

December 9, 2021

Office of Federal Contract Compliance Programs
U.S. Department of Labor
Attention: RIN 1250-AA09
200 Constitution Avenue NW
Washington, DC 20210

VIA ELECTRONIC SUBMISSION

Re: Comments on Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (RIN 1250-AA09)

The Center for Reproductive Rights (“the Center”) respectfully submits the following comment on the Notice of Proposed Rulemaking (“the proposed rule”) on the Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, published by the Department of Labor (“DOL” or “the Department”) Office of Federal Contract Compliance Programs (“OFCCP” or “the agency”) on November 9, 2021.

Founded in 1992, the Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights worldwide. Our litigation and advocacy over the past 26 years have expanded access to reproductive health care around the nation and the world. We have played a key role in securing legal victories in the United States, Latin America, Sub-Saharan Africa, Asia, and Eastern Europe on issues including access to life-saving obstetrics care, contraception, abortion services, and comprehensive sexuality information. We envision a world where every person participates with dignity as an equal member of society, regardless of gender; where individuals are free to decide whether or when to have children and whether or when to get married; where access to quality reproductive health care is guaranteed; and where every person can make these decisions free from coercion or discrimination.

As is outlined in this comment, the Center supports the proposed rescission of “Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption” in order to comply with Executive Order 11246, Title VII, and the Administrative Procedure Act.

I. The Rescission of the 2020 Rule Is Necessary to Properly Apply Executive Order 11246's Religious Exemption and to Comply with Title VII Case Law and Principles.

We strongly support OFCCP rescinding the regulations established in the 2020 Rule, which sharply deviated from OFCCP's longstanding policy of interpreting and applying Executive Order 11246's religious exemption in accordance with Title VII case law and principles. With the proposed rule, OFCCP will return to the policy that was in place during both the George W. Bush and Obama administrations of applying Title VII case law as it evolves and considering Religious Freedom Restoration Act (“RFRA”) claims raised by contractors on a case-by-case basis. We agree with OFCCP that a return to its “traditional approach” of interpreting the religious exemption, which is consistent with the intent of Executive Order 11246 and the government's longstanding policy of requiring federal contractors to prevent discrimination, will “promote clarity and consistency in the application” of the religious exemption for federal contractors.¹ The proposed rescission of the 2020 Rule is essential to ensuring both

¹ “Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,” 86 Fed. Reg. 62,115, 62,117 (Nov. 9, 2021).

that federal contractors provide equal employment opportunity for all protected characteristics and that taxpayer funds are not used to illegally discriminate.

a. Rescinding the 2020 Rule is Necessary Because the Rule Misstated the Law and Unjustifiably Expanded the Scope of the Religious Exemption.

Executive Order 11246 outlines the nondiscrimination obligations each federal contractor accepts as a condition of the government contract. Its vital workplace protections against discrimination cover more than one-fifth of the country's workforce.² The 2020 Rule's blanket religious exemption would have upended the promise of civil rights protections and undermined the security they should provide to women, LGBTQ+ people, religious minorities, and the nonreligious.

The text of Executive Order 11246 specifies that a contractor is eligible for the religious exemption if they qualify as a "religious corporation, association, educational institution, or society"—a term taken from Title VII's religious exemption.³ However, the 2020 Rule created an entirely new religious employer test that misstated and greatly deviated from the decades of established Title VII case law interpreting the term. This test vastly expanded the scope of contractors that are eligible for the religious exemption and, for the first time, would have allowed for-profit corporations to be eligible for the exemption.

The 2020 Rule's definition of "particular religion" also expanded the scope of the exemption and deviated—without justification—from the longstanding view that Executive Order 11246 prohibits religious employers from using the exemption to discriminate on the basis of protected characteristics other than religion. Additionally, the 2020 Rule's preamble adopted an unsupported, categorical approach to the analysis of Religious Freedom Restoration Act ("RFRA") claims that "fail[ed] to allow sufficient flexibility to weigh competing governmental and third-party interests against the interests of individuals asserting religious exemptions."⁴ Recission of the 2020 Rule is needed to correct these misinterpretations of the law and prevent the unjustifiable expansion of the scope of the religious exemption.

b. The Proposed Rule Increases Clarity and Consistency in the Application of Executive Order 11246's Religious Exemption and Promotes Equal Employment Opportunity for All Protected Classes.

