

September 16, 2019

U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
Division of Policy and Program Development  
Room C-3325  
200 Constitution Avenue NW  
Washington, D.C. 20210  
*Submitted via regulations.gov*

**RE: 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”).<sup>1</sup> The undersigned include scholars of law, public policy, economics, and public health, among other fields, with substantial expertise related to anti-discrimination law generally and discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) people in particular, and who are affiliated with the Williams Institute at the University of California at Los Angeles School of Law. The Williams Institute is a research center dedicated to conducting rigorous and independent academic research on sexual orientation and gender identity, including on the extent and effects of employment discrimination on the bases of sexual orientation and gender identity. The undersigned also include Patricia A. Shiu, former Director of OFCCP, Patrick Patterson, former Deputy Director of OFCCP and former Senior Counsel to the Chair of the Equal Employment Opportunity Commission (“EEOC”), and Chris Lu, former Deputy Secretary of Labor, who each have extensive knowledge and experience related to all aspects of OFCCP, enforcement of Executive Order 11246, and the Proposed Rule. The undersigned further include law professors who teach and write in the areas of anti-discrimination law and religious liberty.

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 and subcontractors (collectively, “contractors”).<sup>2</sup> Covering approximately 22% of the U.S. workforce,<sup>3</sup> this executive order

---

<sup>1</sup> 84 Fed. Reg. 41,677 (Aug. 15, 2019).

<sup>2</sup> Equal Employment Opportunity, Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended by, e.g.,* Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, Exec. Order 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

<sup>3</sup> M.V. Lee Badgett et al., An Executive Order to Prevent Discrimination Against LGBT Workers 4 & n.23 (2013) (citing <https://web.archive.org/web/20160206204951/http://www.dol.gov/ofccp/regs/compliance/aa.htm>),

provides critical anti-discrimination protections. These types of protections are especially important to the 4.1 million LGBT workers who live in states without express statutory protections against sexual orientation and gender identity discrimination,<sup>4</sup> including the roughly 900,000 LGBT people who likely currently work for a contractor in those states.<sup>5</sup>

Section 204(c) of Executive Order 11246 establishes a narrow exemption for a 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.”<sup>6</sup> This exemption protects religious liberty, which is a core principle of our democracy, but it is narrow because Executive Order 11246’s very purpose is to prevent discrimination against workers. Indeed, Section 204(c) specifies that “[s]uch contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.”

The Proposed Rule would expand the religious exemption beyond the narrow confines set by Section 204(c). But the Proposed Rule is a regulation in search of a problem and risks gutting the protections provided by Executive Order 11246, especially the protections against discrimination on the bases of sexual orientation and gender identity. In Part I, we object to the unjustified and unjustifiable short comment period on the Proposed Rule and OFCCP’s omission of critical data, each of which deprived the public of a meaningful opportunity to comment on the Proposed Rule. In Part II, we show that OFCCP’s prior guidance was clear and faithful to the text of Section 204(c), the EEOC’s interpretation of a similar provision, and case law. By contrast, the Proposed Rule is vague and inconsistent with the law in numerous respects. In Part III, we show that OFCCP’s required Regulatory Impact Analysis is fundamentally flawed because it fails to account for the potential impact of the Proposed Rule on those workers who are currently protected by Executive Order 11246 but who would, by operation of the Proposed Rule, lose protection. OFCCP must assess and account for the impact of the Proposed Rule on all workers and on the government in terms of increased discrimination, and must assess and account for the impact of the Proposed Rule on LGBT workers in particular because they are especially vulnerable to religiously motivated discrimination. For all of these reasons, OFCCP should withdraw the Proposed Rule in its entirety and reinstate its clear prior interpretation that Section 204(c) is limited to religious organizations with hiring preferences for coreligionists and to the well-established ministerial exemption.

---

<https://williamsinstitute.law.ucla.edu/research/discrimination/executive-order-19-feb-2013/>; *see also* OFCCP, History of Executive Order 11246, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html> (last visited Sept. 12, 2019) (noting Executive Order 11246 covers “approximately one-fifth of the entire labor force”).

<sup>4</sup> The Williams Institute, LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf>.

<sup>5</sup> We approximate the number of LGBT people who currently work for a contractor in states without express statutory protections against sexual orientation and gender identity discrimination by multiplying the estimate of LGBT workers living in such states (4,100,000) by the percentage of the U.S. labor force that works for a contractor (22%).  $4,100,000 \times .22 = 902,000$ .

<sup>6</sup> Exec. Order 11,246 § 204(c).

## I. OFCCP ARBITRARILY AND CAPRICIOUSLY DENIED REQUESTS FOR A REASONABLE COMMENT PERIOD AND OMITTED CRITICAL DATA

As an initial but critical matter, OFCCP deprived the public of a meaningful opportunity to review, assess, and comment on the Proposed Rule. The Administrative Procedure Act (“APA”) requires that the public have a meaningful opportunity to submit data and written analysis regarding a proposed rulemaking.<sup>7</sup> Rather than provide for a normal 60-day comment period, OFCCP permitted only 30 days of comment – and over the Labor Day weekend and the entire August recess of Congress no less. OFCCP’s unduly short deadline violates the longstanding rule that “each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be *at least* 60 days.”<sup>8</sup>

OFCCP did not provide any justification for shortening the usual comment period by half, and no good cause exists for this abbreviated period. There is no “urgent necessity for rapid administration action,”<sup>9</sup> for example. This short comment period not only limited the time available for commenters to refine their comments and analysis of the Proposed Rule, but likely also prevented some individuals and organizations that would have participated in the rulemaking, had the regular amount of time been made available, from filing comments altogether. We understand that OFCCP has received numerous requests from a variety of stakeholders – including members of Congress, civil rights organizations, and contractors – seeking an extension of the comment period, and it was arbitrary and capricious to not grant those requests and allow for meaningful comment.<sup>10</sup>

The problems created by the short comment period were exacerbated by OFCCP’s omission of critical data necessary to assess the impact of the Proposed Rule. Though the preamble to the Proposed Rule vaguely asserts that “[s]ome religious organizations have previously provided feedback to OFCCP that they were reluctant to participate as federal contractors because of uncertainty regarding the scope of the [exemption],”<sup>11</sup> OFCCP did not provide either the number of such organizations nor other relevant information such as the number of contractors that have historically utilized the Section 204(c) exemption and how many

---

<sup>7</sup> 5 U.S.C. § 553(c).

<sup>8</sup> Improving Regulation and Regulatory Review, Exec. Order 13,563 § 2(b), 76 Fed. Reg. 3821 at 3821-22 (Jan. 18, 2011) (emphasis added); *see also* Regulatory Planning and Review, Exec. Order 12,866 § 6(a)(1), 58 Fed. Reg. 51,735 at 51,740 (Sept. 30, 1993) (“[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”).

<sup>9</sup> *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996) (upholding a shortened comment period in light of a specific congressional mandate requiring the agency to issue its regulation “‘without administrative or judicial delays’”).

<sup>10</sup> *See, e.g., Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (APA notice and comment requirements were not satisfied by FNPR that only permitted 28 days for response); *Estate of Smith v. Bowen*, 656 F. Supp. 1093, 1099 (D. Colo. 1987).

<sup>11</sup> 84 Fed. Reg. at 41,679.

contractors OFCCP expects will seek to avail themselves of the expanded exemption to be codified by the Proposed Rule. Nor has OFCCP provided the number of workers who have been affected by granted exemptions in the past or the number that OFCCP expects will be affected by future exemptions. Without this and other relevant information within OFCCP's control, commenters were deprived of critical information necessary to review and comment on the Proposed Rule and its cost-benefit analysis.<sup>12</sup>

Thus, at the very least, OFCCP should provide the information noted above, open a new comment period of at least 60 days (which would be necessary to analyze the requested data and estimates), and allow commenters to file additional or revised comments on all aspects of the Proposed Rule. With these objections noted, we turn to the substance of the Proposed Rule.

## **II. THE PROPOSED RULE IS INCONSISTENT WITH THE LAW**

In this Part, we describe Section 204(c) and the clear guidance OFCCP had provided about its application, which was consistent with the EEOC's interpretation of a similar provision in Title VII of the Civil Rights Act of 1964 ("Title VII"). The Proposed Rule, by contrast, is vague and inconsistent with the law.

### **A. OFCCP Had Provided Clear Guidance About Section 204(c)**

Added to Executive Order 11246 by then President Bush in 2002, Section 204(c) provides:

Section 202 of this Order shall not apply to a Government contractor or subcontractor 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. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.<sup>13</sup>

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).<sup>14</sup>

---

<sup>12</sup> See, e.g., *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) ("Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment"); *Estate of Smith*, 656 F. Supp. at 1099 (proposed rule inadequate where meaningful information was omitted).

