A Union of Professionals

December 9, 2021

Jenny R. Yang
Director
Office of Federal Contract Compliance Programs
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Oregon Tradeswomen, Pride at Work, and the American Federation of Teachers' Comment on the Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Docket Number: RIN 1250–AA09.

Dear Director Yang:

Oregon Tradeswomen, Pride at Work, and the American Federation of Teachers appreciate the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP) proposal to rescind the regulations established in the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption." 85 Fed. Reg. 79,324 (Dec. 9, 2020) (to be codified at 41 C.F.R. pt. 60-1) (the 2020 Rule).[1] We strongly support the proposed rescission—the regulation to be rescinded harms workers by sanctioning discrimination against women, lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, religious minorities, and anyone who runs afoul of an employer's religious beliefs. We encourage OFCCP to finalize the proposed rescission promptly.

Our organizations are plaintiffs in ongoing litigation challenging the 2020 Rule.[2] Oregon Tradeswomen is a nonprofit organization that works to increase the number of women, including women of color and LGBTQ women, who work in the trades (e.g., construction and metal working). Pride at Work is an official constituency group of the American Federation of Labor and Congress of Industrial Organizations. It represents the interests of LGBTQ union members.

[1] Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption. 86 Fed. Reg. 62,115 (Nov. 9, 2021) (to be codified at 41 C.F.R. pt. 60) (2021 NPRM).

[2] *Oregon Tradeswomen, Inc., v. DOL*, No. 21-cv-89 (D. Or. filed Jan. 21, 2021).

AFT is a national labor union representing approximately 1.7 million members across the United States, including healthcare professionals, educators, and public service workers. We brought the lawsuit challenging the 2020 Rule because that Rule is not only arbitrary and unlawful, but also conflicts with our goals of promoting equity in the workplace.

The 2020 Rule reinterprets what had previously been a narrow exemption to the nondiscrimination requirements of Executive Order 11246—an exemption that had allowed religious organizations to give preference to coreligionist applicants when making hiring decisions and do so without violating Executive Order 11246's mandate prohibiting contractors from discriminating on the basis of religion. The Rule expands the reach of that limited exemption and expressly authorizes federal contractors and subcontractors to make employment decisions that discriminate on the basis of sex, sexual orientation, or gender identity, among other things, if the contractor relies on its religious beliefs or views.

The 2020 Rule expands the religious exemption in multiple ways. First, it adopts broader criteria for determining whether a federal contractor or subcontractor is a religious organization that can claim the exemption—including by allowing for-profit companies to qualify.[3] Second, the rule adopted broad definitions of "religion" and "particular religion" to make clear that the exemption is no longer limited to "denominational preference[s]," i.e., preferences for coreligionists, or people who are of the same religion.[4] Third, the rule allows religious organizations to make employment decisions that discriminate on the basis of sex, sexual orientation, or gender identity based on their religious beliefs.[5] Fourth, the rule allows religious organizations to claim the religious exemption for all employment decisions (instead of only during the hiring process), regardless of whether those decisions further the organization's religious purpose.[6] And fifth, the rule adopts a highly deferential mode of inquiry, under which OFCCP would "merely ask[] whether a sincerely held religious belief actually motivated the institution's actions."[7]

As a result of these changes, the 2020 Rule will now allow a federal contractor or subcontractor to, for example, make employment decisions based on an organization's beliefs "regarding matters such as marriage and intimacy," so long as those beliefs are sincere and tied to religious tenets.[8] In so doing, the Rule diverges from settled interpretations of the religious exemption provided in Title VII of the Civil Rights Act, 42 U.SC. § 2000e-1(a) (Title VII)—on which the religious exemption in Executive Order 11246 is purposefully mirrored. It justifies permitting such discrimination on the ground that OFCCP has "less than a compelling interest in enforcing [Executive Order] 11,246 when a religious organization takes employment action

[3] 85 Fed. Reg. at 79371.

[4] *Id*. at 79,330, 344, 371.

[5] *Id*. at 79,354.

[6] *Id*. at 79,346-47.

[7] *Id*. at 79,341.

