

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC.

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
LABOR, *et al.*,

Defendants.

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

AMICUS CURIAE BRIEF OF THE DISTRICT OF COLUMBIA AND THE
STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, NEW JERSEY, NEW
YORK, PENNSYLVANIA, AND VIRGINIA IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND INTEREST OF AMICI STATES

The District of Columbia and States of California, Connecticut, Delaware, New Jersey, New York, Pennsylvania and Virginia (Amici States) file this amicus curiae brief pursuant to Local Rule 7(o). Amici States urge the Court to preserve the administrative enforcement powers of the Department of Labor’s (DOL) Office of Federal Contract Compliance Programs (OFCCP), which has developed a comprehensive administrative compliance and enforcement framework to advance diversity and ensure nondiscrimination among federal contractors.

OFCCP administers and enforces three laws regarding equal employment opportunity and nondiscrimination for applicants and employees of federal contractors and subcontractors. Amici states rely on OFCCP’s oversight and, in particular, its administrative enforcement mechanisms, to ensure that the States’ federal contractor sector complies with anti-discrimination laws. Despite state and federal government efforts, employment discrimination remains a problem at workplaces nationwide, including among federal contractors. While some Amici States have state agencies devoted to investigating complaints of discrimination, OFCCP has devoted resources to, and developed expertise in, investigating and enforcing systemic discrimination cases and violations of affirmative action policies—enforcement efforts that are labor-intensive and difficult to replicate.

Amici States are home to a substantial number of federal contractors and share OFCCP’s goal of holding contractors “responsible for complying with the legal

requirement to take affirmative action and not discriminate¹ Stripping OFCCP of its administrative enforcement powers as advocated by Oracle America, Inc. (Oracle)—including its ability to seek backpay and other make-whole relief to deter unlawful discrimination—has the potential to disrupt equal employment and antidiscrimination enforcement in Amici States and nationwide. This Court should reject that effort.

FACTUAL BACKGROUND

A. OFCCP's Enforcement Authority and Framework

OFCCP's authority is derived from three sources: Executive Order 11,246 (the Order), as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended. Collectively, these authorities prohibit federal contractors and subcontractors from discriminating in employment based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability or status as a protected veteran.² These authorities also require federal contractors to take affirmative steps to ensure equal employment opportunity in all aspects of their employment practices.

At issue in this lawsuit are OFCCP's administrative enforcement powers under the Order, which comprises the vast majority of OFCCP's compliance and enforcement efforts. President Lyndon B. Johnson issued the Order in 1965 in the

¹ OFCCP, *About Us*, U.S. DEP'T OF LABOR, <https://www.dol.gov/ofccp/aboutof.html>.

² *See* Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578; Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 355, 393; Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

wake of the civil rights movement to ensure that the federal government would not subsidize employment discrimination through taxpayer funded contracts.³ The Order has been the federal government's mandate for federal contractors for over half a century.

From the outset, the Order included provisions to ensure that DOL could meaningfully enforce its mandate. The Order grants the Secretary of Labor broad powers to "adopt such rules and regulations and issue such orders as [] deem[ed] necessary and appropriate to achieve" the Order's nondiscrimination aims. 30 C.F.R. 12,319 § 201. The Order also grants the Secretary authority to investigate employment practices, make determinations regarding violations and hold hearings. *Id.* at §§ 206(a), 208. The penalties and sanctions provided for under the Order include the cancellation or suspension of any contract and the debarment of noncomplying contractors from federal contracts. *Id.* at § 209(a)(5)-(6).

Based on this grant of authority, at the Secretary's direction, OFCCP promulgated implementing regulations that established a comprehensive administrative compliance and enforcement framework focused not only on preventing discrimination, but also requiring proactive steps to ensure equal opportunity. The regulatory requirements of this framework are incorporated into the terms of each organization's covered contract with the federal government. According to these requirements, contractors must develop an annual Affirmative

³ See OFCCP, *Executive Order 11246*, U.S. DEPT OF LABOR, <https://www.dol.gov/agencies/ofccp/executive-order-11246/regulations>.