<sup>13</sup> Exec. Order 11,246 § 204(c).

<sup>14</sup> 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

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.

[I]f a religious organization does hold a covered contract, it is prohibited from discriminating on any of the protected bases listed in Executive Order 11246, as amended, including the newly added categories of sexual orientation and gender identity. The Executive Order and OFCCP regulations do provide, though, an exception that permits religious organizations to prefer to employ only members of a particular religion. The so-called “ministerial exception,” also discussed below, may apply as well.<sup>15</sup>

The guidance took an eminently reasonable approach to balancing religious liberty interests with civil rights 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.”<sup>16</sup>

OFCCP and the EEOC have a longstanding Memorandum of Understanding pursuant to which OFCCP interprets and enforces Executive Order 11246 in accordance with Title VII principles.<sup>17</sup> OFCCP’s 2015 Guidance mirrored the EEOC’s interpretation of the religious exemption in Title VII:

[S]pecially-defined “religious organizations” and “religious educational institutions” are exempt from certain religious discrimination provisions, and a “ministerial exception” bars Title VII claims by employees who serve in clergy roles. . . . Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose “purpose and character are primarily religious.”

---

not make changes to the corresponding regulation at 41 CFR 60-1.5(a)(5), which tracks the language of the Executive Order.”).

<sup>15</sup> OFCCP, Frequently Asked Questions: EO 13672 Final Rule (archived Jul. 9, 2015), [https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](https://web.archive.org/web/20150709220056/http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html) (last visited Sept. 12, 2019) (hereinafter “2015 Guidance”). *Accord* OFCCP, Sex Discrimination Frequently Asked Questions (FAQs) (archived Dec. 22, 2016), [https://web.archive.org/web/20161222125932/https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination\\_faqs.htm](https://web.archive.org/web/20161222125932/https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm); OFCCP, Compliance Webinar (Mar. 25, 2015), [https://www.dol.gov/ofccp/LGBT/FTS\\_TranscriptEO13672\\_PublicWebinar\\_ES\\_QA\\_508c.pdf](https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf).

<sup>16</sup> 2015 Guidance, *supra*.

<sup>17</sup> EEOC & OFCCP, Memorandum of Understanding Between the U.S. Department of Labor and the Equal Employment Opportunity Commission (Nov. 7, 2011), [http://www.eeoc.gov/laws/mous/eeoc\\_ofccp.cfm](http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm); *see also* OFCCP, Federal Contract Compliance Manual § 2H01 (July 2013), [https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM\\_FINAL\\_508c.pdf](https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf).

. . . [and] it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability.<sup>18</sup>

The EEOC has provided this instructive example based on a decision from the Ninth Circuit:

Justina works at Tots Day Care Center. Tots is run by a religious organization that believes that, while women may work outside of the home if they are single or have their husband's permission, men should be the heads of their households and the primary providers for their families. Believing that men shoulder a greater financial responsibility than women, the organization pays female teachers less than male teachers. The organization's practice of unequal pay based on sex constitutes unlawful discrimination.<sup>19</sup>

OFCCP's and the EEOC's interpretations reflect long-standing case law. As the Fourth Circuit explained with respect to Title VII:

While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin, *see EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277 (9th Cir.1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 282 (5th Cir.1981); *EEOC v. Mississippi College*, 626 F.2d [485,] 484 [(5th Cir. 1980)]; *McClure v. Salvation Army*, 460 F.2d [553,] 558 [(5th Cir. 1972)]. The statutory exemption applies to one particular reason for employment decision—that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.<sup>20</sup>

---

<sup>18</sup> EEOC, Questions and Answers: Religious Discrimination the Workplace, [https://www.eeoc.gov/policy/docs/qanda\\_religion.html](https://www.eeoc.gov/policy/docs/qanda_religion.html) (last visited Sept. 12, 2019); *see also, e.g.*, EEOC, Directives Transmittal No. 915.003, EEOC Compliance Manual, Section 2: Threshold Issues § 2-III.B.4.b.i (last modified Aug. 6, 2009) (“[D]iscrimination is not permitted on any basis other than religion.”), <https://www.eeoc.gov/policy/docs/threshold.html>.

<sup>19</sup> EEOC, Directives Transmittal No. 915.003, EEOC Compliance Manual, Section 12: Religious Discrimination § 12-I.C.1 (Jul. 22, 2008) (citing *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986)), <https://www.eeoc.gov/policy/docs/religion.html>; *see also id.* (“The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability.”).

<sup>20</sup> *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166–67 (4th Cir. 1985); *see also DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (religious institutions may not engage in age discrimination); *Ziv v. Valley Beth Shalom*, 156 F.3d 1242, 1998 WL 482832 (9th Cir. Aug. 11, 1998) (unpublished) (religious organization can be held liable for retaliation and national origin discrimination).

As a result, contractors have 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.

## **B. The Proposed Rule Is Vague, Exceeds OFCCP’s Authority, Misreads Relevant Case Law, and Raises Constitutional Concerns**

OFCCP has now deviated from the above-described interpretation of Section 204(c). In doing so, OFCCP has created a vague regulatory scheme that provides less guidance than previously available, ignored constraints on its authority, and taken approaches that are, at a minimum, vulnerable to serious legal challenge.

OFCCP started down this misguided path in August 2018, when it issued a vague Directive 2018-03 that sought to “incorporate recent developments in the law regarding religion-exercising organizations and individuals.”<sup>21</sup> The Directive referred to three recent Supreme Court decisions concerning religious liberty under the Constitution and the Religious Freedom Restoration Act, as well as two Executive Orders from President Trump.<sup>22</sup> Neither the cases nor the Executive Orders refer in any way to Executive Order 11246. Nonetheless, in a footnote, Directive 2018-03 stated that it “supersedes any previous guidance that does not reflect these legal developments, for example, the section in OFCCP’s [2015 Guidance] regarding ‘Religious Employers and Religious Exemption.’”<sup>23</sup> OFCCP provided no additional reasoning for deviating from OFCCP’s prior – and the EEOC’s continuing – view of the language of Section 204(c).

Like Directive 2018-03, the Proposed Rule raises a host of legal questions and problems. We detail below some of the salient ways in which the Proposed Rule improperly elevates protections for religious liberty. Each of these singly would be sufficient to raise questions under the Establishment Clause; taken together, they raise serious concerns that the Proposed Rule would be an unconstitutional “establishment of religion[.]”<sup>24</sup> The Supreme Court made clear in *Cutter v. Wilkinson* that when crafting a religious exemption, 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.”<sup>25</sup> OFCCP has not even mentioned the harm to workers that would result from the Proposed Rule, *see infra* Part III, let alone put forward a measured exemption that does not “override” significant harms to workers.<sup>26</sup>

---

<sup>21</sup> OFCCP Directive 2018-03 (Aug. 10, 2018), [https://www.dol.gov/ofccp/regs/compliance/directives/dir2018\\_03.html](https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at n.1.

<sup>24</sup> U.S. Const. amend. I.

<sup>25</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005).

<sup>26</sup> *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (“It is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’” (quoting *Cutter*, 544 U.S. at 709 & 720)); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (“All of these cases . . . involve legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs[.]”); *Estate of Thornton v.*

For this reason and others, OFCCP’s reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n* is misplaced.<sup>27</sup>

### **1. The Proposed Rule’s definition of “particular religion” conflicts with Section 204(c) and relevant case law**

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,”<sup>28</sup> the preamble to the Proposed Rule explains that the proposed regulation would “permit[] qualifying employers to take religion—defined more broadly than simply preferring coreligionists—into account in their employment decisions.”<sup>29</sup> Thus, the Proposed Rule would, among other things, define “particular religion” expansively to mean:

the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.<sup>30</sup>

However, OFCCP does not explain how the Proposed Rule’s expansive definition of “particular religion,” among other terms, can 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”<sup>31</sup> and the fact that “an employer may not . . . invoke religion to discriminate on other bases protected by law,” as the Proposed Rule itself recognizes.<sup>32</sup> According to the preamble, for example, the Proposed Rule “is . . . intended to make clear that

---

*Caldor, Inc.*, 472 U.S. 703, 708-10 (1985) (“This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses[.]”); *see also* *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (“[A]ccommodation is not a principle without limits[.]”);

<sup>27</sup> *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Among the other reasons that these decisions are inapposite to the question of Section 204(c) scope is the difference between programs that make “aid ‘generally’ available to all applicants that satisfy some objective and neutral criteria” and funding awarded “on a competitive basis.” Memorandum from Randolph D. Moss, Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William P. Marshall, Deputy Counsel to the President, Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the “Community Renewal and New Markets Act of 2000” at 24 (Oct. 12, 2000).