[8] *Id*. at 79,364.

solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race."[9]

As we allege in our complaint, the 2020 Rule violates the Administrative Procedure Act, 5 U.S.C. § 706(2) (APA). The reasons OFCCP gave for promulgating the Rule are unsubstantiated and unreasonable. Its determination that it categorically does not have a compelling interest in preventing discrimination, aside from racial discrimination, by employers claiming the religious exemption was unreasoned and legally incorrect. The Rule conflicts with Executive Order 11246, Title VII, and associated case law, and responds to this conflict arbitrarily and capriciously. The OFCCP did not acknowledge or explain the Rule's inconsistency with the longstanding conclusion that the nondiscrimination protections in Executive Order 11246 are necessary for economy and efficiency in contracting. And most profoundly, it fails entirely to account for the harmful discrimination, particularly against women and LGBTQ workers, it sanctions. Analysis of the impact of these harms is missing from the cost benefit analysis and throughout the Rule. These errors in reasoning support—indeed, require—rescission of the 2020 Rule.[10]

The notice proposing to rescind the 2020 Rule appropriately relies on several of these errors as part of its justification for the rescission.[11] We encourage OFCCP to do the same in the final rescission. We provide additional analysis below regarding the illegality of the 2020 Rule, which we believe reinforces the legality of rescission.

I. OFCCP should rescind the 2020 Rule because that Rule violates the APA.

A. The 2020 Rule is inconsistent with Executive Order 11246, Title VII, and associated caselaw.

The 2021 NPRM explains clearly the ways in which the 2020 Rule differs from both Title VII and the settled requirements of Executive Order 11246.[12] In brief, the 2020 Rule adopted an unprecedented and expansive religious employer test that is inconsistent with the relevant body of caselaw.[13] It purported to establish a categorical exemption for religious organizations from requirements of nondiscrimination on other protected bases when making employment decisions based on sincere religious beliefs, which is in conflict with the text of Executive Order 11246 and does not comport with the weight of Title VII case law.[14] And the 2020 Rule described a categorical approach to analysis under the Religious Freedom Restoration

[9] *Id*. at 79,354.

[10] *See*, *e.g*., *DHS v. Regents*, 140 S. Ct. 1891, 1912 (2020) (errors in reasoning may render an agency action arbitrary and capricious).

[11] 2021 NPRM, *supra* n. 1.

[12] 86 Fed. Reg. at 62,118-21.

[13] *Id*. at 62,118-19.

[14] *Id.* at 62,120.

Act (RFRA) analysis, which was inconsistent with prior OFCCP policy and guidance from the Supreme Court.[15] We applaud OFCCP's conclusions and analysis in this regard.[16]

B. OFCCP never substantiated the need for the 2020 Rule.

Beyond those other errors, as it now recognizes, OFCCP did not substantiate any need for the 2020 Rule in the first instance,[17] failing the basic requirement to offer a "rational connection between the facts found and the choices made."[18] Where there is such a "disconnect between the decision made and the explanation given," a rule is arbitrary and capricious.[19]

First, the 2020 Rule purports to expand access for federal contracting opportunities,[20] but the preamble to that Rule does not provide any basis for the assertion that entities that seek to contract with the federal government have been unable to do so on account of religion. The Rule does not identify any organizations that lost contracting opportunities because of the nondiscrimination requirements lifted by the 2020 Rule, or any that previously desired to apply for federal contracts, but declined to do so because of those nondiscrimination requirements. It identifies no complaints by such entities, examples of actual exclusion from contracting opportunities, or any other concrete evidence to support its assertion that the Rule is needed.[21] On the contrary, the 2020 Rule admits that OFCCP had no concrete evidence in support of its assertion that the supposed problem exists.[22]

Second, the 2020 Rule claimed it would provide additional clarity regarding the nondiscrimination obligations of federal contractors.[23] But the only evidence it provides for this claim is the general statement that "some religious organizations provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the

---

[15] *Id*. at 62,120-21.

[16] The Coalition Against Religious Discrimination provided additional analysis regarding these issues in its coalition comment, which we support.

[17] 86 Fed. Reg. at 62,117 (explaining that OFCCP had reevaluated the need for the 2020 Rule).

[18] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quotation omitted).

[19] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

[20] 85 Fed. Reg. at 79,330, 79,370.

[21] The only support the 2020 Rule provided for the claim that it would expand federal contracting opportunities is one unidentified comment from an individual describing the behavior of religious organizations second hand and other comments regarding other contexts, such as federal grants. *Id*. at 79,370. This limited and nonconcrete information is hardly sufficient to bear the weight of such a policy change.

