

December 9, 2021

Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210
Submitted via *regulations.gov*

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

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Office of Federal Contract Compliance Programs (“OFCCP”) of the U.S. Department of Labor (“Department”) on the above-captioned notice of proposed rulemaking (the “Proposed Rule”). *See* 86 Fed. Reg. 62,115 (Nov. 9, 2021).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) people. As part of our work, the Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, to report on the extent and effects of discrimination on the bases of SOGI in employment, including by government contractors and subcontractors (collectively, “contractors”).

On September 16, 2019, we submitted comments to OFCCP (our “original comments”)¹ in response to a notice of proposed rulemaking titled “Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,”² which was ultimately published as a final rule taking effect on January 8, 2021 (the “Existing Rule”).³ There, we shared our opposition to the Existing Rule, noting that it would “risk[] gutting the protections provided by Executive Order 11246, especially [its] protections against discrimination on the bases of sexual orientation and gender identity.”⁴ More specifically, we explained that while Section 204(c) of Executive Order 11246 establishes a specific exemption for government

¹ Williams Institute Scholars, Comment Letter on Proposed Rule Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption (Sept. 16, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-OFCCP-Sep-2019.pdf>.

² 84 Fed. Reg. 41,677 (Aug. 15, 2019).

³ Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 85 Fed. Reg. 79,324 (Dec. 9, 2020).

⁴ Williams Institute Scholars, *supra* note 1. Executive Order 11246, as amended, prohibits “discriminat[ion] against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin” by most government contractors. Exec. Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

contractors on the basis of religion,⁵ the Existing Rule would expand that exemption beyond the narrow confines set by Section 204(c) and would be contrary to the purpose of the executive order to prevent certain forms of discrimination against workers.

As explained in the Proposed Rule—which rescinds the Existing Rule—OFCCP “believes that the [Existing Rule] creates a lack of clarity regarding the scope and application of the exemption because . . . it misstates the law in key respects.”⁶ The Proposed Rule continues that, “as a threshold matter, OFCCP has reevaluated the need” for the Existing Rule as it has “already recognized that the [Existing Rule] has ‘no effect on the overwhelming majority of federal contractors.’”⁷ OFCCP’s reasoning in the Proposed Rule is consistent with our original comments, as described more fully below. We therefore write in support of the Proposed Rule, and in particular OFCCP’s position “that no affirmative rulemaking to modify or replace the [Existing Rule] is needed at this time.”⁸ Additionally, we write to reaffirm our concerns that OFCCP did not properly consider the impact of potential increased discrimination against LGBT workers when issuing the Existing Rule, and that same should therefore be rescinded as a rulemaking contrary to OFCCP’s obligations under longstanding executive orders.

The Proposed Rule is Consistent with Existing Law

OFCCP’s original implementation of Section 204(c) was clear and faithful to the text of Executive Order 11246 and relevant caselaw. That remains true today.

Section 204(c) was added to Executive Order 11246 by then President Bush in 2002.⁹ To implement this provision, OFCCP amended the regulation implementing Executive Order 11246, codified at 41 C.F.R. 60-1.5(a), by simply restating in the regulation the clear text of Section 204(c).¹⁰ In 2015, OFCCP issued guidance (“2015 Guidance”) reflecting its longstanding view that the plain text of Section 204(c) is limited to religious organizations with hiring preferences for coreligionists and to the well-established ministerial exemption.¹¹ The 2015 Guidance took an eminently reasonable approach to balancing religious liberty interests with civil rights

⁵ Specifically for any contractor that is a “religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” *Id.* at § 204(c).

⁶ 86 Fed. Reg. at 62,117.

⁷ *Id.*

⁸ *Id.*

⁹ Exec. Order 13279, 67 Fed. Reg. 77,139 (Dec. 12, 2002).

¹⁰ See Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities; Final Rule, 68 Fed. Reg. 56,392, 56,393 (Sept. 30, 2003); see also Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985, 72,986-87 (Dec. 9, 2014) (“[A]s section 204(c) of EO 11246, which provides an exemption for religious organizations, was not amended by EO 13672, this rule does not make changes to the corresponding regulation at 41 CFR 60-1.5(a)(5), which tracks the language of the Executive Order.”).

