ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

December 9, 2021

Ms. Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Department of Labor
200 Constitution Avenue NW, Room C–3325
Washington, DC 20210

Re: Comments Submitted to Federal eRulemaking Portal, http://www.regulations.gov, Concerning Regulatory Information Number (RIN) 1250–AA09, Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 FR 62115–62122, published Nov. 9, 2021.

Dear Ms. Williams:

Alliance Defending Freedom (ADF) submits the following comments on the notification of proposed rescission of the OFCCP regulations implementing the Equal Opportunity Clause's religious exemption. 86 FR 62115 (Nov. 9, 2021).

ADF is an alliance-building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding.

Since its launch in 1994, ADF has handled countless matters involving the religious freedom principles addressed by the notification of proposed rescission. It has represented and advised religious organizations offered federal government contracts and subcontracts, helping them navigate the ambiguities in Executive Order 11246's religious exemption. ADF has also represented religious employers with respect to their eligibility for Title VII's religious exemption.

Accordingly, ADF respectfully submits that it is well-qualified to comment on the NPRM.

The proposed rescission rests primarily on four suspect contentions: (1) that the 2020 Rule was unnecessary; (2) that the 2020 rule's "religious employer" test is insufficiently rooted in Title VII case law; (3) that the 2020 rule will permit employment actions that should be

impermissible; and (4) that the 2020 rule rests on an unsound application of the Religious Freedom Restoration Act.

None of these contentions bears scrutiny.

A. The 2020 Rule Was Necessary.

The notification of proposed rescission claims that the 2020 rule was unnecessary. *See* 86 FR at 62117. It makes two observations to bolster that assertion. First, it observes that for 17 years, OFCCP "implemented the Executive Order 11246 religious exemption without seeking to codify its scope and application in specific regulatory language." *Id*. Second, it notes that the religious exemption has "no effect on the overwhelming majority of federal contractors." *Id*. (quoting 85 FR at 79367); *see also id.* at 62118 & n. 3.

The fact that OFCCP neglected to flesh out the meaning of the religious exemption between 2003 and 2020 is hardly conclusive proof that clarification was unnecessary. Indeed, the facts demonstrate that such clarification was in fact overdue.

The 2020 rule was necessary because the relevant case law was either inconsistent or undeveloped on two key issues: (1) the test for determining whether an employer qualifies for the religious exemption; and (2) the proper application of the religious exemption to claims of discrimination based on protected characteristics other than religion.

First, as the notification acknowledges, "there is no uniform test that all courts use" to determine a contractor's eligibility for the exemption. 86 FR at 62118. Indeed, as the preamble to the 2020 rule states, the appellate courts interpreting Title VII's analogous provision generated a "confusing variety of tests, [which] themselves often involve unclear or unconstitutionally suspect criteria." 85 FR at 79331. *See Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); and *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997). Given this state of affairs, it was necessary for OFCCP to bring greater clarity to the relevant legal issues, for the benefit of government contractors, their employees, and OFCCP itself.

Second, courts had not conclusively settled how the Title VII religious exemption should apply to claims of discrimination based on protected characteristics other than religion. That issue became more pressing as some courts and federal agencies began to interpret Title VII and other bans on sex discrimination to reach sexual orientation and gender identity discrimination, culminating in the June 2020 decision in *Bostock v. Clayton County*, 140 S. Ct. 1731. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)(Title IX).

To state the obvious, many faith-based organizations—including some that serve as government contractors—believe that homosexual and transgender behavior is inconsistent with

their religious tenets and give effect to that belief in the employment setting. As a result, it was appropriate (even necessary) for OFCCP to bring greater clarity to the interpretation and application of the religious exemption, so that such religious organizations could better assess their eligibility to serve as federal government contractors.

The notification of rescission also argues that 2020 rule was unnecessary because the percentage of government contractors that are religious is relatively low. 86 FR at 62117 (noting that the rule has "no effect on the overwhelming majority of federal contractors); *id*. at 62118 (referring to the "comparatively few" contractors and subcontractors that might even potentially qualify as exempt religious employers); *id*. at 62118 n. 3 (contending that no contractor had invoked the religious exemption since 2004).