<sup>28</sup> Exec. Order 11,246 § 204(c).

<sup>29</sup> 84 Fed. Reg. at 41,680.

<sup>30</sup> *Id.* at 41,690-91.

<sup>31</sup> Exec. Order 11,246 § 204(c).

<sup>32</sup> 84 Fed. Reg. at 41,680.

religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, *provided that they do not discriminate based on other protected bases.*<sup>33</sup>

But the Proposed Rule contains no language limiting its definition of “religious tenets” to tenets defined without reference to race, color, sex, sexual orientation, gender identity, or national origin. Indeed, OFCCP offers no explanation whatsoever for how it will apply these two provisions in cases in which they appear to conflict. For example, will OFCCP permit a contractor with a religious objection to same-sex marriage to discriminate on the basis of sexual orientation by firing a gay employee married to someone of the same sex? Will OFCCP permit a contractor with a religious objection to inter-racial marriage to discriminate on the basis of race by refusing to hire a Latino employee married to a White person? Will OFCCP permit a contractor with a religious objection to transgender people or to transitioning gender to discriminate on the basis of gender identity by paying less to a transgender employee?

Should OFCCP determine that such discrimination qualifies for an exemption – and we request clarification from OFCCP about these and similar types of potential conflicts created by the Proposed Rule – that interpretation would directly conflict with Section 204(c) itself, would conflict with the EEOC’s interpretation of Title VII, and would risk creating an exemption that swallows the rule of non-discrimination provided by Executive Order 11246 in its entirety. Moreover, such an interpretation would ignore limitations in relevant case law. As noted above in Part II.A, courts have held that “Title VII’s religious exemption “does not exempt religious organizations from Title VII’s provisions barring discrimination on the basis of race, gender, or national origin.”<sup>34</sup> And even if a religious employer has a religious motivation for discriminatory conduct, courts have held that such conduct – if done because of a protected characteristic – is unlawful.<sup>35</sup>

## **2. The Proposed Rule fails to address the rights of employees to be free from discrimination without regard to religion or national origin**

A further but similar problem related to the Proposed Rule’s definition of “particular religion,” among other terms, is that OFCCP has failed to address the rights of employees to be free from discrimination on the basis of religion and national origin codified at 41 C.F.R. § 60-50.1. While the preamble notes the existence of these regulations, it does not grapple with a number of conflicts between them and the Proposed Rule. For example, 41 C.F.R. § 60-50.3 requires:

---

<sup>33</sup> *Id.* at 41,679 (emphasis added).

<sup>34</sup> *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *see also* *E.E.O.C. v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *cf. Hobby Lobby*, 573 U.S. at 733 (2014) (rejecting “the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education[.]”).

<sup>35</sup> *See, e.g., Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1319-21 (11th Cir. 2012); *Fremont Christian Sch.*, 781 F.2d at 1365-67; *Pac. Press Pub. Ass’n*, 676 F.2d at 1276-77; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1174-76 (N.D. Ind. 2014).

An employer must accommodate to the religious observances and practices of an employee or prospective employee unless the employer demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, an employer must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as his Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of an employer's obligations under this section, at least the following factors shall be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.<sup>36</sup>

In the preamble to the Proposed Rule, OFCCP states “[t]hose provisions continue to govern contractors’ obligations to accommodate employees and potential employees’ religious observance and practice.”<sup>37</sup> But the Proposed Rule is unclear as to whether it would displace a religious employee’s right to accommodation if such an accommodation conflicts with the contractor’s “particular religion” as defined by the Proposed Rule.

### **3. The Proposed Rule’s definition of “religious corporation, association, educational institution, or society” is unsupported in case law**

The Proposed Rule proposes an expansive definition of “religious corporation, association, education institution, or society” that would include for-profit corporations and organizations that only nominally have a religious purpose. OFCCP justifies its 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. According to *Spencer*, 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. OFCCP does not follow the majority holding in *Spencer* or either concurrence, but instead forges its own test designed to qualify more types of contractors for the exemption.

Among other unjustified changes to the *Spencer* test, OFCCP would drop the fourth prong in order to permit for-profit corporations to qualify for the Section 204(c) exemption. In support of dropping this prong, OFCCP has failed to cite any Title VII case law extending the

---

<sup>36</sup> 41 C.F.R. § 60-50.3.

<sup>37</sup> 84 Fed. Reg. at 41,679.

religious exemption to for-profit entities. Instead, OFCCP relies on *Burwell v. Hobby Lobby*.<sup>38</sup> While *Hobby Lobby* did permit a closely-held for-profit company to be considered a “person” under the Religious Freedom Restoration Act (“RFRA”), that is an entirely different statutory scheme and the Court’s decision turned on the definition of “person” in that particular statute. Indeed, even after *Hobby Lobby*, the Ninth Circuit continues to apply the fourth prong of *Spencer* – as in *Garcia v. Salvation Army*, a decision that the Proposed Rule fails to discuss.<sup>39</sup> Moreover, the Supreme Court’s reasoning in *Hobby Lobby* rested, in significant part, on the Court’s conclusion that there would be no third-party harms from accommodating the employer’s religious beliefs. OFCCP utterly fails to grapple with this limitation on *Hobby Lobby*’s application and likely deliberately so, because there is substantial harm to which workers would be subject under the enhanced exemptions to Executive Order 11246 authorized by the Proposed Rule. *See infra* Part III. Even if *Hobby Lobby* were controlling, OFCCP exceeds that decision by not expressly limiting eligibility for the proposed exemption to *closely-held* for-profit corporations. OFCCP vaguely states that it “does not anticipate that large, publicly held corporations would seek exemption or fall within the proposed definition.”<sup>40</sup> Failing to expressly exclude publicly held corporations from the exemption in the rule itself contravenes the reasoning of *Hobby Lobby* and would raise a host of legal issues.

The Proposed Rule also guts the second prong of the *Spencer* test that requires the entity be “engaged primarily in carrying out that religious purpose.”<sup>41</sup> Instead, the Proposed Rule would only require that the “contractor . . . exercise religion consistent with, and in furtherance of, a religious purpose.”<sup>42</sup> OFCCP asserts that its exceedingly more expansive criteria would be easier for the agency to administer but it is untethered to Title VII case law and defies the “measured” exemption required by the Establishment Clause.

#### **4. The proposed definition of “religion” is unsupportable**

OFCCP proposes to define “religion” to include “all aspects of religious observance and practice, as well as belief.”<sup>43</sup> This definition is drawn from Title VII’s requirement that employers reasonably accommodate religious employees.<sup>44</sup> This expansive definition of religion in Title VII is designed to protect *victims* of discrimination, but Title VII imposes no more than a *de minimis* accommodation cost on employers.<sup>45</sup> In stark contrast, the Proposed Rule would

---

<sup>38</sup> 573 U.S. 682 (2014).

<sup>39</sup> *Garcia v. Salvation Army*, 918 F. 3d 997, 1004 (9th Cir. 2019).

<sup>40</sup> 84 Fed. Reg. at 41,684.

<sup>41</sup> *Spencer*, 633 F.3d at 724.

<sup>42</sup> 84 Fed. Reg. at 41,683.

<sup>43</sup> *Id.* at 41,691.

<sup>44</sup> “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observances or practices without undue hardship on the conduct of the employer’s business.” 42 USC §2000e(j).

protect not the victim of discrimination but the employer that has perpetrated the adverse action; the harm caused by employment discrimination is rarely, if ever, *de minimis*. See *infra* Part III.

## **5. The Proposed Rule lacks objective, clear, and fact-based criteria for defining the exemption**

Compounding the various problems of the Proposed Rule discussed above, OFCCP has not provided objective, clear, and fact-based criteria for defining the exemption. For example, the Proposed Rule defines “sincere” in the phrase “sincere exercise of religion” to be: “sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party’s religious exercise or belief”<sup>46</sup> But that definition is so vague and circular that it defies objective analysis or verification based on clearly stated criteria, and would make effective, objective, and even-handed enforcement virtually impossible. The preamble does state:

In assessing sincerity, OFCCP takes into account all relevant facts, including whether the contractor had a preexisting basis for its employment policy and whether the policy has been applied consistently to comparable persons, although absolute uniformity is not required. OFCCP will also evaluate any factors that indicate an insincere sham, such as acting in a manner inconsistent with that belief or evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.<sup>47</sup>

But those criteria are not incorporated into the definition itself, and elsewhere in the preamble OFCCP is completely ambiguous about its approach to enforcement. For instance, in discussing the issue of pretext – which must be an available inquiry in order to prevent actual “sham[s]” as well as to discourage future ones – OFCCP discusses differing case law and merely concludes that “[t]hese turn on their individual facts, and OFCCP does not attempt to enumerate such situations here.”<sup>48</sup> Such ambiguity contravenes the very purpose OFCCP asserts justifies the Proposed Rule: “bringing clarity and certainty to federal contractors.”<sup>49</sup> (We observe the omission in this quotation of concern for bringing clarity and certainty to workers, further evidencing OFCCP’s disregard for the very people who are protected by Executive Order 11246. See *infra* Part III.)