Action Plan (AAP) to employ and advance qualified workers regardless of race or gender, as well as furnish OFCCP with reports about their diversity programs and workforce demographics. Contractors must also submit to compliance evaluations in which OFCCP compliance officers perform complex statistical analysis of contractors' AAPs and personnel data to identify hiring, promotional, and pay disparities. Where a compliance evaluation reveals violations of regulatory requirements, OFCCP attempts to remedy these violations through a conciliation agreement. Conciliation agreements may require the contractor to change its employment practices, make technical or administrative improvements, or provide make-whole relief to discriminated employees or applicants. OFCCP monitors compliance with conciliation agreements through periodic reports. If conciliation efforts fail, OFCCP issues an order to show cause and may recommend that an enforcement action be brought before DOL's Office of Administrative Law Judges (OALJ).⁴

DOL issued new rules implementing the Order in 1977. 42 Fed. Reg. 3454, 3456 (Jan. 18, 1977). As DOL explained at the time, the new rules simply "amended the current regulations incorporating enforcement procedures already in use, codifying existing practices and extending coverage."⁵ The Order already authorized the use of hearings "for compliance, enforcement, or educational purposes" and also

⁴ For a general overview of the compliance and enforcement process, see 41 C.F.R. § 60-1 *et seq.*

⁵ U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977 63 n.1 (1977), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12en22977.pdf> (citing to letter from Donald Elisburg, Assistant Sec'y for Employ't Standards, U.S. Dep't of Labor).

“prior to imposing, ordering, or recommending the imposition of penalties and sanctions.” 30 C.F.R. 12319 § 208. However, the amended regulations provided uniform procedures for the administrative hearings and required them to be held by an administrative law judge.⁶ 42 Fed. Reg. 3462 § 60-30 (Jan. 18, 1977) (codified at 41 C.F.R. § 60-30). The amended regulations also codified OFCCP’s power to “seek back pay and other make-whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation.” 41 C.F.R. § 60-1.26(a)(2).

B. OFCCP’s Enforcement Action Against Oracle

OFCCP’s enforcement action against Oracle followed the agency’s established administrative compliance and enforcement framework. In 2014, OFCCP conducted a compliance evaluation of Oracle and found evidence that the organization engaged in systematic discrimination in its compensation and hiring practices. Specifically, OFCCP found that Oracle discriminated against women, Black and Asian employees in its compensation practices at its headquarters in Redwood Shores, California, and that Oracle engaged in hiring discrimination against qualified white, Latino, and Black applicants in favor of Asian applicants. Complaint at ¶¶ 7-10, *Oracle America, Inc.*, 17-OFC-00006, OFCCP No. R00192699 (U.S. D.O.L. Jan. 17, 2017).⁷ Oracle also failed to provide OFCCP with required records, a further violation of its federal contract. OFCCP attempted to engage in conciliation discussions with Oracle to

⁶ *Id.* at 22 (“Previously, procedures for hearings were not uniform and could be established by the Secretary of Labor or the head of any compliance agency.”).

⁷ OFCCP filed the Complaint as a result of its compliance evaluation into Oracle’s hiring and compensation practices.

resolve the violations but could not reach an agreement. OFCCP then filed an administrative enforcement action against Oracle before the OALJ on January 17, 2017, and trial commenced on December 5, 2019. Oracle now challenges OFCCP's authority to enforce the Order in an administrative proceeding, and specifically OFCCP's authority to award individualized make-whole relief to applicants and employees. Oracle contends that the Order only permits OFCCP to seek "prospective" relief, such as contract remedies, in administrative proceedings before an Administrative Law Judge, but that OFCCP must refer cases to the EEOC or DOJ for prosecution in an Article III court to seek any "retrospective" make-whole relief.

ARGUMENT

Amici States request that this Court reject Oracle's arguments and uphold OFCCP's current administrative enforcement framework for three reasons. First, OFCCP plays a key role in enforcing equal opportunity in employment. Employment discrimination is a nationwide problem that needs to be addressed on a systemic basis, including in the federal contractor sector. OFCCP has significant expertise in specialized practices of civil rights enforcement, such as systemic discrimination and affirmative action enforcement, which address some of the most pervasive, but often hidden, forms of employment discrimination. Second, OFCCP's administrative enforcement framework is essential to its effectiveness. For decades, this framework has enabled it to efficiently detect, correct and deter illegal disparities in hiring and compensation at federal contractor companies. The touchstone of that framework is OFCCP's ability to enforce the Order via the administrative hearing process and seek

make-whole relief, such as backpay remedies, to deter discriminatory conduct. Without this, OFCCP's enforcement framework would be rendered substantially less effective. Third, gutting OFCCP's administrative enforcement regime would require other federal and state agencies to step into an enforcement gap they are not well-equipped to fill. Indeed, none could readily replicate OFCCP's step-by-step framework, single-forum resolution, or institutional expertise, all of which put OFCCP in the best position to address systemic discrimination among federal contractors.