[22] 85 Fed. Reg. at 79,329 (OFCCP "cannot perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers would compare to the whole of the contracting pool.")

[23] *See*, *e.g*., *id*. at 79,370.

scope of the religious exemption."[24] Because it lacks detail about the number of religious organizations providing this feedback, the nature of their uncertainty, and whether existing guidance or opportunities to solicit feedback from the agency were inadequate to resolve the uncertainty, this reference does not substantiate the claim that the need for additional clarity justifies the Rule.[25] Nor did the 2020 Rule even attempt to substantiate its claims that additional "clarity" would provide the follow-on benefits of cost savings passed on from contractors with reduced legal consultancy fees and from the reduced need for costly enforcement actions by OFCCP.[26] Such speculation cannot justify the regulatory change.[27]

Indeed, additional information makes clear that the 2020 Rule's speculation about its benefits to federal contractors was unfounded. The president of the Professional Services Council, a major trade association for federal contractors, recently stated that *no members* have complained about needing a religious exemption. He explained, "Our position is that the federal government deserves the best workforce, and any form of discrimination inhibits our ability to have the best workforce."[28]

Besides being unsubstantiated, the 2020 Rule's speculation that it would reduce existing confusion about nondiscrimination requirements is not reasonable. The Rule adopted a wholly *new* standard for determining when the religious exemption applies and what conduct it permits. In so doing, the 2020 Rule departed from OFCCP's longstanding tradition of following interpretations of the mirror-image religious exception under Title VII provided by EEOC and relevant case law.[29] Although there may be questions about particular applications of the Title VII religious exemption in novel scenarios, the body of case law and guidance provided comprehensive and useful information to employers seeking to determine its scope. Claiming that adopting an entirely new standard would resolve any uncertainty in the application of the religious exemption is irrational.

---

[24] *Id*. at 79,328.

[25] *Id*. at 79,239.

[26] *Id*. at 79,370.

[27] *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("conclusory statements will not do; an agency's statement [in support of its action] must be one of reasoning") (cleaned up).

[28] Michelle Boorstein, *Biden administration reverses Trump-era rule that expanded religious exemptions for massive federal contracting force*, Wash. Post (May 7, 2020), https://www.washingtonpost.com/dc-md-va/2021/11/12/contractors-religious-exemption-trump-biden/.

[29] Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities, 68 Fed. Reg. 56391 (Nov. 3, 2003) (to be codified at 41 C.F.R. pt. 60) ("The exemption for religious entities added to Executive Order 11246, as amended, is modeled on the exemption for religious institutions and organizations under Title VII of the Civil Rights Act of 1964.").

Further, the 2020 Rule admits, as it must, that many federal contractors are *also bound by* Title VII and its narrower religious exemption.[30] making it entirely unclear what benefits the Rule could provide, even on its own terms. That decision thus decreased clarity in this respect as well. Similarly, the 2020 Rule's claim that the pool of federal contractors would be expanded by eliminating nondiscrimination restrictions is rendered even more nonsensical as to Title VII covered employers—those employers could only take advantage of the invitation to discriminate more broadly if they stopped complying with Title VII, hardly a reasonable outcome.[31] Further, the Trump rule makes no findings particular to employers not covered by Title VII, so that the impact of the rule on that subset of employers is not sufficient justification.[32]

Compounding the arbitrariness of the analysis, the 2020 Rule gave no consideration to providing clarity for employees of contractors who might invoke the religion exemption. Instead, the Rule left them with profound uncertainty about whether their employer could newly claim the exemption and whether they could be subject to new, previously prohibited discrimination, a matter of significant consequence for those employees. Considering the impact of the rule only on regulated entities and not on employees who benefit from the regulation in this manner fails to consider an important aspect of the problem, making it arbitrary and capricious.[33]

C. The 2020 Rule's treatment of its inconsistency with Title VII is arbitrary and capricious.

OFCCP should also explain that the 2020 Rule's treatment of its inconsistency with Title VII was arbitrary and capricious. First, the Rule denied the straightforward fact, recognized in the 2021 NPRM, that it was inconsistent with Title VII and associated caselaw, bizarrely claiming to be following in its tradition of "generally interpret[ing] the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII."[34] The 2020 Rule's failure to acknowledge that it is departing from the mainstream interpretation of the Title VII religious exemption—certainly an important factor to consider—makes it arbitrary and capricious.

