Transgender Law Center

Making Authentic Lives Possible

September 13, 2019

Submitted via www.regulations.gov

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

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

Dear Director Fort:

I write on behalf of the Transgender Law Center in response to the U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP) Notice of Proposed Rulemaking (hereinafter "proposed rule") to express our staunch opposition to the proposed rules to amend regulations relating to Section 204(c) of Executive Order 11246 published in the Federal register on August 15, 2019.

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. As an organization committed to keeping transgender and gender nonconforming people alive and thriving, we have a keen interest in ensuring that transgender people in this country are able to access employment opportunities and can do so without experiencing harassment or abuse.

For the reasons detailed in the comments that follow, OFCCP should immediately withdraw its current proposal, and dedicate their efforts to advancing policies that safeguard the rights of all employees of federal contractors living in the United States through robust, good-faith compliance with the current regulations interpreting Section 204(c). The proposed rule will harm transgender and gender non-conforming people living in the U.S. who face significant obstacles to accessing employment in the formal economy. Furthermore, the proposed rule is legally unsupportable.

Thank you for the opportunity to submit comments on this proposed rule. Please do not hesitate to contact us at Kris@transgenderlawcenter.org. We would be happy to provide further information.

Sincerely,
Kris Hayashi,
Executive Director

Introduction:

Transgender Law Center (hereinafter "TLC") opposes the proposed rule published by the U.S. Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (hereinafter "OFCCP" or "the Department") on August 15, 2019 related to its interpretation of the religious exemption contained in section 204(c) of Executive Order 11246. If finalized, this proposed rule would severely threaten transgender and gender non-conforming (hereinafter "TGNC") people's access to employment and job security and would promote discrimination. The proposed rule would enable and encourage government contracted companies, including for-profit companies, to deny transgender and gender non-conforming people employment. TLC urges OFCCP to withdraw the proposed rule and focus its efforts instead on enforcement of the Executive Order as it currently exists. In addition, given that the usual comment period is sixty days, and this comment period was only given thirty days, the Department of Labor should extend the comment period to a full sixty day period, in order to give the public an adequate amount of time to comment on this potentially devastating rule.

I. THE PROPOSED RULE SUPPORTS DISCRIMINATION OF TRANSGENDER AND GENDER NON-CONFORMING PEOPLE IN EMPLOYMENT WHO FACE HIGH RATES OF DISCRIMINATION

Ensuring that federal contractors comply with Executive Order 11246 is crucial to the Office of Federal Contract Compliance Programs (OFCCP) commitment to "protect workers, promote diversity and enforce the law."[1] As EO 11246 prohibits the OFCCP from discriminating in employment on the basis of "race, color, religion, sex, sexual orientation, gender identity, or national origin", the proposed rule completely undermines these commitments with its proposed expansion of religious exemptions. As we know, lesbian, gay, bisexual, transgender, and queer (hereinafter "LGBTQ") people, women, religious minorities, and the nonreligious face some of the most risk and undeniable forms of employment discrimination. Expanding religious exemptions will only further reproduce discrimination for LGBTQ people, women, religious minorities, and the nonreligious, and will particularly affect TGNC people who are currently only protected by EO 11246 because of the 2016 addition of 'gender identity' in the Rule.

A national survey of more than 25,000 TGNC people living in the U.S. in 2015 found that the unemployment rate for its respondents was 15% (fifteen percent), or three times higher than the U.S. unemployment rate at the time of the survey in 2015, which was 5% (five percent).[2] As this data highlights, the number of TGNC people who are unemployed was three times the national rate, and should be of national concern. We can also gather from this proposed rule that if and when worker discrimination does occur, the proposed rule would make it much harder to challenge said discrimination, because of the expansion of religious exemptions. For transgender and gender non-conforming people, experiences of discrimination are all too common. In a 2015

[1] U.S. DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, (2019) https://www.dol.gov/ofccp/aboutof.html

[2] Sandy E. James, et al., The Report of the 2015 U.S. Transgender Survey, NAT'L CTR. FOR TRANSGENDER EQUALITY, 93, (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (hereinafter "2015 U.S. Transgender Survey") (hereinafter "2015 U.S. Transgender Survey").

survey of more than 25,000 TGNC people, 16% (sixteen percent) of transgender people who have ever been employed reported losing at least one job because of their gender identity or expression.[3] The inclusion of the 'gender identity' to the 2016 Rule, attempted to address the vital issue of losing employment for TGNC people. However, much of that redress would be undone if this proposed rule is published.

II. ACCESS TO EMPLOYMENT FREE OF DISCRIMINATION IS CRITICALLY IMPORTANT FOR TGNC PEOPLE

For TGNC people, in particular, access to employment is a critical piece on a pathway to self-determination. A national survey of TGNC people living in the U.S. in 2015 notes that nearly 29% (twenty-nine percent) of its more than 25,000 TGNC respondents were living in poverty.[4] More specifically, TGNC people who are undocumented, people with disabilities, and people living with HIV were also more likely to be living in poverty. TGNC people of color with the highest rates of living in poverty included Black TGNC people, Latinx TGNC people, American Indian TGNC people, and multiracial TGNC people in the same national survey.[5] In addition, the data highlights that TGNC people were more than three times more likely than the average U.S. population to have an annual income below $10,000. With numbers like these, labor protections for TGNC people are extremely critical, especially for the most marginalized. With support by the OFCCP of the proposed rule, the Department of Labor is single-handedly facilitating an increase of these rates of poverty - whether by intention or by outcome of their potential progress. Access to employment protections for TGNC people who are already experiencing disproportionate levels of poverty should be further protected by the OFCCP and not in jeopardy of being overturned due to religious exemptions. Despite the well documented high levels of discrimination, harm, and poverty that TGNC people, and TGNC people of color in particular, experience in employment, the proposed rule would encourage further discrimination and place TGNC people in devastating positions of having fewer legal avenues of recourse to pursue.

III. THE PROPOSED RULE IS UNSUPPORTED UNDER PREVAILING LAW

Executive Order 11246 and its implementing regulations promulgated by OFCCP were enacted "for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts."41 C.F.R. § 60-1.1.