I. OFCCP Plays a Key Role in the Nation's Civil Rights Enforcement Efforts.

A. Workplace Discrimination Is a Pervasive Problem that Needs to Be Addressed Systemically.

Although significant progress has been made since the passage of the Civil Rights Act of 1964, discrimination in the workplace remains prevalent. Indeed, there is overwhelming evidence that many people in America have experienced some form of employment discrimination and much of this discrimination is at the systemic—rather than individual—level.

For example, a 2017 survey found that 56% of Blacks experienced discrimination when applying for jobs, and 57% experienced discrimination when applying for promotions.⁸ Roughly one third of Hispanic and Native Americans, and one quarter of Asian Americans, reported similar experiences.⁹ Surveys have also

⁸ DISCRIMINATION IN AMERICA: FINAL SUMMARY 7 (2018), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf>.

⁹ *Id.*

shown that as many as 43% of gay people, and 90% of transgender people, have experienced discrimination or harassment in the workplace.¹⁰ According to a 2017 Pew Research Center poll, 42% of women in the U.S. have also experienced workplace discrimination based on gender.¹¹ And a 2017 AARP survey revealed that 61% of workers 45 and older had either seen or experienced age discrimination in the workplace.¹²

Importantly, much of this discrimination relates to systemic disparities in compensation, recruitment and hiring, all of which can be hard for individual job applicants and employees to detect, let alone correct. Women still earn just 85 cents on the dollar compared to men.¹³ And studies have shown that Black men earn 15% less than white men, while Black women earn 6% less than white women.¹⁴ Black people are also twice as likely to be unemployed as white people, and Black men with

¹⁰ CROSBY BURNS & JEFF KREHELY, CTR. FOR AM. PROGRESS, GAY AND TRANSGENDER PEOPLE FACE HIGH RATES OF WORKPLACE DISCRIMINATION AND HARASSMENT: DATA DEMONSTRATE NEED FOR FEDERAL LAW 1 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/workplace_discrimination.pdf.

¹¹ Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RESEARCH CTR. (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>.

¹² REBECCA PERRON, AARP, THE VALUE OF EXPERIENCE: AGE DISCRIMINATION AGAINST OLDER WORKERS PERSISTS 3 (2018), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf.

¹³ Nikki Graf, Anna Brown & Eileen Patten, *The narrowing, but persistent, gender gap in pay*, PEW RESEARCH CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/>.

¹⁴ Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 188 (2008).

high school degrees are 70% more likely to experience unemployment than similarly situated white men.¹⁵ Studies have also found that employers are more likely to give callback interviews to people with white-sounding names than people with Black-sounding names who have identical resumes.¹⁶

In addition, many classes of employees are significantly underrepresented in certain sectors of the economy. For example, women make up 48.7% of the general workforce but only 22% of the technology sector, and Black and Hispanic employees are similarly underrepresented.¹⁷ As recently as 2015, Black people only held 8% of white-collar jobs while 61.3% of executive positions were held by white men.¹⁸ Discrimination can manifest in other ways too, including the types of assignments that employees receive and how their performance is judged.¹⁹

Whether it is intentional or not, the potential for discriminatory bias in employment practices is well documented for women and minority employees. These

¹⁵ *Id.* at 187.

¹⁶ *Id.*

¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-69, DIVERSITY IN THE TECHNOLOGY SECTOR: FEDERAL AGENCIES COULD IMPROVE OVERSIGHT OF EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS 13 (2017), <https://www.gao.gov/products/GAO-18-69>.

¹⁸ Michael Gee, "Why Aren't Black Employees Getting More White-Collar Jobs," *Harv. Bus. Rev.* (Feb. 28, 2018), <https://hbr.org/2018/02/why-arent-black-employees-getting-more-white-collar-jobs>.

¹⁹ Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/>.

systemic forms of discrimination disadvantage entire classes of employees²⁰ and the effects are felt in the Amici states and on a national level.

Yet employees facing discrimination often face an increasingly uphill climb in seeking justice under existing laws. Evidence in systemic cases, like comparative pay data, is not only frequently “buried in personnel records only the employer can access,”²¹ but it is also voluminous and costly to analyze. Victims of systemic discrimination may not even know that they have been discriminated against, and even when they are aware, they face a variety of hurdles wholly unrelated to the merits of their cases. For example, recent federal court decisions demonstrate the difficulty of bringing systemic discrimination claims against private employers. Most notably, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court ostensibly raised the class certification standard for plaintiffs, making it “considerably more difficult for private plaintiffs to pursue claims of systemic employment discrimination.”²²

Additional shifts in the legal landscape have also led to an increase in the use of mandatory arbitration as a means of resolving employment related claims, thus encouraging resolution on an individual rather than systemic basis.²³ The increased

²⁰ Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1133 (2015).

