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BY E-MAIL

September 16, 2019

Harvey D. Fort
Acting Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs, Room C-3325
200 Constitution Avenue, N.W., Washington, D.C. 20210

Re: RIN 1250-AA09

Dear Mr. Fort,

On behalf of ADL (Anti-Defamation League), we are writing to offer our comments on the proposed amendments to 41 CFR part 60-1, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," as outlined at [XX] ("Proposed Rule" or "Part 60-1").

For more than a century, ADL has been an ardent advocate for religious freedom for all Americans – whether they hold majority or minority religious beliefs. Among our core principles is strict adherence to the separation of church and state effectuated through both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when: all individuals are able to practice their faith or choose not to observe any faith; government neutrally accommodates religion but does not favor any particular religion; and religious belief is not used by government or other actors in the public marketplace to harm or infringe on the rights of individuals.

The Proposed Rule purports to parallel Title VII's Section 702 religious employer exemption. *See* 42 U.S.C. § 2000e–1(a). In realty, however, Part 60-1 is far broader and effectively makes any federal contractor eligible to discriminate in hiring and firing on the basis of religion. The Proposed Rule opens the door to discrimination against millions of applicants for publicly funded employment and would have a particularly harmful impact on religious minorities and LGBTQ people. It therefore would thwart the federal government's "compelling interest in providing an equal opportunity to participate in the workforce. . ." *See Burwell v. Hobby Lobby*, 573 U.S. 682, 733 (2014). Indeed, Part 60-1 contradicts the very Title VII case law cited in support of it. Furthermore, the Proposed Rule raises serious constitutional issues under the Establishment Clause to the First Amendment. The Proposed Rule should be recalled for modification because it is fundamentally unfair, unlawful, and unconstitutional.

The Proposed Rule Vastly Expands the Existing Federal Contractor Exemption

The Proposed Rule adds five definitions to the current federal contractor exemption. *See* 41 CFR § 60-1.5. The Proposed Rule would amend 41 CFR § 60-1.3 by adding definitions of: (1) "Exercise of religion"; (2) "Particular religion"; (3) "Religion"; (4) "Religious corporation, association, educational institution, or society"; and (5) "Sincere." The fourth definition would result in an overly broad religious exemption that is far beyond the scope and purpose of Title VII's. This definition is also incorporated by reference into the definition of "Particular religion."

To fall within the fourth definition, the government explains, a contractor must have a sincere religious belief and must: (1) be organized for "a self-identified religious purpose"; (2) "hold itself out to the public as carrying out a religious purpose"; and (3) "exercise religion consistent with, and in furtherance of, a religious purpose." (emphasis added).

These three elements are not intended to be a guide in determining whether a contractor is "primarily religious" or "secular as a whole." Rather, demonstration of each factor is stand-alone because according to the Proposed Rule's analysis, making such a balancing determination cannot be done "in any consistent way." Furthermore, to meet this standard a religious purpose "need not be the contractor's only purpose." Therefore, a contractor could have one religious purpose and multiple secular ones, but nonetheless be exempted.

Conversely, under the Proposed Rule, the Office of Federal Contract Compliance Programs (OFCCP) would make such a balancing determination in assessing whether an entity holds a sincere religious belief. As to that assessment, it would "take[] into account all relevant facts," including a contractor's "acting 'in a manner inconsistent with'" its religious beliefs, or a contractor's using religion to veil secular interests. Thus, Part 60-1 permits OFCCP to determine whether a belief is sincerely religious or secular, but it prohibits a determination that considers all relevant circumstances on the question of whether a contractor itself is religious or secular. The later should apply to both.

Moreover, relying on the U.S. Supreme Court's decision in *Hobby Lobby*, Part 60-1 specifically rejects non-profit status, or engaging primarily or substantially in the exchange of goods or services for beyond nominal amounts, as factors in determining whether a contractor has a religious purpose. As a result, virtually any for-profit contractor could avail itself of the exemption. Furthermore, virtually any separately incorporated religiously affiliated organization could fall within the exemption.

Federal and other statistics reflect the magnitude of the prospective detrimental impact of the Proposed Rule. Based on a search of the System for Award Management web-site, there are 378,896 companies and organizations registered as federal contractors. Of this number, 35 are the nation's largest private companies, which alone employ close to one and a half-million people.[1] Under the Proposed Rule, the for-profit nature of these companies would not be a barrier to invoking the exemption. Thus, under Part 60-1 the employees of these companies and many more millions at others could be newly subjected to government-funded discrimination.

The Proposed Rule Contradicts the Title VII & Other Caselaw It Cites

The Proposed Rule's standard for determining whether a religious corporation, association, educational institution, or society falls within the exemption heavily relies on the *per curium* decision in *Spencer v. World Vision, Inc.*, which set forth a new Ninth Circuit standard for the Title VII religious

[1] *See* "America's Largest Private Companies ... 2018 Ranking," Forbes, https://www.forbes.com/largest-private-companies/list/ (last visited August 28, 2019).

employer exemption. *See* 633 F.3d 723 (9th Cir. 2011).[2] Yet, Part 60-1 rejects a fourth factor set forth in the concurrences by Judges O'Scannlain and Kleinfeld, which formed the court's opinion, as well as a criterion found in Judge Kleinfeld's concurrence and Judge Berzon's dissent.

