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September 16, 2019

The Honorable Patrick Pizzella
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

RE: RIN 1250-AA09: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption

Dear Acting Secretary Pizzella:

We write in strong support of the Department of Labor's (DOL) proposed rule to clarify the religious exemption for federal contractors. Religious organizations have been discouraged from seeking federal contracts because of uncertainty surrounding the current religious exemption. The proposed rule will provide certainty regarding the obligations of federal contractors, which will encourage wider participation in the federal contracting system. This will not only benefit religious organizations seeking federal contracts, it will also benefit the contracting system and taxpayers as additional qualified organizations bid for contracts, increasing competition and providing needed goods and services that may otherwise not be provided.

More broadly, the proposed rule reaffirms the importance of protecting the constitutional principle of the free exercise of religion. The First Amendment to the Constitution begins by stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—codifying for the first time in human history the right to religious liberty. By ensuring that those who contract with the federal government may freely exercise their religion, the proposed rule carries out this founding principle. As J. Matthew Sharp, Senior Counsel, Alliance Defending Freedom, recently testified at a hearing before the Committee on Education and Labor:

Pervasive government regulation is a fact of modern life. And in a nation as diverse as ours, all of those laws have serious consequences for the free exercise of

religion.... [F]reedom of religion—along with freedom of speech, of the press, and others enshrined in our Bill of Rights—are cornerstones of our democracy. We want the government to safeguard minorities and respect individual rights. The alternative is the tyranny of the majority....¹

DOL's proposed rule is well-grounded in federal law and longstanding policies. Title VII of the *Civil Rights Act of 1964* exempts 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."² Title VII broadly defines "religion" as including "all aspects of religious observance and practice, as well as belief."³ In 2002, President George W. Bush issued an executive order (EO) amending EO 11246 which prescribes the nondiscrimination requirements for federal contractors by importing word-for-word Title VII's religious exemption.⁴ The Bush EO thus clarified that the contours of Title VII's religious exemption applied equally in the federal contracting context.

However, subsequent amendments to EO 11246 have caused unnecessary uncertainty regarding the religious exemption in federal contracting. The proposed rule reaffirms the religious exemption as described in the 2002 Bush EO and provides additional guidance for contractors. Like Title VII, the proposed rule defines "religion" broadly to include "all aspects of religious observance and practice."⁵ In keeping with Title VII case law, the proposed rule also makes clear that the religious exemption allows religious contractors not only to prefer in employment those who share their religion, but also to prefer in employment those who accept or adhere to the employer's religious tenets.⁶ These clarifications will ensure religious contractors are allowed to exercise their religion in practice.

The proposed rule also clarifies the kinds of employers who qualify for the exemption, which will provide needed guidance to employers who have had questions about whether the religious exemption applies to them. To make sure a contractor qualifies as a religious corporation, association, educational institution, or society, the proposed rule exempts employers who 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."⁷ The rule thus appropriately makes clear the exemption is not only for churches but also for employers organized for a religious purpose.

In recent years, the U.S. Supreme Court has issued significant decisions regarding the religious freedoms of employers, all of which affirmed the limitations on the government to infringe on the

¹ *Do No Harm: Examining the Misapplication of the "Religious Freedom Restoration Act": Hearing Before the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (written statement of J. Matthew Sharp, Senior Counsel, Alliance Defending Freedom, at 16).

² 42 U.S.C. § 2000e-1(a).

³ *Id.* § 2000e(j).

⁴ Exec. Order No. 13,279 § 4, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

⁵ Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677, 41,679 (proposed rule Aug. 15, 2019).

⁶ *Id.*

⁷ *Id.*

free exercise of religion.⁸ The proposed rule rightly considers these decisions in defining the religious exemption, ensuring DOL's approach regarding the religious freedoms of contractors is up to date.

We are committed to protecting religious freedom for all Americans, including federal contractors. The proposed rule clarifies the protections retained by religious organizations that contract with the federal government. The proposed rule, which is backed by federal law and Supreme Court precedents, will provide certainty and predictability for federal contractors, encouraging more employers to participate in the federal contracting system. We urge DOL to adopt the proposed rule in a timely manner.

Thank you for your consideration of these comments.

Respectfully submitted,



Rep. Virginia Foxx
Ranking Member



Rep. James Comer
Ranking Member
Subcommittee on Civil Rights and Human
Services

⁸ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) (government violates the Free Exercise Clause 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 (2017) (government violates the Free Exercise Clause when it conditions a generally available public benefit on an entity's giving up its religious character unless that condition withstands strict scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (*Religious Freedom Restoration Act* applies to federal regulation of for-profit closely-held corporations); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171 (2012) (ministerial exception is grounded in the First Amendment's religion clauses and bars claim of employment discrimination).