

# **EXHIBIT 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ORACLE AMERICA, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Defendants,

and

COMMUNICATIONS WORKERS OF  
AMERICA,  
501 3rd Street NW  
Washington, DC 20001

UNITED STEELWORKERS,  
60 Boulevard of The Allies  
Pittsburgh, PA 15222

*Proposed Intervenor-  
Defendants*

Case No. 1:19-cv-3574 (APM)

**BRIEF OF FORMER OFCCP DIRECTOR PATRICIA A. SHIU, FORMER OFCCP  
DEPUTY DIRECTOR PATRICK O. PATTERSON, EQUAL RIGHTS ADVOCATES, AND  
OTHER FORMER GOVERNMENT OFFICIALS AND WORKERS' RIGHTS  
ADVOCATES AS AMICI CURIAE IN SUPPORT OF PROPOSED INTERVENORS AND  
DISMISSAL**

**DISCLOSURE STATEMENT**

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

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### **IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici curiae* are a group of former government officials and employees, civil and workers' rights advocacy groups, labor unions, and law firms, all of whom share a common interest in the ongoing ability of the Office of Federal Contract Compliance Programs ("OFCCP" or the "Office") to implement and enforce the government's longstanding policy against discrimination in government contracting. They respectfully submit that the Court's resolution of this matter would benefit from their collective understanding and perspective on the history, efforts, and accomplishments of this Office. *Amici* former government officials and employees have extensive experience and firsthand knowledge of how OFCCP works and the authority the Office possesses—and requires—to carry out its critical mission: ensuring the government does not contract with businesses that do not afford fair and equal treatment to all workers. *Amici* are concerned that, if successful, Oracle's challenge would severely undermine OFCCP's ability to promote equal opportunity and protect all contractor employees—a huge swath of the workforce in America—against unlawful discrimination in all its insidious forms.

The former government officials include former Director of the OFCCP, Patricia A. Shiu, and former Deputy Director Patrick O. Patterson, as well as several other former OFCCP officials and employees. These *amici* remain committed to OFCCP's mission and its continued success, and can provide valuable insight into the Office's history and operations. Other *amici* include former officials from the Department of Labor ("DOL") and the Equal Employment Opportunity Commission ("EEOC"). Stuart J. Ishimaru, for example, is a former Commissioner of the EEOC, who understands the distinct and important role OFCCP plays in federal antidiscrimination efforts—and the complications that would ensue if (as Oracle seeks) EEOC were required to take on OFCCP's enforcement role.



A diverse coalition of civil, labor, and workers' rights organizations have also joined as *amici* to support OFCCP. Lead *amicus curiae* Equal Rights Advocates ("ERA") is a non-profit legal advocacy organization that fights for gender justice and equal opportunity on behalf of all gender identities, including millions of women who work for federal contractors. ERA is joined by forty-six *amici* workers' rights advocates, labor organizations, and other groups that are committed to protecting civil rights and advancing equal opportunity for all workers—including women, people of color, people with disabilities, and LGBTQ individuals.

In addition, a number of law firms and other legal associations involved in defending workers' rights have joined because they too are committed to the mission of OFCCP and know first-hand that the Office's compliance efforts and its ability to bring enforcement actions are vital to securing equal access and economic opportunity for millions of working people.

Together, all of the *amici* appreciate the gravity of Oracle's challenge and seek to inform the Court of the history and important work of this vital Office. A full list of *amici* and their particular interest in this litigation is attached as Appendix A.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

Beginning with President Franklin D. Roosevelt, the Executive Branch has maintained a firm stated policy that it will not buy goods and services, and will not pay taxpayer dollars, to contractors that discriminate in their employment practices. By Executive Order, contractors must, as a condition of doing business with the government, agree to refrain from discrimination and take affirmative action to promote equal opportunity for all workers. For decades, longstanding regulations have empowered OFCCP to enforce the government's policy against contractor discrimination, authorizing the Office to take those actions necessary to ensure contractors comply with their contractual agreement, and legal obligation, not to discriminate.

OFCCP takes that responsibility seriously. Its goal in every aspect of its work is contractor compliance. The Office works with the government's contracting partners to ensure that they understand what their obligations are and what they must do to comply with those obligations. It monitors whether contractors are achieving and maintaining compliance through reporting requirements and regular audits. Where OFCCP detects areas of noncompliance, it works with contractors to try and identify mutually acceptable ways the contractor can rectify the issue. And, where cooperative efforts fail, OFCCP invokes its power to enforce a contractor's antidiscrimination and affirmative action obligations by asking an Administrative Law Judge ("ALJ") to determine whether the contractor, has in fact, violated those obligations and, if so, what measures (including backpay and other make-whole relief) will be required to bring the contractor back into compliance. Those essential enforcement powers are what Oracle asks the Court to invalidate in this lawsuit.

As Intervenors ably demonstrate, Oracle's challenge ignores decades of precedent confirming that OFCCP acts well within its regulatory authority when it employs those measures necessary to enforce contractor compliance. Oracle also ignores, or at least tries to downplay, the threat that its lawsuit poses to OFCCP's ability to police and prevent contractor discrimination. Oracle denies any attempt to "effectively abolish" the Office, noting that OFCCP would retain certain regulatory powers even if the Court strips it of any enforcement authority. *See, e.g.*, Opp'n Mot. Intervene 7, ECF No. 14. But *amici* can attest, based on decades of collective experience, that the result Oracle seeks would in fact have a devastating impact on OFCCP's ability to achieve its antidiscrimination mission. In a world where OFCCP wields no enforcement authority, contractors would engage less in the various initiatives the Office now undertakes to promote voluntary compliance; they would resist OFCCP's efforts to obtain information on their antidiscrimination

and affirmative action practices (as Oracle itself did in the underlying action, *see* 2d Am. Admin. Compl. ¶¶ 43–51, *OFCCP v. Oracle*, 2017-OFC-6 (Mar. 8, 2019)); and they might well refuse altogether to engage in the meaningful conciliation process OFCCP now employs to resolve issues of potential noncompliance. It is simple common sense, borne out by *amici*'s years of experience as government regulators and workers' rights advocates, that the power to enforce is a necessary complement to the power to regulate.

