



September 16, 2019

Office of Federal Contract Compliance Programs (“OFCCP”), Labor
Attention: Comment on Notice of Proposed Rulemaking: **RIN 1250-AA09**
U.S. Department of Labor
Harvey D. Fort, Acting Director, Division of Policy and Program Development
Room C-3325
200 Constitution Avenue NW, Washington, DC 20210

RE: Proposed Clarifications to Religious Exemption in §204(c) of Executive Order 11246

To Whom It May Concern,

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and its members supporting the adoption of the proposed rule issued by the Department of Labor (“DOL” or “The Department”) on August 15, 2019, regarding Title VII clarifications to the religious exemption in section 204(c) of Executive Order 11246 as reported in 84 FR 41677 of the Federal Register (hereinafter “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 a number of significant cases involving the freedoms of speech and religion.¹ The ACLJ has submitted amicus briefs with the Supreme Court in support of petitioners in issues related to this rule in both *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014)² and *Zubik v. Burwell*, 136 S.Ct. 1557 (2016).³

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause).

² Amicus Curiae Brief of American Center for Law and Justice in Support of Petitioners, *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-354).

³ Amicus Curiae Brief of American Center for Law and Justice in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter *Amicus Curiae Brief*].

In general, it is good for society to shape its laws in ways that allow people to live their lives consistent with their sincerely held religious obligations. As Americans, we have always valued the freedom and expression of religion, and religious accommodations are an essential part of everyday life. When President Johnson signed Executive Order 11246 into action, he recognized the need for the critical accommodation for religious employers to be included in Title VII's protections. The Executive Order was then amended in 2002 by President Bush to include Title VII's exemption for religious organizations, which has since been implemented through the DOL's regulations.

The OFCCP is seeking to protect those accommodations by proposing clarifications to the Executive Order. We believe the Rule should be implemented fully as OFCCP has proposed. The alternative could mean that religious organizations that currently contract with the federal government would be forced to choose between ceasing their work or violating their sincerely held religious beliefs. Aside from the distastefulness and illegality of such a choice, it is untenable, because failure to implement the accommodations would result in hundreds of thousands of Americans being cut off from social welfare programs and assistance given to them through these religious organizations.

Critics of the Rule have tried to argue in the reverse, asserting that what these protections afford is actually tantamount to religious discrimination in and of itself.⁴ The truth, however, is that this Rule adds nothing at all new and takes nothing at all away from existing regulations. It simply clarifies that when a religious group asks its employees to adhere to the tenets of the group's faith, that is not, and never has been, discrimination. The proposal also reaffirms employers' obligations not to discriminate on the basis of race, sex, or other protected bases, and does not exempt or excuse a contractor from complying with any other requirements, including the state laws of the jurisdiction where they are located.

The Rule should be adopted in full as (a) it would clarify an ambiguity in the law regarding Title VII exemption; (b) religious organizations provide a net positive to society unlike any other; and (c) it would protect the long-standing rights of religious organizations as seen in the Constitution.

I. The Proposed Clarification Would Address an Ambiguity in the Law

Although this Rule is already the current policy, the proposal would clarify some of the ambiguity that religious organizations have faced--ambiguity which has actually prevented some organizations from participating in federal contracts over the last few years.⁵ This Rule comes one year after the OFCCP issued a Directive that told employees to

⁴ Comment in Opposition of *Proposed Rule* (Sept. 10, 2019), <https://www.regulations.gov/document?D=OFCCCP-2019-0003-11377>.

⁵ Such ambiguity can be seen as stemming from the Obama Administration. See Douglas Laycock, *Defense Authorization Bill needs to protect religious liberty*, <https://thehill.com/blogs/congress-blog/labor/306539-defense-authorization-bill-needs-to-protect-religious-liberty> (Nov. 17, 2016).