The proposed rule appropriately returns to a narrow interpretation of Executive Order 11246's religious exemption that only permits religious employers to prefer members of their religion in employment. Religious organizations would not be exempted from Executive Order 11246's other nondiscrimination requirements. This interpretation is consistent with longstanding agency practice, reflects Congressional intent, and creates clarity and consistency for federal contractors and employees.

Executive Order 11246 was adopted and amended over the years to address serious and continuing problems of employment discrimination. In 2002, President George W. Bush amended the Executive Order to include the religious exemption in the existing Section 202.⁵ Executive Order 11246's religious exemption is narrow, allowing religious organizations to prefer members of their religion in employment, but prohibiting religious organizations from discriminating in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin. When OFCCP published a final rule in 2003 to incorporate the religious exemption into the Executive Order 11246 regulations, the agency stated in the

² See *History of Executive Order 11246*, DEP'T OF LABOR, OFF. OF FED. CONT. COMPLIANCE PROGRAMS <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Dec. 8, 2021).

³ See Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279; 42 U.S.C. 2000e-1(a).

⁴ 86 Fed. Reg. at 62,118.

⁵ See Exec. Order No. 11,246, § 204(c), as amended by Exec. Order No. 13,279.

preamble that the religious exemption in the Executive Order was “modeled on” the religious exemption in Title VII of the Civil Rights Act of 1964.⁶

Title VII’s religious exemption similarly allows religious employers to hire coreligionists, but prohibits discrimination against other protected characteristics. Title VII case law has “consistently held” that the religious exemption requires qualifying religious employers “to comply with Title VII’s prohibitions against discrimination on other protected bases.”⁷ A religious employer’s religious motivation for discriminatory conduct does not convert unlawful discrimination into permissible religious discrimination.⁸ This interpretation of the scope of both Title VII’s religious exemption and Executive Order 11246’s exemption is also consistent with Congressional intent. Congress twice considered and rejected blanket religious exemptions from all of Title VII’s protections against employment discrimination.⁹ Recission of the 2020 Rule is necessary to return to the narrower interpretation of the scope of Executive Order 11246’s exemption and reverse how the blanket exemption “undermine[d] the government’s interest in ensuring equal employment opportunity by federal contractors.”¹⁰

OFCCP should also return to the policy of considering RFRA claims on a case-by-case basis. The RFRA requires a careful, individualized review that considers the “particular circumstances” of each case.¹¹ As the proposed rule importantly notes, the case-by-case approach is necessary because it is not possible in rulemaking to properly weigh “governmental and third-party interests in a particular case.”¹² This approach is also consistent with the Supreme Court’s decision in *Fulton v. City of Philadelphia* where the Court reemphasized that the compelling interest must be assessed on a case-by-case basis, looking at the specific facts presented by particular religious claimants.¹³ The government’s ability to provide religious accommodations—including under RFRA—is not unlimited. The Establishment Clause requires that an “accommodation must be measured so it does not override other significant interests”¹⁴ or “impose unjustified burdens on other[s].”¹⁵

As discussed in the proposed rule, the return to interpreting the religious exemption consistent with Title VII case law and to evaluating RFRA claims on a case-by-case basis are “needed to enable OFCCP to properly apply and enforce Executive Order 11246”¹⁶ and retain the agency’s commitment “to protecting religious freedom in accordance with applicable law.”¹⁷ This proposed rule creates clarity for federal

⁶ “Exemption for Religious Entities,” Final Rule, 68 Fed. Reg. 56392 (Sept. 30, 2003) (codified at 41 CFR 60–1.5(a)(5)).

⁷ 86 Fed. Reg. at 62,116. Courts have held that religious employers do not get a license to discriminate on the basis of race, national origin, or sex. See *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).

⁸ 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).

⁹ See *Rayburn*, 772 F.2d at 1167; *Pac. Press Pub. Ass’n*, 676 F.2d at 1276-77.