OFCCP now proposes to undercut this purpose by vastly expanding the reach of its religious exemption in various ways that constitutes a stark departure from prevailing law. The agency relies on misplaced case law and provides no explanation to justify such a drastic change in regulation. By watering down the criteria for religious exemptions, the agency effectively threatens to convert what was intended to be the exception to 11246's mandate into the

[3] 2015 U.S. Transgender Survey, at 93, (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[4] *Id.*
[5] *Id.* at 144-145, Figure 9.6.

prevailing rule. If enacted this would permit any employer to discriminate against TGNC people under the guise of religion with few mechanisms to prevent abuse.

The proposed rule flies in the face of Congressional intent regarding the scope of the Title VII exemption. Congress twice considered and rejected blanket exemptions from all of Title VII's protections against employment discrimination.[6] Because the Trump administration could not get what it wanted through Congress, OFCCP is now attempting to circumvent the legislative process by crafting a blanket exemption with this proposed rule and give contractors a catch-all defense to discrimination complaints.

A. This Broad Religious Exemption Violates the Establishment Clause

While there is a long history of protecting religious freedom in the U.S. that guarantees people the right to practice faith—or not—as we see fit, religious freedom was never intended to be used to harm or discriminate against others. The Establishment Clause of the U.S. Constitution forbids religious exemptions that burden or harm third parties.[7] Thus, when crafting an exemption, the government "must take adequate account of the burdens" an accommodation places on nonbeneficiaries and ensure it is "measured so that it does not override other significant interests."[8]

The proposed rule utterly fails to strike this balance. Instead it vastly expands the current exemption in EO 11246 for government-funded employers to engage in employment discrimination with no mechanism to meaningfully curb it, as described in further detail, below. In its proposed rule the Department does not even consider the harms to employees impacted by the broader exemption. For example, expanding the exemption to authorize for-profit government contractors to take adverse employment actions against their employees because of race, religion, sex or national origin could harm employees who are LGBTQ, pregnant and unmarried, or practice a minority religion, as well as others. As such, the proposed rule infringes upon the rights of many communities, including TGNC people, many of whom are protected classes under civil rights law, in violation of the Establishment Clause. TGNC people who face numerous barriers to gainful employment, as discussed, *Supra.,* Under I. and II., and *Infra.*, under III. F. would have even fewer means of challenging discrimination under the proposed rule.

B. The Proposed Rule Expands The Exemption to Encompass Entities who only Nominally Carry Out Religious Purpose

The proposed rule vastly expands the religious exemption of EO 11246 by adding several critical definitions and a new legal test for courts to determine whether contractors qualify for its

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[6] *See Rayburn*, 772 F.2d at 1167 (recounting legislative history); *Pac. Press*, 676 F.2d at 1276-77 (same).
[7] *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985). *See also Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 729 n.37 (2014).
[8] *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

exemption. The proposed rule allegedly borrows the definition of "religious corporation, association, educational institution or society" from Title VII ,[9] however, it completely changes the test courts have already developed to interpret whether an organization is a religious entity entitled to exemption. This will allow many more organizations and businesses to qualify without prior notice to employees or taxpayers, who, with notice, could choose to patronize different businesses, work at different companies, or vote differently.

Legal precedent has already established how courts must identify a religious entity. In *Spencer v. World Vision*, Inc., 633 F3d 723, 724 (9th Cir. 2011) the Ninth Circuit Court of Appeals in a *per curiam* opinion stated that an entity meets the definition of a religious entity if it (1) is organized for a religious purpose, (2) is engaged ***primarily*** in carrying out that religious purpose, (3) holds itself out to the public as an entity for carrying out that religious purpose, and (4) ***does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts***. [10]

After quoting *dicta* from a variety of cases about the dangers of secular courts inquiring into the religiosity of an organization, the Department puts forth a vague three prong test that eviscerates the test put forth by the Ninth Circuit. The Department does this by swapping in prongs from the test used by Judge O'Scannlain in his concurring opinion, watering down how it will enforce certain prongs, and outright rejects important prongs, including the prong that prohibits for-profit entities from qualifying for the exemption. Additionally, the test proposed by the Department rests solely on ill-defined criteria that must be measured from the perspective of the employer in question.

The proposed test would require that: 1) a religious employer is organized for a religious purpose, but "need not be the contractor's only purpose"; 2) the contractor holds itself out to the public as carrying out a religious purpose, which "must be measured with reference to the particular religion identified by the contractor;" and 3) the contractor must exercise religion consistent with, and in furtherance of, a religious purpose, also "measured with reference to the particular religion identified by the contractor." In an unprecedented move, the proposed rule would even allow *for-profit* corporations to use the religious exemption.

Entities that meet this definition would qualify for the broadened religious exemption. Under the proposed definition organizations that only nominally carry out a religious purpose would qualify for the religious exemption. For example, a Catholic hospital receiving federal money could refuse to hire a transgender employee if transitioning is counter to its religious tenets; ultimately giving the hospital free range to discriminate. Under the *World Vision* test such a hospital would not qualify for religious exemption because it is a for profit entity that is primarily engaged in the provision of healthcare rather than religious purposes. However, under

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[9] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg. 41667 (proposed Aug. 15, 2019) (to be codified 41 C.F.R. Pt. 60–1).
42 U.S.C.A. § 2000e-1 (West) provides: "This subchapter shall not apply to an employer with respect to [...] 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."

[10] *Spencer v. World Vision*, Inc., 633 F3d 723, 724 (9th Cir. 2011) (emphasis added).

the test proposed by the Department such a hospital may qualify so long as it was organized for a religious purpose, held itself out as a carrying out that religious purpose, and it exercises religion in furtherance of that purpose. As a direct result, a significant number of workers would lose nondiscrimination protections and could be fired from their jobs.

i. The Proposed Rule Eliminates the Requirement that the Entity Must Be a Nonprofit Organization

Critical to the inquiry under current case law is whether the employer in question engages in for profit exchange of goods and services or is primarily engaged in faith practices or teaching.[11] *See for example LeBoon v. Lancaster Jewish Community Center Ass'n.,* [12](finding that a nonprofit Jewish community center constitute an exempt religious organization); *see also Crotteau v. St. Coletta of Wisconsin*, [13](finding that a Catholic non-profit organization run by nuns providing services for people with developmental disabilities constituted a religious organization).