Oracle also errs in asserting that other agencies could pick up the slack if OFCCP is no longer able to bring claims against contractors who fail to comply with their antidiscrimination obligations. EEOC is chronically underfunded and is only able to litigate a small fraction of its own cases each year. And in any event, the agencies to which Oracle would have OFCCP refer its cases would need to reinvent the wheel every time. Diligent attorneys at EEOC or the Department of Justice would (properly) want to do their own investigations before prosecuting a case, which would take duplicative time and resources and inevitably complicate, slow, and lessen enforcement.

The government's long-stated policy that it will not countenance contractor discrimination is laudable. But even decades since President Roosevelt first pronounced that policy, the fact remains: The individuals who make up the contractor workforce are still often subject to insidious and even blatant discrimination. The gender pay gap is alive and well in this sector and indeed throughout our economy.<sup>1</sup> Hispanic workers are paid poverty-level wages at more than twice the rate of white workers.<sup>2</sup> The nationwide unemployment rate for Black individuals is more than twice as high as

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<sup>1</sup> Elise Gould et al., *What is the Gender Pay Gap and Is It Real?*, Economic Policy Institute, Oct. 20, 2016, <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/>.

<sup>2</sup> David Cooper, *Workers of Color are Far More Likely to be Paid Poverty-Level Wages Than White Workers*, Economic Policy Institute (June 21, 2018), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>.

the white unemployment rate.<sup>3</sup> Substantially hampering the federal agency best-positioned, and long-empowered, to root out and remedy such disparities where they are perpetuated by the government's taxpayer-funded contracting partners would be devastating and wrong-headed. The Court should grant the Intervenor's Motion for Summary Judgement and reject what is, despite Oracle's protestations, an unjustified and unsubstantiated effort to "effectively abolish" OFCCP.

## ARGUMENT

### **I. For Decades, The Government Has Maintained A Policy Against Contracting With Those Who Would Discriminate Against Their Workers**

Government contractors and their employees play a critical role in the work of the federal government. They build the government's airplanes, outfit the military, service and maintain our federal buildings, develop information technology, and much more. The government, and thus our nation's taxpayers, spends a huge amount of money on the goods and services contractors provide—up to 40 percent of the government's discretionary budget, translating to hundreds of billions of dollars in recent years.<sup>4</sup> Contractors are able to perform all of this business and earn all of this revenue through the efforts of millions of workers—employees of federal contractors constitute about 20 percent of the entire U.S. labor force.<sup>5</sup>

While the importance of contractors and their employees to a well-functioning government has increased over the years, it is far from a recent development. This workforce has been crucial for decades. And for decades the government has maintained a firm, stated policy that it will not

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<sup>3</sup> Janelle Jones, *Black Unemployment is at Least Twice as High as White Unemployment at the National Level and in 12 States and D.C.*, Economic Policy Institute (Oct. 30, 2018), [https://www.epi.org/publication/2018q3\\_unemployment\\_state\\_race\\_ethnicity/](https://www.epi.org/publication/2018q3_unemployment_state_race_ethnicity/)

<sup>4</sup> *Federal Government Contracting for Fiscal Year 2018*, WatchBlog (May 28, 2019), <https://blog.gao.gov/2019/05/28/federal-government-contracting-for-fiscal-year-2018-infographic/>.

<sup>5</sup> OFCCP, *History of Executive Order 11,246*, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html> (last visited April 3, 2020).

award contracts, funded by taxpayer dollars, to businesses that discriminate in their employment practices. That policy reflects this nation's core values. It also helps to ensure "the Government has access to, and ultimately benefits from, the best qualified and most efficient employees," *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39,108, 39,109 (June 15, 2016), thus furthering the critical goals of economical and efficient government contracting set forth in the Federal Property and Administrative Services Act of 1949 (the "Procurement Act"), 40 U.S.C. § 101. *See also* *Validity of Exec. Order Prohibiting Gov't Contractors from Discriminating in Emp't Practices on Grounds of Race, Color, Religion, or Nat'l Origin*, 42 U.S. Op. Att'y Gen. 97 (1961), 1961 WL 4913 (noting that "discriminatory practices . . . might tend to deprive the United States of the services of an important segment of the population in the performance of its contracts.").

Though far from perfect, the government's efforts have, in many ways, led the nation's attempts to address workplace discrimination and the societal and economic damage it inflicts. In 1941, years before Title VII or the establishment of the EEOC, President Roosevelt issued an Executive Order prohibiting discrimination on the basis of "race, creed, color, or national origin" by any federal defense contractor. Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 25, 1941). Two years later, President Roosevelt went further, prohibiting such discrimination by all businesses that contract to sell goods and services to the government. Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943).

In the following years, it became apparent that simply prohibiting contractors from discriminating was not enough. A 1961 study "reveal[ed] an urgent need" for the government to be more proactive in helping to rectify the nation's long legacy of discrimination. *See* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 6, 1961). Responding to that study, President Kennedy ordered that, as a condition of contracting with the government, businesses must specifically covenant to

refrain from discrimination *and* to “take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin.” *Id.*

In more recent times, the government’s efforts to promote equality for the contractor workforce have continued. In 2014, for example, President Obama ordered that any business wishing to contract with the federal government would be required to agree not to discriminate on the basis of sexual orientation or gender identity. Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014).

## **II. The Government Has Long Used Administrative Procedures To Ensure Contractors Are Abiding By Their Agreements Not To Discriminate**

Early on, the Executive recognized that, without “adequate means of enforcement,” a policy against discrimination by the government’s contracting partners “would be nothing more than an empty shell, an abstract statement of principles.” *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 375 (D.D.C. 1979).

In 1951, President Truman established a committee to recommend ways to “strengthen[] and improve[]” efforts to obtain compliance with the prohibition against contractor discrimination. Exec. Order No. 10,308, 16 Fed. Reg. 12303 (Dec. 3, 1951). Two years later, President Eisenhower formed a Government Contract Committee, also focused on compliance, and specifically empowered it to receive and consider complaints about potential contractor discrimination. Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953).

