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**RE: Proposed Rule, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” RIN 1250-AA09**



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The American Civil Liberties Union (“ACLU”) submits these comments on the proposed rule published at 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019), RIN 1250-AA09, with the title “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (the “Proposed Rule” or “Rule”).

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than 8 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The Proposed Rule is yet another attempt by the Trump Administration to undermine crucial antidiscrimination protections through unconstitutional and unfounded religious exemptions. By its own statement, the mission of the Department of Labor (the “Department”) and the Office of Federal Contract Compliance Programs “is to enforce, for the benefit of job seekers and wage earners, the contractual promise of equal employment opportunity and affirmative action required of those who do business with the federal government.”<sup>1</sup> For the reasons described in this comment, the

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<sup>1</sup> U.S. Department of Labor, *OFCCP By The Numbers*, <https://www.dol.gov/ofccp/BTN/>.

Proposed Rule would betray that goal by expanding the ability of taxpayer-funded federal contractors to discriminate against their employees. First Amendment rights are fundamental, but religious freedom is not a license to discriminate.

The Proposed Rule purports to clarify the scope of Executive Order 11,246's existing religious exemption by defining key terms, but instead expands the exemption both as to the forms of discrimination that would be permitted and as to which employers would qualify for the exemption. What is more, the Department completely ignores the potential harms to employees of federal contractors that would be subject to discrimination by their employers, a grave concern given that one in four people in the United States work for an employer that has a federal government contract.<sup>2</sup>

For these reasons, as well as the ones that follow, we recommend that the Department decline to finalize the Proposed Rule.

## I. BACKGROUND ON EXECUTIVE ORDER 11,246.

Executive Order 11,246, as amended by subsequent executive orders, requires federal contractors to affirm in all of their government contracts that they “will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” 41 C.F.R. § 60-1.4(a)(1). They must also “take affirmative action” to ensure that applicants do not face discrimination in the course of their hiring or employment. *Id.* These protections ensure that the government does not discriminate indirectly by permitting its contractors to discriminate.

Executive Order 13,279, issued in 2002, amended Executive Order 11,246 to grant certain religious entities a partial exemption from this requirement, permitting them to discriminate “with respect to the employment of individuals of a particular religion.” 41 C.F.R. § 60-1.5; Equal Protection of the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77,143 (Dec. 12, 2002) (codified at 41 CFR 60-1.5(a)(5)). This exemption allows non-profit religious entities that contract with the government to hire co-religionists—for example, a Catholic charity that has a contract with the government could elect to hire a Catholic director of operations over someone of a different religion. Because this exemption shares the same text as the religious exemption from Title VII, 42 U.S. Code § 2000e-1(a), they have been construed similarly. *See Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam).

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<sup>2</sup> Despite the national impact of the Proposed Rule, the Department has failed to provide any justification for an unusually short 30-day comment period. Given that the Proposed Rule represents substantial shifts in the Department's enforcement approach in several respects, the comment period on the Proposed Rule should be extended to a minimum of 60 days to provide adequate time to comment on the numerous legal issues presented and the potential harms the proposed rule will cause.

## **II. BY EXPANDING THE DEFINITION OF “PARTICULAR RELIGION,” THE PROPOSED RULE IMPERMISSIBLY INVITES WIDESPREAD DISCRIMINATION BY FEDERAL CONTRACTORS.**

The Proposed Rule would expand the bases for discrimination authorized under the Executive Order by defining “particular religion” to mean the “religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, *including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.*” 84 Fed. Reg. at 41,690–91 (emphasis added).

This definition expands the permitted discrimination beyond, for example, a Jewish social services organization being allowed to require that its program director be Jewish, to the organization being permitted to fire any employee, including one not of the faith, who does not follow all the tenets of the organization’s faith. Even worse, the preamble makes clear that the Department intends this rule to authorize such discrimination even where that would constitute discrimination on other protected bases like sex or race. Such an unlimited expansion is contrary to the text of Executive Order 11,246 itself, which explicitly states that, beyond discriminating in the employment of individuals of a particular religion, “contractors and subcontractors are *not exempted or excused* from complying with the other requirements contained in this Order.” Amendment of Exec. Order No. 11,246, Sec. 204(c), Equal Employment Opportunity, 30 Fed. Reg. 12,319, 12,320 (Dec. 12, 2002) (emphasis added). By adding this proposed definition to the existing Executive Order, the Department departs from legal precedent, and would create confusion and significant harm.

### **A. The Department Should Not Expand the Definition of “Particular Religion” to License Discrimination Beyond the Hiring and Firing of Co-Religionists.**

The Department’s proposed definition of “particular religion” will open the door to government contractors seeking to discriminate by allowing “religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor.” 84 Fed. Reg. at 41,679.