Despite the history of considering an entities non-profit status, the proposed rule notably eliminates the requirement from the *World Vision per curiam* decision that an entity "not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[14] Instead, the proposed rule explicitly permits for-profit organizations to qualify for the exemption. This vastly expands the number of TGNC employees--namely all of those who work in the private sector--from discrimination under the guise of religion. This is a stark departure from prevailing case law. Even Judge O'Scannlain's concurring opinion, which the proposed rule relies upon heavily, states that "the initial consideration, whether the entity is a nonprofit, is especially significant." [15] Indeed, the Department is unable to point to one single case where a court extended the Title VII exemption to a for-profit entity. Instead, the Department relies upon misplaced cases to explain it's departure from settled law.

The Department relies heavily on the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*.[16] to justify dropping this prong but it's reliance is misplaced. The OFCCP ignores several key pieces of the *Hobby Lobby* decision. In *Hobby Lobby*, a bare majority of the U.S. Supreme Court determined that a small subset of certain "closely held" for-profit companies could be considered "persons" under the Religious Freedom Restoration Act (RFRA), invalidating the Affordable Care Act's contraceptive coverage requirement for those employers. It is inapplicable in this context for several reasons.

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[11] *See World Vision , Inc.*, 633 F3d at 724 (stating that "an entity is eligible for the [Title VII] Section 2000-e1 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 good or services for money beyond nominal amounts;")
[12] 503 F.3d 217, certiorari denied 553 U.S. 1004 (C.A.3 (Pa.) 2007).
[13] 200 F.Supp.3d 804 (W.D.Wis.2016).
[14] *Id.*
[15] *World Vision, Inc.*, 633 F.3d at 734.
[16] 573 U.S. 682 (2014).

First, RFRA is an entirely different statutory scheme. Second, the Department ignores the fact that the *Hobby Lobby* decision rested, in part, on an analysis of the effect an exemption would have on people who are entitled to seamless access to contraception. Indeed, Justice Kennedy, in a concurring opinion, specifically noted that respecting religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[17] Yet, OFCCP entirely ignores the harms that this expansive religious exemption would have on employees across the country. Third, the Court's decision in *Hobby Lobby* was restricted to "closely held corporations, each owned and controlled by members of a single family."[18] The Department, however, does not limit its proposed rule in the same way.[19] Instead it simply says it "does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition." Finally, while the *Hobby Lobby* decision dealt with a general requirement on all non-grandfathered insurance plans, while the OFCCP proposed rule deals with businesses that willingly enter contracts with the federal government.

Since the Hobby Lobby decision, courts have maintained the definition of "religious corporation" put forth under *World Vision*. Cases decided post-*Hobby Lobby* have continued to apply the requirement that a religious corporation, at a minimum, be a nonprofit entity.[20] As such, the Department's reliance on *Hobby Lobby* is misplaced and cannot be used to support the Department's new definition. OFCCP's reliance on *Hobby Lobby* to broadly expand the religious exemption is just the latest of many attempts by this Administration to misuse and unlawfully expand the reach of the *Hobby Lobby* decision and RFRA, despite the significant harm to others.[21]

Under the Administrative Procedures Act, agencies are charged with interpreting statutes enacted by Congress by promulgating guiding regulations. They are not empowered to create entirely new law. The Department's attempt to drop the requirement that religious corporations must be non-profit entities to qualify for religious exemption is plainly unlawful.

ii. The Proposed Rule Eliminates the Requirement that the "Entity Must Be Engaged Primarily in Carrying out that Religious Purpose."

The proposed rule also drops the requirement from the test in the *World Vision per curiam* decision that an entity be "engaged ***primarily*** in carrying out" the religious purpose for which it

[17] *Id.* at 739 (Kennedy, J., concurring).
[18] *Hobby Lobby*, 573 U.S. at 717.
[19] The Administration similarly applied an unsupported expansive reading of the *Hobby Lobby* decision and RFRA in finalizing the broad exemption to the ACA's contraceptive coverage requirement. The Third Circuit has enjoined those rules, concluding that the rules were not supported by the law. *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019).
[20] *See Garcia v. Salvation Army*, 918 F. 3d 997, 1004 (9th Cir. 2019).
[21] For example, the Administration has relied on RFRA in granting an exemption to a foster care agency in South Carolina, allowing it to turn away non-Christian families in violation of non-discrimination protections. Similarly, the Administration has relied on RFRA to vastly expand the number of employers that can claim an exemption to the ACA contraceptive coverage benefit. And the Administration has relied on RFRA as one of its bases for rolling back protections against discrimination in health care. In each of these instances, the Administration has willfully misread *Hobby Lobby* and ignored the Court's own analysis of the accompanying harm a refusal based on religious objections will have on third parties.

was organized.[22] The proposed rule replaces this prong with the mere requirement that the entity "engages in exercise of religion consistent with, and in furtherance of, a religious purpose,"[23] which is broader than "engaged primarily in carrying out that religious purpose."

This prong is further watered down by the proposed rule's adoption of RFRA's extremely broad definition of the term "engage in religious exercise."[24] The Department looks to a completely different statute to define the term, using the definition in the Religious Freedom Restoration Act (RFRA).[25] The Department is pulling its definition from various different authorities in order to cobble together the result it wants, but such an patchwork approach is not sanctioned by law. The Department's mandate is to clarify existing law, not to create new law. The preamble explains that the determination of what is an exercise of religion is determined by the contractor and what it views as religious, which is also dangerously subjective threatening to encompass any given activity. This is too vague to provide guidance to employers and employees alike, and patrons.

iii. The Proposed Rule Keeps the Prong that an Entity Must Be "Organized for a Religious Purpose" but Renders it Practically Meaningless.

The proposed rule says that "a religious purpose can be shown by articles of incorporation or other founding documents, *but that is not the only type of evidence that can be used*." [26] The proposed rule fails to articulate a specific standard or type of documents that must be shown to demonstrate religious purpose. In contrast, Judge O'Scannlain articulated in his concurrence in *World Vision* that he would require that the religious purpose be evidenced by "Articles of Incorporation or similar foundational documents." By including the catch-all for other evidence, the Department further dilutes the boundaries of the test put forth in *World Vision.*

iv. The Proposed Rule Keeps the Prong that an Entity Must Be "Hold Itself Out to the Public as an Entity for Carrying Out that Religious Purpose" but Renders it Practically Meaningless.