In 1961, President Kennedy further strengthened the enforcement mechanism, authorizing his presidential committee to impose “sanctions” and “remedies” “[i]n the event of the contractor’s non-compliance with the nondiscrimination clauses.” Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 6, 1961).

Four years later, President Johnson brought that authority to a Cabinet-level agency. In 1965, a government-wide review of civil rights issues led by Vice President Humphrey concluded it was “essential” for the government’s civil rights goals to be “pursued vigorously and without [the] delay that frequently accompanies a proliferation of interagency committees and groups.”<sup>6</sup> “[W]henver possible,” the review concluded, “operating functions should be performed by departments and agencies with clearly defined responsibilities, as distinguished from interagency committees.”<sup>7</sup> It was that recommendation that led President Johnson to transfer the authority to implement and enforce the government’s policy against contractor discrimination to the Secretary of Labor.

In Executive Order 11,246, the President confirmed the government’s policy by requiring, consistent with the purposes of the Procurement Act, that contractors agree not to “discriminate against any employee or applicant for employment because of race, creed, color, or national origin.” Exec. Order 11,246 § 202, 30 Fed. Reg. 12319 (Sept. 24, 1965).<sup>8</sup> And the same Order empowered the Secretary of Labor to promulgate rules and regulations, and issue orders, “necessary and appropriate” to carry out the Order’s antidiscrimination and affirmative-actions purposes. *Id.* §§ 201, 202.

Executive Order 11,246 specifically authorizes the Secretary to “investigate the employment practices of any Government contractor or subcontractor . . . to determine” compliance with the agreement not to discriminate, *id.* § 206; receive and respond to complaints of contractor

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<sup>6</sup> Hubert Horatio Humphrey, Jr., Memorandum For the President From the Vice President on Recommended Reassignment of Civil Rights Functions (Sept. 24, 1965), <https://www.presidency.ucsb.edu/documents/memorandum-reassignment-civil-rights-functions>.

<sup>7</sup> *Id.*

<sup>8</sup> Two years later, the Order was amended to add sex to the list of protected categories. *See* Exec. Order 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967).

noncompliance, *id.*; hold “hearings” to resolve claims that a contractor has violated its contractual and legal obligations, *id.* § 208; and, depending on the results of those hearings, “impos[e], order[], or recommend the imposition of penalties and sanctions” to address noncompliance, *id.* § 208, *see also* §§ 202, 209, 211. The Order makes clear that the Secretary may condition continued and future contracting opportunities “upon a program for future compliance” and may bar a contractor from receiving future contracts until it “has satisfied the Secretary” that it will act in compliance going forward. *See id.* at § 209. The Order also broadly authorizes the Secretary to impose additional remedies “by rule, regulation or order of the Secretary, or as otherwise provided by law.” *Id.* § 202.

In 1966, the Secretary of Labor determined that it was “necessary and appropriate” to establish an office dedicated to implementing and enforcing Executive Order 11,246 and its policy concerning government contracting. Secretary’s Order No. 26-05, 31 Fed. Reg. 6921 (May 11, 1966). That Order gave rise to OFCCP.

### **III. OFCCP Employs A Range Of Complementary Regulatory Tools To Accomplish Its Mission Of Contractor Compliance**

For more than fifty years, OFCCP has acted pursuant to well-established legal authority to implement and enforce Executive Order 11,246’s antidiscrimination and affirmative-action policies. Using a range of collaborative methods, the Office helps contractors understand and comply with their contractual and legal obligations to refrain from discrimination and to promote workplace equality. It is when those collaborative efforts fail that the Office necessarily invokes its authority to ask an ALJ (subject to judicial review) to determine whether a contractor has engaged in discrimination and what remedies are required to bring the contractor back into compliance. History and *amici*’s experience demonstrate that OFCCP’s power to take these enforcement actions is a necessary complement to its other regulatory activities and critical to its ability to “achieve



nondiscrimination in employment by Government contractors.” *See* 31 Fed. Reg. 6921 (May 11, 1966).

**a. Compliance Assistance: Education And Support For Contractors**

An important aspect of OFCCP’s work is compliance assistance. Through an extensive and frequently updated set of publications, the Office works to ensure contractors understand what their obligations are and what actions they can and must take to comply. Those publications include technical assistance guides, factsheets, brochures, Frequently Asked Questions documents, directives, and more recently, webinars.<sup>9</sup> In addition, OFCCP publishes a comprehensive Federal Contract Compliance Manual (“Compliance Manual” or “Manual”) that sets forth the methods OFCCP compliance officers employ in performing their duties.<sup>10</sup> The Manual promotes uniformity across OFCCP’s efforts, and also assists contractors in understanding how the Office works and how that work could affect them. No law or regulation requires OFCCP to disseminate the Manual to contractors. Nonetheless, the Office determined that making this resource publicly available would promote the kind of transparency and fairness critical to an effective regulatory regime.

For similar reasons, OFCCP has made it a priority to engage in an open and ongoing dialogue with contractors about the Office’s regulatory priorities and the practical issues facing the contractor community. To that end, upon assuming her position, former OFCCP Director and *amicus* Patricia Shiu embarked on a series of “listening tours.” Meeting directly with contractors, as well as employees and civil rights groups, Director Shiu and the Office gained critical insight that improved their efforts to help contractors achieve and maintain compliance. In the same vein,

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<sup>9</sup> *See* OFCCP, *What Federal Contractors Can Expect* (2018) <https://www.dol.gov/ofccp/CAGuides/files/WhatFederalContractorsCanExpect-CONTR508c.pdf>.

<sup>10</sup> The manual is available on OFCCP’s website. OFCCP, *Federal Contract Compliance Manual* (March 20, 2020), <https://www.dol.gov/agencies/ofccp/manual/fccm>.