¹⁰ 86 Fed. Reg. at 62, 117.

¹¹ See 42 U.S.C. 2000bb-1 (If a person’s religious exercise is substantially burdened, the government must demonstrate the policy or law is the least restrictive means of furthering its compelling interest with regard to *those particular circumstances*).

¹² 86 Fed. Reg. at 62,118.

¹³ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); see 86 Fed. Reg. at 62,120-21.

¹⁴ See *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interests” violates Constitution).

¹⁵ *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”). See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (the religious accommodation would have “precisely zero” impact on third parties); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (accommodation “would not detrimentally affect others”).

¹⁶ 86 Fed. Reg. at 62,121.

¹⁷ *Id.*

contractors that are religious corporations, associations, educational institutions, or societies and for employees. Contractors will once again only have to follow one religious employer test under Title VII and Executive Order 11246. Further, OFCCP’s proposed return to the narrower and correct interpretation of the religious exemption—that employers are prohibited from using the exemption to discriminate against other protected characteristics—promotes equity and fairness and is supported by law. This proposal is consistent with the government’s interest in ensuring equal employment opportunity for federal contractors and the text and purpose of Executive Order 11246.

c. The Proposed Rule Is Consistent with the Administration’s Policy to Further Nondiscrimination Protections and Promotes Economy and Efficiency.

The proposed rescission of the 2020 Rule is consistent with the Administration’s policy to prevent and combat discrimination on the basis of gender identity and sexual orientation and to advance gender equity and equality. We recommend that OFCCP emphasize this policy preference in finalizing the proposed rescission.

On January 20, 2021, President Biden issued Executive Order 13988, “Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation,” which stressed that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation,”¹⁸ and “[a]dults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes.”¹⁹ The Executive Order directed each federal agency to review all existing agency actions that may be inconsistent with the Administration’s policy position to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation and to consider whether to revise or rescind such agency actions or promulgate new agency actions to fully implement statutes that prohibit sex discrimination.²⁰ Further, in the first-ever National Strategy on Gender Equity and Equality, the Administration reaffirmed its commitment to address the “impact of intersectional discrimination and bias on the basis of gender, race, and other factors, including sexual orientation, ethnicity, religion, disability, age, and socioeconomic status,” as an essential component to advancing gender equity and equality.²¹

Employment discrimination on the basis of race, color, national origin, religion, and sex, including on the basis of sexual orientation and gender identity, continues to be prevalent and is harmful and costly to employees, taxpayers, and society as a whole. The costs experienced by individuals who experience employment discrimination include lost wages and benefits, decreased or lost productivity, and negative mental and physical health impacts.²² There are also intangible costs on workers including: infringements on the ability of workers to make deeply personal decisions regarding expression of their gender identity, or sexual orientation, relationships and families, or regarding medical treatment; increased social stigma toward LGBTQ+ people, women, religious minorities, and the nonreligious; and a reduction in equity, fairness, and personal freedom.²³

¹⁸ Exec. Order 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ THE WHITE HOUSE, NATIONAL STRATEGY ON GENDER EQUITY AND EQUALITY 9 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

²² Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INST. (July 2011), <https://williamsinstitute.law.ucla.edu/publications/employ-discrim-effect-lgbt-people/>.

²³ For example, a recent report by the Williams Institute found that more than 40% of LGBT workers surveyed reported “experiencing unfair treatment at work, including being fired, not hired, or harassed because of their sexual orientation or gender identity at some point in their lives.” BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT (Sept. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

Taxpayers are also impacted by the decreased productivity in the performance of federal contractors who unlawfully discriminate. Discriminatory contractors would be unable to recruit the best talent and would likely experience unnecessary and expensive employee turnover—all subsidized by taxpayer dollars.²⁴ OFCCP’s proposed return to its longstanding policy of interpreting Executive Order 11246’s religious exemption consistent with Title VII case law promotes efficiency by reaffirming nondiscrimination protections for employees and ensuring that taxpayer funds are not used to discriminate. OFCCP’s longstanding view has been that robust nondiscrimination protections benefit both workers by providing equal employment opportunity and the government by increasing economy and efficiency in contracting.²⁵ The proposed rule would reaffirm that under Executive Order 11246, federal contractors that are religious organizations can prefer members of their religion in employment, but such religious organizations are not free to discriminate against employees or applicants on the basis of other protected characteristics. The proposed rule would prevent qualified and talented employees from being arbitrarily excluded from the workforce, and therefore would increase the diversity of federal contractors and applicants.

