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Subj: Proposed Rescission of Legal Requirements Regarding Equal Opportunity Clause's Religious Exemption, RIN No. 1250-AA09

Dear Ms. Williams:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Office of Federal Contract Compliance Programs' (OFCCP) proposal, published at 86 Fed. Reg. 62115 (Nov. 9, 2021), to rescind regulations on religious exemptions for federal contractors that were published on December 9, 2020. 85 Fed. Reg. 79324 ("2020 regulations").

There are three principal problems, in our view, with the proposal to rescind the 2020 regulations.

First, the proposed rescission relies, in part, on the erroneous proposition that the exemptions for religious organizations in Title VII of the Civil Rights Act of 1964 (the Act) are only a defense to *religious* discrimination claims, a proposition that cannot be squared with the text of Title VII or case law.

Second, the proposal relies on the faulty premise that only those organizations that are "primarily religious" are eligible for the religious exemption, a test that necessarily requires a constitutionally impermissible government inquiry into the degree of an organization's religiosity.

Third, and perhaps most importantly, the proposal eliminates regulatory language that, in our view, clearly and faithfully reflects the meaning and scope of the applicable statutory

religious exemption. The proposal to entirely rescind those regulations, and to issue nothing in their place, would leave stakeholders without any guidance as to how the religious exemption for federal contractors will or should be interpreted or implemented.

In Part I of these comments, we discuss the text of the Title VII religious exemptions—the text upon which the religious exemption for federal contractors is modeled—and we explain why that text supports application of the religious exemption to more than just religious discrimination claims. In Part II, we discuss additional support for this conclusion in case law. In Part III, we discuss contrary court decisions and explain why, in our view, those decisions are flawed. In Part IV, we explain the problems with applying a "primarily religious" test to religious organizations. In Part V, we comment on the virtues of the 2020 regulations and the adverse consequences of rescinding them.

I. Analysis of the Statutory Text

OFCCP has long applied, and continues to apply, Title VII in ascertaining the meaning and scope of the religious exemption applicable to federal contractors. Our analysis of the OFCCP religious exemption therefore begins, as it must, with the text of Title VII.

Title VII has two exemptions that apply to religious employers. Section 702(a) of the Act, 42 U.S.C. § 2000e-1(a), provides:

> *This title [subchapter] shall not apply* to an employer with respect ... to 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.[1] [Emphasis added.]

Section 703(e) of the Act, 42 U.S.C. § 2000e-2(e), provides:

> *Notwithstanding any other provision of this title [subchapter]* ... (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of

[1] Prior to its amendment in 1972, section 702(a) referred to the employment of individuals of a particular religion to perform work for an organization connected with the carrying on of the organization's "*religious* activities." [Emphasis added.] In 1972, Congress amended section 702 to drop the word "religious" before "activities." As a result, the current version of section 702(a) applies to *all* employees of a religious employer, not just those employees engaged in religious activities. *See*, *e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (applying the section 702(a) exemption to a building engineer); *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 192 (4th Cir. 2011) (noting that in 1972, Congress broadened section 702(a) "to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature"); *Little v. Wuerl*, 929 F.2d 944, 950-51 (3d Cir. 1991) (noting that the current religious exemptions cover all employees, not just those engaged in religious activities); *Newbrough v. Bishop Heelan Catholic Schools*, No. C13-4114, 2015 WL 759478 (N.D. Iowa Feb. 23, 2015) (applying the section 702(a) exemption to a religious school system's director of finance).

> a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[2] [Emphasis added.]

The phrase "*This title* shall not apply" in the first of these exemptions, and the phrase "Notwithstanding any other provision of *this title*" in the second, mean that when a religious employer makes an employment decision "with respect to the employment of individuals of a particular religion," then that employer is exempt from *all of Title VII*.[3] Use of the term "title" in each exemption requires that result.