---

[30] 85 Fed. Reg. at 79,326.

[31] Although not desirable, reduced compliance with Title VII's nondiscrimination protections is a foreseeable outcome of the 2020 Rule ule. OFCCP's robust enforcement program makes its nondiscrimination requirements particularly effective (and the elimination of them particularly harmful despite remaining statutory protections). But it is arbitrary to rely on supposed benefits derived from noncompliance with other federal requirements.

[32] *DHS v. Regents*, 140 S. Ct. at 1907 ("It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.") (cleaned up).

[33] *State Farm*, 463 U.S. at 48 (quotation omitted).

[34] 85 Fed. Reg. at 79,234; *see also id*. at 79,325 ("OFCCP has chosen a path consistent with the Supreme Court's religion and Title VII jurisprudence as well as what OFCCP views to be the more persuasive reasoning of the federal courts of appeals in these areas of the law."); id. at 79,326 (stating that comments that the rule deviates from the EEOC's interpretation of the Title VII religious exemption are "unfounded").

To the extent it admits any divergence from Title VII doctrine, the 2020 Rule stated that "OFCCP has [] adapted Title VII principles to ensure a proper fit in the government contracting context."[35] But it does not explain what about the government contracting context requires any particular divergence, aside from one undeveloped reference to a particular need for clarity of parties' obligations.[36] Title VII applies to federal employers just as to private employers, so that distinction cannot support OFCCP's claim. This nonsensical and unfounded justification makes the 2020 Rule arbitrary and capricious.

The 2020 Rule also arbitrarily ignored the benefits of aligning OFCCP policy with the established Title VII regime. Indeed, OFCCP previously concluded that it could "*increas[e] efficiency* by creating a uniform Federal approach to sex discrimination law" by aligning with Title VII's requirements.[37] As discussed above, the 2020 Rule's argument that by departing from settled Title VII principles it creates additional clarity is nonsensical standing alone. The failure to explain its deviation from this prior conclusion further dooms the Rule's legality.

D. The 2020 Rule's categorical approach to RFRA analysis is arbitrary and capricious.

In its consideration of the application of RFRA requirements, the 2020 Rule makes the audacious claim that "[r]ecognizing the value that religious contractors provide, OFCCP has determined that it has less than a compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race."[38] In those circumstances, OFCCP determined categorically "it should instead appropriately accommodate religion, especially when doing so (as with national interest exemptions) would foster a more competitive pool of government contractors."[39]

The 2021 NPRM appropriately recognizes the legal error in adopting such a categorical approach to RFRA analysis, and we encourage OFCCP to rely on that analysis in the final rescission.[40] The categorical approach suffers additional flaws besides being a misreading of RFRA, however. As discussed above, despite relying on it to justify its lack of interest in protecting against sex (and other protected class) discrimination, the Rule provides no evidence

---

[35] *Id*. at 79,326.

[36] *Id*. at 79,332.

[37] Discrimination on the Basis of Sex; Final Rule, 81 Fed. Reg. 39108, 39109 (June 15, 2016) (to be codified at 41 C.F.R. pt. 60). Ignoring prior factual findings in this manner is arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in judgment) (If an agency changes course, it cannot "ignore[] or countermand[] its earlier factual findings without reasoned explanation for doing so.").

[38] 85 Fed. Reg. at 79,354.

[39] 85 Fed. Reg. at 79,354.

[40] 86 Fed. Reg. at 62118.

that providing broader religious accommodations will actually foster a more competitive pool of government contractors. That speculation therefore should have had no bearing on the determination of how compelling the government's interest is. Nor did the Rule cite to any basis for determining that the legal analysis of the compelling interest in enforcing Title VII is lessened where there are claimed efficiency benefits on the other side or when a particular Presidential administration is less concerned about enforcing nondiscrimination protections.[41]