---

<sup>45</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (“To require [employer] to bear more than a *de minimis* cost in order to give [employee] Saturdays off is an undue hardship.”).

<sup>46</sup> 84 Fed. Reg. at 41,691.

<sup>47</sup> *Id.* at 41,685 (internal citations and quotation marks omitted).

<sup>48</sup> *Id.* at 41,681.

<sup>49</sup> U.S. Dep’t of Labor, News Release: U.S. Department of Labor Proposed a Rule Clarifying Civil Rights Protections for Religious Organizations (Aug. 14, 2019) (quoting OFCCP Director Craig Leen), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814>.

**6. Any final rule must clarify that Executive Order 11246 prohibits sexual orientation and gender identity discrimination**

Astonishingly, the Proposed Rule fails to even mention that Executive Order 11246 prohibits sexual orientation and gender identity discrimination, though it discusses the other protected characteristics. While we hope this omission was inadvertent, it may evidence OFCCP's improper hostility to Executive Order 11246's protections against sexual orientation and gender identity discrimination. OFCCP is obligated to fully enforce the Executive Order as to each and every protected characteristic. While we request that OFCCP withdraw the Proposed Rule in its entirety, should OFCCP proceed with a final rule we request that OFCCP clarify that Executive Order 11246 continues to prohibit sexual orientation and gender identity discrimination, and expressly include in its recitation of the historical background that President Obama amended Executive Order 11246 in 2014 to include sexual orientation and gender identity as protected characteristics. To omit this information would be misleading and would provide the public with a misimpression of Executive Order 11246's true scope.

**III. THE REGULATORY IMPACT ANALYSIS IS FUNDAMENTALLY FLAWED**

Under Executive Orders 12866 and 13563, OFCCP is required to fully analyze the costs and benefits of the Rule.<sup>50</sup> But OFCCP has abjectly failed to meet this obligation by not assessing and accounting for the foreseeable costs of the Proposed Rule to all workers and LGBT workers in particular, and to the government in terms of increased discrimination. OFCCP has also made inaccurate and unsupported assumptions underlying the asserted benefits of the Proposed Rule. The broad scope of this Proposed Rule demands a much more robust, evidence-based, overall analysis.

**A. OFCCP Must Assess and Account for the Impact of the Proposed Rule on Workers and the Government From Increased Discrimination**

The Proposed Rule is expressly designed to expand the circumstances in which contractors will be excused from complying with the anti-discrimination provision of Executive Order 11246. And, by definition, an exemption permits otherwise unlawful discrimination. Yet, remarkably and inexplicably, OFCCP's discussion of the costs of the Proposed Rule does not even mention the impact the rule would have on the very people who are protected by Executive Order 11246: workers. Assessing the impact of the Proposed Rule on workers is even more critical when considering that OFCCP's authority to enforce Executive Order 11246 rests on "the strong federal interest in ensuring that the cost and progress of [federal] projects [are] not adversely affected by an artificial restriction of the labor pool caused by discriminatory employment practices."<sup>51</sup> As the D.C. Circuit has explained, "it is in the interest of the United

---

<sup>50</sup> Exec. Order No. 12,866 §§ 6-7, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>51</sup> *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169 (4th Cir. 1981).

States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen.”<sup>52</sup> Thus, OFCCP’s failure to analyze the impact of the Proposed Rule on workers and its attendant failure to “examine the relevant data”<sup>53</sup> can be dissected into at least two sub-categories: (1) the costs to workers of increased discrimination and (2) the costs to the federal government of increased discrimination.

While OFCCP is obligated “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible,”<sup>54</sup> OFCCP made no effort to analyze either of these costs. In fact, as noted above in Part I, OFCCP did not even provide minimal data that might permit commenters to weigh in on the costs and necessity of the Proposed Rule, such as: the number of contractors that have historically utilized the Section 204(c) exemption; how many contractors OFCCP expects will seek to avail themselves of the expanded exemption to be codified by the Proposed Rule; the number of workers who have been affected by granted exemptions in the past; or the number of workers that OFCCP expects will be affected by future exemptions. OFCCP should withdraw the Proposed Rule for this reason alone.

Yet even without these data, because the Proposed Rule is expressly designed to broaden the religious exemption in Executive Order 11246, it is certain that if any contractors avail themselves of the expansions provided by the rule, some number of workers will be denied protection from Executive Order 11246 that they would otherwise receive. Among the numerous harms that workers who are subject to discrimination may experience are lost jobs, lost wages, lost benefits, emotional harm, and inconvenience. Upon a finding of discrimination, OFCCP may seek back pay, front pay, salary adjustments, and other make-whole relief including a variety of non-monetary remedies.<sup>55</sup> But regardless of which remedies OFCCP is authorized to provide, OFCCP must consider the full impact of the Proposed Rule on workers and their families.<sup>56</sup> OFCCP must also consider the effect of the Proposed Rule in terms of not only increased government expenditures on unemployment,<sup>57</sup> Medicaid,<sup>58</sup> or other government

---

<sup>52</sup> Am. Wild Horse Pres. Campaign v. Perdue, 837 F.3d 914, 932 (D.C. Cir. 2017).

<sup>53</sup> Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).

<sup>54</sup> Exec. Order No. 13,563 § 1(c).

<sup>55</sup> OFCCP, Directive 2013-04 (July 17, 2013), <https://www.dol.gov/ofccp/regs/compliance/directives/dir310.htm>.

<sup>56</sup> See, e.g., Amanuel Elias & Yin Paradies, *Estimating the mental health costs of racial discrimination*, 16 BMC Public Health 1205 (2016) (finding that racial discrimination costs the Australian economy \$37,900,000,000 annually); Level the Playing Field Inst., *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* (2007) (estimating that the “cost of losing and replacing professionals and managers who leave their employers solely due to workplace unfairness” is \$64,000,000,000 per year). While not all of these expenses, among others, would necessarily be attributable to the Proposed Rule, OFCCP has failed to provide pertinent estimates of the number of contractors or workers it expects to be impacted by the Proposed Rule.

<sup>57</sup> Eligibility for, the amount of, and the duration of unemployment benefits vary by state, but OFCCP could estimate the cost of the Proposed Rule in terms of unemployment benefits given available data on such benefits and data within OFCCP’s control about the number of workers it expects to be affected by the Proposed Rule. For example, an eligible person may receive: up to \$465 per week for up to 26 weeks in Texas or up to \$275 per week

benefits that workers may be forced to utilize on account of discrimination permitted by the Proposed Rule, but also the government's efficient procurement of goods and services.<sup>59</sup>

To the extent that there is uncertainty about the costs of the Proposed Rule with respect to increased discrimination, OFCCP should follow White House guidance to conduct "additional research prior to rulemaking" to address significant uncertainties about net benefits, because "[t]he costs of being wrong may outweigh the benefits of a faster decision."<sup>60</sup> And even if some of those harms are uncertain or challenging to quantify, the magnitude of them is significant and not zero.<sup>61</sup>

That OFCCP must account for these costs is underscored by the fact that the agency has previously taken into account the impact on workers of its regulations. For example, in its 2014 rule implementing Executive Order 11246's protections against sexual orientation and gender identity discrimination, OFCCP explained that the rule's benefits included "equity, fairness, and human dignity," and 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."<sup>62</sup> With respect to direct impacts on employees, OFCCP noted that:

Contractor employees who face discrimination on the basis of sexual orientation or gender identity on the job may experience lower self-esteem, greater anxiety and conflict, and less job satisfaction. Such employees may also receive less pay and have less opportunity for advancement. Job applicants who experience discrimination on the basis of sexual orientation or gender identity may not be considered for a job at all, even though they may be well-qualified.<sup>63</sup>

---

for anywhere between 12 and 23 weeks in Florida, depending on Florida's current unemployment rate. Lisa Guerin, *Collecting Unemployment Benefits in Texas* (n.d.), <https://www.nolo.com/legal-encyclopedia/collecting-unemployment-benefits-texas-32500.html>; Lisa Guerin, *Collecting Unemployment Benefits in Florida* (2016), <https://www.nolo.com/legal-encyclopedia/collecting-unemployment-benefits-florida-32505.html>.