II. OFCCP’s Proposed Rescission Protects Employees of Federal Contractors from the Serious and Unjustified Harms of the 2020 Rule.

The agency’s proposal to rescind the 2020 Rule will protect employees from the serious harm that would result from the 2020 Rule’s unjustified expansion of the religious exemption. The 2020 Rule failed to adequately consider the potential harm of an expanded religious exemption on both employees of federal contractors and the populations they serve, caused confusion and uncertainty, and failed to provide evidence to justify the need for such a rule as required by the Administrative Procedure Act (“APA”).

As an initial matter, we note that the proposed rule appropriately identifies “ensur[ing] that federal contractors provide equal employment opportunity on all protected bases” as a benefit of rescission. We urge OFCCP to include even more detail in the final rule about what this protection means for employees of federal contractors. The Center and other commenters provided this information on the real harms of an expanded religious exemption in response to the proposed 2020 Rule; we encourage OFCCP to explicitly include that portion of the record for the 2020 rulemaking in the record for the proposed rescission.²⁶

²⁴ Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, CTR. FOR AM. PROGRESS (Nov. 16, 2012), <https://www.americanprogress.org/article/there-are-significant-business-costs-to-replacing-employees/>.

²⁵ President Roosevelt made such findings in an early predecessor to Executive Order 11246, and they have been reiterated in successor executive orders and OFCCP policies. *See, e.g.*, Exec. Order 8802: Prohibition of Discrimination in the Defense Industry (1941), available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=72>. In 2016, for example, OFCCP explained, “the requirements of the Executive Order [11246] promote the goals of economy and efficiency in Government contracting, and the link between them is well established. *See* “Discrimination on the Basis of Sex”; Final Rule, 81 Fed. Reg. 39,108, 39109 (June 15, 2016) (nondiscrimination requirements regarding sex “ultimately reduce[] the Government’s costs and increases the efficiency of its operations by ensuring that all employees and applicants, including women, are fairly considered and that, in its procurement, the Government has access to, and ultimately benefits from, the best qualified and most efficient employees.”).

²⁶ *See, e.g.*, The Center for Reproductive Rights, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 13, 2019), <https://www.regulations.gov/comment/OFCCP-2019-0003-106311>; Fenway Health, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 20, 2019) <https://www.regulations.gov/comment/OFCCP-2019-0003-107608>; The Human Rights Campaign, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 20, 2019) <https://www.regulations.gov/comment/OFCCP-2019-0003-107619>; The National Women’s Law Center, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 20, 2019) <https://www.regulations.gov/comment/OFCCP-2019-0003-107372>; The Transgender Law Center, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 20, 2019) <https://www.regulations.gov/comment/OFCCP-2019-0003-107770>; The

a. Rescinding the 2020 Rule Will Limit the Harmful Impact of Religious Exemptions on Women, LGBTQ+ People, and Religious Minorities.

An agency rule is arbitrary and capricious and must be set aside “if the agency has relied on factors which Congress has not intended it to consider” or “entirely failed to consider an important aspect of the problem.”²⁷ As OFCCP now acknowledges, the 2020 Rule entirely failed to consider the harmful impact an expanded religious exemption would have on employees of federal contractors, considering only the impact on “religious organizations that decide to become or already are federal contractors.”²⁸ By rescinding the 2020 Rule, OFCCP will prevent the harmful impact of this rule and advance the nondiscrimination goals of Executive Order 11246.

Sex discrimination in employment is widespread, and religious employers frequently advance religious liberty defenses against allegations of such discrimination. Such discrimination can be based on a person’s reproductive choices, for example, the use of assisted reproductive technology,²⁹ having sex and getting pregnant outside of marriage,³⁰ and seeking abortion care.³¹ Religiously motivated sex-based discrimination can also include sex-based harassment, disparate treatment in the workplace,³² and pay discrimination.