The preamble to the Proposed Rule recognizes that “an employer may not, under Title VII or Executive Order 11246, invoke religion to discriminate on other bases protected by law,” and indicates that racial discrimination by government contractors “cloaked as religious practice,” for instance, would still be barred. 84 Fed. Reg. at 41,680 (internal quotation marks omitted). By expanding the definition of “particular religion” beyond co-religionists to reach compliance with the tenets of the organizations’ faith and permitting evidence that religious beliefs were even just a partial cause of the discrimination as sufficient to avoid liability, the Proposed

Rule could allow a religious contractor to claim that firing an employee because his spouse is of a different race was permissible because marriages between people of different races violated the employer's religious tenets, or that it is permissible to fire a transgender woman for transitioning, based on a religious objection. As long as discrimination can be cast as "adherence to religious tenets," an employer could claim a license to discriminate under the Proposed Rule. 84 Fed. Reg. at 41,679. Additionally, the Proposed Rule puts the burden on the *Department* to prove that the discrimination was based on another protected characteristic besides religion. *Id.* at 41,685.

The Department claims that the Proposed Rule's definition of particular religion is "consistent with Title VII case law." *Id.* at 41,679. But courts have repeatedly held that the Title VII exemption from discrimination in employment on the basis of religion is narrow:

While the language of [the exemption] makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin. The statutory exemption applies to one particular reason for employment decision—that based upon religious preference.

*Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (citation omitted); *see also Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982) (holding same), *abrogated on other grounds by Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802, 807 (N.D. Ill. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980) (holding same); *accord McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (exemption allows "a religious organization to employ persons of a particular faith . . . without otherwise violating the provisions of Title VII" (emphasis added)).

Applying this exemption, courts have prohibited religious organizations from engaging in discrimination on other bases, including sex, regardless of whether that discrimination is motivated by the organization's sincere religious beliefs. The exemption "merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with sex discrimination." *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996). "Thus, church organizations have been held liable under Title VII for benefit and employment decisions which they contended were based upon religious grounds but which also discriminated against women based upon sex." *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992); *see, e.g., EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365–67 (9th Cir.1986); *Pac. Press*,

676 F.2d at 1276; *Rayburn*, 772 F.2d at 1166 (citing approvingly to decision in *Pacific Press*); *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (“[I]t remains fundamental that religious motives may not be a mask for sex discrimination in the workplace.”); *EEOC v. First Baptist Church*, No. S91-179M, 1992 WL 247584 (N.D. Ind. June 8, 1992).

Further support for a narrow interpretation of Title VII’s religious preference language (and the analogous language in Executive Order 11,246) comes from the fact that Congress twice rejected a blanket exemption for religious employers: first when Title VII originally passed, and then again when it adopted the current exemption. *See Pac. Press*, 676 F.2d at 1276–77 (discussing legislative history of Civil Rights Act of 1964 and citing H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963), reprinted in EEOC, *Legislative History of Title VII and XI of Civil Rights Act of 1964* (1968), 1964 U.S. Code Cong. & Ad. News p. 2355); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) (“[T]he legislative history of Title VII makes clear that Congress formulated the limited exemptions for religious institutions to discriminat[e] based on religion with the understanding that provisions relating to non-religious discrimination would apply to such institutions.”); *Martin v. United Way of Erie County*, 829 F.2d 445, 449 (3d Cir. 1987); *Rayburn*, 772 F.2d at 1166 (summarizing legislative history).

The Department does not point to a single court decision holding that the Title VII exemption is intended to immunize employers from all discrimination that is religiously motivated, as opposed to on the basis of religion alone. All but two of the cases cited by the Department in support of its definition involved plaintiffs who sued for religious discrimination. *See Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 191 (4th Cir. 2011) (“Title VII does not apply to claims for *religious* harassment and retaliation against religious organizations” (emphasis added)); *LeBoon v. Lancaster Jewish Community Ctr. Ass’n*, 503 F.3d 217 (3d Cir. 2007); *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Killinger v. Samford U.*, 113 F.3d 196 (11th Cir. 1997); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991).<sup>3</sup> One of the remaining cases cited did not reach if the exemption even applied, *see Maguire v. Marquette U.*, 814 F.2d 1213, 1216 (7th Cir. 1987), and the other does not support the broad application the Department has endorsed, as the court was careful to issue a narrow ruling, explicitly noting that “[i]t is by no means the case that all claims of gender discrimination against religious employers are impermissible.” *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 142 (3d Cir. 2006).

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<sup>3</sup> In particular, *Little v. Wuerl*, cited most heavily by the Department, does not support a wide-ranging tenets exemption. First, the plaintiff in *Little* was a Protestant teacher who was terminated by her Catholic employer for remarrying after getting divorced. 929 F.2d at 946. *Little* did not involve any allegations of sex, race, or national origin discrimination. Second, the *Little* court explicitly noted that “Title VII has been interpreted to bar race and sex discrimination by religious organizations towards their non-minister employees.” *Id.* at 947–48 (citations omitted). But that is exactly the kind of discrimination the Proposed Rule could authorize, if enacted.