“proceed in a manner neutral toward and tolerant of . . . religious beliefs.”⁶ The exemption “springs directly from the Title VII exemption, it should be given a parallel interpretation consistent with the Supreme Court’s repeated counsel that the decision to borrow statutory text in a new statute is a ‘strong indication that the two statutes should be interpreted *pari passu*.’”⁷

The proposal will clarify that religious organizations can make employment decisions that are consistent with its religious tenets without being sanctioned by the federal government.⁸ The Rule states that the religious exemption should in fact be construed to provide the broadest protections for religious freedoms and exercise that are grounded in the Constitution and current laws, such as the Religious Freedom Restoration Act. This proposed regulatory change “make[s] clear that the Executive Order 11246 religious exemption covers not just churches, but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose.”⁹

Additionally, the proposed Rule also seeks to clearly define the following terms: *Exercise of religion; Particular Religion; Religion; Religious Corporation, Association, Educational Institution, or Society; and Sincere*.¹⁰ The defined terms are meant to provide and further promote the robust protections that religious freedom demands and deserves. Explaining why these clarifications are so important, Patrick Pizzella, acting U.S. Secretary of Labor stated that “[a]s people of faith with deeply held religious beliefs are making decisions on whether to participate in federal contracting, they deserve a clear understanding of their obligations and protections under the law.”¹¹

II. Religious Organizations Provide an Essential and Quantifiable Net Positive to Society as a Whole by Promoting Charity, Civic Virtues, and Good Citizenship.

It is important to recognize the fact that, as sociologist Robert Putnam has demonstrated, religious organizations provide clear and long-lasting benefits to society generally, benefits that go well beyond merely protecting the beliefs of practitioners, and extend into the secular world as well.¹² In recent studies, for example, Gallup found a similar connection between religion and civic engagement. This includes giving, volunteering, and

⁶ Laura Mitchell, *OFCCP Proposes New Rule to “Ensure Religious Employers are Protected*, NATIONAL REVIEW (Aug. 16, 2019),

<https://www.natlawreview.com/article/ofccp-proposes-new-rule-to-ensure-religious-employers-are-protected>.

⁷ Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption: A Proposed Rule by the Federal Contract Compliance Programs Office, 84 Fed. Reg. 41677 (Aug. 15, 2019) (to be codified at 41 C.F.R. 60) [hereinafter *Proposed Rule*] (Citing *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam).

⁸ This Rule “also reaffirms employers’ obligations not to discriminate on the basis of race, sex, or other protected categories and does not exempt or excuse a contractor from complying with any other requirements.”

⁹ *Proposed Rule*, *supra* note 7, at 41678.

¹⁰ *Id.* at 41679.

¹¹ U.S. Department of Labor Proposes a Rule Clarifying Civil Rights Protections for Religious Organizations, News Release, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814> (Aug. 14, 2019).

¹² See generally *Amicus Curiae Brief*, *supra* note 3.

helping strangers, around the world.¹³ That is why it is imperative to make sure religious organizations are able to receive necessary federal contracts to remain viable.¹⁴

Religious organizations and similar nonprofits have been contributing to American society for generations. “Their continued efforts provide important services within our national welfare system, including healthcare, social work, disaster relief, education, and charitable giving.”¹⁵ Historically, some sweeping societal changes that are universally accepted as being positives have come from religious initiatives as well: the Abolition Movement and the Civil Rights Movement received strong support from religious institutions. It is in fact difficult to imagine our society without the contributions of religious organizations to our conception of care and justice, as George Washington emphasized when discussing the importance of religion in his famous Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness— these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?¹⁶

Religious accommodations have enjoyed bipartisan support for many years, though only recently have some tried to make them into a contentious partisan issue. For example, President Obama famously recognized the important role religious nonprofits play in serving local communities:

Now, as we move to implement this rule, however, we’ve been mindful that there’s another principle at stake here—and that’s the principle of religious liberty, an inalienable right that is enshrined in our Constitution. . . . In fact, my first job in Chicago was working with Catholic parishes in poor neighborhoods, and my salary was funded by a grant from an arm of the Catholic Church. And I saw that local churches often did more good for a community than a government program ever could, so I know how important the work that faith-based organizations do and how much impact they can have in their communities.¹⁷

¹³ *Id.* at 16. (Citing Brett Pelham & Steve Crabtree, Worldwide, Highly Religious More Likely to Help Others, GALLUP (Oct. 8, 2008), <http://www.gallup.com/poll/111013/worldwide-highly-religious-more-likely-helpothers.aspx>).