As to the later, Judge Kleinfeld's concurrence states:

> *Accordingly, I would reformulate Judge O'Scannlain's test as this: To determine whether an entity is a "religious corporation, association, or society," determine whether it is organized for a religious purpose,* ***is engaged primarily in carrying out that religious purpose,*** *holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. Id.* at 748 (emphasis added).

Similarly, the standard set forth by Judge Berzon would require a finding of "whether an organization is 'primarily religious.'" *Id.* at 752. Thus, a majority of the Ninth Circuit would have found that for an employer to be covered by the Title VII exemption, there must be a determination that the employer is primarily religious. Additionally, in 2007 the U.S. Court of Appeals for the Third Circuit ruled that there must be a finding of an organization's being primarily religious to fall within the Title VII exemption. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229 (3rd Cir. 2007). However, the Proposed Rule explicitly rejects this criterion. Indeed, it prohibits the three factors for determining whether a "religious corporation, association, educational institution, or society" is religious from being taken together to make a such a finding.

Judge O'Scannlain's concurrence in *World Vision* found that an entity's being non-profit "is especially significant" in determining whether the Title VII exemption applies because it is a neutral factor bolstering a claim that the employer's purpose is "non-pecuniary." 633 F.3d at 734. While Judge Kleinfeld agreed that considering non-profit status "would facilitate free exercise of religion," he expressed a concern that relying on it "would also allow people to advance discriminatory objectives outside the context of religious exercise by means of mere corporate paperwork." *Id.* at 742. According to his concurrence, a focus on non-profit corporate status is incorrect because there are some religious assemblies without corporate status, and "[a]bsence of corporate papers" should not defeat the purpose of the exemption. *Id.* at 745. Emphasizing this factor "would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." *Id.* To Judge Kleinfeld, charitable motive should be the focus. He distinguished between a religious motive and a monetary motive for work that serves others. *Id.* at 747. For example, he drew a distinction between a religious hospital that receives money for valuable services at the market rate and the Salvation Army which gives away or provides services at a nominal rate. *Id.* at 746-47. As a result, the factor which Judge Kleinfeld adopted was providing services at no-cost or for a nominal fee. *Id.* at 748. The Proposed Rule rejects both factors.

The Proposed Rule erroneously ignores this binding precedent by relying on the *Hobby Lobby* decision, a case in totally different context. *Hobby Lobby* involved a challenge to the Affordable Care Act's contraception mandate under the federal Religious Freedom Restoration Act (RFRA), which is distinct and operates far differently than the Title VII exemption. Significantly, the Supreme Court held only that RFRA could apply to for-profit closely held corporations. *See* 573 U.S. at 683. Moreover, in the context of government health insurance mandates, the Court also held that the protections of RFRA may not apply to closely held, for-profit corporations in all circumstances. *Id* at.

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[2] "[A]n entity is eligible for the [Title VII] section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 724.

730. Yet, as discussed *supra*, the Proposed Rule's exemption could apply to virtually any for-profit private or public corporation.

Critically, the Court in *Hobby Lobby* explicitly distinguished the challenge to the contraception mandate from "discrimination in hiring, for example on the basis of race, [being] cloaked as religious practice to escape legal sanction." *Id.* at 733 (emphasis added). According to the Court: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* The decision's use of the phrase "for example" does not limit this *dicta* to employment discrimination based on race. Moreover, in the context of employment discrimination, the Court indicated that even a for-profit closely held corporation could not invoke RFRA's free exercise protections.

The Proposed Rule also points to the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), for support. That case also did not involve the Title VII exemption. Rather, it held that the First Amendment provides houses of worship and other religious institutions with a "ministerial exception" to discrimination claims. *Id.* at 172-75. The Court further held that the exception applied to the employee in question. *Id.* In reaching this holding, the Court weighed the religious and secular functions of the employee to determine whether she had a ministerial role at the church. It found that the exception covered the employee "given all the circumstances of her employment." *Id.* at 190. In doing so, the Court reviewed the employee's religious and secular functions. *Id.* at 190-93. This analysis is analogous to that conducted in *LeBoon, see* 503 F.3d at 226-229, and both cases undermine the Proposed Rule's representation that OFCCP could not engage in a similar type of balancing to determine whether a contractor is religious or secular.