<sup>58</sup> See *infra* Part III.B (discussing studies estimating Medicaid expenditures due to anti-transgender employment discrimination).

<sup>59</sup> See, e.g., *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (recognizing anti-discrimination requirements in federal contracting further the government's "financial and completion interests"); The White House, *FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good for Business* (July 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0> (discussing M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Sexual Orientation and Gender Identity Policies* (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-May-2013.pdf>).

<sup>60</sup> Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4 at 39 (Sept. 17, 2003).

<sup>61</sup> See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008).

<sup>62</sup> *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).

<sup>63</sup> *Id.*

While OFCCP did not quantify these benefits in its rule on sexual orientation and gender identity discrimination, it took them into account – meaning that it would be arbitrary and capricious for OFCCP to ignore such benefits of non-discrimination in the present rulemaking.

Similarly, in 2016, OFCCP determined that its rule respecting Executive Order 11246’s sex discrimination protections would “increase and enhance the promise of equal employment opportunity envisioned under E.O. 11246 for the millions of women and men who work for contractor establishments.”<sup>64</sup> OFCCP noted that clarifying sex discrimination protections would benefit male and female employees, transgender and non-transgender employees, and that it would benefit the estimated 2,046,850 contractor workers likely to become pregnant and others affected by childbirth or pregnancy-related medical conditions.<sup>65</sup> With regard to transgender workers, OFCCP cited research indicating that employment discrimination against this population is widespread.<sup>66</sup>

## **B. OFCCP Must Assess and Account for the Impact of the Proposed Rule on LGBT Workers in Particular**

Not only must OFCCP assess and account for the costs of the Proposed Rule on increased discrimination generally, it must assess those costs with respect to LGBT people in particular. That is because the Proposed Rule is unclear as to whether OFCCP, through any final rule or through enforcement proceedings, will permit an employer to engage in sexual orientation or gender identity discrimination under the religious exemption when, for example, an LGBT employee or applicant violates a contractor’s religious tenets based on the employee’s or applicant’s sexual orientation or gender identity. *See supra* Part II.B. That lack of clarity means not only that OFCCP may find that such discrimination would be exempted, but also that LGBT people and contractors may be led to believe that such discrimination is exempted even if OFCCP does not so find. Thus, the Proposed Rule’s vagueness is likely to invite discrimination and improperly chill workers in protecting their rights.

When President Obama added sexual orientation and gender identity to Executive Order 11246, he did so because LGBT people face widespread discrimination, which negatively affects the economy and the government’s efficient procurement of goods and services.<sup>67</sup> As detailed below, a voluminous body of evidence establishes that LGBT people face widespread discrimination in employment across the United States; that the experience and expectation of discrimination can harm LGBT people in a variety of ways, including by creating the minority stress that is a major cause of health disparities between LGBT and non-LGBT populations; that anti-LGBT employment discrimination is commonly motivated by religion; and that Executive

---

<sup>64</sup> Discrimination on the Basis of Sex; Final Rule, 81 Fed. Reg. 39108, 39110 (June 15, 2016).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (citing Jaime M. Grant, et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 3 (2011), <http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-executive-summary>).

<sup>67</sup> The White House, FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good for Business, *supra*.

Order 11246 has enabled workers to challenge sexual orientation and gender identity discrimination and may be reducing discrimination against LGBT people. By increasing the risk and expectation that LGBT people can be discriminated against, the Proposed Rule serves to increase incidents of discrimination and increase minority stress. In turn, the Proposed Rule risks reducing the health and well-being of LGBT people and exacerbating health disparities between LGBT and non-LGBT populations.

The costs associated with all of these foreseeable harms must be assessed by OFCCP.<sup>68</sup> To the extent they are uncertain, they certainly are not insignificant and must be accounted for. The Medicaid expenditures by states in response to anti-transgender discrimination alone are significant. For example, recent studies have estimated that *annual* Medicaid expenditures stemming from workplace discrimination against transgender people are significant: \$1,253,000 for the state of Texas,<sup>69</sup> \$1,048,000 for Georgia,<sup>70</sup> and \$256,000 for Michigan.<sup>71</sup> While not all of these expenses would necessarily be attributable to the Proposed Rule, OFCCP has failed to provide pertinent estimates of the number of contractors or workers it expects to be impacted by the Proposed Rule.

## **1. LGBT people face widespread employment discrimination**

LGBT-identified people comprise approximately 4.5% of the U.S. adult population; younger people are more likely than older people to identify as LGBT, including 8.2% of millennials (born 1980-1999).<sup>72</sup> LGBT people have faced a long, painful 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 “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>73</sup> The Seventh Circuit has explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”<sup>74</sup> With respect to transgender people, the District of Columbia Court of Appeals has

---

<sup>68</sup> See, e.g., Crosby Burns, *The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt\\_biz\\_discrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf).

<sup>69</sup> Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 63-64 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-Impact-of-Stigma-and-Discrimination-Report-April-2017.pdf>.

<sup>70</sup> Christy Mallory et al., *The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia* 39-40 (2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-of-Discrimination-and-Stigma-against-LGBT-People-in-Georgia-FINAL-4.pdf>.

<sup>71</sup> Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Michigan-Economic-Impact-May-2019.pdf>.

<sup>72</sup> Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%* (2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

<sup>73</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>74</sup> *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).

observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”<sup>75</sup>

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.<sup>76</sup> 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 sexual orientation and gender identity discrimination filed against employers.

*First*, case law, news reports, and other sources contain countless examples of employment discrimination against LGBT people.<sup>77</sup> Recent cases finding unlawful

---

<sup>75</sup> *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

<sup>76</sup> See *Amici Curiae* Brief of Scholars Who Study the LGB Population in Support of the Employees, *Bostock v. Clayton County, 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); Brief of *Amici Curiae* Ilan H. Meyer, PhD, and Other Social Scientists and Legal Scholars Who Study the LGB Population in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (filed Oct. 30, 2017) (hereinafter “Meyer Brief”), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Williams-Masterpiece-Cakeshop-Amici-Brief.pdf>. 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).

<sup>77</sup> See, e.g., Christy Mallory & Brad Sears, *Discrimination Against LGBT People in South Carolina* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/South-Carolina-ND-July-2019.pdf>; Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan*, *supra*; Christy Mallory & Brad Sears, *Discrimination Against LGBT People in Kansas* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Kansas-ND-Report-January-2019.pdf>; Christy Mallory et al., *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, *Discrimination Against LGBT People in Montana* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Montana-ND-September-2017.pdf>; Christy Mallory & Brad Sears, *Discrimination Against LGBT People in Idaho* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Idaho-ND-September-2017.pdf>; Christy Mallory & Brad Sears, *Discrimination Against LGBT People in Wyoming* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Wyoming-ND-September-2017.pdf>; Christy Mallory & Brad Sears, *Discrimination Against LGBT People in Nebraska* (2017), [https://williamsinstitute.law.ucla.edu/wp-content/uploads/NE\\_discrimination\\_Aug\\_2017.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/NE_discrimination_Aug_2017.pdf); Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas*, *supra*; Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Florida* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Florida-Impact-Discrimination-Oct-2017.pdf>; Christy Mallory & Brad Sears, *Discrimination Against LGBT People in Indiana* (2017), [https://williamsinstitute.law.ucla.edu/wp-content/uploads/IN\\_discrimination\\_Aug\\_2017.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/IN_discrimination_Aug_2017.pdf).

discrimination against LGBT workers include the following. A gay machinist was subject to years and years of “derogatory slurs for homosexuals,” such as “faggot get out of here”; “the demeaning treatment made him so upset that his body would shake, his work product suffered, and it became difficult for him to sleep.”<sup>78</sup> 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.”<sup>79</sup> A transgender tenure-track professor was repeatedly denied tenure and ultimately discharged as a result of transitioning while on the job.<sup>80</sup> 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.<sup>81</sup> A prospective orthopedic surgeon saw her offer of employment rescinded after disclosing her transgender identity.<sup>82</sup>

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. For example, one recent survey of a representative sample of the U.S. population found that LGB people are significantly more likely to report experiences of employment discrimination as opposed to their heterosexual peers, with 60% reporting being fired from or denied a job and 48% reporting being denied a promotion or receiving a negative evaluation, compared to 40% and 32% respectively among heterosexuals.<sup>83</sup> Similarly, according to a 2017 survey of a nationally representative sample, “one in five LGBTQ people report[ed] being personally discriminated against because of their sexuality or gender identity when applying for

---

<sup>78</sup> *Patino v. Birken Mfg. Co.*, 41 A.3d 1013, 1018-20 (Conn. 2012). The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Birken”).