This argument wrongly suggests that the participation of religious organizations in the federal procurement system is unimportant. The willingness of the President to issue an executive order focusing exclusively on such participation belies this contention, E.O. 13279, Equal Protection of the Laws for Faith-Based and Community Organizations (Dec. 12, 2002)(President George W. Bush), as does the broader government-wide effort to increase partnerships with faith-based social service providers. *See, e.g.*, E.O. 13498, Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships (Feb. 5, 2009)(President Obama); E.O. 13831, Establishment of a White House Faith and Opportunity Initiative (May 3, 2018)(President Trump); E.O. 14015, Establishment of the White House Office of Faith-Based and Neighborhood Partnerships (Feb. 14, 2021)(President Biden).

In sum, the 2020 rule was necessary. Rescinding the rule based on an incorrect contrary assertion is unjustified and unwarranted.

B. The 2020 Rule's "Religious Employer" Test is Sufficiently Rooted in Title VII Case Law.

The notification also argues that the 2020 rule's "religious employer" test should be rescinded because it allegedly does not sufficiently track case law interpreting Title VII's analogous religious exemption. 86 FR at 62117 (referring to its alleged "departures from Title VII principles and case law" and claiming that its test is "independent of Title VII case law interpreting the identical term"). The notification observes that the preamble to the 2003 rule explained that the then-newly added religious exemption was modeled on the Title VII exemption. 86 FR at 62116-62117. This argument is misplaced.

The notification first contends that the 2020 rule departs from Title VII because it dispenses with the "primarily religious" verbal formula set forth in certain Title VII cases. *Id*. at 62117-62119. To be sure, many of the judicial decisions regarding Title VII's religious exemption declare that employers must be "primarily religious" to qualify. *See, e.g., Spencer*, 633 F.3d at 726; *LeBoon,* 503 F.3d at 226. According to its preamble, however, the 2020 rule avoided the "primarily religious" verbal formula because of the constitutional difficulties raised by an inquiry undertaken under that formula. 85 FR at 79331. OFCCP invoked Judge

O'Scannlain's concurring opinion in *Spencer* to support its concerns. *Id*. (citing *Spencer*, 633 F.3d at 737-38). These concerns are well-grounded. *See, e.g., Colo. Christian Univ. v. Weaver*, 534 F.3d at 1245 (10th Cir. 2008)(striking down inquiry into whether a religious educational institution was "pervasively sectarian" as too intrusive).

In any event, the preamble to the 2020 rule correctly observes that the "primarily religious" verbal formula is of limited utility. 85 FR at 79333. It noted that "courts have labored over how to operationalize that requirement into a set of factors that can be applied neutrally, objectively, and with minimal constitutional entanglement." *Id*. The divergent tests developed by various courts of appeals confirms the preamble's point. Accordingly, the 2020 rule's decision to eschew the "primarily religious" formulation hardly means that it diverges in substance from the relevant precedents.

The 2020 rule's definition of "religious corporation, association, educational institution, or society" does in fact incorporate the key elements of Title VII case law. That definition requires that an employer must be "organized for a religious purpose" and "hold[] itself out to the public as carrying out a religious purpose." 41 C.F.R. § 60-1.3. These elements are found in both *Spencer* and *LeBoon*. The requirement that the organization "engage[] in activity consistent with, and in furtherance of, that religious purpose" also resonates with these and other Title VII decisions. In light of these realities, it is difficult to credit the notification's contention that the 2020 rule's religious employer test is insufficiently connected with Title VII case law and should thus be rescinded.

The notification's unstated premise seems to be that agencies like OFCCP cannot resolve for themselves uncertainties created by conflicting judicial decisions or by the absence of judicial decisions addressing emerging but pressing questions. To be sure, agencies may not contradict or rewrite the statutes (or executive orders) they are purporting to interpret. But that limitation hardly restrains them from resolving judicial disagreements or addressing unanswered questions. There is simply no compelling reason for an agency like OFCCP to endlessly tolerate significant uncertainties while waiting (perhaps futilely) for courts not only to address these issues (in the different Title VII context) but also to do so in a unanimous fashion. That is unrealistic and unworkable.

Oddly enough, the notification makes *no* effort to engage the illustrative examples set forth in the 2020 rule. 41 C.F.R. § 60-1.3 (discussing four hypothetical contractors and whether they qualify for the religious exemption). These examples go a long way not only towards demonstrating the 2020 rule's fealty to Title VII case law but also towards addressing the lack of clarity in a concrete, practical, and "user-friendly" way. This component of the notification is but one example of its tendency to focus on the 2020 rule's preamble (which, of course, is not itself operative) instead of the text of the rule itself (which is). This makes the rationale for rescinding the rule in its entirety all the more curious.