Similarly, LGBTQ+ workers have been subjected to a wide variety of religiously-motivated discriminatory actions.³³ Religious employers have terminated employees and withdrawn offers of

Yellowhammer Fund, Comment Letter on Proposal to Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption (Sept. 20, 2019) <https://www.regulations.gov/comment/OFCCP-2019-0003-103812>.

²⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁸ “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” 85 Fed. Reg. 79,324, 79,367 (Dec. 9, 2020).

²⁹ See, e.g., *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F.Supp.3d 1168, 1173 (N.D. Ind. 2014) (teacher at Catholic School was terminated after her employer learned that she was undergoing in vitro fertilization treatments); Kimball Perry, *Teacher Awarded \$171,000 in Insemination Case*, THE CINCINNATI ENQUIRER (June 3, 2013) <https://www.usatoday.com/story/news/nation/2013/06/03/pregnant-teacher-fired/2385909/>; (Ohio teacher was terminated for in vitro fertilization treatments); *Teacher Says She Was Fired Over In Vitro*, NBC NEWS (Sept. 28, 2006), <https://www.nbcnews.com/health/health-news/teacher-says-she-was-fired-over-vitro-flna1c9468181> (Catholic school system terminated Appleton, Wisconsin French teacher for allegedly violating “Catholic doctrine” portion of her employment contract receiving in vitro fertilization treatments).

³⁰ See, e.g., Tracey Tully, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired*, THE N.Y. TIMES (Jun. 28, 2021) <https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html>; *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) (Catholic school explicitly stated that it would not renew teacher’s contract after concluding that she had engaged in premarital sex, based on the timing of her pregnancy); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998) (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was “clear evidence that she had engaged in coitus while unmarried”).

³¹ See, e.g., *Ducharme v. Crescent City Deja Vu, L.L.C.*, No. CV 18-4484, 2019 WL 2088625, (E.D. La. May 13, 2019) (Louisiana bartender was fired on the day of her abortion procedure after notifying her employer she would need to take two days off of work to have an abortion); *DeJesus v. Fla. Cent. Credit Union*, Case No. 8:17-cv-2502-T-36TGW, 2018 WL 4610613 (M.D. Fla. Oct. 11, 2018) (credit union employee was terminated after taking medical leave during her probationary period because her employer felt that it was not an appropriate use of medical leave).

³² See, e.g., *Garrick v. Moody Bible Inst.*, 494 F.Supp.3d 570 (N.D. Ill., 2020) (instructor at a Christian post-secondary religious institution alleged that she experienced a hostile work environment and that female employees were expected to teach more courses and experienced harsher performance reviews.).

³³ Recent reports issued since the promulgation of the 2020 rule also suggest that employment discrimination against LGBTQ+ workers remains a serious issue. In a September 2021 report from the Williams Institute, over one in four (approximately 30%) LGBT employees surveyed reported being fired or not hired because of their sexual orientation or gender identity. The rate of reported discrimination for only transgender employees was nearly 50%. Of the LGBT employees who reported discrimination, 57% reported that their employer or co-workers did or said something to indicate that the unfair treatment was motivated by religious beliefs. Brad Sears et al., WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT (Sept. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

employment after discovering that an employee was in a same-sex marriage.³⁴ Sometimes, even the suspicion that an employee may be a member of the LGBTQ+ community is enough for a religious employer to initiate an adverse employment action.³⁵ Employers have also denied (and fought for the right to deny)³⁶ gender-affirming health care coverage to LGBTQ+ workers.

The 2020 Rule failed to meaningfully consider any of the above harms, including those raised by commenters as well as the agency's own prior evidentiary findings in its 2014 and 2016 rules. Instead, the agency summarized the objections of commenters and stated that it believed it had "adequately accounted for the burdens on others" that the rule would cause, and that "the vindication of the law's religious protections... justify any burdens on third parties."³⁷ As the D.C. Circuit has noted, "[n]odding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."³⁸

The 2020 Rule's failure to meaningfully consider the overwhelming evidence of the widespread harmful impacts on employees not only violates the APA,³⁹ but also frustrates the express policy of Executive Order 11246. The proposed rule appropriately recognizes and limits the harms of an expanded religious exemption.

b. The 2020 Rule Failed to Provide Evidence to Support its Drastic Shift from Established OFCCP Policy.