In contrast to the fact-specific inquiry made in *World Vision* to determine that the entity held itself out to the public as a religious entity,[27] the proposed rule would allow an entity to meet this

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[22] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg. at 41683 (emphasis added). *See also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (explaining that its nine-factor test is designed to answer the question of whether the entity's "purpose and character are primarily religious.").

[23] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg. at 41691.

[24] The definition would use this broad term from the Religious Freedom Restoration Act (RFRA), an entirely different statute.

[25] 42 U.S.C. sec. 2000cc-5.

[26] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg. at 41682 (emphasis added).

[27] *See World Vision*, 633 F.3d at 738-39. World Vision met this prong through demonstrating that it displayed its religious logo, religious iconography, and religious text across its campus; distributed Christian Messaging Guidelines that governed their external communications; and included a religious statement on every piece of communication.

prong if it merely "affirm[s] a religious purpose in response to inquiries from a member of the public or a government entity." [28]

As a result, under this proposed rule, an entity could make no public showing of a religious purpose, yet could meet this prong of the test by merely answering a call from an OFCCP employee and answering "yes" to the question of whether or not it is religious. This would provide no notice to taxpayers, employees, or applicants that the religious exemption may be invoked and applied. Arguably, any company or organization could invoke such an exemption to shield themselves from liablity against bona fide employement discrimination claims allowing them to hire and fire people in manners that run afoul of anti-discrimination protections.

C. The Proposed Rule Expands the Definition of "Particular Religion" such that Contractors May Condition Employment On Adherence To Religious Tenets

The EO 11246's existing religious exemption is narrow. It states that its nondiscrimination protections "shall not apply to a" religious entity, "*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. *Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order*."[29]

The proposed definition would expand the scope of the exemption and explicitly state that contractors can condition employment on adherence to religious tenets. Additionally, this definition encompasses "all aspects of religious belief, observance and practice as understood by the employer." [30] Not only is this incredibly broad but it permits the unbounded subjective viewpoint of the employer to be the arbiter of what constitutes religion. Not only is such a lax standard dangerous, risking interpretation without bounds, but also this definition fails to acknowledge the limitations within the case law that safeguard workers who suffer from discrimination on the basis of their sex, sexual orientation, gender identity, or other protected characteristic under the pretext of a religious tenet. Courts have held that religious employers do not get a license to discriminate on the basis of race, national origin, or sex.[31] A religious employer's religious motivation for discriminatory conduct does not convert unlawful discrimination into permissible religious discrimination.[32] Without a more objective standard this definition in the proposed rule risks permitting any pretext to discriminate so long as the employer alleges it is in the name of religion. Thus, an employer could allege that permitting a

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[28] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg.at 41683.
[29] E.O. 11,246 Sec 204 (c) (emphasis added).
[30] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg.at 41679.
[31] *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *E.E.O.C. v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982).
[32] *See Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 163 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014).

transgender employee to transition on the job is against its religious tenets, effectively circumventing the anti-discrimination protections afforded to TGNC people in the workplace.

The proposed rule's overly simplified description of the case law would wrongly empower contractors to discriminate on the basis of an organization's religious tenets. Contrary to the position of the Department, a religiously affiliated employer's religious motivation for discriminatory conduct does not convert unlawful discrimination into permissible religious discrimination.

i. The Proposed Rule Supplants Title VII's Definition of "Religion" Intended to Protect Employees Against Religious Discrimination and Applies it to Religious Employers Who Prefer Co-religionists

The proposed rule would extract the definition of "religion" from Title VII,[33] which is used in the context of protecting employees from religious discrimination, and apply it to the context of permitting employers to prefer to hire co-religionists. Under Title VII, employees are granted protections only to the extent that an employer can reasonably accommodate their religious practice with no more than a *de minimis* cost.[34] Thus, Title VII's definition of religion contains a limitation.[35] The proposed rule, however, applies this definition to employers and drops the accommodation language included in Title VII's definition of religion, leaving an almost unlimited definition in its place. The Title VII religious exemption is supposed to be interpreted narrowly, and to only allow religious organizations to prefer coreligionists. Using Title VII's broad definition of religion in the context of employers expands the reach of the exemption far beyond its intent.[36]

In the context of Title VII, employers generally need only provide accommodations to employees like flexible schedules or allowances for religious attire as long as those accommodations do not require more than a *de minimis* cost.[37] In contrast, under this exemption, employees may be required to adhere to all of the religious tenets of their employer and possibly sign a statement of faith or risk losing their job. For example, an employee of a Christian

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[33] 42 U.S.C.A. § 2000e (West) provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

[34] *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (Title VII does not require religious accommodations that impose more than "de minimis" costs to an employer).

[35] "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observances or practices without undue hardship on the conduct of the employer's business." 42 USC §2000e(j) .

[36] *See Little v. Wuerl,* 929 F.2d 944, 950 (3d Cir. 1991) (Title VII's definition of religion "seems intended to broaden the prohibition against discrimination—so that religious practice as well as religious belief and affiliation would be protected. There appears to be no legislative history to indicate that Congress considered the effect of this definition on the scope of the exemptions for religious organizations.").

[37] U.S. DEP'T OF LABOR, *Religious Discrimination and Accommodation in the Federal Workplace*, https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/religious-discrimination-accommodation (last visited Sept. 12,, 2019).

denominational company may refuse to hire someone who is pregnant and unmarried or be unable to transition on the job without risking losing their job. The way the proposed rule modifies the definition, uses it in a different context, and pairs it with the definition of "particular religion," it would further expand the existing religious exemption.