¹¹ See, e.g., *Frequently Asked Questions: EO 13672 Final Rule*, OFCCP (archived Jul. 9, 2015), https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html; *Sex Discrimination Frequently Asked Questions (FAQs)*, OFCCP (archived Dec. 22, 2016), https://web.archive.org/web/20161222125932/https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm; *Compliance Webinar*, OFCCP (Mar. 25, 2015), https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf.

obligations. Moreover, OFCCP explained that “contractors [do not need] to obtain pre-approval from OFCCP to take advantage of the religious exemption. . . . Contractors can also invoke the exemption in connection with an OFCCP compliance evaluation, or when they enter into a covered contract or subcontract. OFCCP carefully considers each of these requests in coordination with the Solicitor of Labor.”¹²

Moreover, OFCCP and the Equal Employment Opportunity Commission (“EEOC”) have a longstanding Memorandum of Understanding pursuant to which OFCCP interprets and enforces Executive Order 11246 in accordance with Title VII of the Civil Rights Act of 1964 (“Title VII”).¹³ OFCCP’s 2015 Guidance mirrored the EEOC’s interpretation of the religious exemption in Title VII.¹⁴

As a result, contractors had clear and consistent guidance from both OFCCP and the EEOC, as well as the opportunity for further clarification from OFCCP with respect to applicability of the exemption as to them prior to the issuance of the Existing Rule.

The Proposed Rule Promotes the Economy and Efficiency of the Federal Government

The Proposed Rule notes that, in rulemaking, agencies may consider “benefits that are difficult to quantify or monetize but are nevertheless important...[including] equity and fairness.”¹⁵ Decades of research show that “the proposed rescission [of the Existing Rule] would promote economy and efficiency of 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 their work on government contracts,”¹⁶ including SOGI.

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.¹⁷ LGBT people have faced a long history of public and private discrimination in the United States. In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been

¹² *Frequently Asked Questions: EO 13672 Final Rule*, OFCCP, *supra* note 11.

¹³ Memorandum of Understanding Between the U.S. Department of Labor and the Equal Employment Opportunity Commission (Nov. 7, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-11-16/pdf/2011-29568.pdf>. This has since been superseded with a new Memorandum of Understanding, now involving the Department of Justice as well, maintaining similar requirements, see Memorandum of Understanding among the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the U.S. Department of Justice (Nov. 3, 2020), <https://www.eeoc.gov/sites/default/files/2020-11/Fully%20Executed%20OFCCP%20EEOC%20DOJ%20MOU%2011-3-20.pdf>.

¹⁴ See, e.g., *Questions and Answers: Religious Discrimination the Workplace*, EEOC (July 22, 2008), https://www.eeoc.gov/policy/docs/qanda_religion.html; see also, e.g., *Section 2: Threshold Issues*, EEOC (May 12, 2000), <https://www.eeoc.gov/policy/docs/threshold.html> (“[D]iscrimination is not permitted on any basis other than religion.”).

¹⁵ 86 Fed. Reg. at 62,121; see also *Improving Regulation and Regulatory Review*, Exec. Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

¹⁶ 86 Fed. Reg. at 62,121.

¹⁷ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>. More recent data collected by Gallup following our study indicate that this percentage has risen to 5.6% of the U.S. adult population. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

“prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”¹⁸ The Seventh Circuit has explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”¹⁹ With respect to transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”²⁰

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades (in some places more than others), ample research confirms that anti-LGBT violence, stigma, and discrimination remain widespread. That evidence has recently been documented elsewhere, and we incorporate into this comment those documents and the sources they cite.²¹ The evidence generally falls into the following categories: individual examples, surveys of LGBT people, wage analyses, experiments that show differential treatment of LGBT job applicants, and charges of SOGI discrimination filed against employers.

First, case law, news reports, and other sources contain countless examples of employment discrimination against LGBT people.²² Recent cases finding unlawful

¹⁸ 135 S. Ct. 2584, 2596 (2015).