The Department and other federal agencies have interpreted the religious exemption in Executive Order 13,279 similarly. They have interpreted the exemption to be limited to “permit[ing] qualifying organizations only to prefer members of their own faith in their employment practices.” 84 Fed. Reg. at 41,680. In the past, the Department has explained that the “exemption allows religious organizations to hire only members of their own faith.” OFCCP, *Coming Into Compliance with Sexual Orientation and Gender Identity Requirements Webinar* (Mar. 25, 2015), [https://www.dol.gov/ofccp/LGBT/FTS\\_TranscriptEO13672\\_PublicWebinar\\_ES\\_QA\\_508c.pdf](https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf). The Equal Employment Opportunity Commission (“EEOC”), which is the agency primarily responsible for enforcing Title VII, has likewise interpreted the text of that exemption to mean that “religious organizations are permitted to give employment preference to members of their own religion.” EEOC, EEOC Compliance Manual sec. 12–I.C.1 (July 22, 2008). The EEOC has explained:

Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. . . . The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.

EEOC, *Questions and Answers: Religious Discrimination in the Workplace* (January 31, 2011), [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html).

Under the Proposed Rule, where the contractor qualifies as a religious corporation, the Department will find an employee was unlawfully discriminated against only when the *Department* can prove that the discrimination was based on another protected characteristic besides religion, which now means religious tenets. 84 Fed. Reg. at 41,685. It is a “but for” test, requiring the Department to “prove by a preponderance of the evidence that a protected characteristic other than religion was a but for cause of the adverse action.”<sup>4</sup> *Id.* This flips antidiscrimination protections on their head, where normally the employer would bear the burden of

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<sup>4</sup> Congress explicitly adopted the “motivating factor” test in Title VII for evaluating claims of discrimination. 42 U.S.C.A. § 2000e-2(m) (“an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice”), and the Department has previously done so for claims of discrimination. 84 Fed. Reg. at 41,685 n.10 (citing *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 80 Fed. Reg. 54,934, 54,944–46 (Sept. 11, 2015)). The Department has explained that the but-for standard articulated in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) addressed the standard for retaliation, not discrimination. 80 Fed. Reg. at 54,944. And *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), was interpreting a specific statute which explicitly required that discrimination be “because of such individual’s age.” *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1)). No such language exists in the exemption at issue here. Thus, neither of the cases cited by the Department supports a but-for standard of proof.

showing that the exemption applies.<sup>5</sup> And more profoundly, it allows the employer to argue, “I didn’t fire you because of race, I fired you for violating my religious tenet against interracial marriage.” Such an assertion—unless disproved by the Department—will end the discrimination inquiry.

The Department offers no persuasive reason for reversing course. While the Department claims that the proposed definition is offered for clarification, it would actually permit discrimination of the very kind the Executive Order simultaneously prohibits, and create significant harm and confusion for myriad federal contractors, their employees, and the government entities charged with enforcement of Executive Order 11,246.

### **B. Expanding the Definition of “Particular Religion” Will Embolden Employers to Discriminate.**

If the exemption is expanded to permit employers to discriminate against employees who do not “adhere[] to religious tenets as understood by the employer,” all employees will face a heightened risk of discrimination in the workplace. 84 Fed. Reg. at 41,679. Recent experience shows that such discrimination will likely be felt most heavily by all women and employees who are lesbian, gay, bisexual, and transgender (“LGBT”). For example, Aimee Stephens, whose employment discrimination case is currently pending before the Supreme Court, was fired from the closely held, for-profit funeral home where she had worked for over five years, after she disclosed that she is a transgender woman.<sup>6</sup> The funeral home argued that it should not have to comply with Title VII’s nondiscrimination protections because employing Stephens would violate its religious beliefs.<sup>7</sup> The Sixth Circuit rejected those arguments and the funeral home and the Department of Justice are now urging the Supreme Court to rule that transgender people have no protections under federal law. In other instances, lesbian and gay employees have been fired by religious organizations for becoming engaged to or marrying a spouse of the same sex.<sup>8</sup>

In addition, religious employers have discriminated in pay, benefits, and

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<sup>5</sup> The issues with the Proposed Rule’s interpretation of the word “sincere” are only multiplied when the Department proposes to apply that understanding to the standard that an “exercise of religion need only be sincere.” 84 Fed. Reg. at 41,690 (proposed 41 CFR Part 60–1-3). If the Department wants only to rely on the sincerity of a contractor to determine if it qualifies for the exemption, then the contractor must be subject to an obligation to demonstrate that sincerity.

<sup>6</sup> *R.G. & G.R. Harris Funeral Homes v EEOC & Aimee Stephens*, ACLU (Sept. 10, 2019), <https://www.aclu.org/cases/rg-gr-harris-funeral-homes-v-eeoc-aimee-stephens>.

<sup>7</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018), *cert. granted in part on other bases*, 139 S. Ct. 1599 (2019) (employer declined to petition for certiorari as to its arguments that complying with Title VII violated its religious beliefs).