OFCCP officials have regularly attended the annual National Industry Liaison Group Conference, one of the largest gatherings of contractors throughout the United States. Such events give contractors the opportunity to share with each other and OFCCP staff their approaches for effective compliance. OFCCP also maintains a virtual “help desk,” to respond to specific compliance questions not answered in published documents and help contractors apply general guidelines to their specific situation through individualized attention and assistance.<sup>11</sup>

**b. Recordkeeping and Reporting Requirements**

In addition to engaging with contractors, OFCCP also requires them to compile and periodically submit data concerning their employment practices. By regulation jointly promulgated with EEOC, contractors with more than 50 workers and \$50,000 in federal contracts must submit annual Employer Information Reports EEO-1, providing various demographic information about their workforce. *See* 41 C.F.R. 60-1.7(a). Under separate OFCCP regulations, many federal contractors are also required to create Affirmative Action Plans (“AAPs”). *See* 41 C.F.R. Part 60-2.<sup>12</sup> In their AAPs, contractors must include detailed quantitative analyses concerning, for example, the percentage of women or people of color in specific job groups. *See id.* § 60-2.13. AAPs are a critical tool for contractors to measure and track progress in hiring and promoting a diverse workforce that reflects the pool of qualified available workers for those job groups. Based on that analysis, contractors must set forth in their AAPs objectives and targets for their plan; identify where “impediments to equal opportunity” appear to exist; and describe the “action-oriented

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<sup>11</sup> *See* Press Release, Department of Labor, U.S. Department Of Labor Launches Online Help Desk To Provide Compliance Assistance To Federal Contractors And Stakeholders (Aug 9, 2019), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190809-0>.

<sup>12</sup> This requirement applies to contractors not engaged in construction who employ 50 or more workers and have government contracts of \$50,000 or more, and construction contractors with contracts over \$10,000. 41 C.F.R. 60-2.1(a); *id.* § 60-4.1

programs” they will implement to fix those problems. *See id.* §§ 60-2.16–2.17. OFCCP officials review contractors’ AAPs as part of compliance reviews, discussed below. *Id.* § 60-1.20(a)(1); Compliance Manual § 1D.

In the experience of former OFCCP *amici*, the process of pulling together this information can alert a contractor that its standard practices are producing unintentionally discriminatory results—results that take the contractor out of compliance with its obligations and, at the same time, undercut its own goals of efficient and fair employment practices.<sup>13</sup>

### c. Compliance Evaluations

Periodic reporting serves another purpose as well: It allows OFCCP to conduct its own analyses of contractors’ employment and hiring practices and thus evaluate contractor compliance. *See* 41 C.F.R. 60-1.20; Compliance Manual §1A02. Using data reported by contractors, compliance officers employ statistics and other analytic tools to identify any anomalous and potentially discriminatory patterns in contractors’ hiring, promotion, or compensation practices. Where these analyses “identify evidence of disparity against members of a protected group, [the compliance officer] must request additional data from the contractor for further analysis.” Compliance Manual § 1O03; *Id.* § 1O02 (instructing that “statistical results that identify preliminary indicators of a potential discrimination problem do not themselves prove discrimination or the existence of an affected class”). That additional data may be collected as part of or in conjunction with an on-site review of the contractor. During such reviews, compliance officers also meet with and interview

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<sup>13</sup> *See* Notice of Proposed Rulemaking, *Government Contractors, Requirement To Report Summary Data on Employee Compensation*, 79 Fed. Reg. 46562, 46563 (Aug. 8, 2014) (“By requiring contractors and subcontractors to report the data, OFCCP believes that some of these employers will voluntarily change their employment policies and practices.”).

members of management and employees themselves. Doing so sometimes enables OFCCP to uncover evidence of disparate treatment discrimination that data and statistics may not reveal.<sup>14</sup>

Importantly, OFCCP conducts its compliance evaluations *not* in response to complaints it receives, but proactively, as a way of monitoring contractors' ongoing compliance with their antidiscrimination and affirmative-action agreements.<sup>15</sup> A tool uniquely employed by OFCCP, these comprehensive, data-driven evaluations are a critical means to identify discrimination, including potential systemic, class-based discrimination that could otherwise go undetected and/or unreported, such as discriminatory failures to hire or pay discrimination. Oracle's case provides a ready example. It was through proactive compliance reviews that OFCCP identified what appear to be significant disparities in how Oracle pays and promotes its employees, depending on sex and race. *See* First Admin. Compl. ¶¶ 6–9, *OFCCP v. Oracle*, 2017-OFC-6 (Jan. 17, 2017). The claims that resulted from these findings have yet to be fully adjudicated. But one thing is clear: the pervasive discrimination potentially occurring at Oracle would not have been identified at the time it was but for OFCCP's compliance efforts.

#### **d. The Conciliation Process**

In all cases, OFCCP's goal is to assist and work cooperatively with contractors to address any potential discrimination its officers have found. In cases where that is not possible, and where OFCCP has identified sufficient supporting information, the Office may issue the contractor a

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<sup>14</sup> The goal of OFCCP's evaluations is not surprise. Per Office policy, compliance officers must schedule evaluations in advance, posting the information online to provide the employer's "EEO staff at least 45-days advance notice to prepare for the compliance review . . . and encourage contractors to take advantage of OFCCP compliance assistance offerings." *See* OFCCP Corporate Scheduling Announcement List Frequently Asked Questions, <https://www.dol.gov/ofccp/regs/compliance/faqs/csafaqs.htm>; *see also* Compliance Manual § 1B03.

<sup>15</sup> OFCCP does investigate complaints it receives, but may refer these complaints to the EEOC if any action is warranted. *See* Memorandum of Understanding Between U.S. Dep't of Labor and Equal Employment Opportunity Commission § 7 (2011).

notice of violation (“NOV”). Compliance Manual § 8F.<sup>16</sup> An NOV “identifies the violations” OFCCP has found and “describes the [Office’s] recommended corrective actions.” *Id.* § 8F00. But an NOV does not lead automatically to an adversarial proceeding. Instead what follows is a “conciliation process,” through which OFCCP and the contractor attempt to negotiate a resolution to the Office’s findings. *Id.* § 8G; *see* 41 C.F.R. § 60-1.33 (discussing conciliation agreements).