The proposed rescission of the 2020 Rule is warranted based on the lack of evidence in the record supporting the alleged necessity of the Rule's expanded religious exemption. The 2020 Rule failed to provide the minimum "findings and [] analysis to justify the choice made"⁴⁰ required to justify its departure from OFCCP's long-established policy of narrowly interpreting religious exemptions and following Title VII jurisprudence.

The 2020 Rule asserted that new guidance was necessary in order to facilitate "clarity and consistency" regarding equal opportunity employment obligations for religious organizations that might be reluctant to enter into contracts with the federal government. However, the 2020 Rule provided virtually no evidence of this alleged reluctance, admitting that it "cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers compare to the whole

³⁴ See, e.g., *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F.Supp.3d 1195, 1199 (S.D. Ind. 2020) (after 39 years of service, employee of a Catholic high school was told her contract would not be renewed because the school had learned she was married to a woman); Robert Shine, *Community Protests Catholic School Rescinding Job Offer to LGBTQ Employee*, NEW WAYS MINISTRY (Sept. 21, 2021), <https://www.newwaysministry.org/2021/09/21/community-protests-catholic-school-rescinding-job-offer-to-lgbtq-employee/> (Catholic school withdrew offer of employment to lacrosse coach after learning she was in a same-gender marriage.).

³⁵ Cooper Levey-Baker, *Local Lawsuit Tests Sex Discrimination Rules for Religious Institutions*, SARASOTA (May 4, 2021), <https://www.sarasotamagazine.com/news-and-profiles/2021/05/sex-discrimination-lawsuit-manatee-county> (a long-time employee of Gospel Crusade, a Florida religious nonprofit, alleged that she was fired after her employer learned she would be moving in with a female co-worker and assumed that the women were in a romantic relationship).

³⁶ See, e.g., *Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113 (D.N.D. 2021) (Catholic hospital challenged the Department of Health and Human Services 2016 regulation implementing the nondiscrimination provisions of the Affordable Care Act, on the grounds that providing abortion services, sterilization, and gender-affirming surgery to transgender employees would violate its religious beliefs.).

³⁷ 85 Fed. Reg. at 79,340.

³⁸ *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir., 2020).

³⁹ *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Human Servs.*, 485 F.Supp.3d 1, 45 (D.D.C. 2020) (holding that HHS had failed to consider the harm that would be caused by a "blanket" religious exemption from the nondiscrimination requirements of the Affordable Care Act.).

⁴⁰ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (quotation omitted).

of the contracting pool.”⁴¹ The only evidence cited within the rule was a brief, vague summary of “a few comments” indicating that some religious organizations were wary of becoming federal contractors “because of the lack of clarity regarding religious exemptions in federal law.”⁴²

Even in the absence of the overwhelming evidence of potential and actual harm present here, the lack of evidence supporting the necessity of the 2020 Rule weighs heavily in favor of its rescission.

III. Conclusion

We appreciate the opportunity to comment on the proposed rule’s rescission of the 2020 Rule and return to a policy and practice that effectuates the purpose of Executive Order 11246. If you require any additional information about the issues raised in this letter, please contact Katherine Gillespie, Acting Director, Federal Policy and Advocacy, at kgillespie@reprorights.org.

Signed,

The Center for Reproductive Rights

⁴¹ 85 Fed. Reg. at 79,329.

⁴² 85 Fed. Reg. at 79,367. Notably, the D.C. District Court recently found an agency’s “vague summary of comments” from organizations purportedly seeking religious exemptions in the provision of healthcare was inadequate evidence to justify the agency’s policy reversal from a narrow religious exemption. *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health and Human Servs.*, 485 F.Supp.3d 1, 44-45 (D.D.C. 2020).