<sup>79</sup> *Godfrey v. Branstad*, 56 F. Supp. 3d 976, 979-80 (S.D. Iowa 2014). A jury recently awarded the plaintiff \$1.5 million in damages. See 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/>. The State of Iowa has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “State of Iowa”).

<sup>80</sup> \$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>. The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Clark County School District”).

<sup>81</sup> *Roberts v. Clark County School District*, 215 F. Supp. 3d 1001, 1015-16 (D. Nev. 2016). The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Southeastern Oklahoma State University”).

<sup>82</sup> *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 515 (D. Conn. 2016). The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Hospital of Central Connecticut”).

<sup>83</sup> Ilan H. Meyer, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US 1* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

jobs” and 22% said they had experienced such discrimination in pay or promotion.<sup>84</sup> A 2016 nationally representative survey found “25.2 percent of LGBT respondents ha[d] experienced discrimination because of their sexual orientation or gender identity *in the past year*.”<sup>85</sup>

*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.<sup>86</sup> 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.<sup>87</sup> Indeed, as noted elsewhere in this section, other research finds employment discrimination against lesbians.

*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 fictitious lesbian and bisexual applicants received 30% fewer callbacks than the control resumes.<sup>88</sup> 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).<sup>89</sup> 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

---

<sup>84</sup> NPR et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* 29 (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

<sup>85</sup> Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways* (2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-livessubtle-significant-ways/> (emphasis added).

<sup>86</sup> 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).

<sup>87</sup> *See, e.g.*, Klawitter, *supra*, at 23-24; Badgett et al., *Bias in the Workplace, supra*, at 585.

<sup>88</sup> 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).

<sup>89</sup> 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\\_Full\\_Report\\_1.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_Full_Report_1.pdf); *see also* Make the Road N.Y., *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination* 4, <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1020&context=institutes> (2010).

perceived as cisgender while not offering an interview to at least one of the more qualified applicants perceived as transgender.<sup>90</sup>

*Fifth*, administrative charges filed alleging sexual orientation or gender identity discrimination in employment demonstrate a high degree of perceived discrimination. Since 2013, the EEOC has allowed workers to file sex discrimination charges that allege sexual orientation or gender identity discrimination. Recently, Badgett and colleagues analyzed over 9,000 such charges filed with the EEOC or an analogous state or local agency.<sup>91</sup> 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. Many of these charges were filed against employers in low-wage industries, such as the retail sector and the food services industry. Individuals living in states without state-level protections against sexual orientation and gender identity 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.<sup>92</sup>

## **2. Prior to the issuance of the Proposed Rule, Executive Order 11246’s protections against sexual orientation and gender identity discrimination were operating as intended**

In two working papers, a team of researchers quantitatively and qualitatively assessed the impact of Executive Order 11246 as it relates to sexual orientation and gender identity, by examining charges of sexual orientation or gender identity discrimination against contractors. In the quantitative study, Badgett and colleagues found evidence that Executive Order 11246 “achieved at least one intended impact, increasing the use of the enforcement process, and possibly another—reducing discrimination by federal contractors.”<sup>93</sup> In particular, the authors found that the number of sexual orientation and gender identity charges filed with the EEOC or a state or local agency surged upward after President Obama amended Executive Order 11246 in 2014, indicating that the surge was driven by President Obama’s action. In particular, for federal contractors, the probability of a charge rose by 0.6% from a 2% average charge rate, or a 30% increase.<sup>94</sup> This surge occurred in states with and without existing statutory protections against sexual orientation discrimination,<sup>95</sup> indicating that the Executive Order empowered employees to

---

<sup>90</sup> Rainey & Imse, *supra*, at 6.

<sup>91</sup> M. V. Lee Badgett et al., Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination (2018); *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*, 66 J. Homosexuality \_\_ (2019).

<sup>92</sup> Baumle et al., *supra*, at 6.

<sup>93</sup> M.V. Lee Badgett et al., The Impact of a Ban on Sexual Orientation and Gender Identity on Federal Contractors 35-36 (Mar. 2019) (on file with the Department).

<sup>94</sup> *Id.* at 36.

<sup>95</sup> *Id.* at 28.

seek recourse against anti-LGBT discrimination even if they could have availed themselves of state-level protections.<sup>96</sup>

Overall, 18% of the charges were deemed meritorious,<sup>97</sup> leading the authors to conclude:

The fact that one in five charges filed against these establishments resulted in a merit outcome suggests that some of those additional charges reflect discrimination that might not have been reported in the absence of the executive order. As a result, the order is likely to have led to some charging parties receiving benefits or a finding of discrimination that they would not have had in the absence of the executive order.<sup>98</sup>

Contractors in states without state-level protections against sexual orientation and gender identity discrimination – i.e., the employers that faced the biggest change in policy following the addition of sexual orientation and gender identity protections to Executive Order 11246 – “saw a lower probability of a charge having merit after the executive order, falling from 22.5% to 14.7%.”<sup>99</sup> Yet, analysis of charge quality implied that “it is plausible that the probability of merit fell because federal contractors were less likely to discriminate after the executive order[,]”<sup>100</sup> but more research is needed including with respect to data from OFCCP compliance reviews.<sup>101</sup>

In the qualitative study, Baumle and colleagues analyzed 964 charges to, among other things, identify the different experiences of discrimination claimed, as well as to assess differences between federal contractors and non-contractors. The authors found a number of differences in terms of gender and race, and between contractors and non-contractors on a variety of particular types of discrimination experiences, but overall “[b]oth the quantitative charge database and our analysis of the charge narratives reveal that SOGI [sexual orientation and gender identity] charges most commonly involve issues of discharge, harassment, and/or terms and conditions of employment, and that these issues were similarly distributed for federal contractors and noncontractors.”<sup>102</sup> Moreover, the authors identified a number of challenges for LGBT employees employed by contractors and non-contractors alike, such as possible fear and

---

<sup>96</sup> *Id.* at 36.

<sup>97</sup> *Id.* at 30. The percentage of these charges found to be meritorious is comparable to the proportion of other types of charges that are meritorious. See EEOC, All Statutes (Charges filed with EEOC) FY 1997 - FY 2018, <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Sept. 15, 2019); see also EEOC, LGBT-Based Sex Discrimination Charges, [https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt\\_sex\\_based.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm) (last visited Sept. 15, 2019). In addition, we observe that there are many reasons that employers will not settle or enforcement agencies will not find a charge meritorious – e.g., a lack of witnesses – but that does not mean that the discrimination did not occur.

<sup>98</sup> *Id.* at 36.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 36-37.

<sup>101</sup> *Id.* at 37-38.

<sup>102</sup> Amanda K. Baumle et al., Experiences with Sexual Orientation and Gender Identity Employment Discrimination: Analyzing EEOC Discrimination Charge Narratives 38 (Mar. 2019) (on file with Department).

uncertainty over using internal grievance procedures – fear and uncertainty that will likely be exacerbated by the Proposed Rule.

Taken together, these studies indicate that Executive Order 11246 is largely working as intended by creating accountability for sexual orientation and gender identity discrimination and may in fact be reducing such discrimination.

### **3. Stigma and discrimination adversely impact the health and well-being of LGBT people**

Employment discrimination adversely impacts LGBT people’s financial security, health, well-being, and dignity. An individual who is fired from or not hired for a job for discriminatory reasons, for example, must at a minimum experience the difficulty of searching for a new job, assuming one for which he or she is qualified exists within a reasonable distance from their home. If such a job does not exist, the person may face either long-term unemployment or may have to move, if doing so is even feasible. When job loss means that someone will not have the resources to buy food or keep shelter, such loss as a result of discrimination can be absolutely devastating, leading to malnutrition and homelessness. If this person has dependents such as children or an elder parent, a job loss can reverberate and devastate a whole family. Employment discrimination can plunge LGBT people and their families into, or can intensify, poverty. Widespread employment discrimination against LGBT people, moreover, likely contributes to the greater vulnerability to poverty for some groups of LGBT people than for similar heterosexual people, particularly for transgender and bisexual people and for people in same-sex couples.<sup>103</sup>

Discrimination related to sexual orientation or gender identity can also be psychologically damaging to the victim, because such discrimination carries a strong symbolic message of disapprobation of something core to that person’s identity. This is true of all forms of discrimination, from slurs and harassment to more tangible employment actions such as firing. According to one recent nationally representative survey, among LGBT people who experienced sexual orientation or gender identity discrimination in the past year: 68.5% reported that discrimination at least somewhat negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their physical well-being; 47.7% reported that discrimination negatively impacted their spiritual well-being; 52.8% reported that discrimination negatively impacted their work environment; and 56.6% reported that it negatively impacted their neighborhood and community environment.<sup>104</sup>

In addition, anti-LGBT stigma – manifested through employment discrimination, for example – drives well-documented health disparities between the LGBT and non-LGBT populations, including: disproportionately high prevalence of psychological distress, depression,

---

<sup>103</sup> See, e.g., M.V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S.*, 37 Pop. Research & Pol’y Rev. 667, 691 (2018); Christopher Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States* 6 (forthcoming 2019) (on file with commenters).

