

extreme poverty as discussed above. Yet, OFCCP fails to meaningfully consider the financial and other harms to employees impacted by its broad exemption, in flagrant violation of its responsibilities under federal law.

The OFCCP's claim that the proposed rule will generate cost savings in other respects also lacks empirical or documentary support. The proposed rule substitutes settled law concerning hiring by federal contractors for a vague, almost standardless approach that sows uncertainty about the rights of Americans to live and work without being rebuffed simply because their faith does not conform with that of their employer.

By overlooking and/or failing to acknowledge these costs while overstating the potential benefits and cost savings, OFCCP confirms that its rule was proposed without due consideration to the impact on relevant stakeholders.

IX. OFCCP's Federalism Analysis is Flawed

Finally, OFCCP errs in providing a vague, contradictory, and flawed federalism analysis. The OFCCP states that its rulemaking will not (1) impose substantial direct requirements or costs on State or local governments; (2) preempt State law; or (3) otherwise have federalism implications. This is unsupported. Rather, by upending the regulatory regime applicable to contractors and leaving their employees vulnerable to discrimination, OFCCP imposes a burden on State governments that will have more unemployed or underemployed people in their jurisdiction drawing down on the welfare system without being able to contribute to the tax base.

CONCLUSION

In order to fulfill its mandate to "protect workers, promote diversity and enforce the law," OFCCP must refrain from adopting a religious exemption so broad in scope that it provides a license to discriminate against roughly one-fifth of the American workforce.

The federal government cannot fund discrimination in the name of religion as contemplated by the proposed rule without running afoul of the U.S. Constitution and core legal precepts, including but not limited to the Establishment Clause. Nor should the lives and livelihoods of countless American workers—many of whom already experience marginalization because of their sexual orientation or racial, ethnic, and gender identities—be thrown into jeopardy.

Accordingly, the Center for Constitutional Rights respectfully asks that you heed our request and withdraw the proposed rule in its entirety.

Sincerely,

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