¹⁹ *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

²⁰ *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

²¹ *See, e.g., Amici Curiae Brief of Scholars Who Study the LGB Population in Support of the Employees, Bostock v. Clayton Cty., Georgia*, No. 17-1618, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. filed July 3, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Amici-Brief-Bostock-and-Zarda-5.pdf>; *Amici Curiae Brief of Scholars Who Study the Transgender Population in Support of Respondent Aimee Stephens, R.G. v. G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm’n*, No. 18-107 (U.S. filed July 3, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Amici-Brief-Stephens-4.pdf>; Adam P. Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 ALA. C.R. & C.L. L. REV. 35 (2019); Christy Mallory & Brad Sears, *LGBT Discrimination, Subnational Public Policy, and Law in the United States*, in OXFORD ENCYCLOPEDIA OF LGBT POLITICS AND POLICY (Don Haider-Markel ed., 2019). For earlier reviews of this body of evidence, see M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 85 CHI. KENT L. REV. 559 (2009); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012).

²² *See, e.g.,* CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN PENNSYLVANIA (2021), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-pa/>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN WEST VIRGINIA (2021), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-wv/>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN VIRGINIA (2020), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-va/>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN OHIO (2019), <https://williamsinstitute.law.ucla.edu/publications/lgbt-stigma-discrim-oh/>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN OKLAHOMA (2019), <https://williamsinstitute.law.ucla.edu/publications/lgbt-discrim-ok/>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN SOUTH CAROLINA (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/South-Carolina-ND-July-2019.pdf>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN MICHIGAN (2019), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-mi/>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN KANSAS (2019),

discrimination against LGBT workers working for employers that are or have been federal contractors include the following: A gay machinist was subject to years and years of “derogatory slurs for homosexuals,” such as “f****t get out of here”; additionally, “the demeaning treatment made him so upset that his body would shake, his work product suffered, and it became difficult for him to sleep.”²³ A gay political appointee was subjected to repeated demands to tender his resignation over a period of several years after his newly-elected governor discovered he was gay, leading to retaliation through a salary decrease to the statutory minimum for his position and exclusion “from meetings, retreats, and conferences relating to the performance of his duties when all other employees at the same level were included.”²⁴ A transgender tenure-track professor was repeatedly denied tenure and ultimately discharged as a result of transitioning while on the job.²⁵ A transgender school police officer was granted summary judgment after providing evidence that his school district employer banned his access to all-gender restrooms after he disclosed his intent to transition.²⁶ A prospective orthopedic surgeon saw her offer of employment rescinded after disclosing her transgender identity.²⁷

These examples are not isolated and rare incidents. Rather, *second*, numerous recent surveys show that a large proportion of LGBT people report experiencing discrimination at work—including discrimination motivated by employers’ and coworkers’ religious beliefs. For example, a recent Williams Institute study found that employment discrimination against LGBT people in the U.S. continues to be persistent and widespread. Using survey data collected in May 2021, we examined lifetime, five-year, and past-year experiences of discrimination and harassment among LGBT employees, producing some of the first studies to look at LGBT employment discrimination during the COVID-19 pandemic and in the year following the

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Kansas-ND-Report-January-2019.pdf>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN ARIZONA (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Arizona-Impact-Discrimination-March-2018.pdf>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN MONTANA (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Montana-ND-September-2017.pdf>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN IDAHO (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Idaho-ND-September-2017.pdf>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN WYOMING (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Wyoming-ND-September-2017.pdf>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN NEBRASKA (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/NE_discrimination_Aug_2017.pdf; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN TEXAS (2017), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-tx/>; CHRISTY MALLORY ET AL., WILLIAMS INST., THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN FLORIDA (2017), <https://williamsinstitute.law.ucla.edu/publications/fl-impact-lgbt-discrimination/>; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN INDIANA (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/IN_discrimination_Aug_2017.pdf.

²³ *Patino v. Birken Mfg. Co.*, 41 A.3d 1013, 1018–20 (Conn. 2012) (censored text not in original).