²¹ Jameel & Yerardi, *supra* note 19.

²² Kim, *supra* note 20, at 1134.

²³ *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (requiring employees to arbitrate Fair Labor Standards Act claims on an individual basis); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding class action waivers in arbitration agreements); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that agreements to arbitrate employment-related disputes instead of bringing them to

use of arbitration agreements has caused over 60 million workers to lose the ability to litigate employment disputes in court,²⁴ and over 30% of these employees are also subject to class action waivers,²⁵ negating for those employees the ability to seek classwide relief. Employers can also prevent the disclosure of evidence related to the allegations or value of any settlements, which shields employers from the accompanying “reputational sanctions” that deter unlawful and discriminatory conduct.²⁶ Altogether, the many barriers to private enforcement of individual and systemic workplace discrimination underscore the substantial need for government enforcement and the critical role played by OFCCP.

B. OFCCP’s Unique Expertise Is a Necessary Component of Government Enforcement Efforts.

Under its authority to enforce the Order, OFCCP has developed an administrative enforcement framework that requires recordkeeping, compliance evaluations, and administrative proceedings for violations. The agency has used this approach to focus on systemic discrimination, in order to: (1) prioritize enforcement resources by focusing on the worst offenders; (2) prevent violations by encouraging

court are enforceable under the Federal Arbitration Act). In light of these decisions, the EEOC recently rescinded its 1997 policy against using mandatory arbitration in employment disputes. *See Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/recission_mandatory_arbitration.cfm.

²⁴ALEXANDER J.S. COLVIN, *THE GROWING USE OF MANDATORY ARBITRATION 2* (2018), <https://www.epi.org/files/pdf/144131.pdf>.

²⁵ *Id.*

²⁶ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680-81 (2018).

employers to self-audit their employment practices; and (3) achieve maximum leverage of resources to protect the greatest number of workers from discrimination.²⁷

OFCCP's 1977 regulations strengthened the agency's impact by establishing a process for reallocating many of the individual complaints that OFCCP receives to other agencies, to enable OFCCP "to devote more of their resources to combat[t]ing systemic discrimination."²⁸ Further, the memorandum of understanding between OFCCP, DOL, and the EEOC makes it clear that OFCCP is to retain systemic discrimination cases for investigation and enforcement, while individual cases generally are to be handled by the EEOC.²⁹

Because of its longstanding commitment to addressing systemic discrimination, OFCCP is uniquely poised to enforce those cases. OFCCP houses professional labor economists and statisticians who are versed in statistical models and back pay calculations consistent with prevailing law, and who participate in the conciliation and administrative hearing process to support OFCCP's findings.³⁰ Moreover, OFCCP can efficiently resolve contractual violations, including by seeking relief for victims of discriminatory conduct, all in one forum.

OFCCP is also uniquely positioned to assess hiring discrimination cases because its regulations require extensive recordkeeping. Contractors generally must

²⁷ *About Us*, *supra* note 1.

²⁸ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 74.

²⁹ Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission (Nov. 7, 2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

³⁰ OFCCP, U.S. DEP'T OF LABOR, DIR-2018-15 (2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html.

preserve all personnel and employment records (including applicant flow data) for two years.³¹ *See* 41 C.F.R. § 60-1.12(a), 41 § C.F.R. 60-300.80, and 41 C.F.R. § 60-741.80. Based on these regulations, OFCCP has access to more applicant data necessary to evaluate hiring practices than any other enforcement agency and, unlike other agencies, OFCCP does not have to receive a complaint to review such practices.

In addition, OFCCP is able to utilize the regulations' affirmative action requirements to review hiring, outreach, and recruitment practices for underrepresented groups, and enforce violations accordingly.³² The underlying premise of the affirmative action requirement is that "absent discrimination" the composition of the workforce will generally reflect the demographics of the labor pool. 41 C.F.R. § 60-2.10(a)(1). As OFCCP's regulations explain, "[t]here is a positive correlation between the presence of affirmative action and the absence of discrimination." 41 C.F.R. § 60-2.10(a)(3).

Contractors subject to the Order's AAP requirements must maintain a copy of its AAP and all documentation of good-faith efforts for the current and preceding year and must update its AAP annually. *See* 41 C.F.R. §§ 60-1.12(b), 60-2.31. Further, an AAP must include an in-depth analysis identifying potential impediments to equal opportunity, including in job placements, personnel activity, and compensation

³¹ If the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period is one year.