There are no formal requirements for the conciliation process. It “may involve various methods of communication, including the exchange of letters and emails, telephone conferences and in-person meetings.” Compliance Manual § 8G. OFCCP encourages compliance officers to “take a collaborative approach with contractors during the exchange of information to promote a shared understanding of the issues and to promote resolution.” *Id.* If the contractor and compliance officer are able to reach a resolution, the officer “document[s] the terms of the settlement in a formal [conciliation agreement].” *Id.* § 8G01; *see* 41 C.F.R. § 60-1.33.

The ultimate goal in any conciliation process is for the contractor and OFCCP to reach agreement on the critical issues the contractor must address and what remedy the contractor will undertake on behalf of the affected workers, including specific injunctive-like relief to ensure that discriminatory conduct does not recur (*e.g.*, personnel policy changes, training, and monitoring). In *amici* former OFCCP officials’ experience, both sides know enforcement is a possibility, and would prefer to avoid it if possible. That leverage is often helpful in encouraging contractors to engage in conciliation efforts and settle cases short of litigation. As such, where basic compliance assistance does not suffice, and compliance reviews turn up discriminatory practices or effects, this

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<sup>16</sup> “Since fiscal year 2010, OFCCP has not found violations in the vast majority of its compliance evaluations. For example, in fiscal year 2015 OFCCP did not find violations in 83 percent of its evaluations and found discrimination in about 1 percent of evaluations.” U.S. Gov’t Accountability Off., GAO-16-750, *Equal Employment Opportunity: Strengthening Oversight Could Improve Contractor Nondiscrimination Compliance* 16 (2016), <https://www.gao.gov/assets/680/679960.pdf>.

conciliation process, with its informal, collaborative approach, is greatly effective in producing mutually acceptable and beneficial outcomes. The following are just a few examples:

- ***FedEx.*** In the course of routine compliance reviews over the course of seven years, OFCCP staff uncovered evidence of discrimination in hiring at 23 FedEx facilities in 15 states. The 21,635 affected job seekers included men, women, African Americans, Caucasians, Native Americans, and people of Hispanic and Asian descent, all of whom OFCCP identified as being subject to improper discrimination through FedEx's hiring practices for entry-level package handler and parcel assistant jobs. Once OFCCP made FedEx aware of the violations, compliance officers worked with the company to resolve these issues. In 2012, that process ended with a successful conciliation agreement, in which FedEx came back into compliance with its contract's antidiscrimination provisions. The company agreed to pay a total of \$3 million in backpay and interest to affected job seekers and to extend job offers to some of the affected workers once positions became available. FedEx also made clear its commitment to complying with its antidiscrimination obligations in the future, by agreeing to employment opportunity training and undertaking extensive self-monitoring measures, including an outside review of its hiring practices.<sup>17</sup>
- ***Dell EMC.*** Pay data OFCCP obtained from Dell EMC indicated potentially discriminatory pay discrepancies at the company's facilities in California and North Carolina. Specifically, regression analyses revealed that Dell EMC had consistently paid lower salaries to women and African Americans working in certain engineering, marketing, and sales positions. After OFCCP issued NOV's to the company, laying out its findings, Dell EMC agreed to pay almost \$3 million in backpay and interest to almost 500 workers affected by its discriminatory practices, as well as to make pay adjustments, conduct annual compensation analyses, and take additional steps to ensure it meets its antidiscrimination obligations going forward.<sup>18</sup>
- ***Goldman Sachs.*** OFCCP's routine compliance evaluations uncovered evidence that between 2011 and 2012, Goldman Sachs had paid lower salaries to African-American, Asian, Hispanic, and female employees in certain positions at its New York City headquarters. Under the terms of s

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<sup>17</sup> See Press Release, Department of Labor, Shipping Giant FedEx to Pay \$3 Million to Settle Charges of Hiring Discrimination Brought by US Department of Labor (Mar. 22, 2012), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20120322>.

<sup>18</sup> See Press Release, Department of Labor, U.S. Department of Labor Recovers More Than \$2.9 Million To Resolve Alleged Pay Discrimination Violations at Dell EMC (May 14, 2018) <https://www.dol.gov/newsroom/releases/ofccp/ofccp20180514>; RJ Vogt, *Dell to Pay \$3M to End DOL Pay Discrimination Claims*, Law360, May 15, 2018, <https://www.law360.com/articles/1043729/dell-to-pay-3m-to-end-dol-pay-discrimination-claims>; Conciliation Agreement Between OFCCP and Dell-EMC (Apr. 27, 2018) [https://www.dol.gov/sites/dolgov/files/ofccp/foia/files/Dell-EMC-CA\\_Redacted.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/foia/files/Dell-EMC-CA_Redacted.pdf).

conciliation agreement, Goldman Sachs agreed to pay almost \$10 million in backpay and interest to 600 affected employees. In addition, it agreed to make changes to its affirmative action program to bring it in line with its legal and contractual obligations.<sup>19</sup>

**e. Administrative Enforcement Proceedings**

In some instances, despite best efforts, compliance officers and contractors are unable to resolve issues OFCCP has identified through conciliation. In those cases, under longstanding regulations, the agency may commence a hearing before a Department of Labor (“DOL”) Administrative Law Judge (“ALJ”), to adjudicate whether a violation has occurred and, if so, the remedies needed to address that violation. 41 C.F.R. § 60-1.26; *see also* 33 Fed. Reg. 7804, 7810 (May 28, 1968) (announcing the rule that first empowered OFCCP to commence formal hearings to adjudicate a contractor’s potential “violation of [Executive Order 11,246’s] equal opportunity clause”).