The 2020 Rule also relies heavily on OFCCP's ability to grant exceptions from Executive Order 11246's nondiscrimination requirements in other contexts to justify the categorical decisions that it has no compelling interest in enforcing those requirements (aside from race) against religious objectors.[42] But, to the contrary, this argument undercuts the 2020 Rule. Even if there were some perceived need to expand the contracting pool to include discriminatory religious employers in certain contexts, the existing scheme of exceptions permits OFCCP to do so without additional rulemaking. This is a more limited alternative to the supposed problem at hand, and the failure to consider it renders the 2020 Rule arbitrary and capricious.[43] Further, the 2020 Rule did not weigh the rationales behind the various cited exceptions against the repeated determinations by courts that the government's interest in nondiscrimination laws on the basis of sex is compelling.[44] It may be that in some rare, factually specific situations that interest is overridden by competing demands, such as in the exceptions identified in the 2020 Rule, but the interest is still compelling. Disregarding it categorically is arbitrary and capricious.

Finally, Title VII and Executive Order 11246 describe their protected classes as equally protected, without special exception for race. The 2020 Rule attempts to rely on the unique treatment of race discrimination in equal protection jurisprudence to justify its assertion that as a categorical matter it has a less than compelling interest with respect to equal employment protections for other protected classes in the face of religious objections.[45] But it provides no analysis for imposing differing modes of legal analysis on a unified statutory scheme. This unpersuasive effort to distinguish race from other classes protected under Title VII and the Executive Order reinforces how arbitrary and capricious it is to categorically exclude the other protected classifications.

E. The 2020 Rule did not acknowledge or justify departures from prior policies and factual determinations.

---

[41] "Title VII is an interest of the highest order." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

[42] 85 Fed. Reg. at 79353.

[43] *DHS v. Regents*, 140 S. Ct. at 1913.

[44] *See*, *e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.").

[45] 85 Fed. Reg. at 79,356.

The 2020 Rule arbitrarily ignored longstanding conclusions by OFCCP and throughout the federal government that robust nondiscrimination protections benefit both workers and the government. In a predecessor order to Executive Order 11246, President Franklin Roosevelt required nondiscrimination in the national defense program, explaining that "the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders" and finding that discrimination was "to the detriment of workers' morale and of national unity."[46] Although the scope of protected classifications expanded over time, consistent with the nation's expanding understanding of the meaning of equal employment opportunity, these findings of the dual benefits of nondiscrimination were reiterated in the twentieth and twenty-first century.[47]

With respect to benefits to the government, for example, in 2014 OFCCP explained that "employment discrimination on the basis of sexual orientation or gender identity, like employment discrimination on other bases prohibited by EO 11246, may have economic consequences," including "reduced productivity and lower profits."[48] Similarly, in 2016, with respect to sex discrimination, OFCCP explained, "the requirements of the Executive Order [11246] promote the goals of economy and efficiency in Government contracting, and the link between them is well established."[49]

---

[46] President Roosevelt made such findings in an early predecessor to Executive Order 11246, and they have been reiterated in successor executive orders and OFCCP policies. *See*, *e.g.*, Exec. Order No. 8,802, Prohibition of Discrimination in the Defense Industry, 6 Fed. Reg. 3109 (June 27, 1941), *available at* https://www.ourdocuments.gov/doc.php?flash=false&doc=72.

[47] For example, in establishing the Government Contract Committee, President Eisenhower ordered that "it is in the interest of the Nation's economy and security to promote the fullest utilization of all available manpower" and "such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds." Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 18, 1953), *available at* https://www.presidency.ucsb.edu/documents/executive-order-10479-establishing-the-government-contract-committee. In a later iteration of this executive order, President Kennedy declared, with respect to federal contracts, "it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons…" and "it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower." Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961), *available at* https://www.presidency.ucsb.edu/documents/executive-order-10925-establishing-the-presidents-committee-equal-employment-opportunity.

[48] Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors; Final Rule, 79 Fed. Reg. 72,985, 72,987 (Dec. 9, 2014) (to be codified at 41 C.F.R. pt. 60).

[49] 81 Fed. Reg. at 39109 (nondiscrimination requirements regarding sex "ultimately reduce[] the Government's costs and increases the efficiency of its operations by ensuring that all employees and applicants, including women, are fairly considered and that, in its procurement, the Government has access to, and ultimately benefits from, the best qualified and most efficient employees.").