³² For an example of how to structure and format an AAP consistent with OFCCP's requirements, *see* OFCCP, *Sample Affirmative Action Programs*, U.S. DEPT OF LABOR, <https://www.dol.gov/ofccp/regs/compliance/aaps/aaps.htm>.

systems, and the contractor must develop an internal auditing system to measure the effectiveness of its affirmative action efforts. *See* 41 C.F.R. § 60-2.17.

The affirmative action recordkeeping requirements uniquely enable OFCCP to identify potential systemic hiring cases and its enforcement ability allows the agency to hold contractors accountable. During the period from fiscal years 2016-2020, OFCCP resolved 476 recordkeeping violations, as well as 323 (68%) AAP violations and 347 (72%) recruitment violations.³³

II. OFCCP's Comprehensive Enforcement Powers Are Essential to Its Effectiveness.

A. OFCCP's Enforcement Powers Enable It to Have a Wide Reach and Impact.

OFCCP's enforcement efforts have a significant impact in promoting diversity and enforcing equal opportunity requirements in American workplaces. It is currently responsible for overseeing approximately 200,000 federal contractor establishments,³⁴ collectively employing nearly one in five workers in America.³⁵

Because of its sizable jurisdiction, OFCCP relies heavily on compliance evaluations, which can result in financial penalties and enforcement proceedings if violations are found. Each year, OFCCP identifies approximately 2,500 to 5,000

³³ Office of Fed. Coordination & Compliance, *OFCCP Compliance Evaluation and Complaint Investigation Data*, U.S. DEP'T OF LABOR (Feb. 27, 2020), https://enforcedata.dol.gov/views/data_catalogs.php.

³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 8.

³⁵ OFCCP, *History of Executive Order 11246*, U.S. DEP'T OF LABOR, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html>.

contractor establishments to undergo an OFCCP compliance evaluation process.³⁶ Most recently in 2019, OFCCP identified approximately 4,000 establishments nationwide.³⁷

OFCCP has successfully utilized these compliance evaluations to identify violations of the Order and to seek appropriate remedies. According to OFCCP data for fiscal years 2016-2020, OFCCP identified violations that led to conciliation agreements for 981 establishments that underwent compliance evaluations. Of these, 762 conciliation agreements, covering contractors with nearly 500,000 employees, identified violations and required the contractor to implement specific non-financial remedies and relief.³⁸ Another 219 compliance evaluations, covering contractors with nearly 320,000 employees, ended with financial conciliation agreements or consent decrees, whereby violations were addressed by back pay and make-whole relief.³⁹

OFCCP further reports that it obtained \$81 million for over 69,000 employees and job seekers who were discriminated against during the three-year period from October 2016 to September 2019, reflecting the highest amount of monetary relief for

³⁶ OFCCP, *Corporate Scheduling Announcement List Frequently Asked Questions*, U.S. DEPT OF LABOR, <https://www.dol.gov/ofccp/regs/compliance/faqs/csalfaqs.htm#Q3>.

³⁷ See OFCCP, *Freedom of Information Act Library*, U.S. DEPT OF LABOR, <https://www.dol.gov/ofccp/foia/FOIALibrary/> (follow “FY 2019 CSAL List” & “FY 2019 CSAL Supplement” hyperlinks).

³⁸ Office of Fed. Coordination & Compliance, U.S. Dep’t of Labor, *OFCCP Compliance Evaluation and Complaint Investigation Data*, U.S. DEPT OF LABOR (Feb. 27, 2020), https://enforcedata.dol.gov/views/data_catalogs.php.

³⁹ *Id.* (showing 209 financial agreements and 10 consent decrees).

any three-year period on record.⁴⁰ During the same period, OFCCP conducted compliance reviews at facilities that collectively employed 2.8 million workers. Most recently in fiscal year 2019, OFCCP obtained \$40,569,816 in monetary relief for 45,726 class members, averaging close to \$900 per class member.⁴¹

Some of OFCCP's recent remedies through the conciliation process include a \$4.2 million agreement by Bank of America to resolve allegations of hiring discrimination at locations in Florida, Georgia, New Jersey, and Texas; a \$7 million agreement by Dell Technologies, Inc. to resolve wage discrimination allegations at facilities in California, Massachusetts, Oklahoma, Tennessee, Texas and Washington; and a nearly \$10 million agreement by Goldman Sachs & Co. LLC to resolve alleged discrimination in compensation at its New York corporate headquarters.⁴²

As a result of its enforcement program, OFCCP has also been successful in identifying and resolving cases of hiring discrimination. In fiscal years 2016-2020, OFCCP identified over 500 violations pertaining to recruitment and hiring among its compliance evaluations.⁴³ Further, OFCCP obtained 142 financial conciliation

⁴⁰ OFCCP, *OFCCP By the Numbers*, U.S. DEPT OF LABOR, <https://www.dol.gov/ofccp/BTN/>.