²⁴ *Godfrey v. Branstad*, 56 F. Supp. 3d 976, 979–80 (S.D. Iowa 2014). A jury awarded the plaintiff \$1.5 million in damages. Stephen Gruber-Miller, *Jury decides Terry Branstad discriminated against gay employee as governor, awards employee \$1.5 million*, DES MOINES REGISTER (July 16, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/07/15/terry-branstad-gay-official-discrimination-chris-godfrey-workers-compensation-commissioner-verdict/1714302001/>.

²⁵ *\$1.16 Million Awarded in Transgender Employment Discrimination Jury Trial*, THE NAT’L L. R. (Dec. 4, 2017), <https://www.natlawreview.com/article/116-million-awarded-transgender-employment-discrimination-jury-trial>.

²⁶ *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016).

²⁷ *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 515 (D. Conn. 2016).

Supreme Court’s decision *Bostock v. Clayton County*.²⁸ We found that lifetime experiences of discrimination were common among LGBT people—45.5% of respondents reported experiencing unfair treatment at work, including being fired, not hired, or harassed, because of their SOGI at some point in their lives—and that these experiences are ongoing, with 31.1% of respondents reporting experiencing SOGI discrimination or harassment within the past five years.²⁹ We also found that 8.9% of employed LGBT people reported being fired or not hired because of their SOGI in the past year, with rates being five times as high for those who were out as LGBT to at least some people at work as compared to those who were not out (10.9% compared to 2.2%).³⁰ The majority of LGBT employees who had experience discrimination or harassment at work—57%—reported that their employer or co-workers did or said something to indicate that the treatment that they experienced was motivated by religious beliefs.³¹

Third, many studies show a significant pay gap for gay and bisexual men when compared to heterosexual men who have the same productive characteristics and conclude that discrimination is the likely explanation. A 2015 meta-analysis examining more than thirty separate studies found that gay and bisexual men, on average, earn 11% less than comparable heterosexual men.³² Lesbian and bisexual women generally earn the same as or more than heterosexual women, but researchers have noted that this finding is *not* explained by a lack of discrimination against lesbians at work.³³ Indeed, as noted elsewhere in this section, other research finds employment discrimination against lesbians.³⁴

Fourth, scholars have conducted experiments to assess the existence and extent of discrimination by employers in the hiring of LGBT people. Typically, these researchers send out pairs of resumes that are matched on qualifications, but one of the resumes indicates that the applicant is LGBT; the researchers then determine if real employers receiving these resumes treat the applicants differently. In one study focused on female applicants, for example, the

²⁸ 140 S. Ct. 1731 (2020). In *Bostock*, the Supreme Court held that the prohibition against sex discrimination contained within Title VII encompasses discrimination based on SOGI. *Id.* at 1737.

²⁹ BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 5 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

³⁰ *Id.* at 20.

³¹ *Id.* at 14.

³² Marieka M. Klawitter, *Meta-Analysis of the Effects of Sexual Orientation on Earnings*, 54 INDUS. REL. 4, 21–25 (2015); see also, e.g., Trenton D. Mize, *Sexual Orientation in the Labor Market*, 81 AM. SOC. REV. 1132, 1152 (2016); Brendan Cushing-Daniels & Tsz-Ying Yeung, *Wage Penalties and Sexual Orientation: An Update Using the General Social Survey*, 27 CONTEMP. ECON. POL’Y 164 (2009).

³³ See, e.g., Klawitter, *supra* note 32, at 23–24; Badgett et al., *supra* note 21, at 585.

³⁴ See, e.g., Ilan H. Meyer et al., Williams Inst., LGBTQ People in the US: Select Findings from the Generations and TransPop Studies (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf> (providing findings from the first LGBTQ population-based national dataset, developed using data collected prior to the COVID-19 pandemic, including on discrimination faced by LGBTQ people at work); BIANCA D.M. WILSON ET AL., WILLIAMS INST., PATHWAYS INTO POVERTY: LIVED EXPERIENCES AMONG LGBTQ PEOPLE 4–5 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Pathways-Overview-Sep-2020.pdf> (noting examples of employment discrimination experienced by LBTQ women, among others in the LGBTQ community, collected through a qualitative study of pathways to poverty among LGBTQ people).