<sup>8</sup> *See, e.g., Billiard v. Charlotte Catholic High School*, ACLU (Oct. 16, 2017) <https://www.aclu.org/cases/billard-v-charlotte-catholic-high-school>.

working conditions because of religious beliefs about appropriate gender roles.<sup>9</sup> Some women have been fired for their reproductive decisions, including becoming pregnant outside of marriage, becoming pregnant while in a same-sex relationship, or having an abortion.<sup>10</sup> For example, Emily Herx was fired by a Catholic school for undergoing in vitro fertilization treatment to have a second child. Her employer told her that made her a “grave, immoral sinner”—and she is far from the only employee to be fired because her employer expressed religious objections to her pregnancy.<sup>11</sup>

If the Proposed Rule is finalized, contractors will be further emboldened to discriminate against LGBT people and all women in the workforce, despite the longstanding recognition by courts and federal agencies that the religious exemption in Title VII and the Executive Order should not be read to authorize discrimination on other grounds prohibited by law.

### **III. THE PROPOSED RULE’S EXPANSION OF THE CATEGORY OF CONTRACTORS THAT QUALIFY FOR THE EXEMPTION IS CONTRARY TO LAW.**

The Department has proposed a definition of “religious corporation, association, educational institution, or society” that would expand the category of government contractors that qualify for the exemption far beyond the current exemption. The Proposed Rule would permit for-profit organizations to claim the religious exemption, despite legal precedent consistently weighing against such an outcome. Further, in purporting to adopt the standard set by *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), the Department rejects key aspects of that test, drastically lowering the standard for contractors to qualify for the exemption. The Department should not define religious entities in a manner that is unsupported by precedent and does not adequately protect against abuse by non-religious for-profit entities wishing to discriminate in hiring. This is particularly the case where the proposed rule invites discrimination.

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<sup>9</sup> *Ohio Civil Rights Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986) (failing to renew a pregnant employee’s contract because of a religious belief that mothers should stay at home with young children); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

<sup>10</sup> See, e.g., *Herx*, 48 F. Supp. 3d at 1168; *Ganzy*, 995 F. Supp. at 345 (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”); *Jennifer Maudlin v. Inside Out*, ACLU (Oct. 22, 2013), <https://www.aclu.org/cases/reproductive-freedom/jennifer-maudlin-v-inside-out-inc-et-al>; Dana Liebelson and Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, Mother Jones (Feb. 10, 2014), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>.

<sup>11</sup> *Religion Isn’t a Free Pass to Discriminate Against Employees*, ACLU (Sept. 17, 2012), <https://www.aclu.org/blog/speakeasy/religion-isnt-free-pass-discriminate-against-employees>.



### A. The Proposed Rule Should Not Allow For-Profit Entities to Qualify for the Exemption.

Permitting for-profit contractors to qualify for the exemption is completely inconsistent with Congress’s and the courts’ interpretations of the analogous term “religious corporation” in Title VII. *See, e.g., LeBoon*, 503 F.3d at 229 (“[o]f course the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity”) (citing *EEOC. v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 610 (9th Cir. 1988)). The Proposed Rule misrepresents this precedent and distorts the requirements of *World Vision* far beyond that case’s limits.

The Department states that it “proposes to adopt the test set out in *World Vision*,” 84 Fed. Reg. at 41,682, but the Proposed Rule rejects the test proposed in the *per curiam* opinion in favor of a significantly weakened version of the test proposed by Judge O’Scannlain’s concurrence—mislabeling it as the “court’s reasoning.” *Id.* at 41,682–83. The Department, moreover, proposes to eliminate the central requirement that the entity be a nonprofit. Judge O’Scannlain proposed that:

a *nonprofit* entity qualifies for the . . . exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.

*World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring) (emphasis added and footnote omitted).

The Department offers two reasons for rejecting the requirement that an entity be a nonprofit to qualify for the exemption, neither of which withstands scrutiny. First, the Department claims that “[a] test that makes *financial exchange* a dispositive factor may sweep more broadly than Executive Order 11246 intended.” 84 Fed. Reg. at 41,684. This is a straw-man. Requiring that an organization be a nonprofit does not mean it cannot engage in “financial exchanges” or participate in the marketplace. Instead, a nonprofit structure dictates how the *revenue* from those exchanges is handled. “It is true that a ‘nonprofit’ may make a ‘profit’—at least in the sense that it may have net earnings because its revenues exceed its costs. But, a nonprofit entity is distinguished from a for-profit entity by what it does with its net earnings.” *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring).