¹⁴ *Amicus Curiae Brief*, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.* at 8 (Citing President George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 220 (James D. Richardson ed., 1896)).

¹⁷ Mark Aaron Goldfeder, *There is a Place for Muslims in America: On Different Understandings of Neutrality*, 93 NOTRE DAME L. REV. 59 (2017) (citing President Barack Obama, Remarks by the President on Preventive Care (Feb. 10, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/02/10/remarks-president-preventive-care>).

President Obama was correct in saying that religious liberty is an inalienable right and noting how religious groups make worthwhile contributions to secular society. Studies have shown time and again that involvement in religious organizations and/or religious networks is one of the strongest predictors of philanthropic generosity and civic involvement that are available.¹⁸

A. Religious organizations inculcate a commitment to civic involvement.

Religion and the social networks and organizations surrounding it are crucial in transmitting civic norms and habits. In fact, religious Americans are up to twice as active civically as secular Americans.¹⁹ “Religiosity is by far the strongest and most consistent predictor of a wide range of measures of civic involvement, such as belonging to a community organization, especially a health-related one, youth-serving organizations, neighborhood and civic associations, fraternal and service organizations, and even professional and labor groups.”²⁰

Likewise, religion energizes community problem solving and promotes active community leadership, including participation in local government and political activism. Of the most religious fifth of the population, twenty-nine percent said they had served as an officer or committee member of some organization, compared to only fourteen percent for the most secular fifth. Additionally, twenty percent of Americans who are religious say that they are a member of some organization that took local action for social or political reform within the last twelve months, compared to eleven percent of secular Americans.²¹

B. Religious organizations promote charitable giving and volunteering across both religious and secular nonprofit organizations.

Religiously based organizations and networks are without a doubt the greatest predictors of philanthropic generosity and civic involvement.²² “Research demonstrates that religious Americans are generally more altruistic neighbors and more conscientious citizens than their secular counterparts.”²³ In fact, the bulk of charitable donations made in the United States are made to religious congregations and organizations.²⁴ Of the \$358.38 billion given in private charitable contributions in 2014, thirty-two percent were made to congregations and religious organizations, with the next highest share being just fifteen

¹⁸ Goldfeder, *supra* note 17, at 63. (Citing ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 444–58 (2010)).

¹⁹ *Amicus Curiae Brief*, *supra* note 3, at 13. (Citing PUTNAM, *supra* note 18, at 454).

²⁰ *Amicus Curiae Brief*, *supra* note 3, at 13.

²¹ *Amicus Curiae Brief*, *supra* note 3, at 13. (Citing PUTNAM, *supra* note 18, at 454–56).

²² *Amicus Curiae Brief*, *supra* note 3, at 19. (Citing PUTNAM, *supra* note 18, at Ch. 13).

²³ *Amicus Curiae Brief*, *supra* note 3, at 19.

²⁴ *Id.* (Between 2008 and 2013, religiously affiliated charities received as much as one-third of all charitable donations made in the United States. Brian S. McKeever & Sarah L. Pettijohn, The Nonprofit Sector in Brief 2014, URBAN INSTITUTE 11 (Oct. 2014), <http://www.urban.org/sites/default/files/alfresco/publicationpdfs/413277-The-Nonprofit-Sector-in-Brief-.PDF>).

percent to educational organizations.²⁵ With that, among the top 50 largest U.S. charities are actually religious organizations like Catholic Charities USA, Salvation Army, St. Jude's Research Hospital, and Lutheran Services in America.²⁶

