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December 8, 2021

The Honorable Martin J. Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

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

Dear Secretary Walsh:

We write in strong opposition to the Department of Labor's (DOL) proposal to revoke the Trump administration's final rule clarifying the rights and obligations of religious federal contractors.¹ Prior to the final rule, religious organizations were reluctant to seek federal contracts because of uncertainty regarding their rights and obligations.² The final rule provides clarity and certainty, which were sorely lacking, and encourages wider participation in the federal contracting system. This not only benefits religious organizations seeking federal contracts, but it also benefits the contracting system and taxpayers. If additional qualified organizations are encouraged to bid for contracts, this increases competition and provides needed goods and services.

More broadly, the religious contractor rule reaffirms the importance of protecting the constitutional principle of the free exercise of religion. The First Amendment to the Constitution begins by stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—codifying for the first time in human history the right to religious liberty. By ensuring that those who contract with the federal government may freely exercise their religion, the final rule carries out this founding principle. As J. Matthew Sharp,

¹ Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 62,115 (proposed Nov. 9, 2021) [hereinafter Proposed Rescission].

² Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324, 79,328 (Dec. 9, 2020) (religious organizations provided feedback they were reluctant to participate in federal contracting because of uncertainty regarding their rights and obligations) [hereinafter Religious Contractor Rule].

Senior Counsel, Alliance Defending Freedom, testified in 2019 at a hearing before the Committee on Education and Labor:

Pervasive government regulation is a fact of modern life. And in a nation as diverse as ours, all of those laws have serious consequences for the free exercise of religion.... [F]reedom of religion—along with freedom of speech, of the press, and others enshrined in our Bill of Rights—are cornerstones of our democracy. We want the government to safeguard minorities and respect individual rights. The alternative is the tyranny of the majority....³

The religious contractor rule is well-grounded in federal law and longstanding policies. Title VII of the *Civil Rights Act of 1964* (Title VII) allows religiously based decisions for 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.”⁴ Title VII broadly defines “religion” as including “all aspects of religious observance and practice, as well as belief.”⁵

Executive Order (EO) 11246 prohibits employment discrimination by federal contractors because of race, color, religion, sex, sexual orientation, gender identity, or national origin.⁶ In 2002, President George W. Bush amended EO 11246, prescribing the nondiscrimination requirements for federal contractors by incorporating word-for-word Title VII’s religious-employer provision.⁷ The Bush EO thus clarified that the contours of Title VII’s religious-employer provision apply equally in the federal contracting context.

The religious contractor rule reaffirms the religious-employer provision advanced by the Bush administration and provides additional guidance for contractors. Like Title VII, the rule defines “religion” broadly to include “all aspects of religious observance and practice, as well as belief.” In keeping with Title VII case law, the rule also makes clear that in employment, religious contractors may not only prefer those who share their religion, but they may also prefer those who accept or adhere to the religious tenets of the employer’s religion.⁸ These clarifications ensure religious contractors are allowed to exercise their religion in practice, not just in theory.

The rule also clarifies the kinds of employers who qualify as religious organizations, which provides needed guidance to employers who have had questions about whether they qualify and are able to make religiously based employment decisions. To make sure a contractor qualifies as a religious corporation, association, educational institution, or society, the rule applies to an

³ *Do No Harm: Examining the Misapplication of the “Religious Freedom Restoration Act”*: Hearing Before the H. Comm. on Educ. & Labor, 116th Cong. 64 (2019) (statement of J. Matthew Sharp, Senior Couns., Alliance Defending Freedom).

⁴ 42 U.S.C. § 2000e-1(a).

⁵ *Id.* § 2000e(j).

⁶ DOL, Off. of Fed. Cont. Compliance Programs, EO 11246, As Amended, <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended>.

⁷ Exec. Order No. 13,279 § 4, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

⁸ 41 C.F.R. § 60-1.3.

employer who is “organized for a religious purpose,” “[h]olds itself out to the public as carrying out a religious purpose,” and “[e]ngages in activity consistent with, and in furtherance of, that religious purpose.”⁹ The rule thus appropriately makes clear the religious-employer protections are not only for churches but also for employers organized for a religious purpose.

In recent years, the U.S. Supreme Court has issued significant decisions regarding the religious freedoms of employers, all of which affirmed the government has limited authority to infringe on the free exercise of religion.¹⁰ The preamble to the rule rightly considers these decisions in defining religious-employer protections, ensuring DOL’s approach regarding the religious freedoms of contractors is up to date. Indeed, the rule states that it is to be construed “in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the *Religious Freedom Restoration Act* . . .”¹¹ This is certainly the appropriate construction when it comes to a freedom enshrined in the First Amendment.

Concern that the religious contractor rule may somehow permit employment discrimination and violations of Title VII is misplaced.¹² The preamble to the rule discusses how the rule follows Title VII case law and recent Supreme Court decisions addressing religious-exercising organizations.¹³ By incorporating and synthesizing Title VII case law and Supreme Court decisions in plain language, the rule provides much-needed clarity for religious employers who may not have in-house or outside counsel to advise them on their rights and obligations as they participate in federal contracting.

We are committed to protecting religious freedom for all Americans, including federal contractors. The religious contractor rule clarifies the protections retained by religious organizations who contract with the federal government. The rule, which is backed by federal law and Supreme Court precedents, provides certainty and predictability for federal contractors, encouraging more employers to participate in federal contracting.

Rescinding the religious contractor rule would jettison the certainty that has been provided to religious contractors and would once again discourage them from bidding on federal contracts, decreasing competition, and harming federal programs and taxpayers. We strongly urge DOL not to rescind the religious contractor rule, so that religious Americans can continue participating equally in the federal contracting system.

⁹ *Id.*

¹⁰ *See, e.g.,* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n, 138 S. Ct. 1719 (2018) (government violates the Free Exercise Clause when its decisions are based on hostility to religion or a religious viewpoint); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (government violates the Free Exercise Clause when it conditions a generally available public benefit on an entity’s giving up its religious character unless that condition withstands strict scrutiny); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (*Religious Freedom Restoration Act* applies to federal regulation of for-profit closely-held corporations); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n, 565 U.S. 171 (2012) (ministerial exception is grounded in the First Amendment’s religion clauses and bars claim of employment discrimination).

¹¹ 41 C.F.R. § 60-1.5(e).

¹² Proposed Rescission, *supra* note 1, at 62,117.

¹³ Religious Contractor Rule, *supra* note 2, at 79,325-79,326.

The Honorable Martin J. Walsh

December 8, 2021

Page 4

Thank you for your consideration of these comments.

Respectfully submitted,



Virginia Foxx
Ranking Member



Russ Fulcher
Ranking Member
Subcommittee on Civil Rights and Human
Services