Second, the Department mistakenly claims that the nonprofit status of an entity “has not been determinative for other courts.” 84 Fed. Reg. at 41,684. The Department immediately walks back that statement by acknowledging that “[a]n entity’s for-profit or nonprofit status, or the volume or amount of its financial transactions, may be a factor” that courts consider, *id.*, and indeed, the preamble does not mention a single case in which a court found a for-profit entity to qualify for the religious exemption. All the opinions in *World Vision*—the *per curiam* as well as Judges O’Scannlain’s and Kleinfeld’s concurrences—considered whether the

entity was a nonprofit to be a core factor. 633 F.3d at 724, 735, 748. Further, all the other cases cited in the preamble consider whether the entity operates for profit—and if they do, hold that they do not qualify for the exemption. *See, e.g., LeBoon*, 503 F.3d at 226–27 (considering “whether the entity operates for a profit” in determining that non-profit organization is a religious organization); *Killinger*, 113 F.3d at 199; *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 461 n.8, 463–64 (9th Cir. 1993) (holding schools are primarily secular, but considering that they “are chartered as a nonprofit educational institution”), *as amended on denial of reh’g* (May 10, 1993); *Townley*, 859 F.2d at 619 (“On the secular side, the company is for profit. It produces mining equipment, an admittedly secular product.”); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1340, 1345 (N.D. Ga. 1994), *aff’d*, 73 F.3d 1108 (11th Cir. 1995); *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344–45 (D.C. Cir. 2002) (considering whether entity was not-for-profit educational institution for purposes of claimed exemption from NLRB jurisdiction); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 384, 387 (1st Cir. 1985) (same); *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1438–39 (9th Cir. 1983) (same).

The Department’s contention that considering whether the entity is a nonprofit would lead to “unexpected results” that are “difficult to square with other case law,” 84 Fed. Reg. at 41,683—even though it has consistently been considered by courts when determining whether the exemption applies—is frankly absurd. Congress also contemplated such a requirement, as “Congress’s conception of the scope of [the Title VII religious exemption] was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.” *Townley*, 859 F.2d at 618.

The Proposed Rule also points to *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), for support, but that case is completely inapplicable. *Hobby Lobby* addresses an entirely different statute. The Supreme Court in *Hobby Lobby* was exploring the definition of the word “person” in the Religious Freedom Restoration Act (“RFRA”), *id.* at 708, so it offers no insight into how “religious corporation” should be defined, or the scope of the word historically, for purposes of the exemption at issue here. The term “religious corporation, association, educational institution, or society” is clearly and intentionally narrower than the word “person,” but the Proposed Rule ignores that. Even then, the Court only held that “closely held corporations” could invoke RFRA, *id.* at 689, 753 n.15, a key limit that the Department has not placed on its own definition of religious organizations. Despite *Hobby Lobby*’s extension of RFRA protections to closely held religious corporations, courts have since continued to require that a religious corporation be a non-profit entity for purposes of the Title VII exemption. *See, e.g., Garcia v. Salvation Army*, 918 F. 3d 997, 1004 (9th Cir. 2019).<sup>12</sup>

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<sup>12</sup> Additionally, the Court explicitly considered in *Hobby Lobby* that employees’ interest in accessing contraceptive coverage could still be protected under the Court’s holding. 573 U.S. at 732. Here, there are no such protections for employees subject to discrimination by government contractors.

## **B. The Proposed Rule Should Not Eliminate Other Objective Measures to Determine Whether Contractors Qualify for the Exemption.**

The Proposed Rule compounds its failure to properly cabin the entities that qualify for the exemption by indicating that the Department will rely on the employer's own characterization of its activities, with no minimum, objective standards of evidence required. In establishing a test for which entities qualify for the exemption, the Proposed Rule requires the contractor to "be organized for a religious purpose," "hold itself out to the public as carrying out a religious purpose," and "exercise religion consistent with, and in furtherance of, a religious purpose." 84 Fed. Reg. at 41,682–83. However, the preamble indicates that the Department will not enforce any baseline evidentiary standards for an entity to meet those factors.

For example, while requiring that an eligible "contractor must be organized for a religious purpose," *id.* at 41,682, neither the proposed rule nor the preamble demands any evidence of such a purpose. Contractors are not even required to include such a statement of purpose in their articles of incorporation or other founding documents. *Id.* By comparison, Judge O'Scannlain in *World Vision* observed that "[e]ven a cursory review of World Vision's Articles of Incorporation, bylaws, core values, and mission statement reveal explicit and overt references to a religious purpose." 633 F.3d at 736.

Similarly, although the Proposed Rule requires that a "contractor must hold itself out to the public as carrying out a religious purpose," the preamble says this can be accomplished by merely "affirming a religious purpose in response to inquiries." 84 Fed. Reg. at 41,683. Such inquiries from the public or the Department itself would actually indicate that it is *not* evident that a contractor is public about its religious purpose. Allowing mere inquiries to meet this requirement would offer no notice to employees and others that a federal contractor could qualify for the religious exemption and would certainly not serve as the "market check" envisioned by the *World Vision* concurrence. 633 F.3d at 735.

Additionally, though the Proposed Rule says that the "contractor must exercise religion consistent with, and in furtherance of, a religious purpose," 84 Fed. Reg. at 41,683, the preamble to the Proposed Rule calls into question whether the Department would be able to evaluate whether the contractor is acting with a religious purpose, as the preamble (mistakenly) states time and again that inquiry into the religious nature of an entities' actions is not permissible. *See, e.g., id.* ("an inquiry into whether an entity is engaged 'primarily' in religious activity invites the balancing of things that cannot be balanced in any consistent way"). As discussed above, *supra* Part II.A., such inquiries are necessary and important to ensure that employers are still subject to the law.

