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Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Ave., NW
Washington, DC 20210
Submitted electronically to http://www.regulations.gov

RE: RIN 1250-AA09

Mr. Fort:

The American Federation of State, County & Municipal Employees (AFSCME) is pleased to submit these comments to the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) on the Proposed Rule regarding the religious exemption to the equal opportunity clause of Executive Order (EO) 11246, as amended. The Proposed Rule would unjustifiably allow an overly broad class of federal contractors to discriminate against individual workers in otherwise protected classes. This will result in significant harm to the federal government and the broader economy, as well as to the individual workers themselves. Further, the proposed expansion of a right to discriminate in employment by federal contractors is predicated on erroneous conclusions of law. For these reasons, we strongly urge you to withdraw the Proposed Rule.

AFSCME's 1.4 million members serve in hundreds of occupations across the nation—from nurses to corrections officers, child care providers to sanitation workers—providing the vital services that make America happen. AFSCME advocates for fairness in the workplace, excellence in public services and freedom and opportunity for all working families. We work to promote policies that prohibit harassment, discrimination and retaliation in employment for our members, as well as policies that affirm the rights and fair treatment of the people with whom we come into contact in our work. Our members include government workers as well as employees of government contractors.

AFSCME's commitment to equal opportunity manifests in the principles we adhere to, the work we do and the results AFSCME and its members deliver every day. It is embodied in AFSCME's constitution, in which the first clause of the our Members' Bill of Rights guarantees individuals will be accepted into membership "on a basis of unqualified equality," without regard to race, creed, color, national origin, ethnicity, sex, age, sexual orientation, gender identity or expression, disability, immigration status, or political belief. AFSCME members have been leaders in fighting for equal

treatment on the job, whether it has been pushing to end racial discrimination[1], leading the charge to ensure women receive equal pay for equal work[2], or negotiating the very first contractual protections against discrimination based on sexual orientation.[3] In most of our collective bargaining agreements, AFSCME members have successfully negotiated for language prohibiting discrimination on the basis of characteristics such as race, gender, sexual orientation, gender identity and faith. Most significantly, the work of AFSCME and other unions to promote equal opportunity on the job has made a real difference in the lives of working people, delivering better and more equal pay and benefits[4], greater financial security,[5] and improved economic mobility and opportunity.[6]

AFSCME strongly supports EO 11246 and the current regulations that implement it. They are consonant with the basic principle that "[n]either the President nor the Congress nor the conscience of the nation can permit money which comes from all of the people to be used in a way which discriminates against some of the people."[7] Further, they reflect the government's compelling interest in both eradicating the broad economic harm caused by employment discrimination and promoting economy and efficiency in federal procurement.

Under the EO and its implementing regulations, federal contractors and subcontractors and federally-assisted construction contractors and subcontractors that do over $10,000 in Government business in one year are (a) prohibited from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin, and (b) required to take affirmative action to ensure that equal opportunity is provided in all aspects of employment without regard to an individual's status in any of these classes. The implementing regulations exempt from these particular requirements a contractor or subcontractor that is "a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 41 CFR § 60-1.5(a)(5). This exemption is narrow, and limited, and, like other statutes

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[1] The historic 1968 strike by AFSCME Local 1733 members in Memphis, Tenn., was driven in significant measure by the poor treatment of the African-American sanitation workers relative to white employees of the city. Robert H. Zieger, For Jobs and Freedom: Race and Labor in America Since 1865 193 (2007).

[2] "Starting in 1963, AFSCME…became the nation's most forceful advocate for comparable worth as the union entered a period of dramatic growth and feminization." Katherine Turk, Equality on Trial: Gender and Rights in Modern American Workplace 108 (2016). In 1981, AFSCME members employed by the City of San Jose struck for equal pay for women, the first strike of its kind.

[3] AFSCME members in Washington and Michigan were the first to negotiate protections against employment discrimination based on sexual orientation. Miriam Frank, Out in the Union: A Labor History of Queer America 107 and FN 7 (2014).