D. The Proposed Rule Defies Title VII and Makes It Harder For Employees To Challenge Discrimination Where Religion Is Used as a Pretext

When the Department evaluates whether a claim of employment discrimination is based in religion or is based on a protected basis other than religion, such as gender identity, the proposed rule would "apply a but-for standard of causation" rather than the "motivating factor" standard.[38] The "standard of causation" determines what must be proved in order to establish that an employer's action was caused by unlawful discrimination. Under a "motivating-factor" standard, an employee can show that an action was discriminatory by proving that action was even partially motivated by a protected characteristic (such as race, sex, or national origin). In contrast, under the "but-for" standard that OFCCP seeks to apply, an employee can only establish that an action was discriminatory by proving that, but for the protected characteristic, it would not have happened. It is much more difficult for an employee to win under the "but-for" standard.

Congress explicitly adopted the "motivating factor" test in 1991 to interpret Title VII cases.[39] Moreover, OFCCP rejected the but-for causation standard in 2015, adopting instead the motivating-factor test that is consistent with Title VII and the Civil Rights Act of 1991.[40]

The two cases cited in the proposed rule to support this change did adopt a but-for causation requirement, but both cases arose in other, distinct contexts. Neither case supports the proposed change to the standard for Title VII or EO 11246 cases.[41] OFCCP also falsely claims it must adopt the "but-for" standard because it eliminates the need to "evaluate the nature of a sincerely held religious belief" and it is improper for OFCCP to make such an evaluation. For decades, however, the courts have resolved claims of employment discrimination by religious organizations without running afoul of the limitations OFCCP repeatedly points to. OFCCP's

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[38] Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption 84 Fed. Reg. at 41685.

[39] *See* Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (amending Title VII to mandate that an "unlawful employment practice is established when the complaining party demonstrates that race, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

[40] *See* 80 Fed. Reg. 54934, 54944-46; *see also* 80 Fed. Reg. at 41685 fn 10.

[41] *See Univ. of Tex. Sw. Med. Ctr. v. Nasser*, 570 U.S. 338, 357 (2013) (distinguishing between status-based discrimination claims, which are analogous to claims under EO 11246, and unlawful retaliation claims, requiring a "but-for" standard only for the latter category) ; *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 174 (2009) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

concerns about these inquiries are overblown and there is no concern about impermissible entanglement.[42]

As result under the proposed rule, discrimination claims would be evaluated differently under Title VII than under EO 11246. This inconsistency is troubling for employers and employees alike and is contrary to OFCCP policy and the alleged purpose of the proposed rule to create consistency between Title VII and EO 11246.

E. The Department Fails to Justify the Proposed Rule

The Proposed Rule represents a sharp change from the Department's settled interpretations of Executive Order 11246, and the Equal Employment Opportunity Commission's parallel interpretations of Title VII of the 1964 Civil Rights Act. Until August 2018, the Department consistently interpreted the Executive Order's religious exemption narrowly, permitting preferences for coreligionists by certain religious organizations, and offered to provide further guidance to any contractor who needed it. Moreover, it applied the "motivating factor" test to evaluate claims of discrimination.

The Department lacks authority to expand that exemption or grant any new exemption for discrimination on the basis of race, color, national origin, or sex, including sexual orientation or gender identity.

The Department's reliance on case law unrelated to employment discrimination laws or the text of Executive Order 11246 cannot justify this sharp change of policy. Nor does the Department's vague statement that it received "feedback" from "some organizations" sufficient to establish any need for this dramatic shift in position. There is no evidence[43] that organizations that would otherwise have provided competitive bids on federal contracts were unable to obtain contracts based on the Department's settled interpretation of the law.

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[42] *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 3d 166, 169-70 (2d Cir. 1993); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328-30 (3d Cir. 1993); *Fremont Christian*, 781 F.2d at 1370; *Pac. Press*, 676 F.2d at 1282; *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992); Dolter, 483 F. Supp at 269-71.

[43] Frank J. Bewkes and Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, CTR. FOR AM. PROGRESS (Sept. 3, 2019) (focusing on a subset of organizations whose employees publicly argued in favor of a new religious exemption targeting LGBTQ workers, this analysis indicates that among those entities that were federal contractors at the time that EO 13672 went into effect, all but one continued to receive new contracts and at least one allocation under those contracts in the 12 months following the EO), https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/.

F. The Department Fails To Adequately Consider The Potential Costs Of The Proposed Rule And Exaggerates The Potential Benefits.

Under the Administrative Procedure Act and relevant Executive Orders, the Department must adequately assess all the potential costs and benefits of the rule and adopt an approach that produces the least total burden and most benefit to society.

Executive Order 11246 was adopted and amended over the years to address serious and continuing problems of employment discrimination. Employment discrimination has numerous costs for workers and society, including lost wages and benefits, lost productivity, and negative impacts on mental and physical health. Yet, OFCCP completely fails to acknowledge the potential costs the Proposed Rule could generate by promoting increased employment discrimination, and exaggerates any possible benefits. The proposed rule utterly fails to account for the impact that such a change would undoubtedly have on many communities, including TGNC people who face rampant discrimination and abuse in the job market nation wide, let alone the collateral societal costs of such discrimination.

i. Transgender People Experience Elevated Rates of Poverty And Homelessness Due To Societal Bias.

Transgender people in the United States currently experience disproportionate levels of poverty and economic insecurity because of the barriers they face to accessing employment.[44] Transgender individuals experience unemployment at three times the rate of the general population—a rate that climbs to four times that of the general population for transgender people of color.[45] Studies have also found that transgender people are nearly four times more likely to have a household income under $10,000 per year (the threshold for extreme poverty) than the general population. [46] Transgender people of color and people with disabilities report even higher rates of extreme poverty.[47]

Transgender people in the United States also experience disproportionate rates of homelessness because of the barriers we face when trying to access employment.[48] Victoria, [49] a transgender

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[44] *See* 2015 U.S. Transgender Survey; *see also* CTR. FOR AM. PROGRESS, et al., *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Feb. 2015), www.lgbtmap.org/unfair-price-transgender (hereinafter "Paying an Unfair Price"); M.V. Lee, et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, WILLIAMS INST. (Jun. 2007), https://williamsinstitute.law.ucla.edu/research/discrimination/ bias-in-the-workplace-consistent-evidence-of-sexual-orientation- and-gender-identity-discrimination/ (hereinafter "Bias in the Workplace").

[45] 2015 U.S. Transgender Survey at 6, 141.

[46] Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (hereinafter "2011 U.S. Transgender Survey").