⁴¹ *Id.*

⁴² OFCCP, *Class Member Locator Case Summary*, U.S. DEPT OF LABOR, <https://www.dol.gov/ofccp/regs/compliance/pdf/ClassMemberLocatorCaseSummary.html>.

⁴³ Office of Fed. Coordination & Compliance, *supra* note 38 (indicating 347 violations pertaining to recruitment and 157 violations pertaining to hiring).

agreements and consent decrees for hiring violations, comprising approximately 65% of all financial settlements during the period.⁴⁴

Significantly, the Amici States are home to a large proportion of federal contractors and employees and benefit from OFCCP's administrative compliance and enforcement work. Three of the nation's 200 largest federal contractors are headquartered in the District. The most recent federal contracts with these companies were worth more than \$2.3 billion.⁴⁵ As the seat of the federal government, the District is also the workplace of thousands of employees who work for contractors that are headquartered elsewhere but that station employees in the District to serve agencies in the nation's capital. In the last five years, OFCCP resolved discrimination complaints and compliance matters affecting more than 24,000 employees of 40 different federal contractors in the District of Columbia.⁴⁶

Similarly, since 2016, OFCCP has resolved discrimination complaints and offered compliance assistance at 430 federal contractor worksites that employ nearly 352,000 workers in California.⁴⁷ California is home to 21 of the 200 largest federal contractor companies as measured by contract size, and these 21 companies had federal contracts worth \$35.3 billion in 2018 alone.⁴⁸

⁴⁴ *Id.*

⁴⁵ BLOOMBERG GOVERNMENT, BGOV 200 FEDERAL INDUSTRY LEADERS 2019, at 61, 154, 170 (2019).

⁴⁶ Office of Fed. Coordination & Compliance, *supra* note 33.

⁴⁷ *Id.*

⁴⁸ BLOOMBERG GOVERNMENT, *supra* note 45, at 18, 28, 30, 35-37, 47, 67, 78-79, 102, 110, 113-14, 124-25, 155, 180-81, 199, 201.

Likewise in Virginia, federal contractors make up a significant part of the workforce and economy. Nearly a fifth of the 100 largest federal contractors by contract size for fiscal year 2018 were headquartered in Virginia—more than in any other state.⁴⁹ In the last five years, OFCCP has conducted more than 255 discrimination-related compliance evaluations and complaint investigations for Virginia-based contractor worksites.⁵⁰

New York State is home to four of the 200 largest federal contractors with government contracts worth more than \$6 billion in fiscal year 2018 and employing over 300,000 workers across the country.⁵¹ Moreover, as the nation's third largest state, New York is also the home and workplace of many thousands of workers employed by federal contractors based in other States.

And in Pennsylvania, in the last five years OFCCP has resolved discrimination complaints and evaluated compliance at more than 200 federal contractor worksites in Pennsylvania employing more than 160,000 employees.⁵² Six of the 200 largest federal contractor companies for fiscal year 2018 are headquartered in Pennsylvania, and these companies held annual federal contracts worth more than \$4.7 billion.⁵³

The story is the same in other Amici States (and across the country). In the face of significant activity in the federal sector, OFCCP has successfully used its administrative enforcement procedures to the benefit of Amici States and their

⁴⁹ *Id.* at 15, 17, 20-21, 24-25, 33, 38, 40, 46, 48, 54, 71, 75, 77, 89, 92, 109, 111.

⁵⁰ Office of Fed. Coordination & Compliance, *supra* note 33.

⁵¹ BLOOMBERG GOVERNMENT, *supra* note 45, at 26, 67, 74, 115, 121, 143, 198.

⁵² Office of Fed. Coordination & Compliance, *supra* note 33.

⁵³ BLOOMBERG GOVERNMENT, *supra* note 45, at 45, 96, 122, 152, 168, 177.

residents by encouraging federal contractors to comply with the law and holding them accountable when violations occur.