C. The 2020 Rule's "Particular Religion" Definition Does Not Permit Unlawful Employment Actions.

The notice of proposed rescission contends that the 2020 rule potentially exempts employment actions that should be impermissible. 86 FR at 62119-62120. In making this allegation, the notice focuses on its definition of "particular religion." 41 C.F.R. § 60-1.3.

The 2020 rule's definition of "particular religion" permits a contractor to require, as a condition of employment, the applicant's or employee's "acceptance of or adherence to sincere religious tenets as understood by the employer." 86 FR at 62119 (citing and quoting 85 FR at 79371 (codified at 41 C.F.R. § 1.3)). The notice agrees with this contention, as it must. *See, e.g.*, *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). However, it adds a caveat, contending that such employment actions are permissible only if they "do not violate the other nondiscrimination provisions of Title VII, apart from the prohibition on religious discrimination." 86 FR at 62119.

According to the notice of proposed rescission, this provisions might be interpreted to permit religious contractors to engage in employment actions the current OFCCP believes should be disallowed. This provision, in its view, should thus be rescinded.

Although it is true that Title VII's religious exemption does not grant religious employers carte blanche to discriminate on bases other than religion simply by invoking some religious justification, it is also true that religious employers may sometimes impose conduct standards that implicate protected classifications other than religion. This reality reflects the uncontested truth that "religion" has been defined in the law to include not just belief, but also observance, practice, and adherence to religious tenets. *See* 85 FR at 79344.

At the heart of the issue is an inquiry into what is really happening—is the employer actually relying upon religion in making an adverse employment decision, or is it instead relying on something else—such as a protected classification? If the former, the decision does not violate either Title VII or the executive order. As stated in the notice of proposed rulemaking that led to the 2020 rule, "when evaluating allegations of discrimination on bases other than religion against employers that are entitled to the Title VII religious exemption, courts carefully evaluate whether the employment action was permissibly based on religion." 84 FR at 41680. If it was, then the action is permissible.

Given a proper and nuanced understanding of this aspect of the 2020 rule, there is no justification for its rescission.

D. Rescinding the 2020 Rule Will Have Adverse Consequences.

Despite the notice's conclusory claims to the contrary, rescinding the 2020 rule will undoubtedly reduce the clarity of the executive order's religious exemption.

It bears noting that the heart of the 2020 rule is the definition of three ambiguous terms: "particular religion," "religion," and "religious corporation, association, educational institution,

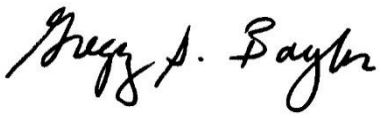
or society." Prior to the 2020 rule, the meaning and application of these terms was disputed and uncertain. Defining them brought greater clarity. Eliminating them will bring back ambiguity, uncertainty, and unpredictability. A proper commitment to the rule of law points towards defining vague terms, not eliminating helpful definitions.

Eliminating these definitions also confers undue discretion on OFCCP. Written standards guide and constrain the exercise of government power. The absence of such standards frees adjudicators (like agencies and courts) to indulge their policy preferences. Religious contractors would be justified in fearing how the current OFCCP might interpret the executive order's religious exemption in the absence of clear standards, given the current Administration's general hostility to religious liberty. *See, e.g.*, Statement of President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress, Feb. 19, 2021 (available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/) (Equality Act would impose unprecedented burdens on religious exercise and dramatically curtail the reach of the landmark bipartisan Religious Freedom Restoration Act).

Finally, rescission of the 2020 rule would almost certainly deter qualified religious organizations from competing for government contracts. Rescission would send a clear signal that they are not welcome unless they are prepared to abandon their sincerely held religious beliefs and practices. This would undermine the government's oft-stated interest in promoting economy and efficiency in federal procurement, 86 FR at 62116 (citing 40 U.S.C. § 101), and the principles set forth in executive orders 12866 and 13563. *See* 86 FR at 62121.

ADF respectfully requests that OFCCP retain the 2020 rule in its entirety.

Respectfully submitted,



Gregory S. Baylor
Senior Counsel