OFCCP's acknowledgment that nondiscrimination requirements benefit the government via enhanced efficiency in contracting ended with the 2020 Rule, however. The 2020 Rule asserted (without evidence) that expanding the pool of contractors to include those that wished to discriminate served economy and efficiency in government contracting,[50] a complete and unreasoned reversal from its prior conclusions as to the efficiency of requiring that contractors not discriminate. That was unlawful: agencies are not bound indefinitely by prior factual determinations, but they may not ignore them or depart from them without explanation.[51]

OFCCP has also consistently understood nondiscrimination requirements to benefit workers as well as the government. For example, OFCCP made specific findings about the benefits of protections for sexual orientation and gender identity. In the 2014 rule that included these as protected classifications, OFCCP explained that the rule's benefits included "equity, fairness, and human dignity."[52] Further, those who face such discrimination "may experience lower self-esteem, greater anxiety and conflict, and less job satisfaction." They "may also receive less pay and have less opportunity for advancement… or may not be considered for a job at all, even though they may be well-qualified."[53] And in 2016, OFCCP made specific findings in support of a new rule on sex discrimination.[54] It concluded that "sex discrimination remains a significant and pervasive problem" in employment, drawing on its compliance evaluations of federal contractors.[55] It described specific examples of discrimination on account of pregnancy, and the "extreme hostility to pregnancy" faced by low-income workers.[56] It described the "significant barriers" to equal employment created by "sex-based stereotyping," including based on how female employees dress, act, and whether or not they have children. It also observed the "severe consequences" of such stereotyping for LGBTQ+ applicants and employees based on their disproportionate experience of workplace discrimination.[57]

The 2020 Rule ignored these conclusions, even though the kinds of discrimination discussed in the 2014 and 2016 rules are common reasons for invoking religious exemptions.[58]

---

[50] 85 Fed. Reg. at 79,343

[51] *Fox*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in judgment) (If an agency changes course, it cannot "ignore[] or countermand[] its earlier factual findings without reasoned explanation for doing so."); *Organized Vill. of Kake v. U.S. Dep't of Agric*., 795 F.3d 956, 969 (9th Cir. 2015) ("The absence of a reasoned explanation for disregarding previous factual findings violates the APA.").

[52] 79 Fed. Reg. at 72,987.

[53] *Id*.

[54] 81 Fed. Reg. at 39110.

[55] *Id*. at 39,112.

[56] *Id*. at 39,114.

[57] *Id*. at 39,115.

[58] Brad Sears et al., *LGBT People's Experiences of Workplace Discrimination and Harassment*, UCLA School of Law, Williams Institute (Sept. 2021),

The 2020 Rule's decision not to address OFCCP's prior findings or explain its departure from them makes the Rule arbitrary and capricious.

We are pleased that the 2021 NPRM returns to OFCCP's traditional determination that it can "promote economy and efficiency in federal procurement by preventing the arbitrary exclusion of qualified and talented employees on the basis of characteristics that have nothing to do with their ability to do work on government contracts" and that doing so benefits not only the government, but also workers via equal employment opportunity.[59] We encourage the final rule to emphasize the degree to which the 2020 Rule was an arbitrary and capricious departure from this tradition.

F. The 2020 Rule failed to consider and account for discriminatory harms it would permit.

Both commenters that supported the 2020 Rule and those that opposed it explained to OFCCP that they did so because the new Rule would permit additional discrimination by certain federal contractors.[60] The Rule allows these contractors to take employment action based on how the contractor believes people should behave, if the action is tied, even tenuously, to a cited religious belief, and even though the action would otherwise constitute unlawful discrimination. The 2020 Rule neither adequately acknowledged nor grappled with the consequences of this outcome.

Attempting to have it both ways, the Rule claimed that "the religious exemption does not permit discrimination on the basis of other protected categories."[61] Be that as it may, the 2020 Rule does permit discrimination *motivated by religious belief* regarding other protected categories. It admits as much, explaining that a federal contractor can now make discriminatory employment decisions relying on "sincerely held religious tenets regarding matters such as marriage and intimacy."[62] An employee who is fired for being in a same-sex marriage is equally harmed whether the employer did so based on religious belief about marriage or a non-religious bias. Among the numerous harms that discrimination causes for workers are lost jobs, lost wages, lost benefits, emotional harm, and inconvenience.

---

https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf; Colum. L. Sch., *Parading the Horribles: The Risks of Expanding Religious Exemptions*, Law, Rights & Religion Project (Nov. 2021), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Policy%20Analyses/Parading_the_Horribles_The_Risks_of_Expanding_Religious_Exemptions.pdf.