fictitious lesbian and bisexual applicants received 30% fewer callbacks than the control resumes.³⁵ In another experiment, employers in the retail and service industries received control resumes and resumes from applicants marked as transgender (and more qualified for the job than the control).³⁶ The study found that 48% of employers appeared to prefer at least one less-qualified applicant perceived as cisgender over a more-qualified applicant perceived as transgender. Thirty-three percent of employers offered interviews to one or more less-qualified applicants perceived as cisgender while not offering an interview to at least one of the more qualified applicants perceived as transgender.³⁷

Fifth, administrative charges filed alleging SOGI discrimination in employment demonstrate a high degree of perceived discrimination. Since 2013, the EEOC has allowed workers to file sex discrimination charges that allege SOGI discrimination. In 2019, Badgett and colleagues analyzed over 9,000 such charges filed with the EEOC or an analogous state or local agency.³⁸ The types of discrimination alleged were serious, and about half of the charges included claims of discriminatory discharges and harassment. The researchers found that a wide range of employees file such charges—with particularly high filing rates by African American workers and men for sexual orientation charges, and by women and White workers for gender identity charges—and half included claims of discriminatory discharges and harassment.³⁹ Many were filed against employers in low-wage industries, such as the retail sector and the food services industry.⁴⁰ Individuals living in states without express state-level protections against SOGI discrimination were found to be particularly vulnerable, with the study noting “a greater proportion of charges includ[ing] allegations of harassment (52% vs. 41%) and discharge (58% vs. 51%)” in these states.⁴¹

As indicated in the Proposed Rule, an individual’s SOGI has no bearing on their ability to do their job.⁴² In fact, courts, state officials, and legal scholars have repeatedly found that SOGI are not related to a person’s ability to contribute to society, or in the workplace.⁴³ For example,

³⁵ Emma Mischel, *Discrimination Against Queer Women in the U.S. Workforce: A Résumé Audit Study*, SOCIUS: SOCIOLOGICAL RESEARCH FOR A DYNAMIC WORLD 1 (2016); see also András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 599-601 (2011).

³⁶ TERESA RAINEY & ELLIOT E. IMSE, D.C. OFFICE OF HUMAN RIGHTS, QUALIFIED AND TRANSGENDER: A REPORT ON RESULTS OF RESUME TESTING FOR EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY 6 (2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf; see also MAKE THE ROAD N.Y., TRANSGENDER NEED NOT APPLY: A REPORT ON GENDER IDENTITY JOB DISCRIMINATION 4, https://ecommons.cornell.edu/bitstream/handle/1813/73787/TransNeedNotApplyReport_05_10.pdf (2010).

³⁷ RAINEY & IMSE, *supra* note 36, at 6.

³⁸ M. V. LEE BADGETT ET AL., CTR. FOR EMP. EQUITY, EVIDENCE FROM THE FRONTLINES ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2018), <https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination>; see also Amanda K. Baumle et al., *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135 (2019).

³⁹ BADGETT ET AL., *supra* note 38.

⁴⁰ *Id.*

⁴¹ Baumle et al., *supra* note 38.

⁴² 86 Fed. Reg. at 62,121.

⁴³ See, e.g., BRAD SEARS ET AL., WILLIAMS INST., DOCUMENTING DISCRIMINATION IN STATE EMPLOYMENT (2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-4-Perform-Workplace-Sep-2009.pdf> (noting such examples from before 2010 in Tables 4-A and 4-B).

in 2008, when considering classifications based on sexual orientation, the Connecticut Supreme Court found that “the characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”⁴⁴ It further noted that the State of Connecticut had even conceded, and that “many other courts admit, that sexual orientation bears no relation to a person’s ability to participate in or contribute to society.”⁴⁵ In books and academic journals spanning from the mid-1980s to the present, legal scholars have reached the same conclusion. While arguments that LGBT people did not belong in the workplace because of mental illness, physical illness, immorality, or criminality were more common before the 1980s,⁴⁶ by the mid-1990s, such arguments had completely vanished from academic circles. Indeed, by 1995, legal scholars frequently noted that a number of states and lower courts had concluded that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society.⁴⁷

