



ADVANCING FAITH, FAMILY AND FREEDOM

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Submitted electronically

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Office of Federal Contract Compliance Programs

Room C-3325

200 Constitution Avenue NW

Washington, DC 20210

Re: Public comment regarding the Proposed Rule “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption”

RIN: 1250-AA09

Dear Sir,

Family Research Council welcomes the proposed rule, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” and writes to commend the Department of Labor’s (DOL) Office of Federal Contract Compliance (OFCCP). Protecting religious liberty is intrinsic to the fabric of our society and has been from the foundation of this nation. The government must treat religious adherents with neutrality, not hostility, allowing those that practice a faith to be treated equally before the government.<sup>1</sup> The protections laid out in the DOL’s proposed rule reaffirm the foundational principle that faith adherents must be afforded the same opportunities to participate in federal contracting as any other person. These protections are not new to government contracting, and they should continue to be affirmed—as they are in this proposed rule—so that religious organizations may remain free and able to contribute to the public good of our society.

### **History Leading Up to the Proposed Rule**

The legal framework on which the proposed rule’s religious freedom protections rely goes back decades. In 1964, President Lyndon Johnson signed the Civil Rights Act into law. In Title VII of that law, Congress provided important protections for religious employers. With the passage of the Equal Opportunity Act of 1972, Congress broadened these protections with a comprehensive definition of “religion,” expanded the religious organization exemption to educational institutions, and increased the exemption’s scope to cover all activities of faith-based

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<sup>1</sup> The Free Exercise Clause, U.S. Const., amend. I, protects against governmental hostility which is masked as well as overt. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint).

organizations—not just those activities religious in nature. The passage of the Equal Opportunity Act indicated Congress’s holistic view of religious protections for faith-based organizations. When this broader exemption was challenged, the Supreme Court in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) rejected the idea that it violated the Establishment Clause and reaffirmed the First Amendment’s broad protection for religious organizations to operate freely in our country.

The executive branch also recognized the importance of protecting religious adherents from discrimination in government contracting. When it was originally issued in 1965, Executive Order (EO) 11246 mandated that all government contracts include a provision stating that the contractor would not discriminate based on race, creed, color, or national origin.<sup>2</sup> Two years later, President Johnson expanded EO 11246 to prohibit, as does Title VII, discrimination on the bases of sex and religion.<sup>3</sup> President Johnson understood the need to ensure that faith-based employers had a level playing field of access to and competition for opportunities to work with the government. He took this into account in EO 11246 regarding federal contracting.

Such careful consideration of religious liberty continued to be reflected in 1978 when the DOL incorporated the religious educational institution exemption into EO 11246, and in 2002, when President Bush amended EO 11246 to include the religious organization exemption—which has since also been implemented by DOL’s regulations.

Section 204(c) of EO 11246 is an exemption from nondiscrimination requirements that mirrors Section 702 of Title VII, stating that otherwise applicable requirements “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.”<sup>4</sup> As the U.S. Court of Appeals for the Third Circuit recognized, “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”<sup>5</sup> Quite obviously, the purpose of the exemption allowing faith-based employers to hire in accordance with their faith is to enable their organization to carry out the mission compelled by their religion. This leaves organizations and the people running them free to live out their faith while contributing to the public good—such as when they participate in a federal contract.

Yet President Obama cast into doubt the religious freedom protections in EO 11246 when he issued EO 13672, adding sexual orientation and gender identity nondiscrimination provisions into federal contracting requirements. Until recently, the question of whether and how a religious organization facing such requirements would remain free to operate according to its beliefs continued to loom large.

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<sup>2</sup> Sec. 202(1), E.O. 11246, 30 FR 12319, 12320 (Sept. 28, 1965).

<sup>3</sup> See sec. 3, E.O. 11375, 32 FR 14303 (Oct. 17, 1967).

<sup>4</sup> Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), available at <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

<sup>5</sup> *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).

Now, with this proposed rule, the Trump administration DOL—drawing upon longstanding protections in federal law and court decisions—is seeking to clarify that religious freedom shall be unequivocally protected in federal contracting.

