



April 3, 2023

TO: Office of Personnel Management

**RE: RIN 3206-AO17
Suitability and Fitness Vetting**

To the Office of Personnel Management:

The American Center for Law and Justice (“ACLJ”) submits the following comment regarding the Notice of Proposed Rulemaking issued by the Office of Personnel Management (“Suitability of Fitness Vetting”), as published in the Federal Register on January 31, 2023 (hereafter, the “Proposed Rule”).

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion and have submitted formal comments regarding proposed rulemaking on a wide variety of issues.¹

The ACLJ urges the Office of Personnel Management (“OPM”) to reject its proposed revision to 5 CFR 731.202(7). The revision is unnecessary and, if adopted, raises the very serious risk that it will be applied in a way to jeopardize fundamental First Amendment freedoms.

Currently, 5 CFR 731.202 (“Criteria for making suitability determinations”) provides that the following factor “will be considered a basis for finding a person unsuitable and taking a suitability action”:

Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.

§ 731.202(7).

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport’s ban on First Amendment activities).

OPM's Proposed Rule proposes replacing that factor with the following "four distinct factors":

- (1) Knowing engagement in acts or activities with the purpose of overthrowing Federal, State, local, or tribal government.
- (2) Acts of force, violence, intimidation, or coercion with the purpose of denying others the free exercise of their rights under the U.S. constitution or any state constitution.
- (3) Attempting to indoctrinate others or to incite them to action in furtherance of illegal acts.
- (4) Active membership or leadership in a group with knowledge of its unlawful aims, or participation in such a group with specific intent to further its unlawful aims.

88 Fed. Reg. 6199.

OPM alleges that "[t]hese more nuanced factors are narrowly tailored to address conduct that is not protected by the First Amendment, that has a clear nexus to the integrity and efficiency of the civil service, and that poses significant insider threat risks to Federal agencies and to the public they serve." *Id.*

As an initial matter, OPM does not reveal any concrete examples demonstrating why these "more nuanced factors" are necessary. It uses only vague, bureaucratic assertions to do so. When proposing a new regulation, the government should bear the burden of explaining why a regulatory change is needed. Simply asserting the interests at stake and opining without data that a change in the regulation will do a better job serving those interests has no persuasive value.

More importantly, the proposed revision raises serious questions about how the four factors will be applied where the First Amendment rights of religious exercise and free speech are at stake. OPM states that these factors "address conduct that is not protected by the First Amendment," but there is no reason to take OPM at its word, especially when the language it is proposing opens the door to potential First Amendment abuse. "The First Amendment 'does not leave us at the mercy of noblesse oblige.'" *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400, 408 (6th Cir. 2022) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

Before addressing what the four factors say, it is important to point out two things that they do **not** say. First, while the current rule appropriately states as a suitability factor "overthrow[ing] the U.S. Government **by force**," the proposed first factor adds other governmental entities (State, local, or tribal) but curiously deletes the words "by force." Why? The NPRM does not say. The term "overthrow" can have many meanings, but two are relevant here: (1) "To cast down (a person or group of people) from a position of influence, prosperity, etc." and (2) "To bring down, depose, or put an end by force to (a government, institution, etc." *Overthrow*, Oxford English Dictionary (Online). See also Merriam-Webster Dictionary (Online) ("overturn, upset"; "to cause the downfall of: bring down, defeat"). In other words, while "overthrow" can include a violent uprising that changes government authorities and/or its structure, it can also mean a majority of the citizenry casting out an elected official at the ballot box, as we see every four years in a presidential election.

No one should be deemed unsuitable for federal employment because of how he or she voted. The Proposed Rule’s removal of the critical words “by force” raises the distinct possibility of that taking place. Any confusion regarding what the Proposed Rule means by “overthrow” is easily resolved: by not removing the words “by force.”

The second thing the proposed rule does not include is any rule of application stating that the proposed four factors should not be applied in a way that circumscribes a person’s constitutional liberties. If OPM is certain in its assertion that the proposed factors “address conduct that is not protected by the First Amendment,” there is no principled reason not to include such language to make that explicit, e.g., “Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.” While it is true that federal officials must comply with the Constitution whether on notice of that or not, given the “nuanced” factors OPM is proposing (“vague” is a more appropriate word) such notice only makes sense.