B. Without the Ability to Seek Make-Whole Relief, OFCCP's Enforcement Efforts Would Be Rendered Less Effective.

OFCCP's authority to bring administrative hearings and award back pay remedies are the cornerstone of its enforcement framework. OFCCP's longstanding approach has been to encourage contractors to comply with the Order, including expansive recordkeeping requirements and thorough compliance evaluations. Failure to comply could be uncovered by a compliance evaluation or a complaint, and then remedied through subsequent enforcement and financial consequences. OFCCP has recently reaffirmed that the practical functioning of its compliance procedures requires the agency to "[s]tand ready to pursue litigation vigorously when necessary."⁵⁴

This was true before the 1977 regulations were even issued. For instance, from 1969 through 1976, OFCCP obtained over \$60 million in back pay for affected class members.⁵⁵ OFCCP's enforcement procedures are thus interrelated and tied together under the umbrella of the eventual enforcement penalties that could be imposed. Recognizing the critical importance of its administrative enforcement leverage, in 1977 the DOL stated that while the "ultimate goal of the contract compliance program is to seek voluntary compliance," there existed a corresponding commitment to

⁵⁴ OFCCP, U.S. DEP'T OF LABOR, DIR-2018-08 (2018) <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-08-ESQA508c.pdf>.

⁵⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 122.

“appropriate action” against non-complying contractors, including enforcement through back pay and sanctions.⁵⁶

OFCCP has similarly noted that its administrative enforcement authority is critical to motivating effective affirmative action programs. In 2005, when OFCCP adopted a comprehensive policy to address “Systemic Compensation Discrimination,” the agency noted: “OFCCP’s focus on finding and remedying systemic workplace discrimination has provided tangible incentives for contractors to implement affirmative action programs to prevent workplace discrimination.” 71 Fed. Reg. 35,124, 35,125 (June 16, 2006).

Eliminating the administrative enforcement powers that Oracle is challenging would have ripple effects, undermining OFCCP’s ability to incentivize compliance. The possibility of a compliance evaluation, which could penalize the contractor with a substantial compensatory award, and potentially be enforced through the administrative hearing process through OALJ, keeps contractors honest through a balanced, step-by-step process of enforcement. Oracle’s efforts to cabin OFCCP to a limited contract compliance role is inconsistent with the origins and purpose of the Order and significantly undermines the comprehensive regulatory regime developed by OFCCP.

III. Gutting OFCCP’s Enforcement Regime Would Create Gaps that Neither Federal Nor State Agencies Are Equipped to Fill.

⁵⁶ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 5, at 142.

Oracle maintains that OFCCP can continue to enforce its compliance evaluation findings by referring cases to the DOJ or EEOC. Compl. at ¶¶ 28-30; *see* Exec. Order No. 11,246, 30 Fed. Reg. 12,319, § 209(a)(2)-(4) (Sept. 24, 1965). But neither option is a realistic alternative to OFCCP's administrative enforcement process. Requiring that contract and employment discrimination claims be parsed out, sent to a new set of lawyers at different agencies with different jurisdictions, and then potentially returned to OFCCP for further resolution, undermines the Order's purpose of rooting out discrimination in the federal contractor sector.

Although OFCCP could potentially refer cases directly to DOJ to litigate in an Article III court, this approach raises practical issues. One of the primary benefits of resolving violations of the Order administratively is its efficiency. As another judge in this district has recognized, "[T]he public interest lies in the efficient enforcement of Executive Order 11246." *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 99 (D.D.C. 2011). But the system Oracle proposes would be unnecessarily burdensome. If OFCCP had to refer its cases to DOJ, it would still have to complete its investigation first and issue a letter of determination. It would then have to send the case to a different agency where the attorneys, unfamiliar with the underlying facts, would essentially have to start over. And after DOJ successfully litigated the case in an Article III court, there is potential that the case would have to be sent back to OFCCP for further processing.

There is also no guarantee DOJ would have the resources to take on additional systemic employment discrimination cases. In addition to handling an influx of cases

referred from OFCCP, DOJ's Employment Litigation Section would continue to shoulder its significant responsibilities enforcing other statutes.⁵⁷ As a consequence, there is potential that systemic discrimination cases will not be enforced at the same level currently handled by OFCCP. In addition, the DOJ recently stated that the section "will maintain an enhanced focus on cases involving intentional discrimination based on race, sex, religion, and national origin."⁵⁸ This enhanced focus on cases of intentional discrimination may limit DOJ's pursuit of all types of systemic discrimination cases—cases which lie at the heart OFCCP's enforcement efforts.