[47] 2015 U.S. Transgender Survey at 6, 144 (finding that 21% of people with disabilities, 19% of Black respondents, and 18% of Latino/a respondents reported a household income below$10,000).

[48] *Id.* at 174 (revealing that 30% of respondents experienced homelessness, and the rate was nearly twice as high among those who lost their job because of their gender identity or expression and transgender women of color); *see also Paying an Unfair Price; Bias in the Workplace*.

[49] This is a pseudonym to protect the identity of the contributor.

woman from Ohio, has been homeless and unemployed for months, and says that, for her, coming out as transgender "pretty much ended any hope for ever having a career."[50] Jade,[51] a 59-year-old transgender woman from San Francisco, has been homeless for half of her life because of discrimination that prevented her from securing jobs.[52] Today, job searching is nearly impossible for Jade because of her lack of employment history.

Cecilia Chung, a transgender activist from San Francisco, saw her high- powered career in finance end when she transitioned in the early 1990's. After being forced out of corporate America, she became homeless and was forced to turn to sex work to survive, despite having a bachelor's degree in International Business Management. Being homeless and engaging in sex work made Cecilia a frequent target of violence, and she turned to self- medicating to get through each day. During this time, Cecilia found out she was living with HIV. Reflecting on her experience, Cecilia says: "I felt defeated and hopeless. It was very painful to survive each day not knowing where my income would come from, what danger I would face, or whether I would eat."

Jade, Victoria, and Cecilia's stories exemplify a broader trend: in the 2015 U.S. Transgender Survey, 30% of respondents experienced homelessness in their lifetime for reasons related to their gender, and 12% experienced homelessness in the past year.[53] Rates of homelessness were even higher among transgender people of color—especially transgender women of color—as a majority of Native American, Black, and multiracial women surveyed reportedly experienced homelessness.[54]

Cecilia's story ultimately had a happy ending: after three challenging years, Cecilia secured employment at a non-profit organization where she was able to present her full self. However, discrimination still cost her: even though Cecilia is a well-respected activist and public speaker who also serves as a Commissioner with the San Francisco Department of Public Health, her income is just a sliver of what she earned in finance prior to her transition.

ii. Discrimination Pushes Transgender People Into Criminalized Economies And Increases Their Likelihood Of Being Trafficked Or Incarcerated.

Rampant, illegal employment discrimination also forces many transgender people into criminalized, underground economies in order to survive.[55] Just consider Miss Major Griffin-

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[50] Supporting materials on file with counsel.
[51] This is a pseudonym to protect the identity of the contributor.
[52] Supporting materials on file with counsel.
[53] *2015 U.S. Transgender Survey* at 178.
[54] *Id.* (finding that 59% of Native American women, 51% of Black women, and 51% of multiracial women had experienced homelessness).
[55] According to the 2015 U.S. Transgender Survey, one in five (20%) transgender people in the sample engaged in sex work, drug sales, or other activities for income, with higher rates for transgender women of color. *Id.* at 158. The vast majority (86%) of respondents who had interacted with police while doing sex work or while suspected of doing sex work faced mistreatment or abuse. Id. at 163. Respondents who were currently working in the underground economy faced high rates of violence. For example, 41% were

Gracy, a legendary transgender rights activist and pioneer of the modern LGBT Rights movement who helped ignite the Stonewall Riots 50 years ago. Like Cecilia Chung, Miss Major turned to sex work after being repeatedly pushed out of jobs where her gender expression was incessantly policed and regulated.[56] As she explains:

"Employers said that my gender expression was 'vile,' 'disgusting,' and 'annoying.' I was called 'an abomination' and 'a man in a dress.' I was told I 'shouldn't be walking like a girl.' I was told they did not want the 'kind of attention' I would bring to their company. They told me they couldn't have 'my kind' in a place of business." [57] Ultimately, sex work alone afforded Miss Major the means to stave off homelessness and the worst ravages of poverty.[58]

Discrimination and bias forced Tracy, [59] a transgender woman from Mississippi, to embark on a similar journey.[60] Tracy began supporting herself at the age of 17 when she was rejected by her family, initially through low-wage food service jobs. However, when Tracy publicly transitioned at the age of 20, she lost access to even low wage work. Employers repeatedly felt emboldened to discriminate against Tracy because courts in Mississippi have yet to clarify that Title VII extends to transgender workers. Tracy was harassed and pushed out of a series of jobs at fast food restaurants and meat processing plants because she was transgender. At one job, Tracy was subjected to daily ridicule by coworkers who referred to her as a man and called her slurs in front of customers. Management did not intervene. After months of harassment that went unchecked, Tracy was terminated while her harassers remained on the job.

Losing access to steady employment meant Tracy was unable to afford healthcare or medication, including the hormone replacement therapy critical to her well-being. Tracy was ultimately forced to turn to sex work, even though she detested it, because recurrent workplace discrimination deprived her of another means to support herself. Tracy continues to seek employment in the formal economy, but roadblocks remain: most recently, Tracy secured a job at a daycare center, but was terminated on her first day after her new employee paperwork disclosed the male name and sex assignment given to her at birth.[61] Unfortunately, Tracy's story of economic hardship is not unique: Sabastian, [62] a transgender man from the Bronx, engaged in

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physically attacked just in the previous year, and more than a third (36%) were sexually assaulted during that year. *Id.* at 202, 206.

[56] Jessica Stern, *This is What Pride Looks Like: Miss Major and the Violence, Poverty, and Incarceration of Low-Income Transgender Women*, SCHOLAR & FEMINIST ONLINE (Fall 2011/Spring (2012), http://sfonline.barnard.edu/a-new-queer- agenda/this-is-what-pride-looks-like-miss-major-and-the-violence-poverty-and-incarceration-of-low-income-transgender- women/0/.

[57] Supporting materials on file with counsel.

[58] Today, Miss Major is based in Arkansas, where she runs the Griffin-Gracy Educational Retreat & Historical Center (a.k.a. House of GG), a first of its kind retreat center for transgender people working for social justice in the South. *See* HOUSE OF G.G., *Safe Haven For Our Trans Community*, http://bit.ly/HouseofGG (last visited June 24, 2019).