The Existing Rule is Inconsistent with Existing Law

In issuing the Existing Rule, OFCCP deviated from its original interpretation of Section 204(c). In doing so, the OFCCP created a vague regulatory scheme that provided less guidance than previously available and ignored constraints on its authority. More particularly, the Existing Rule maintains definitions that conflict with caselaw; lacks objective, clear, fact-based criteria for defining the exemption and would impermissibly expand its scope beyond those employers “engaged primarily in carrying out [a] religious purpose[;]”⁴⁸ and fails to address the right of employees to be free from certain forms of discrimination. Several of these defects were noted in the Proposed Rule’s *Reasons for Recission of the Rule*, including:

Expanded Definition of “Religion”

By redefining key terms, the Existing Rule greatly expands the scope of the exemption under Section 204(c) contrary to the terms of 204(c) itself and existing caselaw. While Section 204(c)’s text provides that qualifying contractors are exempt “with respect to the *employment of individuals of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities,”⁴⁹ the Existing Rule explains that the regulation would “permit[] qualifying employers to take religion—defined more

⁴⁴ Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 432 (2008).

⁴⁵ *Id.*

⁴⁶ See J.J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620-651 (1975) (declassifying homosexuality as a mental illness); see also Stephen Zamansky, *Colorado’s Amendment 2 and Homosexuals’ Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 244-49 (1993).

⁴⁷ See, e.g., Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 354 (1995) (noting that “[a] number of lower court decisions have found that a person’s sexual orientation has no bearing on that person’s ability to contribute to society.”); E. Gary Spitko, *A Biologic Argument for Gay Essentialism—Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598-620 (1996) (finding that “[a] number of states” have found that sexual orientation bears “no relationship whatsoever” to an individual’s ability to perform in society).

⁴⁸ *Quoting* Spencer v. World Vision, 633 F.3d 723, 724 (9th Cir. 2011).

⁴⁹ Exec. Order 11246 § 204(c).

broadly than simply preferring coreligionists—into account in their employment decisions.”⁵⁰ More specifically, the Existing Rule defines “religion” to include “all aspects of religious observance and practice, as well as belief.”⁵¹ This expansive definition cannot be reconciled with the requirement in Section 204(c) itself that qualifying contractors “are not exempted or excused from complying with the other requirements contained in this Order.”⁵² As noted in the Proposed Rule, “[t]he religious exemption does not permit qualifying employers to make employment decisions about non-ministerial positions that amount to discrimination on the basis of protected characteristics other than religion, even if those decisions are based on sincere religious beliefs and tenets.”⁵³

Criteria for Defining Exemption

The Existing Rule broadens the scope of entities that would qualify for an exemption under Section 204(c) (a “religious corporation, association, education institution, or society”)⁵⁴ to include for-profit corporations and organizations that only nominally have a religious purpose.⁵⁵ As noted in the Proposed Rule, the Existing Rule justifies the expanded definition by referencing *Spencer v. World Vision*, a *per curiam* opinion by the Ninth Circuit that set forth a four-factor test for whether an employer is religious for the purposes of Title VII’s exemption.⁵⁶ According to *World Vision*, an entity meets the definition if it (1) is organized for a religious purpose, (2) is engaged primarily in carrying out that religious purpose, (3) holds itself out to the public as an entity carrying out that religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.⁵⁷ However, the Existing Rule does not follow the majority holding in *World Vision* or either concurrence, but instead forges its own test that would qualify more types of contractors for the exemption.

For example, as noted in the Proposed Rule, the Existing Rule drops the fourth prong of the *World Vision* test in order to permit for-profit corporations to qualify for the Section 204(c) exemption.⁵⁸ In support of dropping this prong, the Existing Rule fails to cite any Title VII caselaw extending the religious exemption to for-profit entities. Instead, the rule relies on *Burwell v. Hobby Lobby*.⁵⁹ While *Hobby Lobby* did permit a closely-held for-profit company to be considered a “person” under the Religious Freedom Restoration Act,⁶⁰ that is an entirely different statutory scheme and the Court’s decision turned on the definition of “person” in that

⁵⁰ 84 Fed. Reg. at 41,680.