There are immense benefits created by living in a society that is more giving, and such benefits are distributed more widely than people might first assume. "Eighty-eight percent of givers to religious causes also gave to secular causes, while sixty percent of those who did not give to any religious causes did not give to any secular causes, either."²⁷ Again, looking at giving as a fraction of income, "seventy percent of above-average givers to religious causes are also above-average givers to secular causes, while sixty-seven percent of below-average givers to religious causes are also below-average givers to secular causes."²⁸ All of these statistics hold true even though the average churchgoer tends to be slightly disproportionately poorer.²⁹ While virtually every part of the American philanthropic spectrum benefits disproportionately from giving by religious observant people, this is especially true for organizations serving the vulnerable and the needy.³⁰ Surveys have also shown that churchgoers are significantly more likely to give money to strangers,³¹ family, and friends.³²

Much of the charitable donations made in the United States are through religious organizations. Moreover, public charities contribute nearly \$887.3 billion dollars to the United States economy.³³ Religious organizations make up over two-thirds of those public charities in the United States.³⁴ Over one-third of all volunteering in America is done for religious organizations.³⁵ Perhaps more importantly, of all the people who volunteered for a religious group, over ninety percent also volunteered for at least one secular group—making them two to three times more likely to volunteer for secular groups than people who do not volunteer for religious groups.³⁶ In the Giving and Volunteering surveys from 1988-2001, forty-five percent of weekly churchgoers report nonreligious volunteering in addition to their religious volunteering, while only twenty-six percent of non-churchgoers volunteer for anything at all.³⁷ Compared to a typical once-a-year churchgoer, the average weekly

²⁵ *Amicus Curiae Brief*, *supra* note 3, at 19. (Citing PUTNAM, *supra* note 18, at 448).

²⁶ The 50 Largest U.S. Charities 2015, FORBES, <http://www.forbes.com/top-charities/list/> (last visited Dec. 30, 2015).

²⁷ Goldfeder, *supra* note 17, at 63. (Citing PUTNAM, *supra* note 18, at 448).

²⁸ *Id.*

²⁹ *Id.* at 64. (Citing PUTNAM, *supra* note 18).

³⁰ PUTNAM, *supra* note 18, at 450.

³¹ *Id.* at 451.

³² *Id.* They were also more likely to give money to a charity, do volunteer work for a charity, give money to a homeless person, donate blood, help someone outside their own household with housework, spend time with someone who is down, and help someone find a job. The survey did not find a single type of good deed that is more common among secular Americans than religious Americans. *Id.*

³³ BRICE S. MCKEEVER & SARAH PETTIJOHN, URBAN INST., THE NONPROFIT SECTOR IN BRIEF 2014: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 1 (Oct. 2014), <https://www.urban.org/sites/default/files/publication/33711/413277-The-Nonprofit-Sector-inBrief—.PDF>.

³⁴ *Id.* at 6.

³⁵ Other research, including the 2006 Faith Matters survey, suggests that the number is even higher. *See* INTERNATIONAL COMMUNICATIONS RESEARCH, FAITH MATTERS SURVEY (Robert D. Putnam & David E. Campbell eds., 2006).

³⁶ PUTNAM, *supra* note 18, at 445.

³⁷ *Id.* at 446.

churchgoer volunteers an extra 10.5 hours a month for religious causes and 6.4 hours more for secular causes.³⁸ This difference is especially marked for service to poor, elderly, and young people. Religious organizations that provide social services have a quantifiable impact on the public good. Research shows that roughly eighty-seven percent of charitable congregations provided support or other services in activity areas that the researchers defined as being concerned with human services and welfare.³⁹

In terms of charitable giving, the findings are even clearer: giving to religious charities is strongly and positively correlated to giving to secular charities and organizations. Amongst the most secular fifth of the population, nearly one-third (32 percent) admitted that they had made no charitable contributions to any cause in the last year. Amongst the most religious fifth, that number was only six percent.⁴⁰ “Measured in charitable giving as a fraction of annual income, the average person in the most religious fifth is more than four times as generous as his or her counterpart in the most secular fifth.”⁴¹

This Rule would help protect religious organizations, which are a cornerstone of our society. A byproduct of the religious liberty protected in these organizations has been the growth of an active and pluralistic nonprofit sector including a wide variety of religions, faiths, and denominations. The continued engagement of individuals in this thriving sector promotes diversity and social cohesion and gives Americans across the board the opportunity to live their values, with all of the associated benefits to themselves and to society.