<sup>104</sup> Singh & Durso, *supra*.

anxiety, substance-use disorders, and suicidal ideation and attempts among LGBT people – many of which are two to three times greater among sexual and gender minorities than the non-LGBT majority.<sup>105</sup> According to the Institute of Medicine, “[c]ontemporary health disparities based on sexual orientation and gender identity are rooted in and reflect the historical stigmatization of LGBT people.”<sup>106</sup> Likewise, the Office of Disease Prevention and Health Promotion at the U.S. Department of Health and Human Services has explained: “[r]esearch suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights” and that “[s]ocial determinants affecting the health of LGBT individuals largely relate to oppression and discrimination.”<sup>107</sup>

The relationship between stigma and health has most clearly been articulated in the “minority stress” research literature. The minority stress model, which the Institute of Medicine has recognized to be a core perspective for understanding LGBT health,<sup>108</sup> describes how LGBT people experience chronic stress stemming from their stigmatization. While stressors – such as loss of a job or housing – are ubiquitous in society and are experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other things being equal). This excess stress exposure confers an elevated risk for diseases caused by stress, including many mental and physical disorders.<sup>109</sup>

When an LGBT person faces employment discrimination because of their sexual orientation or gender identity, that is a “prejudice event,” a type of minority stress, that has effects that are both tangible (i.e., the implications of needing to find a new job) and symbolic (i.e., the personal rejection and reverberation of social disapprobation). Further, employment discrimination – and even the threat of employment discrimination – increases expectations of future rejection and discrimination among LGBT people. This expectation is another form of minority stress because it leads to vigilance by LGBT people seeking to defend themselves against potential discrimination. Unlike tangible prejudice events, expectations of rejection and discrimination are stressful even in the absence of a specific event because they are based on what the LGBT person has learned from repeated exposure to a stigmatizing social environment. For example, many LGBT people experience tremendous stress related to whether to come out at

---

<sup>105</sup> See, e.g., Office of Disease Prevention and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Sept. 3, 2019); Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 62 (2011).

<sup>106</sup> Institute of Medicine, *supra*, at 32.

<sup>107</sup> Office of Disease Prevention and Health Promotion, *supra*; see also Centers for Disease Control and Prevention, *Stigma and Discrimination*, <https://www.cdc.gov/msmhealth/stigma-and-discrimination.htm> (last visited Sept. 3, 2019).

<sup>108</sup> Institute of Medicine, *supra*, at 20.

<sup>109</sup> See Brandon L. Velez et al., *Testing the tenets of minority stress theory in workplace contexts*, 60 J. Counseling Psych. 532 (2013); Craig R. Waldo, *Working in a majority context: A structural model of heterosexism as minority stress in the workplace*, 46 J. Counseling Psych. 218 (1999); Meyer Brief, *supra*, at 12-26 & nn. 14-57.

work and, if they decide against doing so, they experience additional stress related to trying to conceal their LGBT identity. Thus, LGBT people become vigilant in order to protect themselves from mistreatment in employment settings.<sup>110</sup>

Research has shown that in U.S. regions where LGB people have better social and legal conditions, they also have better health and lesser health disparities compared with heterosexuals.<sup>111</sup> Because minority stress stems from societal stigma, its root can only be eliminated through social and structural intervention. Anti-discrimination laws that prohibit employers from discriminating against LGBT people propel improved social and legal conditions. Indeed, for example, research finds that awareness of legislation prohibiting discrimination on the basis of sexual orientation is associated with a decrease in the rate of such discrimination in interpersonal employment contexts.<sup>112</sup> But just as laws can help eradicate and dismantle stigma and enhance a nation's health, laws can "be a part of the problem by enforcing stigma."<sup>113</sup>

#### **4. Anti-LGBT discrimination is commonly motivated by religion**

While many people and institutions of faith are welcoming and affirming of LGBT people – and many LGBT people are themselves people of faith – employment discrimination against LGBT people is commonly religiously motivated.<sup>114</sup> Such discrimination commonly results in the discharge of LGBT people. For example, in *E.E.O.C. v. R.G. & G.R. Funeral Homes*, a funeral home director was fired after disclosing her intent to transition gender, with her employer stating that he (the employer) would be "violating God's commands" if he were to allow her to "deny [her] sex while acting as a representative of [the] organization" or if she were to "wear the uniform for female funeral directors while at work."<sup>115</sup> In *Erdmann v. Tranquility Inc.*, a worker alleged he was forced to resign after being told by a religious supervisor that discovery of his identity as a gay man "changed everything because . . . we view homosexuals as immoral, indecent . . . [and that he] 'was going to hell'[,]" going as far as to require that this employee out himself to all of his co-workers and that he describe his intention

---

<sup>110</sup> See sources cited *supra* note 109.

<sup>111</sup> Mark Hatzenbuehler et al., *State Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 Am. J. Pub. Health 2275 (2009); Mark Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 Am. J. Pub. Health 452 (2010).

<sup>112</sup> Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 Psychology, Pub. Pol'y, & L. 191-205 (2013).

<sup>113</sup> Scott Burris, *Stigma and the Law*, 367 Lancet 529 (2006); Link & Hatzenbuehler, *Stigma as an Unrecognized Determinant of Population Health: Research and Policy Implications*, 41 J. Health Politics, Pol'y, & L. 653 (2016).

<sup>114</sup> See, e.g., Human Rights Watch, "All We Want is Equality: Religious Exemptions and Discrimination against LGBT People in the United States (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/lgbt0218\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf).

<sup>115</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

not “to go to bed with everybody [in that workplace.]”<sup>116</sup> In *Barrett v. Fontbonne Academy*, after accepting the position of food service director at a religious school, the plaintiff listed his husband as his emergency contact on a new employee form; the school then rescinded the offer of employment, “citing an expectation that its employees will model its values, including the Catholic Church’s opposition to same-sex marriage.”<sup>117</sup> Similarly, a guidance counselor who had spent the past 40 years working at a school was fired after officials discovered her marriage to a woman, calling it a “violation of her contract and ‘contrary to the teachings of the Catholic Church.’”<sup>118</sup>

Similarly, employers have adopted and publicized discriminatory hiring criteria. For example, a religious theme park – that had received \$18.25 million in tax credits from Kentucky – advertised that prospective applicants must confirm their agreement with the organization’s “statement of faith[,]” which included opposition to LGBT rights.<sup>119</sup>

Religiously motivated discrimination also manifests as harassment. For example, in *Roberts v. United Postal Serv.*, a lesbian proved unlawful sexual orientation discrimination based on years of harassment by her supervisor, who, among other things, repeatedly told the plaintiff “that her sexual orientation as a lesbian was evil and needed to be changed in accordance with religious dictates.”<sup>120</sup> In *Salemi v. Gloria’s Tribeca, Inc.*, a lesbian proved unlawful religious and sexual orientation discrimination by an employer that “subject[ed the plaintiff] to an incessant barrage of offensive anti-homosexual invective[,]” including statements “that homosexuality is ‘a sin,’ and that ‘gay people’ were ‘going to go to hell’[.]”<sup>121</sup>

As these examples illustrate, discrimination against LGBT people in the workplace is often motivated by, animated by, or couched in terms of religion; moreover, such discrimination can be, and is, framed as LGBT people contravening particular religious tenets. Other research indicates that anti-LGBT stigma and discrimination stems largely from religious views. For

---

<sup>116</sup> *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1156-57 (N.D. Cal. 2001). The defendant Tranquility Inc. has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Tranquility Inc.”).

<sup>117</sup> *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015).

<sup>118</sup> Janelle Griffith, *Gay guidance counselor sues Indianapolis Archdiocese for discrimination after being fired*, NBC News (July 29, 2019), <https://www.nbcnews.com/feature/nbc-out/gay-guidance-counselor-sues-indianapolis-archdiocese-after-being-fired-school-n1035941>. The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “Roman Catholic Archdiocese of Indianapolis”).