[59] This is a pseudonym to protect the identity of the contributor.

[60] Supporting materials on file with counsel.

[61] Supporting materials on file with counsel.

[62] This is a pseudonym to protect the identity of the contributor.

sex work after being laid off in order to avoid becoming homeless.[63] Kat,[64] a non-binary person from Arizona, had to donate plasma to survive after losing work due to discrimination.[65] Angelica, [66] a transgender woman from South Carolina whose career as a media executive has been "in ruins" ever since she came out, recently filed for Chapter 7 bankruptcy and is thinking about engaging in sex work to survive.[67]

The widespread incidence of workplace discrimination and bias also restricts the ability of transgender people to leave unsafe and undesirable jobs. Nick,[68] the transgender law enforcement officer in Kentucky discussed above, remained at his job for months, despite being terrorized by management, because "finding a job while transitioning is almost impossible."[69] And, in the 2015 U.S. Transgender Survey, 26% of the respondents reported they stayed at a job they would have preferred to leave for fear of encountering discrimination elsewhere.[70]

Transgender people face heightened vulnerability to exploitation and trafficking for similar reasons.[71] Jasmine, the transgender woman from Georgia discussed above, was trafficked by an abusive boyfriend and forced to return to sex work after she was fired from her job. Once, when Jasmine refused to see a client, her boyfriend broke her leg. Today, Jasmine is living with HIV, but is unable to afford medication due to her loss of income.[72]

The discrimination that transgender people routinely face has also given rise to a "discrimination- to-incarceration pipeline" whereby transgender people deprived of economic opportunity become overrepresented in prisons and jails.[73] According to one survey, one out of six transgender people (or 16%) have been incarcerated at some point in their lives—a rate that skyrockets to 47% among Black transgender people.[74] Transgender people are frequently

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[63] Supporting materials on file with counsel.
[64] This is a pseudonym to protect the identity of the contributor.
[65] Supporting materials on file with counsel.
[66] This is a pseudonym to protect the identity of the contributor.
[67] Supporting materials on file with counsel.
[68] This is a pseudonym to protect the identity of the contributor.
[69] Supporting materials on file with counsel.
[70] *2015 U.S. Transgender Survey* at 154 (reporting even higher rates for American Indian, Black, Latino/a, and disabled individuals).
[71] While there is currently little data on the rates of trafficking of transgender people, anecdotal evidence suggests that job insecurity and financial precarity also make transgender people more vulnerable to human trafficking. *See* Lynly S. Egyes, *Borders and Intersections: The Unique Vulnerabilities of LGBTQ Immigrants to Trafficking*, in BROADENING THE SCOPE OF HUMAN TRAFFICKING, at 181–82 (Eric C. Heil & Andrea J. Nichols eds., 2016).
[72] Supporting materials on file with counsel.
[73] *See, e.g.*, CTR. FOR AM. PROGRESS, et al., *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color,* (Aug. 2016), www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf (hereinafter "Unjust"); Christy Mallory, et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, WILLIAMS INST. (Mar. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March- 2015.pdf.
[74] *2011 U.S. Transgender Survey* at 163.

incarcerated for poverty-related offenses like theft and survival sex-work.[75] Transgender people—particularly transgender women of color—are routinely arrested on mere suspicion that they are sex workers, pursuant to archaic anti-loitering statutes that effectively criminalize people for "walking while transgender."[76] One-third (33%) of the Black transgender women surveyed in the 2015 U.S. Transgender Survey were profiled as sex workers by law enforcement within the prior year.[77] One example illustrating this trend is Monica Jones, a transgender woman from Arizona, who was convicted for "manifesting prostitution" simply for accepting a ride from an undercover officer.[78]

Once in prison, transgender people face tremendous abuse and depravity from inmates as well as from the state.[79] Data collected by the Bureau of Justice Statistics at the Department of Justice reveals an unconscionable level of violence against transgender people in prisons and jails: in the previous year alone, 40% of transgender people in state and federal prisons had been sexually assaulted by other inmates or by facility staff, more than ten times the rate in the general population in prisons and jails.[80]

For instance, Ashley Diamond, a transgender woman from Georgia, who was repeatedly turned away from jobs, was sent to prison after she resorted to writing bad checks as a means of survival. While incarcerated, Ms. Diamond was brutally raped, denied necessary medical care,

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[75] *See* AMNESTY INT'L, *Stonewalled: Police Abuse And Misconduct Against Lesbian, Gay, Bisexual And Transgender People In The U.S.* (Sept. 21, 2005), www.amnesty.org/en/documents/AMR51/122/ 2005/en/; Catherine Hanssens, et al., *A Roadmap For Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV* (May 2014), www.law.columbia.edu/sites/default/files/ microsites/gender-sexuality/files/roadmap_for_change_full_ report.pdf.

[76] *See, e.g.,* Chinyere Ezie, *Rainbow Police*, WASHINGTON POST (June 20, 2019), www.washingtonpost.com/graphics/2019/ opinions/pride-for-sale/ (noting that transgender women in New York State have been arrested for as little as waving, "wearing a skirt" or "standing somewhere other than a bus stop or taxi stand."); Ginia Bellafante, *Poor, Transgender and Dressed for Arrest*, N.Y. TIMES (Sept. 30, 2016), www.nytimes.com/2016/ 10/02/nyregion/poor-transgender-and-dressed-for-arrest.html; MAKE THE ROAD N.Y., *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights* (Oct. 2012), www.maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

[77] *2015 U.S. Transgender Survey* at 187.

[78] Megan Cassidy, *Phoenix Transgender Woman's Conviction In Prostitution Case Is Thrown Out*, AZCENTRAL.COM (Jan. 26, 2015), www.azcentral.com/story/news/local/phoenix/2015/01/26/judge-vacates-transgender-activists-conviction-prostitution-case/ 22380437/.

[79] *See generally* Jason Lydon, et al., *Coming Out of Concrete Closets: A Report on Black & Pink's National LGBTQ Survey*, BLACK & PINK (Oct. 2015), www.blackandpink.org/coming-out- of-concrete-closets; see also Unjust at 24–32.