[59] 86 Fed. Reg. at 62121.

[60] *See*, *e.g.*, 85 Fed. Reg. at 79,328 ("A few commenters expressed support for the proposal specifically because they believed it would exempt religious organizations from the prohibitions on discrimination based on sexual orientation and gender identity…").

[61] *Id*. at 79,329.

[62] *Id*. at 79,364.

Such negative consequences must be considered as important aspects of the problem.[63] This conclusion is reinforced by the statutory requirement to promote economy and efficiency in contracting, which expanded employment discrimination limits.[64] The 2020 Rule's complete failure to acknowledge that these harms would result and their relationship with government contracting goals, much less justify them, makes the rule arbitrary and capricious and in need of rescission.

The 2021 NPRM appropriately identifies "ensur[ing] that federal contractors provide equal employment opportunity on all protected bases" as a benefit of rescission.[65] We encourage OFCCP to include even more detail in the final rule about what this protection means for actual employees of federal contractors, including the harm resulting from its omission, and for economy and efficiency in contracting generally. Commenters provided this information in response to the proposed 2020 Rule; we encourage OFCCP to explicitly include that record in the record for the proposed rescission. Further, several reports have been published in the time since the 2020 Rule's publication that provide additional support for the conclusion that the 2020 Rule was harmful.

For example, the Williams Institute recently published a comprehensive report, LGBT People's Experiences of Workplace Discrimination and Harassment.[66] It found that 30% of LGBT employees reported being fired or not hired because of their sexual orientation or gender identity at some point. The portion rose to nearly 50% for transgender employees.[67] Crucially, for the purpose of this rescission, the report provided information on when that discrimination was motivated by religious beliefs. Over half (57%) of LGBT employees who experienced discrimination or harassment at work reported that their employer or co-workers did or said something to indicate that the unfair treatment was motivated by religious beliefs. For many, this included being quoted to from the Bible, told to pray that they weren't LGBT, and told that they would "go to hell" or were "an abomination."[68] While this kind of religiously motivated harassment can violate Title VII, under the 2020 Rule it would likely no longer be treated as

---

[63] There can be no question that such negative consequences are an "important aspect of the problem", *State Farm*, 463 U.S. at 43, especially considering the Supreme Court's admonition that when requiring accommodation of religious interests, the government "must take adequate account of the burdens" the accommodation places on third parties and ensure it is "measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005).

[64] The stated purpose of the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, is to "provide the Federal Government with an economical and efficient system for" procuring contracts, *id*. § 101, and to enable procurement in a manner "advantageous to [it] in terms of economy, efficiency, or service," *id*. § 501(a)(1)(A).

[65] 86 Fed. Reg. at 62,121.

[66] Sears, *supra* n. 58

[67] *Id*. at 2.

[68] *Id*. at 3.

violating Executive Order 11246, leaving the harassed employees without OFCCP as a possible recourse.[69]

The harmful consequences of discrimination authorized by the 2020 Rule extend beyond the LGBTQ+ community. A recent report by Columbia Law School's Law, Rights, and Religion Project describes instances of employers claiming a religiously motivated right to discriminate against various protected classes.[70] Women are frequently on the receiving end of this discrimination, with employers claiming a religious right to fire pregnant, unmarried employees, or for male employees to refuse to train female employees, arguing a religious prohibition against unmarried men and women from being alone together.[71]

Failure to analyze or consider the harmful effects of sanctioning additional discrimination in employment renders the 2020 Rule arbitrary and capricious.[72]

II. The proposed rescission is consistent with the APA.

As discussed above, the 2020 Rule was profoundly unreasoned in violation of the APA's requirement of reasoned decisionmaking, and it should be rescinded on that basis. We provide suggestions below for making the legality of the rescission even more apparent.

A. OFCCP should expressly state its policy preferencing for limiting discrimination on the basis of sex, sexual orientation, and gender identity, and reinforce this conclusion with additional facts.