<sup>119</sup> Mark Joseph Stern, *Non-Christians Need Not Apply*, Slate (Oct. 27, 2014), <https://slate.com/news-and-politics/2014/10/ken-ham-ark-encounter-theme-park-religious-discrimination-may-block-kentucky-tax-credit.html>.

<sup>120</sup> *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344 (E.D.N.Y. 2015). The defendant has been a federal contractor. See Federal Procurement Data System – Next Generation, [https://www.fpds.gov/fpdsng\\_cms/index.php/en/](https://www.fpds.gov/fpdsng_cms/index.php/en/) (search “United Parcel Service”).

<sup>121</sup> *Salemi v. Gloria’s Tribeca, Inc.*, 982 N.Y.S.2d 458, 459-60 (N.Y. App. Div. 2014) (citations omitted). Plaintiff ultimately prevailed on her claims before a jury, with an appellate court later noting that while her employer had a “right to express his religious beliefs and practice his religion, [he could not] discriminate against his employees based on . . . sexual orientation.” *Id.* at 460.

example, according to a 2013 survey by Pew Research Center, “a significant share of the public believes that homosexuality should be discouraged and that same-sex marriage should not be legal. Much of this resistance is rooted in deeply held religious attitudes, such as the belief that engaging in homosexual behavior is a sin.”<sup>122</sup> More specifically, according to Pew:

The religious basis for opposition to homosexuality is seen clearly in the reasons people give for saying it should be discouraged by society. By far the most frequently cited factors – mentioned by roughly half (52%) of those who say homosexuality should be discouraged – are moral objections to homosexuality, that it conflicts with religious beliefs, or that it goes against the Bible. No more than about one-in-ten cite any other reasons as to why homosexuality should be discouraged by society.<sup>123</sup>

Research finds, moreover, that anti-LGBT views are especially associated with certain religious affiliations.<sup>124</sup> Further, in the largest survey to date of transgender people (with more than 27,700 respondents), 19% of respondents who had been part of a faith community were rejected from it, and 39% of respondents who had been part of a faith community left due to fear of rejection.<sup>125</sup> Respondents who experienced religious rejection, in turn, had higher prevalence of suicide thoughts and attempts than respondents who had not experienced such rejection.<sup>126</sup>

This evidence powerfully indicates that the Proposed Rule, which would expand the scope of the religious exemption in Executive Order 11246 as well as the pool of entities eligible for the exemption, stands to exacerbate the employment discrimination and health disparities facing LGBT people. This risk is underscored by OFCCP’s failure to limit its definition of “religious tenets” to tenets defined without reference to race, color, sex, sexual orientation,

---

<sup>122</sup> Pew Research Center, A Survey of LGBT Americans (2013), <https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/> (citing

<sup>123</sup> Pew Research Center, In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable’ (2013), <https://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/>.

<sup>124</sup> See, e.g., Andrew Flores et al., *Public Opinion about Transgender People and Policies*, in *The Remarkable Rise of Transgender Rights* (Jami K. Taylor et al. eds., 2018); Andrew Flores et al., *The Factors Underlying Public Opinion About Transgender Rights*, in *The Remarkable Rise of Transgender Rights*, *supra*; Andrew L. Whitehead & Joseph O. Baker, *Homosexuality, Religion, and Science: Moral Authority and the Persistence of Negative Attitudes*, 82 *Sociological Inquiry* 487 (2012); Darren E. Sherkat, *Religion, politics, and support for same-sex marriage in the United States, 1988-2008*, 40 *Soc. Sci. Research* 167 (2011); Andrew L. Whitehead, *Sacred Rites and Civil Rights: Religion’s Effect on Attitudes Toward Same-Sex Unions and the Perceived Cause of Homosexuality*, 91 *Soc. Sci. Quarterly* 63 (2010); Laura R. Olson et al., *Religion and Public Opinion about Same-Sex Marriage*, 87 *Soc. Sci. Quarterly* 340 (2006).

<sup>125</sup> Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey 77* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>126</sup> Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey 18-19 & tab. 6* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Suicide-Sept-2019.pdf>.

gender identity, or national origin, among other limitations necessary to be faithful to the text of Section 204(c).

**C. Because the Proposed Rule Provides Less Clarity, OFCCP Incorrectly Asserted the Proposed Rule Would Provide Cost Savings Related to Clarity**

Among other inflated or speculative benefits cited by OFCCP in support of the Proposed Rule, OFCCP is incorrect to reason that: “[i]f the proposed rule increases clarity for federal contractors, this impact most likely yields a benefit to taxpayers (if contractor fees decrease because they do not need to engage third-party representatives to interpret OFCCP’s requirements)”]; “by increasing clarity for both contractors and for OFCCP enforcement, the proposed rule may reduce the number and costs of enforcement proceedings by making it clearer to both sides at the outset what is required by the regulation”; and that “[t]his would also most likely represent a benefit to taxpayers (since fewer resources would be spent in OFCCP administrative litigation and appeals).” 84 Fed Reg. at 41,687. OFCCP is incorrect to make these assumptions because the Proposed Rule does not provide more clarity than the prior guidance. Indeed, as explained above, the Proposed Rule is vague and invites uncertainty and confusion.

**IV. CONCLUSION**

For all of the reasons above, OFCCP should withdraw the Proposed Rule in its entirety and reinstate its clear prior interpretation of Section 204(c). At the very least, OFCCP should conduct a full regulatory impact analysis that analyzes the potential harm to workers and the government due to increased discrimination, then open a new comment period of at least 60 days after providing that analysis and the data and information requested above to the public, permitting commenters to submit additional or revised comments.

Respectfully submitted

M.V. Lee Badgett, Ph.D.  
Professor of Economics  
University of Massachusetts Amherst  
Williams Distinguished Scholar  
Williams Institute  
UCLA School of Law

Courtney Cahill, J.D., Ph.D.  
Donald Hinkle Professor and Associate Dean for Research  
Florida State University  
College of Law

Jessica Clarke, J.D.  
Professor of Law  
Vanderbilt Law School

Andrew R. Flores, Ph.D.  
Assistant Professor of Government  
American University  
Visiting Scholar  
Williams Institute  
UCLA School of Law

Nanette Gartrell, M.D.  
Visiting Distinguished Scholar  
Williams Institute  
UCLA School of Law  
Guest Appointment  
University of Amsterdam

Marie Amélie George, J.D., Ph.D.  
Assistant Professor of Law  
School of Law  
Wake Forest University

Jody L. Herman, Ph.D.  
Scholar of Public Policy  
Williams Institute  
UCLA School of Law

Arthur S. Leonard, J.D.  
Robert F. Wagner Professor of Labor & Employment Law  
New York Law School  
Editor-in-Chief, LGBT Law Notes

Christopher P. Lu, J.D.  
Senior Fellow, University of Virginia Miller Center  
Former U.S. Deputy Secretary of Labor (2014-2017)

Christy Mallory, J.D.  
Director of State & Local Policy  
Williams Institute  
UCLA School of Law

Ilan H. Meyer, Ph.D.  
Distinguished Senior Scholar for Public Policy  
Williams Institute  
UCLA School of Law  
Professor Emeritus of Sociomedical Sciences  
Columbia University

Patrick O. Patterson, J.D.  
Law Office of Patrick O. Patterson, S.C.  
Former Deputy Director, Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
Former Senior Council to Chair Jacqueline Berrien (2010-2014)  
U.S. Equal Employment Opportunity Commission

Adam P. Romero, J.D.  
Assistant Adjunct Professor of Law  
UCLA School of Law  
Arnold D. Kassoy Scholar of Law  
Williams Institute  
UCLA School of Law

Brad Sears, J.D.  
Associate Dean for Public Interest Programs  
David Sanders Distinguished Scholar of Law and Policy  
UCLA School of Law

Elizabeth W. Sepper, J.D., L.L.M.  
Professor of Law  
University of Texas at Austin

Patricia A. Shiu, J.D.  
Former Director, Office of Federal Contract Compliance Programs (2009-2016)  
U.S. Department of Labor

Brian Soucek, J.D., Ph.D.  
Professor of Law  
Martin Luther King Jr. Hall Research Scholar  
University of California, Davis

Luis A. Vasquez, J.D.  
Daniel H. Renberg Law Fellow  
Williams Institute  
UCLA School of Law

Deborah Widiss, J.D.  
Professor of Law  
Associate Dean for Research  
Indiana University Maurer School of Law

Bianca D.M. Wilson, Ph.D.  
Senior Scholar of Public Policy  
Williams Institute, UCLA School of Law  
Affiliated faculty, UCLA California Center for Population Research