A full eighty-four percent of Americans see religious diversity as good for America.⁴² The way that most Americans bridge gaps and promote diversity is through social capital—those norms of trust and reciprocity that arise out of our shared social networks. Religious diversity among social networks promotes and fosters greater religious acceptance and tolerance. When Americans associate with people of faiths other than their own, they become more accepting of others.⁴³ As Robert Putnam explains it, “How has America solved the puzzle of religious pluralism, the coexistence of religious diversity and devotion? And how has it done so in the wake of growing religious polarization? By creating a web of interlocking personal relationships among people of many different faiths. This is America’s grace.”⁴⁴

Often, religious organizations are best-placed to respond to the changing needs of those they help. The close proximity to a local population, first-hand knowledge of the circumstances, and direct access to private funds, means that religious organizations can

³⁸ *Id.*

³⁹ Virginia Ann Hodgkinson et al., *From Belief to Commitment: The Activities and Finances of Religious Congregations in the United States: Findings from a National Survey*, INDEPENDENT SECTOR 18 (1988).

⁴⁰ PUTNAM, *supra* note 18, 447.

⁴¹ *Id.* at 448.

⁴² *Id.* at Ch. 15.

⁴³ *Id.* at 550.

⁴⁴ Little Sisters of the Poor: Our Mission Statement, <http://www.littlesistersofthepoor.org/ourmission/misison-statement> (emphasis added).

address concerns much faster than similar government organizations could. If there is a problem in the community, the local clergy will hear of it before the state social service agency and will likely have a response ready before government authorities can coalesce around a plan.

In practical terms, groups all throughout the United States are impacted by religious organizations and their charitable works. More than two-thirds of federally-supported residences for the elderly in this country are operated by faith-based organizations, with about one sixth of this country's child-care centers being housed within buildings owned by religious institutions. The nation's largest child-care operations are closely affiliated with the Southern Baptist Convention and the Roman Catholic Church.⁴⁵ These religiously affiliated operations are growing faster than the national average, suggesting that parents and guardians are preferring these institutions over secular ones.⁴⁶ Child care is but one example: A recent study by Georgetown University aggregated the economic value of religion in the U.S., and while estimates were clouded by vagaries in the definition of "value," in easily-counted and verifiable contributions alone the amount was greater than Apple and Microsoft's combined global revenues. If incomes and behavior are considered as driven by religious values of the earner, the combined earnings of religious people in the USA alone are roughly one-third of our GDP.⁴⁷

III. These Rights are Already Enshrined in the Constitution

In general, the Supreme Court has ruled it unconstitutional to discriminate against a religious organization based solely on its religious affiliation.⁴⁸ The Court has also made clear that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁴⁹ The Establishment Clause lines of jurisprudence instead say that the government should not pass laws that have the primary purpose of either advancing or inhibiting religion.⁵⁰ The government is to protect religious exercise by essentially being "hands off," including not ordering religious organizations to engage in conduct that goes against their beliefs. Executive Orders 13798, Promoting Free Speech and Religious Liberty, and 13831, Establishment of a White House Faith and Opportunity Initiative, along with U.S. Department of Justice guidance, likewise instruct federal agencies to protect religious exercise and not impede it.⁵¹

⁴⁵ Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government, found at https://www.nationalservice.gov/sites/default/files/documents/faith_guidance.pdf.

⁴⁶ *Id.*

⁴⁷ Brian J. Grim and Melissa E. Grim, The Socio-Economic Contribution of Religion to American Society: An Empirical Analysis. *Interdisciplinary Journal of Research on Religion*, Vol. 12 (2016), Article 3, found at <http://www.religjournal.com/pdf/ijrr12003.pdf>.