[4] David Madland & Alex Rowell, Ctr. For Am. Progress, *Combating Pay Gaps with Unions and Expanded Collective Bargaining* (2018), https://cdn.americanprogressaction.org/content/uploads/sites/2/2018/06/28053712/GenderRacialPayGaps-brief.pdf.https://cdn.americanprogressaction.org/content/uploads/sites/2/2018/06/28053712/GenderRacialPayGaps-brief.pdf.

[5] Christian E. Weller & David Madland, Ctr. For Am. Progress, *Union Membership Narrows the Racial Wealth Gap for Families of Color* (2018), https://cdn.americanprogress.org/content/uploads/2018/08/29074054/UnionMembershipNarrowsRacialGap-Brief1.pdf.

[6] Richard Freeman et al., Ctr. For Am. Progress, *Bargaining for the American Dream: What Unions Do for Mobility* (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/09/08130545/UnionsMobility-report-9.9.pdf.

[7] Richard M. Nixon, *January 22, 1971: State of the Union Address*, millercenter.org (Sept. 5, 2019), https://millercenter.org/the-presidency/presidential-speeches/january-22-1971-state-union-address.

containing such exemptions, is applicable only to the religious institutions and organizations that exist to support and manage the religious practices of their faith.[8]

OFCCP proposes to amend the implementing regulations by expanding the scope and reach of the religious exemption to an unrecognizable degree. Under the Proposed Rule, the exemptions of contractors and subcontractors from the equal opportunity requirements would be interpreted so as to permit discrimination of employees on the basis of "religious exercise" by practically any secular business that can articulate a religious basis for employment discrimination. This interpretation exceeds the bounds of the US Constitution and law, including the Religious Freedom Restoration Act of 1993. Proposed 41 CFR § 60-1.5(e). Specifically, OFCCP proposes to codify broader definitions of the terms "exercise of religion," "particular religion," "religion," "religious corporation, association, educational institution, or society" and "sincere," so as to permit virtually any contractor or entity to qualify for an exemption to the EO's nondiscrimination requirements under the religious exemption. Proposed 41 CFR § 60-1.3.

The Proposed Rule Unjustifiably Expands the Religious Exemption

The Proposed Rule notes that the EO's religious institution exemption is predicated on the similarly worded exemption contained in Title VII. It then notes that the proposed revisions are required as a result of recent Supreme Court precedent which has "reminded the federal government of its duty to protect religious exercise—and not impede it." The precedent cited for this proposition consists of *Masterpiece Cakeshop*, *Trinity Lutheran*, *Hobby Lobby* and *Hosanna-Tabor*.[9] However, these decisions neither justify an expansion of current contractor guidelines nor provide reason to revise the current rule.

Masterpiece Cakeshop involved a First Amendment expressive speech and free exercise challenge to a state commission's determination that a baker had violated Colorado's public accommodation law by declining to create custom wedding cakes for same-sex wedding celebrations. The plurality of decisions, which reversed a Colorado court of appeal, each were predicated on the speech and viewpoint implications of the state commission's action. Indeed, the justices comprising the majority determined that the public accommodation law's flexibility with respect to permitting bakers of wedding cakes to refuse cake orders based on the messages they conveyed was not neutrally applied and, more so, the state commissioners appeared hostile to the particular viewpoint held by Masterpiece Cakeshop's owner. The plurality decisions coalesced around this "hostility" towards the baker's viewpoint while permitting other bakers to reject cakes reflecting other viewpoints. Emphatically, the decisions had nothing to do with employment discrimination in the entirely secular field of federal contracting. Indeed, federal contracting must be entirely secular as a result of the Establishment Clause, which would prohibit religious consideration in contracting or the award of contracts that further religious purposes. Likewise, the government may place restrictions on expressive speech associated with the use of federal funds.

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[8] EEOC Compliance Manual, Section 12-I.C.1 m (Religious organizations exemption of Title VII applies to organizations "whose purpose and character are primarily religious."); see also Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (June 13, 2018), https://www.justice.gov/crt/page/file/1071246/download.