Turning to the other three factors, there can be no doubt that these factors could be used to disguise retaliation for exercising a First Amendment right. Take for example the application of the second factor to a volunteer at a pro-life pregnancy resource center (PRC). Planned Parenthood believes (wrongly so) that “crisis pregnancy centers” “mislead and coerce people facing unintended pregnancies who believe that they are visiting a neutral and objective medical facility.”² NARAL Pro-Choice America has said (wrongly so) that such centers have “the sole purpose of preventing women from accessing abortion (through lies and coercion).”³

Based on the rhetoric of these organizations—rhetoric that undoubtedly echoes throughout the present administration and its agencies—a volunteer at a PRC could readily be deemed unsuitable for a federal job. A pro-abortion bureaucrat might easily find that such a person is guilty of using “coercion with the purpose of denying others the free exercise of their rights” under a state constitutional right to abortion.

Take, as a further example, the fourth factor: “Active membership or leadership in a group with knowledge of its unlawful aims.” The danger of how that factor might be interpreted and applied by relevant government officials to law-abiding citizens exercising their right to religious freedom is not a false alarm. Less than two months ago, an FBI memorandum leaked to the public identified “radical-traditionalist Catholic[s]” as potential “racially or ethnically motivated violent extremists.”⁴ Yes, that memorandum was later retracted, but only after it came to light.

Federal employees play a vital role in carrying out functions related to our country’s social, economic, and financial well-being. As public employees, however, they do not relinquish their

² Planned Parenthood, “CPC Fact Sheet,” https://www.plannedparenthood.org/uploads/filer_public/81/a3/81a30c3d-c40f-4bd9-aa28-be52e2180b1b/ppnc-cpc-fact-sheet.pdf. (Last visited March 17, 2023.)

³ NARAL, “Crisis Pregnancy Centers Lie,” <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf>. (Last visited, March 17, 2023.)

⁴ FBI, *Interest of Racially or Ethnically Motivated Violent Extremists in Radical-Traditionalist Catholic Ideology Almost Certainly Presents New Mitigation Opportunities*, reprinted in Kyle Seraphin, *The FBI Doubles Down on Christians and White Supremacy in 2023*, UncoverDC (Feb. 8, 2023), <https://tinyurl.com/3fdb69ha>.

First Amendment rights “to comment on matters of public interest by virtue of government employment.” *Connick v. Myers*, 461 U.S. 138, 140 (1983) (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968)). Justice Robert Jackson said it best:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

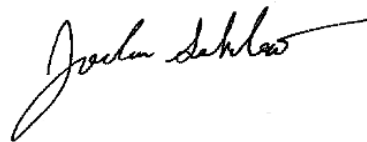
The danger that upstanding, law-abiding citizens will be deemed unsuitable for federal employment based on the Proposed Rule’s proposed four factors strongly counsels against their adoption. Not only will ideologically bent managers use these “nuanced” factors to cancel employees they do not like based on their speech and religious affiliation, but untold employees could be chilled in exercising them in the first place. In our current polarized, political environment, it does not strain credulity to suggest that fear of losing a job with the federal government might lead one to self-censor his or her speech or cease activities protected by the First Amendment. Choosing between a career and the exercise of one’s conscientious beliefs is a calculation no one should have to make. *Cf. Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (“If employees who exercise free speech find themselves facing more burdensome promotion requirements than those employees who remain silent, they are unlikely to speak freely on matters of public concern”). Free speech, after all, “is essential to our democratic form of government and it furthers the search for truth.” *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) (citations omitted).

CONCLUSION

The ACLJ respectfully requests that OPM reject any change to 5 CFR 731.202(7). OPM has not provided any substantive reasons why that change should be made. And the change it proposes jeopardizes the First Amendment liberties of current and future federal employees.

Very truly yours,

AMERICAN CENTER FOR LAW &
JUSTICE



Jordan Sekulow
Executive Director
American Center for Law & Justice