In sum, although purporting to rely on *World Vision* to define a "religious corporation, association, educational institution, or society," the Proposed Rule departs in key ways, by permitting for-profit entities to qualify for the exemption and lowering the overall standard to demonstrate qualifications and further

increasing the likelihood that employees face discrimination by federally funded contractors.

#### **IV. THE PROPOSED RULE UNCONSTITUTIONALLY FAILS TO ACCOUNT FOR THE HARMS OF DISCRIMINATION.**

It is impermissible for the government to force unwilling third parties to suffer the costs of someone else's religious exercise. The Proposed Rule would authorize discrimination against the employees of taxpayer-funded federal contractors far beyond what is currently permitted in violation of the Establishment Clause. The Proposed Rule does not acknowledge the harm to employees who will face discrimination under the Proposed Rule, or even attempt to incorporate the risk of that harm into its analysis. The Department cannot ignore the costs of increased discrimination to employees and the country generally.

##### **A. The Proposed Rule Violates the Establishment Clause as It Would Harm Employees of Government Contractors.**

The First Amendment forbids government action that favors the free exercise of religion to the point of forcing unwilling third parties to bear the burdens and costs of someone else's faith. As the Supreme Court has emphasized, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *accord Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"). Because the Proposed Rule attempts to license discrimination against employees of government contractors, it is incompatible with our longstanding constitutional commitment to separation of church and state. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–10 (1985) (rejecting, as Establishment Clause violation, law that freed religious workers from Sabbath duties, because the law imposed substantial harms on other employees); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion) (invalidating sales tax exemption for religious periodicals, in part because the exemption "burden[ed] nonbeneficiaries markedly" by increasing their tax bills).

Under the Proposed Rule, more employees would lose protections against discrimination, as it would expand the set of federal contractors that qualify for the exemption and the bases on which those contractors can discriminate against their employees. The Proposed Rule thus elevates the rights of religious federal contractors over their employees, but "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Thornton*, 472 U.S. at 710 (alteration in original) (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Even more concerning, this appears to be the Department's intent, as it explicitly states that the Rule "shall be construed in favor of a broad protection of religious exercise"—with no mention of protecting employees from discrimination. 84 Fed.

Reg. at 41,691 (proposed 41 C.F.R. § 60-1.5).

The Department is wrong to rely on *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), in arguing that the Proposed Rule complies with the Establishment Clause. 84 Fed. Reg. at 41,678. The defendants in *Amos* were not funded by the government, partnering with the government, or exercising government functions, 483 U.S. at 337. Here in contrast, the exemption proposed would apply to taxpayer-funded, for-profit federal contractors. Additionally, the exemption as challenged in *Amos* permitted religious organizations to hire only co-religionists, *id.* at 331, 340, but the Proposed Rule expands the exemption beyond that.

### **B. The Department Ignores the Harms of Discrimination to Employees and Taxpayers.**

Discrimination in the workplace is still endemic, but the Proposed Rule ignores the costs to employees who face employment discrimination. The Department estimated in 2014 that approximately 1.5 to 2.6 million LGBT individuals are employed by federal contractors,<sup>13</sup> and they already face widespread discrimination in the workplace. A 2017 survey found that over 25% of LGBT respondents faced discrimination because of their sexual orientation or gender identity over the past year, and of those individuals, over 52% reported that the discrimination negatively affected their workplace.<sup>14</sup> Accordingly, it is not surprising that almost half (46%) of LGBT workers report actively concealing their identity out of fear of discrimination.<sup>15</sup> Lesbian, gay and bisexual people experience higher rates of being fired from a job or denied a job, as well as being denied a promotion or receiving a negative evaluation.<sup>16</sup> Ninety percent of transgender and gender nonconforming individuals reported experiencing harassment, mistreatment, or discrimination at work, or having hidden their identity to avoid facing discrimination.<sup>17</sup> The Proposed Rule is particularly harmful for LGBT individuals who live in the more than twenty-five states without explicit statutory protections barring employment discrimination based on sexual orientation and

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<sup>13</sup> Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 78 Fed. Reg. 72,985, 72,989 (Dec. 9, 2014).

<sup>14</sup> Sejal Singh and Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Center for American Progress, <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

<sup>15</sup> Human Rights Campaign, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide*, [https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?\\_ga=2.241793419.847934864.1567971158-625671509.1567971158](https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?_ga=2.241793419.847934864.1567971158-625671509.1567971158).

<sup>16</sup> Ilan H. Meyer, *LGB Experiences of Discrimination*, The Williams Institute, <https://williamsinstitute.law.ucla.edu/experts/ilan-meyer/lgb-discrim-experiences/>.