The decision to commence such a hearing is not taken lightly. It occurs only after extensive deliberation and a multi-layered review process involving the compliance officer who identified the potential violation, her supervisor, the relevant regional director, and OFCCP deputies and the Director. If, after all that, OFCCP brings the potential enforcement case to DOL’s Office of the Solicitor, the attorneys in that office may decide to take no further action, commence a hearing before an ALJ, or potentially refer the case to the Department of Justice. 41 C.F.R. § 60-1.26; Compliance Manual § 8M. Further, if the Solicitor commences a proceeding before an ALJ, and if and when an ALJ subsequently makes any adverse findings against a contractor, those findings are

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<sup>19</sup> *See* Press Release, Department of Labor, U.S. Department of Labor Reaches Conciliation Agreement for \$9,995,000 in Back Pay and Interest (Sept. 30, 2019), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190930>; Adam Lidgett, *Dell, Goldman Sachs Pay \$17M Total To End Bias Accusations*, Law360, Sept. 30, 2019, <https://www.law360.com/articles/1204428/dell-goldman-sachs-pay-17m-total-to-end-bias-accusations>; Early Resolution Conciliation Agreement Between OFCCP and Goldman Sachs & Co. (Sept. 27, 2019), [https://www.dol.gov/ofccp/foia/files/GoldmanSachsCA-NE2019-09-27version2019-10-01-1530\\_Redacted.pdf](https://www.dol.gov/ofccp/foia/files/GoldmanSachsCA-NE2019-09-27version2019-10-01-1530_Redacted.pdf).

subject to multiple levels of review: by the Administrative Review Board (“ARB”), the Secretary of Labor, and ultimately before Article III federal courts. *See* Proposed Intervenor’s Mot. Summ. J. 11, ECF No. 11-1.

As the Court knows, it is OFCCP’s power to initiate these lawful administrative enforcement actions that Oracle seeks to invalidate in its lawsuit.

#### **IV. Oracle’s Attack, If Successful, Would Undermine OFCCP’s Entire Regulatory Process**

Oracle portrays its attack on OFCCP’s regulatory authority as narrow and targeted. It insists it has no quarrel with the government’s right to condition its contracts, and provision of taxpayer dollars, on a business’s agreement to refrain from employee discrimination and promote equal opportunity. *See* Opp. to Mot. to Intervene 1, ECF No. 14. It says it accept the Office’s authority to require reporting, conduct compliance reviews, and even engage in conciliation efforts. *Id.* at 7. It denies that its lawsuit is an effort to “effectively abolish” OFCCP and dismantle the Office’s efforts to implement the government’s policy against contractor discrimination. *Id.* But what Oracle fails to grasp, or perhaps just refuses to acknowledge, is that OFCCP’s ability to operate as an effective regulator capable of implementing the promise of Executive Order 11,2246 is contingent on its ability to take those enforcement actions necessary to enforce its own regulations and requirements. That power provides a critical foundation for OFCCP’s entire regulatory framework.

Intervenor’s have ably demonstrated the ample legal authority for the enforcement powers that OFCCP has long exercised and contractors have long accepted as a condition of their government contracts, including OFCCP’s power to ask an ALJ to adjudicate and to seek backpay and other remedies to address contractor discrimination. *See* Proposed Intervenor’s Mot. Summ. J.



21–33, ECF No. 11-1.<sup>20</sup> *Amici*, for their part, can attest, based on decades of collective experience, that OFCCP’s ability to take such actions is critical to its regulatory mission.

That is true for several reasons. As recounted above, it is the experience of those *amici* who have worked at OFCCP that many contractors willingly collaborate with the Office to meet and maintain their antidiscrimination and affirmative-action obligations. They participate in the Office’s compliance assistance programs and work with, rather than against, compliance officers during evaluations, including by analyzing their own practices. But if OFCCP lacked the authority to enforce the regulations and obligations the Office is asking contractors to abide by, there is no question that dynamic would shift, if not immediately, then at least over time. Oracle itself proves this point: One of the claims OFCCP seeks to adjudicate in the underlying action is Oracle’s failure to provide, and perhaps to perform at all, certain reviews and analyses of its compensation practices and their impact. *See* 2d Am. Admin. Compl. ¶¶ 43–51, *OFCCP v. Oracle*, 2017-OFC-6 (Mar. 8, 2019). If OFCCP had no power to ask an ALJ to adjudicate such violations, this kind of failure to cooperate might proliferate, undermining the Office’s ability to identify discriminatory treatment and impact.

OFCCP’s ability to resolve issues of discrimination through a conciliatory process that produces mutually acceptable outcomes would also be undermined, if not eliminated. The prospect of an enforcement action is important leverage for OFCCP: The desire to avoid an adversarial process is often what motivates a party to come to the table and work with its regulator to reach a

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<sup>20</sup> Prior to this litigation, Oracle also accepted, as a condition of its government contracts, that it could be subject to administrative adjudication and remedies if it violated its agreement not to discriminate. Since 2005, Oracle has entered into no fewer than 138 separate contracts with various federal contracting agencies and each of those contracts with a value exceeding \$10,000 was conditioned on Oracle’s agreement to “comply with all provisions of Executive Order 11,246” and “rules, regulations, and relevant orders of the Secretary of Labor”—including those that permit the enforcement actions Oracle now challenges. *See* 41 C.F.R. § 60-1.4(a)(5). It was only on the eve of a hearing on OFCCP’s findings of pervasive gender and race discrimination that Oracle came to this Court with a collateral attack on the Office’s long-accepted authority.

compromise. It is the firm judgment of former-OFCCP *amici* that contractors would be far less inclined to try to achieve meaningful conciliation agreements with OFCCP if OFCCP did not itself have the power to ask an ALJ to adjudicate the discrimination it has identified. Contractors would also be less likely to agree to relief like backpay, priority hiring, or training if OFCCP were stripped of the power to seek those particular remedies.<sup>21</sup> And depriving OFCCP of those remedies means that the only sanction the Office could impose would be debarment—prohibiting a contractor from receiving future contracts. *See* 41 C.F.R. § 60-1.27(b). Leaving OFCCP with only that blunt instrument for addressing violations would not benefit anyone.