The Proposed Rule Is Contrary to the Purpose of the Title VII Exemption

Title VII's Section 702 exemption was never intended to provide the basis for government-funded discrimination. Rather, it was enacted to prevent entanglement between government and religious institutions. In 1987, the U.S. Supreme Court upheld the right of religious organizations under Section 702 to discriminate on the basis of religion in hiring staff with their own funds because doing so is intrinsic to their ability to define and carry out their religious mission. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The exemption most certainly was not intended to encompass secular or for-profit employers. Yet, as discussed *supra*, the Proposed Rule's overly broad exemption would do exactly that. Assessing the scope of a far narrower construction of the Title VII exemption, Judge Kleinfeld's concurrence in *World Vision* warned that an overbroad interpretation "would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." 633 F.3d at 745. The same warning must also apply to for-profit employers. And the Judge's admonition was made in the context of private employment. Given that in *Hobby Lobby* the Court found that anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace, it is axiomatic that for publicly-funded employment that interest is amplified. Thus, applying the Title VII exemption in the public employment context undermines the statute's goal and its anti-discrimination prohibitions.

Certainly, the Proposed Rule's exemption also encompasses actual houses of worship and religious institutions. ADL supports the right of a church, synagogue, mosque or other religious organization to use its own private funds to hire only co-religionists for positions that advance its religious mission. However, religious discrimination in hiring for government-funded programs is a wholly

different circumstance. No one should be barred from a taxpayer-funded job based on their faith. Such discrimination violates the American principles of equality and meritocracy.

Furthermore, the Proposed Rule is unconstitutional on two distinct grounds. First, this discrimination constitutes government support for particular religious missions in violation of the Establishment Clause to the First Amendment. *See* U.S. Const. amend. I. Second, it runs afoul of the "no-religious-tests clause" of the U.S. Constitution. *See* U.S. Const., art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

Notwithstanding that an Establishment Clause violation would preempt an application of RFRA, the Proposed Rule's reliance on that statute is misplaced. Citing the U.S. Supreme Court decisions in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Senate Committee Report on RFRA stated: "pre-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." *See* S. REP. 103-111, 1892, 1998 (1993). Moreover, in construing the scope of internal government affairs, the U.S. Supreme Court found in 2011 that "the Government's interest in as 'proprietor' in managing its operations does not turn on" the formality of whether an individual is a civil servant or a contract employee. *NASA v. Nelson*, 562 U.S. 134, 150 (2011) (internal citations omitted). Even if strict scrutiny did apply, as discussed *supra* the interest in public workplace equality achieved through anti-discrimination prohibitions would meet that standard.

Additionally, the Proposed Rule's reliance on the U.S. Supreme Court's recent Free Exercise Clause decisions in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) is misplaced.

Masterpiece Cakeshop did not involve discrimination in publicly-funded employment. Rather, it involved a challenge by a privately-owned business to a local human rights ordinance that *inter alia* prohibited discrimination on the basis of sexual orientation. The Court ruled in favor of the petitioner on the narrow grounds that respondent's finding of discrimination was tainted with religious hostility. *See Masterpiece Cakeshop*,138 S. Ct. at 1732.

In reaching its decision in *Masterpiece Cakeshop*, the Court recognized "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." *Id.* at 1723. It further found that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1723-24. In addition to this case's addressing the context of a private public accommodation, there is no evidence that the Proposed Rule is necessitated by the federal government's hostility toward religion. Additionally, although for these reasons *Masterpiece Cakeshop* is readily distinguishable from the context of the Proposed Rule, this case actually could lend support to the application of a neutral anti-discrimination law to a religious institution in the context of publicly-funded employment.

At issue in *Trinity Lutheran* was a Missouri program that provides grants to private and public schools as well as other non-profit institutions to purchase rubber playground surfaces made from recycled tires. *See* 137 S. Ct. at 2017. Based on Missouri's No-Aid Clause, the program prohibited houses of worship and other religious entities from participating in the program. *Id.*

In an unprecedented ruling, the Supreme Court held that the Free Exercise Clause required the State to provide a direct grant to a house of worship. *Id.* at 2024-25. Specifically, the Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.*

at 2019 (internal citations omitted). In reaching this conclusion, the Court distinguished its decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a denial of public funding for "'degrees in devotional theology'" based on the State of Washington's No-Aid Clause, stating that the petitioner in that case "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." 137 S. Ct. at 2023 (emphasis in original). The Court further found that Missouri failed to justify the program's exclusion of religious institutions based on "religious establishment concerns." *Id.* at 2024.

Critically, the six justices who joined the *Trinity Lutheran* majority evenly split on footnote 3, which states:

> *This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.* Id. at 2024, n.3.

As with *Masterpiece Cakeshop*, the *Trinity Lutheran* decision was made in a completely different context than the Proposed Rule. It did not answer the question of whether a religious institution can discriminate with public funds, and thus the decision has no bearing on the question of whether a religious institution can discriminate in publicly-funded employment. Furthermore, given the government's compelling state interest in workplace equality within the public sector, prohibiting discrimination in all taxpayer-funded jobs would be a state interest of the highest order.

We urge you to recall the Proposed Rule for modifications in light of these serious policy, statutory and constitutional arguments.

Sincerely,

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Vice President

David L. Barkey
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National Religious Freedom Counsel

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