<sup>17</sup> Nat'l Gay and Lesbian Task Force and Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

gender identity.<sup>18</sup>

Likewise, workplace discrimination in its many forms continues to harm all women. “The number of pregnancy discrimination claims filed annually with the Equal Employment Opportunity Commission has been steadily rising for two decades and is hovering near an all-time high.”<sup>19</sup> Businesses across the country have been fighting to deny their employees access to coverage for contraception since it became a legal requirement.<sup>20</sup> Women are more likely to be victims of sexual harassment in the workplace than men.<sup>21</sup> Additionally, women are excluded from male-dominated spaces, both passively and intentionally, which impedes their advancement.<sup>22</sup>

The Department itself has previously acknowledged the harms of discrimination to the country as a whole, but ignores them entirely in the Proposed Rule. In 2014, the Department’s regulations implementing Executive Order 13,672 (adding explicit protections for discrimination based on sexual orientation and gender identity) recognized that:

employment discrimination on the basis of sexual orientation or gender identity, like employment discrimination on other bases prohibited by EO 11246, may have economic consequences. It, like other forms of discrimination, may lead to reduced productivity and lower profits. Contractor employees who face discrimination on the basis of sexual orientation or gender identity on the job may experience lower self-

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<sup>18</sup> Movement Advancement Project, *LGBT Employees & Title VII*, (June 2018), <http://www.lgbtmap.org/file/Title-VII-Two-Pager.pdf> (28 states lack explicit laws that prohibit employment discrimination based on sexual orientation and 30 states lack laws that prohibit employment discrimination based on gender identity).

<sup>19</sup> Natalie Kitroeff and Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies*, *The New York Times* (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html?mtrref=www.google.com>.

<sup>20</sup> Zoe Tillman, *The Trump Administration Agreed To Pay More Than \$3 Million In Legal Fees To Settle Contraception Mandate Lawsuits*, *BuzzFeed* (Jan. 9, 2018), <https://www.buzzfeednews.com/article/zoetillman/the-trump-administration-agreed-to-pay-more-than-3-million>.

<sup>21</sup> Hailey Lee, *One-fifth of American Adults Have Experienced Sexual Harassment at Work, CNBC Survey Says* (Dec. 19, 2017), <https://www.cnbc.com/2017/12/19/one-fifth-of-american-adults-have-been-sexually-harassed-at-work.html>; Holly Kearn et al., *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault* (Feb. 2018), <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf>.

<sup>22</sup> Claire Zillman, *The Fortune 500 Has More Female CEOs Than Ever Before* (May 16, 2019), <https://fortune.com/2019/05/16/fortune-500-female-ceos/>; Sarah Mimms and National Journal, *Why Some Male Members of Congress Won’t Be Alone with Female Staffers* (May 14, 2015), <https://www.theatlantic.com/politics/archive/2015/05/why-some-male-members-of-congress-wont-be-alone-with-female-staffers/449367/>; Ashley Parker, *Karen Pence is the Vice President’s ‘Prayer Warrior,’ Gut Check and Shield* (Mar. 28, 2017), [https://www.washingtonpost.com/politics/karen-pence-is-the-vice-presidents-prayer-warrior-gut-check-and-shield/2017/03/28/3d7a26ce-0a01-11e7-8884-96e6a6713f4b\\_story.html](https://www.washingtonpost.com/politics/karen-pence-is-the-vice-presidents-prayer-warrior-gut-check-and-shield/2017/03/28/3d7a26ce-0a01-11e7-8884-96e6a6713f4b_story.html).

esteem, greater anxiety and conflict, and less job satisfaction. Such employees may also receive less pay and have less opportunity for advancement. Job applicants who experience discrimination on the basis of sexual orientation or gender identity may not be considered for a job at all, even though they may be well-qualified. This rule is designed to address these problems to ensure a fair and inclusive work environment in the context of Federal contractors.

In 2016, the Department finalized regulations regarding sex discrimination, and noted that prohibiting discrimination ensures that “qualified and productive employees . . . receive fair compensation, employment opportunities, and terms and conditions of employment.” *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39,108, 39,150 (June 15, 2016). The Department cited social science research supporting the need for effective nondiscrimination enforcement, both to “promote economic efficiency and growth,” and to avoid “shift[ing] the costs of discrimination to minority group members.” *Id.*<sup>23</sup> Now, only a few years later, the Department proposes an about-face, expanding the opportunity for contractors to discriminate against their employees.

The costs are not only economic. Discrimination also creates intangible costs by reducing equity, fairness, and personal freedom; impeding the ability of workers to make deeply personal decisions regarding expression of their gender identity or sexual orientation, relationships and families, or regarding medical treatment; eroding protections for employees’ personal privacy regarding protected characteristics; and decreasing the dignity and rights of stigmatized minorities.