OFCCP could, as Oracle notes, refer its discrimination findings to other agencies to pursue. But doing so would significantly complicate, inevitably slow, and in some cases prevent altogether efforts to address the potential discrimination OFCCP has identified. The outside agency—whether EEOC or the Department of Justice—would need to follow its own processes, including conducting its own investigation or assessment, before proceeding to take any action. And that is understandable: Responsible lawyers will not put their names on the cases they file in court unless they are assured they have the facts right. Other agencies might also be driven by policy priorities different from OFCCP’s or limited by different funding constraints. EEOC, for example, has dealt with chronic underfunding and labors under an enormous backlog of complaints.<sup>22</sup> And it has its own strategic enforcement plan that differs from the plans and priorities of OFCCP. As a result of

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<sup>21</sup> Oracle claims such remedies are out of bounds for OFCCP, because it does not consider them “contractual” remedies. But that argument misses the mark: A contractor cannot, in its contract with the government, promise it will not discriminate against employees and job applicants, but then proceed to pay certain workers less based on gender, race, or some other improper basis, or refuse to hire applicants on those same improper bases.

<sup>22</sup> Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans With Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. Kan. L. Rev. 1 (2001) (“Congress has never given the EEOC the resources the Agency needed to ensure an appropriate investigation of each case brought before it.”).

these and other factors, EEOC or the Justice Department might well fail to litigate claims that OFCCP otherwise would have.

A critical example are claims concerning systemic discrimination that individual workers are often unable to detect themselves or else are poorly positioned to bring forward themselves. Currently, OFCCP is able to uncover such insidious discrimination through comprehensive analysis of employment data and its proactive, onsite compliance evaluations. OFCCP has developed substantial expertise, and devoted significant resources, to stopping the discrimination it identifies through these methods.

OFCCP could theoretically refer the findings it makes through this type of work to EEOC or DOJ, and EEOC or DOJ might theoretically file a lawsuit based on those findings (after doing its own, independent analysis, as noted above). But there is no guarantee. EEOC, for example, most often brings claims against federal contractors that derive from individual complaints, where a worker is able to identify discrimination and is in a position to bring a claim forward herself. And EEOC and OFCCP have in fact formally agreed, in the area of federal contracting, that it is the latter agency that will take care to prevent and, if necessary, remedy this kind of systemic discrimination. *See Memorandum of Understanding Between U.S. Dep't of Labor and Equal Employment Opportunity Commission § 7(b)–(c) (2011)* (agreeing that individual dual OFCCP/EEOC complaints will be referred to the EEOC but OFCCP will “retain, investigate, process, and resolve” systemic or class allegations.).

Consistent with that agreement, OFCCP has brought administrative actions to vindicate the following claims, thereby correcting substantial contractor noncompliance and obtaining meaningful remedies for the affected workers and job seekers.

- ***NationsBank***. In the mid-1990s, during a routine compliance review at the Charlotte, North Carolina, headquarters of NationsBank (which later

merged with Bank of America), OFCCP uncovered evidence that the bank had discriminated against African-American job applicants for entry-level teller, clerical, and administrative positions. Conciliation efforts failed, and in 1997, DOL filed an administrative complaint to enforce OFCCP's findings. In the meantime, NationsBank challenged OFCCP's compliance review process on Fourth Amendment grounds, first in federal court, then later, after the Fourth Circuit held that it was required to exhaust administrative remedies, *see NationsBank Corp. v. Herman*, 174 F.3d 424 (4th Cir. 1999), through the administrative process. Once those efforts failed, in 2010, an ALJ finally decided the claims against NationsBank on the merits, and found evidence of discrimination in hiring in 1993 and from 2002 to 2005. *OFCCP v. Bank of America*, 1997-OFC-16 (Jan. 21, 2010).<sup>23</sup> In 2013, the ALJ recommended that NationsBank (by then, Bank of America) pay a total of \$2.2 million in backpay to the affected job seekers. *OFCCP v. Bank of America*, 1997-OFC-16 (Sept. 17, 2013).<sup>24</sup> Bank of America appealed to the ARB, and a few years later, the Board upheld the ALJ's findings on liability and damages for the 1993 applicants, but reversed its findings on the 2002 through 2005 applicants. *OFCCP v. Bank of America*, ARB Case No. 13-099 (Apr. 21, 2016).<sup>25</sup> Shortly thereafter, Bank of America exercised its right to challenge the Department's final agency action in federal court. *See Bank of America, N.A. v. U.S. Dept. of Labor*, 16-cv-968 (D.D.C.). Once the lawsuit was filed, the parties returned to the negotiating table and ultimately reached a settlement, in which Bank of America agreed to pay \$1 million in backpay and interest to 1,027 affected job seekers.<sup>26</sup>

- ***B&H Foto & Electronics.*** During a routine compliance review of B&H Foto & Electronics Corporation's Brooklyn, New York warehouse, OFCCP determined that between 2011 and 2013, the company hired only men of Hispanic descent for its entry-level laborer positions. In addition, OFCCP found that B&H systematically denied its Hispanic employees promotion opportunities and paid them less than other employees. Further

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<sup>23</sup> Available at [https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/OFC/10\\_048.OFCP.PDF](https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/10_048.OFCP.PDF).

<sup>24</sup> Available at [https://www.oalj.dol.gov/DECISIONS/ALJ/OFC/1997/OFCCP\\_-\\_WASHINGTON\\_D\\_v\\_NATIONSBANK\\_CORPORAT\\_1997OFC00016\\_\(SEP\\_17\\_2013\)\\_073906\\_CADEC\\_SD.PDF](https://www.oalj.dol.gov/DECISIONS/ALJ/OFC/1997/OFCCP_-_WASHINGTON_D_v_NATIONSBANK_CORPORAT_1997OFC00016_(SEP_17_2013)_073906_CADEC_SD.PDF)

<sup>25</sup> Available at [https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/OFC/13\\_099.OFCP.PDF](https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/13_099.OFCP.PDF).