⁵¹ *Id.* at 41,691.

⁵² Exec. Order 11246 § 204(c).

⁵³ 86 Fed. Reg. at 62,120.

⁵⁴ Exec. Order 11246 § 204(c).

⁵⁵ 85 Fed. Reg. at 79,339 (noting that, and unlike within its original proposal for the Existing Rule, “which stated only that a religious organization need not be nonprofit, the final rule now requires that the organization, if for-profit, present “other strong evidence that it possesses a substantial religious purpose.”).

⁵⁶ 633 F.3d 723, 724 (9th Cir. 2011).

⁵⁷ *Id.*; *Spencer v. World Vision*, 619 F.3d 1109, 1119 (9th Cir. 2010) (*citing* *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002)).

⁵⁸ 86 Fed. Reg. at 62,118.

⁵⁹ 573 U.S. 682 (2014).

⁶⁰ 42 U.S.C. § 2000bb–1(a) (requiring that governments, unless subject to the applicable exception, “not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability”).

particular statute.⁶¹ Indeed, even after *Hobby Lobby*, the Ninth Circuit continues to apply the fourth prong of *World Vision*—as in *Garcia v. Salvation Army*, a decision that the Proposed Rule fails to discuss.⁶²

Additionally, the Existing Rule also guts the second prong of the *Spencer* test that requires the entity be “engaged primarily in carrying out that religious purpose.”⁶³ Instead, the Existing Rule only requires that the “contractor . . . exercise religion consistent with, and in furtherance of, a religious purpose.”⁶⁴ This expanded requirement is untethered to Title VII caselaw and defies the “measured” exemption required by the Establishment Clause.⁶⁵

Conclusion

By rescinding the Existing Rule, OFCCP would be acting consistent with applicable caselaw, as well as with its obligations under Executive Order 12067, which requires that it “cooperate with and assist” the EEOC in the performance of its functions as coordinator of the efforts among federal agencies to “enforce all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity without regard to . . . sex” in such a way that “eliminate[s] conflict . . . and inconsistency among the operations.”⁶⁶ We therefore commend OFCCP for its decision to issue the Proposed Rule and restore its previous implementation of Section 204(c)’s narrowly-defined exemption.

Thank you for your consideration. Please direct any correspondence to vasquezl@law.ucla.edu.

Respectfully Submitted,

Luis A. Vasquez, J.D.
Arnold D. Kassoy Scholar of Law
The Williams Institute
UCLA School of Law

Christy Mallory, J.D.
Legal Director and Renberg Senior Scholar of Law
The Williams Institute
UCLA School of Law

⁶¹ 573 U.S. at 707–713.

⁶² 918 F. 3d 997, 1004 (9th Cir. 2019).

⁶³ *Spencer v. World Vision*, 633 F.3d 723, 724 (9th Cir. 2011).

⁶⁴ 84 Fed. Reg. at 41,683.

⁶⁵ *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“Our decisions indicate that an accommodation [of religious observances] must be measured so that it does not override other significant interests.”).

⁶⁶ Providing for Coordination of Federal Equal Employment Opportunity Programs, Exec. Order 12067, 43 Fed. Reg. 28,967 (June 30, 1978).

Todd Brower, LL.M., J.D.
Judicial Education Director
The Williams Institute
UCLA School of Law
Professor of Law
Western State College of Law

Cary Franklin, D.Phil., J.D.
McDonald/Wright Chair of Law and Faculty Director
The Williams Institute
UCLA School of Law

Jody L. Herman, Ph.D.
Reid Rasmussen Fellow and Senior Scholar of Public Policy
The Williams Institute
UCLA School of Law

Brad Sears, J.D.
Founding Executive Director and David S. Sanders Distinguished Scholar of Law & Policy
The Williams Institute
Associate Dean of Public Interest Law
UCLA School of Law

Will Tentindo, J.D.
Daniel H. Renberg Law Fellow
The Williams Institute
UCLA School of Law

Bianca D.M. Wilson, Ph.D.
Rabbi Barbara Zacky Senior Scholar of Public Policy
The Williams Institute
UCLA School of Law