## **V. THE EXEMPTION SHOULD BE ELIMINATED OR NARROWED, NOT EXPANDED.**

The language in Executive Order 13,279 that created the religious exemption for federal contractors was a mistake when it was enacted in 2002 and should be eliminated. Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).<sup>24</sup>

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<sup>23</sup> Citing Shelley J. Lundberg & Richard Starz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 *American Economic Review* 340 (1983), <http://www.jstor.org/stable/pdf/1808117.pdf?acceptTC=true>; Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 *Indus. & Lab. Relations Rev.* 175 (1977), <http://econ2.econ.iastate.edu/classes/econ321/rosburg/Aigner%20and%20Cain%20-%20Statistical%20Theories%20of%20Discrimination%20in%20Labor%20Markets.pdf>; Kenneth J. Arrow, *What Has Economics to Say about Racial Discrimination?* 12 *J. Econ. Persp.* 91 (1998), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.12.2.91>; J. Hoult Verkerke, *Free to Search*, 105 *Harv. L. Rev.* 2080 (1992); James J. Heckman and Brook S. Payner, *Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 *Am. Econ. Rev.* 138 (1989); Hsieh, C., Hurst, E. Jones, C.I., Klenow, P.J. *The Allocation of Talent and U.S. Economic Growth*, NBER Working Paper (2013), <http://klenow.com/HHJK.pdf>.

<sup>24</sup> Coalition letter to President Barack Obama (July 16, 2014), <https://www.au.org/sites/default/files/LGBT%20EO%20sign-on%20letter%20add'l%20signers.pdf>;

Government-funded discrimination is unacceptable—no less when someone is fired from a job because they are the “wrong” religion or are nonreligious. By permitting contractors to discriminate with federal funds, the exemption unconstitutionally puts the government’s imprimatur on discrimination in violation of the Equal Protection Clause and the Establishment Clause.

“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). And “it is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (citation and internal quotation marks omitted); cf. *United States v. Burke*, 504 U.S. 229, 238 (1992).

The prohibition on discrimination by the government does not change when the means of discrimination is through the distribution of federal funds. For example, as the government’s “constitutional obligation” prevents it from discriminating, it is also prohibited from “giving significant aid to institutions that practice racial or other invidious discrimination.” *Norwood*, 413 U.S. at 467. Even if the purpose of the funding serves “some higher goal,” the Equal Protection Clause still bars government involvement in discrimination. *Id.* at 466–67. Time and again, the Supreme Court has held that the federal government has a responsibility not to lend its “power, property and prestige” to discriminatory organizations. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that state impermissibly supported a private business’s discrimination by leasing public property without including nondiscrimination provisions in business’s lease); see also *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors’”). “Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious.” Civil Rights Div., U.S. Dep’t of Justice, Title VI Legal Manual 1 (2019), <https://www.justice.gov/crt/case-document/file/934826/download> (quoting Pres. John F. Kennedy, H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

Government-funded discrimination is no more permissible when it is done by a religious organization. While faith-based organizations may participate in government-funded programs, such organizations may not use those funds to discriminate. See *Bob Jones*, 461 U.S. at 591. Presently, the Title VII exemption permits religiously affiliated nonprofits to discriminate by hiring co-religionists. 42 U.S.C. § 2000e-1(a). Even assuming the scope of the Title VII exemption is

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CARD letter to President Barack Obama (June 21, 2011), [https://www.aclu.org/sites/default/files/field\\_document/card\\_letter\\_to\\_obama\\_re\\_70th\\_anniversary\\_-\\_final\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/card_letter_to_obama_re_70th_anniversary_-_final_0.pdf).



permissible, importing that exemption into the context of government-funded employment in Executive Order 13,279 was unconstitutional. A religious organization using public funds to advance its religious missions crosses over into improper governmental religious advancement. When the Supreme Court upheld the Section 2000e-1 exemption against an Establishment Clause challenge, the Court expressly distinguished the application of Section 2000e-1 in the case before it from situations involving government financial support of religion. *Amos*, 483 U.S. at 337 (explaining that Establishment Clause claim lies where “the *government itself* has advanced religion through its own activities and influence”). The Court observed that “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, *financial support*, and active involvement of the sovereign in religious activity.” *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)) (emphasis added).

The existing exemption already unlawfully permits taxpayer-funded religious discrimination. Discrimination against religious minorities prevents the most qualified people from being in taxpayer-funded roles. For example, a religiously affiliated, taxpayer-funded refugee resettlement agency refused to hire Saad Mohammad Ali for an Arabic-speaking caseworker job because he was not Christian. Mohammad Ali was himself an Iraqi refugee who served as an interpreter in Iraq for the U.S. government.<sup>25</sup> Mohammad Ali had been volunteering with the organization for six months when a manager encouraged him to apply for a permanent job with the organization—but he was not hired because he was the wrong religion. This is presently licensed by Executive Order 13,279, and illustrates the disadvantages of the current exemption. The exemption should not be further expanded by the Proposed Rule.

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For all these reasons, the Department should withdraw the Proposed Rule. Please contact Lindsey Kaley at [lkaley@aclu.org](mailto:lkaley@aclu.org) with any questions.


Sincerely,



Ronald Newman  
National Political Director



Louise Melling  
Deputy Legal Director



Lindsey Kaley  
Staff Attorney

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<sup>25</sup> 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/>.