<sup>26</sup> *See, e.g.*, Suevon Lee, *BoA Enters Deal Over '93 NationsBank Race Bias Hiring Case*, Law360, Apr. 17, 2017, <https://www.law360.com/articles/914310/boa-enters-deal-over-93-nationsbank-race-bias-hiring-case>; Press Release, Department of Labor, Following US Labor Department Investigation, Administrative Law Judge Finds Bank of America Discriminated Against African-American Job Applicants (Feb. 2, 2010), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20100202>; Press Release, Department of Labor, Judge Orders Bank of America to Pay Almost \$2.2 Million for Racial Discrimination Against More Than 1,100 African-American Job Seekers (Sept. 23, 2013), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20131967>; Press Release, Department of Labor, Settlement Resolves 24-Year-Old Hiring Discrimination Case (Apr. 17, 2017), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20170417>.

investigation uncovered that Hispanic employees were harassed and subjected to racist comments and forced to use separate restrooms from white employees, which were unsanitary and often inoperable. Conciliation efforts were unsuccessful, as B&H was unwilling to agree to take corrective action to bring itself into compliance with its antidiscrimination agreements. In 2016, DOL filed an administrative complaint to enforce OFCCP's findings. After litigating a number of discovery issues in front of the ALJ, the parties reached a settlement and entered into a consent decree. Under the terms of the settlement, B&H paid over \$3 million in backpay to over 1,300 affected job seekers and employees, and agreed to provide annual antiharassment and antidiscrimination training to its managers to help ensure it would abide by its antidiscrimination agreements going forward.<sup>27</sup>

- Palantir.** In 2011, OFCCP conducted a routine compliance review of Palantir's headquarters in Palo Alto, California. Statistical analysis of hiring data obtained during the compliance review showed that the company had been discriminating against job applicants of Asian descent in certain software engineering jobs and utilizing hiring processes, including an employee referral system, that led to discrimination. OFCCP attempted to work with Palantir to bring it into compliance with its antidiscrimination agreements, but conciliation was unsuccessful. In October 2015, OFCCP sent Palantir a Notice to Show Cause why it should not initiate enforcement proceedings, and in February 2016, it filed an administrative complaint. *See* Complaint, *OFCCP v. Palantir Technologies, Inc.*, 2016-OFC-9 (Sept. 26, 2016).<sup>28</sup> A little over a year later, the parties reached an agreement to settle the case, with Palantir agreeing to pay \$1.7 million in backpay and other relief, including stock options, and to extend job offers to eight class members.<sup>29</sup>

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<sup>27</sup> See Press Release, Department of Labor, US Labor Department Sues B&H Foto & Electronics Corp. For Hiring, Pay, Promotion Discrimination; Harassment (Feb. 25, 2016), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20160225>; Press Release, Department of Labor, B&H Foto Resolves Allegations of Discrimination, Bias, and Harassment (Aug. 14, 2017), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20170814>; Bonnie Eslinger, *Federal Contractor B&H Hit With DOL Race Bias Suit*, Law360, Feb. 26, 2016, <https://www.law360.com/articles/764282/federal-contractor-b-h-hit-with-dol-race-bias-suit>; *OFCCP v. B&H Foto & Electronics Corp.*, 2016-OFC-4 (Aug. 11, 2017), available at [https://www.oalj.dol.gov/DECISIONS/ALJ/OFC/2016/OFCCP\\_-\\_NEW\\_YORK\\_NY\\_v\\_BandH\\_FOTO\\_and\\_ELECT\\_2016OFC00004\\_\(AUG\\_11\\_2017\)\\_141112\\_CADEC\\_PD.PDF](https://www.oalj.dol.gov/DECISIONS/ALJ/OFC/2016/OFCCP_-_NEW_YORK_NY_v_BandH_FOTO_and_ELECT_2016OFC00004_(AUG_11_2017)_141112_CADEC_PD.PDF).

<sup>28</sup> Available at [https://www.dol.gov/sites/dolgov/files/legacy-files/newsroom/newsreleases/OFCCP20160926\\_0.pdf](https://www.dol.gov/sites/dolgov/files/legacy-files/newsroom/newsreleases/OFCCP20160926_0.pdf).

<sup>29</sup> See Press Release, Department of Labor, US Department of Labor Sues Silicon Valley Tech Company For Discriminating Against Asian Job Applicants (Sept. 26, 2016), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20160926>; Press Release, Department of Labor, US Department of Labor Settles Charges of Hiring Discrimination With Silicon Valley Company (Apr. 25, 2017), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20170425>; Consent Decree, *OFCCP v. Palantir Technologies, Inc.*, 2016-OFC-9 (April 20, 2017), [https://www.dol.gov/sites/dolgov/files/ofccp/foia/files/Palantir\\_CD\\_DPO\\_Redacted.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/foia/files/Palantir_CD_DPO_Redacted.pdf).

The foregoing are just a few examples of the protection OFCCP has been able to provide the contractor workforce. From 2009 to 2016 alone, OFCCP evaluated contractor facilities employing more than 12.3 million workers to determine whether those businesses were abiding by their antidiscrimination and affirmative-action promises.<sup>30</sup> As a result of those efforts and the discrimination it uncovered, OFCCP was able to obtain contractor compliance, and protect contractor employees, by securing \$85.9 million in backpay for 147,000 employees subjected to unlawful discrimination.<sup>31</sup> OFCCP's work has continued in the current administration, with the Office securing over \$81 million in backpay for more than 69,000 workers in the last three years alone.<sup>32</sup>

In Oracle's ideal world, none of these important accomplishments may have happened at all.

### CONCLUSION

For the foregoing reasons, the Court should grant the Intervenors' Motion for Summary Judgment, or, in the alternative, dismiss the case.

Date: April 3, 2020

Respectfully submitted,

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<sup>30</sup> U.S. Dept. of Labor, *OFCCP By The Numbers*, <https://www.dol.gov/ofccp/BTN/> (as of June 12, 2017).

<sup>31</sup> *Id.*

<sup>32</sup> U.S. Dept. of Labor, *OFCCP By The Numbers*, <https://www.dol.gov/ofccp/BTN/> (as of March 29, 2020).

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