⁴⁸ *Church of Lukumi*.

⁴⁹ *Lynch v. Donnelly* 465 U.S. at 673.

⁵⁰ See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

⁵¹ U.S. DEPARTMENT OF LABOR PROPOSES A RULE CLARIFYING CIVIL RIGHTS PROTECTIONS FOR RELIGIOUS ORGANIZATIONS, News Release, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814>. (Aug. 14, 2019).

The Supreme Court has repeatedly held that laws touching religion must have a valid secular purpose, and not serve primarily to advance or inhibit religion.⁵² But that does not mean that religion should not be respected. The key to the American conception of religious neutrality lies in the understanding that religion is valuable—despite what strict secularists may say—and yet its “value is best honored by prohibiting the state from trying to answer religious questions”⁵³—despite what traditionalists believe.⁵⁴ Further, protecting religious organizations and their respective accommodations are imperative because it is not up to the courts to say that religious employers religious beliefs are “mistaken or insubstantial.”⁵⁵ By essentially forcing religious organizations to hire without regard to the religious preference of a respective candidate, the government would be treating the closely held beliefs of the employer as insubstantial.

Deference to religion in matters of governance means allowing religious groups to have autonomy. The government generally does not dictate its morality to the religious organizations because it would be akin to becoming a church itself. In this way the purity of religious doctrine is maintained as much as society can allow. In exchange, churches are limited in how they dictate their morality to the government -- members may vote and lobby as any other citizen would, but there is a system of checks and balances that prevents the largest church from running the country and imposing itself on others. Religious groups are allowed to contribute without feeling coercion from a government that does not share their belief system, and government is allowed to do its job and adapt to changing social conditions without religious conflict or dogmatism. Neither institution is corrupted by coming into contact with the other, and people remain the freest as a result.

The Supreme Court said it best in the seminal religious freedom case *Watson v. Jones*, where the autonomy and self-governance for churches was enshrined into American law:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.

⁵² See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

⁵³ ANDREW KOPPELMAN, DEFENDING AMERICAN NEUTRALITY 5, 2 (2013).

⁵⁴ See Mark Goldfeder, Book Review, 30 J.L. & RELIGION 541 (2015) (reviewing KOPPELMAN, supra note 11); see also John Witte, Jr. & Joel A. Nichols, “Come Now Let Us Reason Together”: Restoring Religious Freedom in America and Abroad, 92 NOTRE DAME L. REV. 427, 450 (2016) (“Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out.”).

⁵⁵ *Hobby Lobby*, 134 S. Ct. at 2779.

The proposed Rule adheres to this traditional understanding. The Department of Labor is following established Supreme Court jurisprudence using a philosophy of church and state that has sustained our country for centuries and will continue to sustain it for centuries more. Allowing religious organizations to fulfill their missions helps ensure the United States will continue to have a free and voluntary means of providing for its hospitals, food banks, emergency relief, child care, elderly care, education, counseling, and all other areas of life where religious groups perform services every day in this country. Letting religious organization determine how they operate maintains freedom, promotes quality of care, and lets self-rule exist through voluntary organization.

IV. The Proposed Guidelines Do Not Create New Protections but Rather Use the Tried-And-True Legal Framework of the Civil Rights Act of 1964.

Notwithstanding all of the above, in light of recent legal developments⁵⁶, there is a need to provide additional clarity about the requirements of the religious exemption in relation to the scope and application of Executive Order 11246. This will give contractors (and potential contractors) better insight, predictability, and overall information “for ordering their affairs.”⁵⁷ At present, it is not completely clear where the contractor or contracting organization must draw its lines as far as maintaining their belief systems vs. observing fairness among the different protected classes in the American workforce. The suggestion from the Obama administration that the Rule ought to be “religious people cannot be discriminatory for hiring only members of their own religion” instead of what it actually is under the Civil Rights Act of 1964 (non-discrimination law does not apply in religious contexts) gave rise to an ambiguous contradictory signal among those it affects.⁵⁸ Federal contractors have a right to know what to do, and when they are religious contractors, they have a right to know whether following a regulation could cause them to violate their own conscience impermissibly.