[80] Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Dec. 2014), www.bjs.gov/content/pub/pdf/ svpjri1112_st.pdf. By contrast, an estimated 4% of state and federal prison inmates and 3.2% of jail inmates experienced sexual victimization during the same period. *See* Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: National Inmate Survey, 2011–12*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (May 2013), www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

and forced to de-transition by prison officials who denied her hormone therapy while also mocking her.[81] Reflecting on her journey through employment discrimination and unemployment that eventually led her to prison, Ms. Diamond stated: "Every day I struggle with trying to stay alive and not wanting to die. Sometimes I think being a martyr would be better than having to live with all this."[82] Passion Star, a transgender woman from Texas, also faced extensive abuse in prison.[83] She was regularly raped, beaten, threatened, and forced into sexual relationships with inmates. At one point, another inmate repeatedly slashed her with a razor, requiring 36 stitches on her face and forehead.

The wrongful discrimination that leads to incarceration detailed above creates additional forms of social exclusion for transgender people: transgender people released from prison or jail in most jurisdictions may be lawfully denied job opportunities on the basis of their criminal records. These structural barriers push many transgender people further into underground economies, thus perpetuating a cycle of poverty, unemployment, criminalization, and violence.[84]

The proposed rule completely fails to account for the devastating and inevitable human cost of expanding the religious exemption as proposed. The proposed rule will cost taxpayers in the form of decreased productivity in the performance of federal contractors because contractors do not obtain the best talent and experience unnecessary and costly employee turnover.This violates the Department's mandate to weigh the costs and benefits of any promulgated regulation.

iii. Discrimination Also Jeopardizes The Health And Well-Being Of Transgender Individuals.

Unsurprisingly, the discrimination that transgender people face also exacts a mental toll. Angelica,[85] the transgender media executive from South Carolina discussed above, has suffered from severe clinical depression since she was terminated from her job for coming out as transgender.[86] Alyna,[87] a transgender woman from Wisconsin, who has been denied employment more than six times because she is transgender, recently attempted suicide and continues to suffer from anxiety, depression, and post- traumatic stress disorder because of her experiences with discrimination.[88] These problems are not isolated: 40% of transgender people surveyed in 2015 had attempted suicide in their lifetime—nearly nine times the attempted suicide rate in the

[81] Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men's Prison*, N.Y. TIMES (Apr. 5, 2015), www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens- prison.html.
[82] *Id.*
[83] Johnathan Silver, *For Transgender Inmate Who Sued Over Abuse, Parole And Maybe A Settlement,* TEX. TRIBUNE (Dec. 17, 2016), www.star-telegram.com/news/state/texas/article1215 21387.html.
[84] *See 2015 U.S. Transgender Survey* at 5, 153, 184.
[85] This is a pseudonym to protect the identity of the contributor.
[86] Supporting materials on file with counsel.
[87] This is a pseudonym to protect the identity of the contributor
[88] Supporting materials on file with counsel.

U.S. population (4.6%).[89] Thus, discrimination against transgender people is often a life and death matter.

In the proposed rule the Department does not mention at all the numerous human costs that it would have if enacted. Furthermore, it fails to account for the collateral costs it will have on society if enacted. The Department has long recognized that employment discrimination wastes taxpayer dollars because it leads to contractors not obtaining the best talent and experiencing unnecessary and costly employee turnover. The Department fails to address how this rule will affect that mission. The rule is likely to encourage contractors and subcontractors to engage in employment discrimination, which carries many potential costs the Department fails to account for. These include both the economic and non-economic costs to employees in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination, as discussed for TGNC people.

In addition, it fails to account for the increased health care costs related to employment discrimination and increased social stigma toward TGNC and LGBQ, women, religious minorities, and other minority workers.[90]

The Department also exaggerates proposed benefits of the rule. The Proposed Rule provides less, not more clarity for employers and employees because it departs from the Department's settled interpretations in favor of vague new standards and multi-factor tests. The Department also presents no evidence that the proposed rule will result in an increased number of bona fide competitive bids for federal contracts.

G. The Department Has Failed To Provide The Public With Adequate Time To Comment On This Major Shift In Equal Employment Opportunity Enforcement.

The Department fails to provide any justification for an unusually short 30-day comment period. Given that the Proposed Rule represents substantial shifts in the Department's EEO enforcement approach in several respects, the comment period on the Proposed Rule should be extended to a minimum of 60 days to provide adequate time to comment on the numerous legal issues presented and the potential harms the proposed rule will cause.

IV. CONCLUSION

For the above-stated reasons, TLC vehemently opposes the proposed rule and encourage the DOL's Office of Federal Contract Compliance Programs (OFCCP) to support EO 11246 as it

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[89] *2015 U.S. Transgender Survey* at 5. Transgender people surveyed in 2015 were also nearly eight times more likely to be experiencing serious clinical distress than the general population, and nearly twelve times as likely to have attempted suicide in the previous year. *Id.* at 105, 112.

[90] For example, the 2015 U.S. Transgender Survey found that 16% of transgender workers had lost a job because of their transgender status in their lifetime, while 30% of those employed in the past year face mistreatment on the job because they were transgender, https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

was modified in 2016. We are very concerned by the potential for employers to abuse the proposed rule and weaponize religion as a pretext to discriminate, by claiming that they are a religious entity when they are not. In addition, we encourage OFCCP to take seriously the concerns raised and documented by TGNC people regarding the lack of access to employment, fears and realties of being fired, lack of promotions, and other forms of discrimination in the employment process. TLC has developed several resources based upon TGNC people's experiences of employment discrimination. Most notably, the recommendations found in the "Wellness for Our Communities" [91] report from TLC's Positively Trans (T+) program, as well as the "Model Transgender Employment Policy" [92] provide initial guidance that we encourage the OFCCP to utilize.

[91] Cecilia Chung, et. al, *Wellness for Our Communities,* TRANSGENDER LAW CENTER - POSITIVELY TRANS (T+) at 21, (2018), http://transgenderlawcenter.org/wp-content/uploads/2019/07/17608_TLC_Positively_Trans_Needs_CrossSite_Report_Web.pdf

[92] TRANSGENDER LAW CENTER, *Model Transgender Employment Policy: Negotiating for Inclusive Workplaces, (2016),* http://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated1.pdf