Among the most significant errors in the 2020 Rule, as discussed above, was its failure to acknowledge the harmful consequences of permitting increased discrimination, especially as to LGBTQ+ and women employees. Rescission is required based on this error alone.[73] The current administration should go further, however, and emphasize its policy preference for preventing

---

[69] Although, historically, OFCCP referred individual complaints of discrimination to EEOC to prosecute under Title VII, OFCCP and EEOC recently amended their Memorandum of Understanding to provide that OFCCP would investigate and take action, itself, on complaints of discrimination that violates Executive Order 11,246. *See* EEOC, Memorandum of Understanding among the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the U.S. Department of Justice, at 8 (Nov. 2, 2020), *available at* https://www.eeoc.gov/memorandum-understanding-among-us-department-labor-equal-employment-opportunity-commission-and-us.

[70] Parading the Horribles, *supra* n. 58.

[71] *Id*. at 6.

[72] *State Farm*, 463 U.S. at 43 (a rule that fails to consider an important aspect of the problem is arbitrary and capricious).

[73] *Id.*

and combating discrimination on the basis of gender identity or sexual orientation[74] and for advancing gender equity and equality.[75] The 2021 NPRM references the policy preference;[76] we recommend developing it even further in the final rule. Even if the 2020 Rule were lawfully promulgated (which it was not, for numerous reasons), a new administration is free to revise regulations based on changed policy preferences, especially the connection between those policy preferences to the statutory goal of promoting economy and efficiency in contracting.[77] Explaining the impact of the administration's change in policy preferences in even greater detail will further support the legality of the rescission.

Finally, ensuring that the final rescission and the record reflect the reality that religiously motivated discrimination in employment is significant, harmful, and ongoing—as revealed by the reports previously described in this comment, for example—will further underscore the need for, and the legality of, the rescission. We encourage OFCCP to provide additional factual analysis to this end in the final rescission. We also encourage OFCCP to explicitly include the record of comments on the 2020 Rule as part of the record in this rulemaking because many of those comments provided such factual information.

B. The final rule should reject any claimed reliance interests on the 2020 Rule.

Employers that have claimed or intended to claim a religiously based right to discriminate may oppose rescission of the 2020 Rule, and they may claim to have relied on it in deciding to compete for federal contracts or in how to structure their employment practices. Any such asserted reliance interests must be addressed in the final rule, but they should be rejected.[78]

Employers that are not otherwise prohibited from the kind of employment discrimination permitted by the 2020 Rule may claim to have relied on the Rule, but any such interests are unlikely to be serious. Multiple lawsuits seeking to enjoin the 2020 Rule were filed within about one month of its promulgation.[79] The current administration has stated publicly since February

---

[74] Exec. Order No.13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[75] The White House, *National Strategy on Gender Equity and Equality* (Oct. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf.

[76] 86 Fed. Reg. at 62,120.

[77] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

[78] *DHS v. Regents*, 140 S. Ct. at 1914 (agency may determine that other interests and policy concerns outweigh even serious reliance interests).

[79] Complaint, *Oregon Tradeswomen, Inc.*, (D. Or. Jan. 21, 2021), No. 21-cv-89, ECF No. 1; Complaint, *State of New York v. DOL*, (S.D.N.Y. Jan. 21, 2021), No. 21-cv-536, ECF No. 1.

2021 its intention to rescind the 2020 Rule.[80] The uncertainty of the 2020 Rule since its inception makes it unlike the kind of longstanding policies that may have engendered serious reliance interests that must be considered.[81]

Finally, even if there were credible, serious reliance interests engendered by the 2020 Rule, as discussed, the administration is entitled to determine that they are outweighed by other considerations. Given the unlawfulness of the 2020 Rule and the weighty benefits that accompany its rescission, OFCCP should be able to do so easily.

***

We encourage OFCCP to act promptly to finalize the proposed rescission. If you have any questions or would like to discuss the information in this comment, please contact our counsel at Democracy Forward Foundation, Karianne M. Jones, kjones@democracyforward.org and Robin F. Thurston, rthurston@democracyforward.org.

Respectfully submitted,

Oregon Tradeswomen
Pride at Work
American Federation of Teachers

[80] Defs.' Unopposed Mot. for Stay, *Oregon Tradeswomen, Inc.*, (D. Or. Jan. 21, 2021), No. 21-cv-89, ECF No. 15 ("the Department of Labor intends to propose rescission of the rule at issue in this case").

[81] *Encino Motorcars*, LLC, 579 U.S. at 212 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515 (2009)).