Referring cases to the EEOC would be similarly problematic. Because the EEOC does not have the authority to enforce contractual violations, if OFCCP referred a case involving Title VII claims to the EEOC, any accompanying contract-related claims would have to be litigated through a different agency. This would be much less efficient than resolving all of the claims at once at OALJ.

The EEOC also has significant resource constraints. It receives tens of thousands of individual complaints of discrimination each year, and it is statutorily required to accept and investigate charges from any individual who believes that they

⁵⁷ This section also enforces Title VII against state and local governments, both in pattern and practice cases and upon referral of individual complaints by the EEOC, and brings lawsuits under the Uniformed Services Employment and Reemployment Rights Act. Civil Rights Div., U.S. DEP'T OF JUSTICE, *Laws Enforced by the Employment Litigation Section*, <https://www.justice.gov/crt/laws-enforced-employment-litigation-section>.

⁵⁸ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, FY 2019 PERFORMANCE BUDGET CONGRESSIONAL JUSTIFICATION 25, <https://www.justice.gov/file/1034196/download>.

were discriminated against, regardless of the merits of the claim.⁵⁹ Its budget has remained virtually stagnant for decades, and its staff size has shrunk by 42 percent since 1980 while the size of the labor force has increased by 50 percent or 160 million people.⁶⁰ As a consequence, it now receives twice as many complaints with half the staff, which creates substantial resource constraints.⁶¹ Given these limitations, it will be difficult for the EEOC to heavily focus on an increase in systemic discrimination cases, which are more complex and resource intensive than individual complaints.⁶² As noted previously, *supra* Section I.B, OFCCP's institutional expertise is uniquely well-suited to pursuing systemic discrimination claims. In contrast to the EEOC, OFCCP's resolution of individual complaints accounts for only 16 percent of its enforcement activities.⁶³

Reduced enforcement by OFCCP would also increase the burden on state enforcement agencies, many of which lack the resources or the statutory authorization to address OFCCP's cases. For instance, the District of Columbia's Office of Human Rights (OHR) is authorized to receive, review and investigate complaints of unlawful discrimination, D.C. Code § 2-1411.03(3), but it already has a substantial case load. The demands on OHR's resources have already resulted in a

⁵⁹ Kim, *supra* note 20, at 1143-44; *see* 42 U.S.C. § 2000e-5(b).

⁶⁰ Jameel & Yerardi, *supra* note 19.

⁶¹ Maryam Jameel, "More and More Workplace Discrimination Cases Are Being Closed Before They're Even Investigated," *Vox* (June 14, 2019), <https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination>.

⁶² Kim, *supra* note 20, at 1145.

⁶³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 10.

significant backlog for the agency.⁶⁴ And through the its workshare agreement with the EEOC,⁶⁵ a further influx of cases to the EEOC would result in a similar influx of cases to OHR. Additionally, like the EEOC, OHR lacks the authority to pursue contract claims in cases involving contracts with the federal government and does not have trained statisticians or labor economists on staff to handle large-scale systemic discrimination cases.

The California Department of Fair Employment and Housing (DFEH) similarly lacks the resources to replicate OFCCP's enforcement efforts. In 2018, for example, DFEH received 27,840 complaints of discrimination from the public, and investigated 5,395 cases. Meanwhile, the complexity of the cases DFEH investigates continues to increase. In employment cases alone, complainants in 2018 alleged 13,842 bases of discrimination in the cases investigated by DFEH, an increase of 4,137 distinct allegations over the previous year. DFEH is also stretched thin with a significant number of systemic discrimination cases which require substantial resources.

None of these alternatives would adequately replicate OFCCP's administrative enforcement framework. OFCCP's institutional expertise, coupled with its robust

⁶⁴ OFFICE OF HUMAN RIGHTS, OFFICE OF HUMAN RIGHTS FY 2019 PERFORMANCE ACCOUNTABILITY REPORT, [https://oca.dc.gov/sites/default/files/dc/sites/oca/publication/attachments/OHR_FY19 PAR.pdf](https://oca.dc.gov/sites/default/files/dc/sites/oca/publication/attachments/OHR_FY19_PAR.pdf).

⁶⁵ Workshare agreements allow the EEOC to resolve its backlog of cases by transferring them to state and local civil rights enforcement bodies for investigation.

administrative enforcement powers, put it in the best position to prevent systemic discrimination among federal contractors.

CONCLUSION

For the foregoing reasons, Amici States urge the Court to uphold OFCCP's current powers and administrative enforcement framework, which play a central role in advancing equal opportunity and nondiscrimination in employment.

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Respectfully submitted,

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