Like the Civil Rights Act of 1964, this proposed Rule will not lead to a slippery slope where any religious individual or group can invalidate important, generally applicable laws. The religious exemptions to anti-discrimination laws have been protecting religious organizations and groups from governmental intrusion for fifty years by exempting them from scrutiny, and still the country has made great strides towards reducing discrimination in every area during that time. Attempts to use religion to hide discriminatory intent are

⁵⁶ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise Clause of the First Amendment when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (the ministerial exception, grounded in the Establishment and Free Exercise clauses of the First Amendment, bars an employment-discrimination suit brought on behalf of a teacher against the religious school for which she worked).

⁵⁷ *Proposed Rule*, *supra* note, 7.

⁵⁸ Douglas Laycock, *Defense Authorization Bill Needs to Protect Religious Liberty*. THE HILL (Nov. 17, 2016). <https://thehill.com/blogs/congress-blog/labor/306539-defense-authorization-bill-needs-to-protect-religious-liberty>.

generally not successful.⁵⁹ The bedrock of legal precedent regarding sincerity and the compelling government interest in preventing discrimination will all hold true without the heavy hand of government dictating anyone's conscience. The religious freedom framework works well for all in this country, and the Department of Labor's guidance to apply that framework will build on that strong foundation.

VI. CONCLUSION

The ACLJ urges the Department to adopt the Rule in its entirety. It is imperative that religious liberty is protected and upheld. The Rule is consistent with previous implementations of Title VII protections and further clarifies the protections afforded to religious organizations that require religious accommodations. Without such clarification by the Department, current and potential future religious organizations that wish to contract with the federal government may very well be forced to walk away from their good work. This Rule allows religious employers to keep faithful to their closely held religious tenets and does not force them to make employment decisions that would otherwise compromise their beliefs. Religious organizations deserve to have a clear understanding of their obligations and protections under the law.

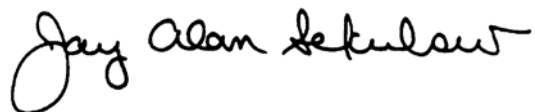
Aside from protecting our first liberty, the Rule is necessary to implement because of the vast societal good that religious organizations foster throughout the country, promoting philanthropic generosity and civic involvement at the highest levels. Indeed, religious organizations should be encouraged to contract with the federal government, not turned away because of any outstanding uncertainties of their protections under the law. Although these protections are already enshrined in the Constitution, adequate enforcement of the religious employer exemption requires specific and applied clarity, which this proposed Rule provides. Robustly protecting religious freedom will further enable religious organizations to do what they do best, which is to help serve those in need. The ACLJ will continue to remain ever vigilant in ensuring that all religious organizations are protected under the law.

Finally, the ACLJ commends and supports the Department in their mission to make sure religious organizations are made fully aware that they are protected in their employment decisions under Title VII. The proposed clarifications to the religious exemption in §204(c) of Executive Order 11246 are crucial in the ongoing battle to protect religious freedom and ensure that religious organizations are free to continue making society stronger. The clarity the Department is providing is admirable, and the Rule should be adopted.

⁵⁹ In 1967, one restaurateur's claims that the "free exercise of the Defendant's religion" required him to refuse service on the basis of race were not successful; the holding in *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 438 (4th Cir. 1967), *aff'd*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968) prevents religious cover for blatant racial discrimination.

Thank you for the opportunity to provide comment on this critical matter.

Sincerely,

A handwritten signature in black ink that reads "Jay Alan Sekulow". The signature is written in a cursive, flowing style.

Jay Alan Sekulow
Chief Counsel
AMERICAN CENTER FOR LAW & JUSTICE

A handwritten signature in black ink that reads "Jordan Sekulow". The signature is written in a cursive, flowing style.

Jordan Sekulow
Executive Director
AMERICAN CENTER FOR LAW & JUSTICE