### **We Commend the Proposed Rule’s Affirmation of First Amendment Principles Ensuring Equal Treatment for Religious Beliefs**

The Supreme Court has made the government’s responsibility to guard and protect religious liberty quite clear. For example, in *Trinity Lutheran Church v. Comer*, a church that ran a daycare center wanted to make their playgrounds safer for children but was denied access to a government grant program for nonprofit organizations that would have allowed them to do so, simply because they were a church.<sup>6</sup> The Supreme Court made clear that Trinity Lutheran Church had just as much a right to participate in the grant program as any other daycare center; their status as a church did not prevent them from participating on an equal playing field with secular organizations when trying to obtain such grants. Likewise, in the current proposed rule, the Trump administration DOL is simply reaffirming a principle the Supreme Court held (by a 7-2 vote) to be squarely in line with the First Amendment.

*Trinity Lutheran* is not the only case in which the Supreme Court recognized that abandoning one’s religious practices could not be a condition of receiving governmental benefits. In *Thomas v. Review Board*, the Court held as unconstitutional the denial of unemployment benefits to a Jehovah Witness who voluntarily quit his job because his religious beliefs prevented him from working on armaments.<sup>7</sup> Importantly, the Court held that a person could not be compelled to choose between exercising the First Amendment and participating in an otherwise public program.

The *Thomas* Court noted that when the government denies an important benefit to a person due to conduct mandated by their religious belief, the government places substantial pressure on a person to modify his or her behavior. As the justices said, “[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”<sup>8</sup> The Court emphasized that the government cannot require a religious adherent to abandon his beliefs in order to receive an important benefit. The proposed rule now under consideration merely implements this longstanding First Amendment principle.

If a contractor must forfeit his beliefs in order to enter into a contract with the government, his or her free exercise is being burdened—just like the burdens condemned by the Court in *Thomas* and *Trinity Lutheran*. DOL’s proposed rule sets to alleviate a similar concern for those who adhere to their religion and wish to participate in a federal contract. The government would be substantially infringing upon the free exercise rights of those religious organizations if the cost of participating in a federal contract is abandoning their faith.

Some religious organizations previously told OFCCP that they were reluctant to participate as federal contractors because they were uncertain of the scope of the religious exemption

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<sup>6</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2014 (2017).

<sup>7</sup> *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 709 (1981).

<sup>8</sup> *Id.*

contained in section 204(c) of EO 11246 and codified in OFCCP's regulations. This proposed rule provides clarity while implementing principles from new legal developments that affirm neutrality between those who adhere to a religion and those who do not. Discrimination that prevents religious adherents from participating in government programs without first abandoning their faith is precisely the type of discrimination that the Court struck down in *Trinity Lutheran* and *Thomas*.

The government contracting context is similar to those governing grant programs and unemployment benefits—all deal with the question of what requirements the government might place on a person or entity as a condition of interfacing with that government. The Supreme Court has already found the choice between participating in a government program or adhering to one's religious belief an infringement on the First Amendment. The proposed rule simply implements protections against a person being forced to defy their religious teaching in order to contract with the government and allows faith-based organizations to live out their constitutional right to advance their religious message.<sup>9</sup>

### **We Commend the Proposed Rule's Broad Protections for Religious Liberty**

The proposed rule also makes clear that while it is upholding religious liberty, it is not giving religious employers any advantage in contracting nor a mechanism for acting improperly. Rather, it is ensuring a level playing field for all those who would like to participate in a federal contract. The proposed rule explicitly states that while faith-based employers can employ individuals in accordance with their religious beliefs, they may not discriminate based on other protected bases.

It also requires that a particular employment decision must be a sincere exercise of religious belief and not an insincere pretext for a secular purpose. Insincere pretexts do not qualify for protection. By being faithful to Supreme Court precedent and important standards of religious liberty, the proposed rule will allow the faithful to live out their beliefs while also being afforded the opportunity to participate in federal contracting programs.

### **We Urge One Note of Caution About the Proposed Rule**

While this proposed rule provides crucial legal clarification on the issue of religious liberty and is a good step forward, it will not alleviate all concern over the current version of EO 11246. The sexual orientation and gender identity provisions currently in federal contracting requirements will continue to cause a cloud of legal uncertainty to hover over entities seeking to live out their religious beliefs in the areas of marriage and sexuality. While we recognize that this problem is outside the scope of the DOL's ability to solve with this proposed rule, it is within the power of the Trump administration to fix it, and we urge the administration to do so.

### **Conclusion**

Religious liberty is a vital cornerstone principle of our nation. It is imperative that it is closely guarded and upheld. The Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it, and

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<sup>9</sup> See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

thus it should be protected for that subset of contractors and would-be contractors who may wish to avail themselves of the protections in this proposed rule. We commend the DOL's OFCCP for this effort, and we urge that this proposed rule be adopted.

Respectfully submitted,

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