[9] 84 FR 41679 (Aug. 15, 2019); *and see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

As in *Masterpiece Cakeshop's* plurality opinions, *Trinity Lutheran* simply affirms that the Free Exercise clause ensures religious institutions are protected from "unequal treatment" and prohibits targeting the religious for "special disabilities." It does not condone a broad religiously-predicated exemption to nondiscrimination laws as the Proposed Rule suggests. In *Trinity-Lutheran* the state law forbade religious institutions from participating in a generally available playground improvement grant program that prohibited religious institutions from receiving a grant. The court described this prohibition as amounting to a "no churches need apply" policy. Again, like *Masterpiece Cakeshop*, the decision was premised on an exclusion (or hostility) of religious institutions from participation on an equal basis with secular institutions. Had religious applicants for the grants reserved the right to exclude children and parents from their playground on the basis of, for example, gender, gender identity, or sexual orientation, the denial of the grant to such an applicant would be entirely lawful. Federal contracting is not a generally available public benefit, but a reticulated system for the funding and delivery of governmental functions and services by private parties. More to the point, the current rule does not target the religious for any "special disabilities."

Likewise, *Hobby Lobby*, concerned the "severe economic consequences" that would be imposed on closely-held corporations that, due to their principal's professed religious beliefs, wished not to offer employees the contraceptive coverage necessary to satisfy the Affordable Care Act's minimum essential coverage requirements. The unavoidable and severe economic consequence of failing to meet the ACA's standard, the Court held, was incompatible with RFRA which, the Court noted goes "far beyond what [] is constitutionally required" under the Free Exercise clause.[10] In addition, the Proposed Rule references *Hosanna-Tabor*, a Title VII case that the NPRM describes as applying the "ministerial exception" to a "religious school" and, on that basis, the NPRM asserts that the religious institutions exemption to Title VII is not limited to religious institutions. But that case involved a congregation of a church and its ministers, not a "religious school." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her.") Certainly the decision cannot be read to invite the general application of the ministerial exception to lay people employed by religious institutions, or private for-profit businesses whose owners may also hold religious beliefs, or engage in practices, that they also wish their employees to hold or engage in.

These precedents offer too precarious a ledge on which to rest the Proposed Rule's dramatic expansion of the EO's religious exemption. Yet the NPRM's reliance on these cases is explicit wherein it states the Proposed Rule "is intended to provide clarity regarding the scope and application of the religious exemption consistent with" these legal developments.

While these decisions do not address, relate to, or authorize the expansive view that the Proposed Rule seeks to adopt, even if that were not the case, the Proposed Rule is inconsistent with these decisions. As these and many other cases confirm, the hallmark of the protection afforded by the Free Exercise clause is to ensure government does not place disabilities on the exercise or practice of religion (absent a compelling basis). However, the Proposed Rule is overly solicitous to contractors who wish to engage in religiously-based discrimination in the performance of the people's business—contracted governmental functions and attendant receipt of public funds to perform that secular purpose. In this way, the Proposed Rule crosses the border from non-interference in religious exercise under the Free Exercise clause and well into

[10] At p. 706.

territory proscribed by the Establishment Clause. It does so by authorizing all manner of federal contractors to forward religious preferences and practices through the receipt of federal funds and performance of governmental purposes and functions.

Expanding the Religious Exclusion Threatens to Undermine the Impact of EO 11246 and Harm Individuals, Government and the Economy

By expanding the kinds of entities and acts that qualify for the religious exclusion, the Proposed Rule will empower federal contractors and subcontractors to engage in employment discrimination. This increased discrimination will come at a high cost to affected individuals, the government and society at large as qualified individuals are excluded from contractor workforces or otherwise denied equal opportunities at work based on irrelevant characteristics that have nothing to do with their ability to do the job. OFCCP has failed to consider these costs adequately in evaluating the appropriateness of the Proposed Rule.

EO 11246 has played an important role in combatting employment discrimination by establishing clear requirements for equal treatment. A substantial body of research shows, for example, the relative number of workers from protected classes increased at federal contractors compared to non-contractors while the EO has been in effect.[11] Exempting more contractors from having to comply with its equal opportunity requirements will lessen its positive impact on workers. This will be especially true for workers not otherwise covered by federal or state statutory protections against discrimination and those only recently given protection through the EO's expanded application to sexual orientation and gender identity. Even for those workers who may be covered by such protections in their jobs, the expanded exemption sends a troubling signal to their employers about the federal government's permissive views of such discrimination and may encourage noncompliance.

The Proposed Rule will directly harm individuals subjected to employment discrimination by federal contractors, denying them both dignity and economic opportunity. Research clearly establishes that employment discrimination inflicts significant harm on working people. For example, the US Commission on Civil Rights has summarized the extensive research on the impact of discrimination on LGBT workers' financial security, as follows:

> Workplace discrimination against LGBT communities can cause job instability and high turnover, resulting in greater unemployment and poverty rates as well as substantial wage gaps between LGBT and heterosexual workers. On average gay men earn from ten to 32 percent less than similarly qualified heterosexual males. Older gay and lesbian adults experience higher poverty rates than their heterosexual counterparts. In the 2015 U.S. Transgender Survey released by the National Center for Transgender Equality, transgender individuals were three times as likely to be unemployed and more than twice as likely to live in poverty compared to general rates in the U.S. Nearly 30 percent of respondents in the survey reported being homeless.[12]

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[11] *See, e.g.*, Fidan A. Kurtulus *The Impact of Affirmative Action on the Employment of Minorities and Women over Three Decades: 1973-2003* Upjohn Inst. Working Paper 15-221 (2015), https://research.upjohn.org/up_workingpapers/221/.

[12] U.S. Comm'n on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans* 14-15 (2017) (citations omitted), https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

The Proposed Rule will harm the federal government by undermining the economy and efficiency of federal procurement. Major employers and federal contactors that have adopted formal policies and statements expressing their commitment to diversity, including with respect to sexual orientation and gender identity, typically cite the positive impact of these policies on their ability to recruit and retain the best talent, innovation within their workforces and employee productivity.[13] Contractors that exclude entire classes of otherwise qualified workers from employment or treat such workers unequally based on irrelevant individual characteristics likely will underperform relative to contractors that do not discriminate. Employers that discriminate limit the worker talent pool from which they draw, diminishing the work performed. Discriminating employers also increase their own costs, as they deal with higher turnover and lower commitment among the workers they do hire.

Employment discrimination also has significant negative macroeconomic effects, which will grow if OFCCP finalizes the Proposed Rule. Discrimination leads to higher unemployment rates and lower wages among impacted workers, as well as lower investment in their education and training, resulting in lower overall economic performance for the country. Further, the financial drag created by employment discrimination at any employer rolls up into large economy-wide harm. For example, one study found that employers' unfair employment practices cost employers $64 billion per year in direct costs from unwanted employee turnover, not counting other hard-to-measure effects like reputational damage, which could further inhibit an employer's ability to attract qualified employees.[14] A more recent study calculated the cost in the technology industry alone to be $16 billion a year.[15]

For the reasons stated above, AFSCME urges OFCCP to withdraw the Proposed Rule. Please contact us with any questions you may have regarding them.

Sincerely,

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Director
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Teague P. Paterson
Deputy General Counsel

SK/TP/SO:tem

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[13] Brad Sears & Christy Mallory, Williams Inst., *Economic Motives for Adopting LGBT-Related Workplace Policies* (2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf.

[14] Level Playing Field Inst., *The Corporate Leavers Survey 2007: The Cost of Employee Turnover Due to Failed Diversity Initiatives in the Workplace* (2007), https://www.smash.org/wp-content/uploads/2015/05/corporate-leavers-survey.pdf#targetText=Level%20Playing%20Field%20Institute's%20Corporate,women%20and%20gays%20and%20lesbians.

[15] Allison Scott, et al., Ford Found. and Kapor Ctr. for Soc. Impact, *Tech Leavers Study: A First-of-Its-Kind Analysis of Why People Voluntarily Left Jobs in Tech* (2017), https://mk0kaporcenter5ld71a.kinstacdn.com/wp-content/uploads/2017/08/TechLeavers2017.pdf.