Importantly, section 701 of the Act, 42 U.S.C. § 2000e, states that "[f]or the purposes of *this title [subchapter]* … [t]he 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 observance or practice without undue hardship on the conduct of the employer's business" [emphasis added]. The reference to "observance" and "practice" makes clear that "religion" includes conduct in conformance with religious mores, a conclusion reinforced by the use in section 2000e of the expansive terms "*all* aspects" and "includes."[4] Because the definition expressly applies to the entire title, it applies to the religion of employers as well as that of employees.[5]

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[2] As enacted by Congress, sections 702(a) and 703(e) of the Act use the word "title" (referring to all of Title VII) rather than "subchapter." Pub. L. 88-352, tit. VII, 78 Stat. 241 (July 2, 1964). The codifiers of the United States Code changed the word "title" to "subchapter" because Title VII of the Act comprises a single subchapter of the U.S. Code. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 J. of L. & Religion (Oxford) 368, 375 n.26 (2015) (explaining these changes).

[3] Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 Tex. Rev. L. & Pol. 295, 302 (2016) (noting that, under the text of the exemptions, when a religious employer makes an employment decision on the basis of an employee's "particular religion," "the employer is exempt from all of Title VII"); Esbeck, *supra* at 375 (noting that the religious exemptions provide a "sweeping override of everything else in all of Title VII").

[4] Use of the term "includes" in a federal statute is an indication that what follows is illustrative, not exhaustive. *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 162 (2012). Thus, the meaning of the term "religion" in section 2000e is not exhausted by the definitional phrase that follows the word "includes."

[5] At least one court, while conceding that the definition of religion in section 701 applies to both exemptions, has suggested in the same breath that the definition of religion "seems intended" only to broaden the prohibition against religious *discrimination*, not the scope of the religious *exemptions*. *Little v. Wuerl*, 929 F.2d at 950. This suggestion is inconsistent with the text of section 701. Title VII has only *one* definition of religion—the one set out in section 701—and that definition *by its express terms* applies to all of Title VII. Had it intended the definition of "religion" in section 701 to apply only to the use of that term in the prohibition against discrimination on the basis of religion, Congress would have defined the term for purposes of the sections in which that prohibition is set out instead of the entire title. *See Larsen v. Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980) (correctly noting that the

Read together, the text of the religious exemptions and of the definition of religion in Title VII has two important consequences. First, religious employers have a right to employ not just their co-religionists, but persons *whose beliefs or conduct are consistent with the employer's own religious beliefs*. 42 U.S.C. § 2000e ("religion" includes "*all* aspects of religious *observance and practice*, as well as belief") (emphasis added). Second, when religious employers exercise this right, none of the rest of Title VII (including Title VII's prohibition on sex discrimination) applies. 42 U.S.C. § 2000e-1(a) ("*This title* [subchapter] *shall not apply* …") (emphasis added); 42 U.S.C. § 2000e-2(e) (Notwithstanding *any other provision of this title* [subchapter] … it *shall not* be an unlawful employment practice…") (emphasis added).

Thus, the section 702(a) and 703(e) religious exemptions, when applicable, create an exemption to *all of Title VII* (not just religious discrimination claims).

This conclusion follows from the very words of the statute, as demonstrated above, and is supported by case law, to which we turn next.

II. Case Law

A close examination of the text of the religious exemptions in Title VII demonstrates that they may be asserted as a defense to Title VII claims when the religious employer's employment decision is based on sincerely-held religious beliefs. So does the case law. For example, at least three decisions—two from federal circuit courts and one from a federal district court—have applied the Title VII exemptions as a defense to a Title VII claim of sex discrimination when the religious employer asserted a sincerely-held theological or doctrinal basis for its challenged employment decision. *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ*., 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds*, *vacated in part*, 814 F.2d 1213 (7th Cir. 1987).

In the first of these decisions, *Curay-Cramer*, a Catholic school fired a teacher after she signed her name to a pro-choice ad in a local newspaper. The teacher sued for sex discrimination under Title VII. The Third Circuit concluded that the adjudication of the teacher's claim that the school treated her more harshly than male colleagues who she claimed had also violated Church teaching would raise serious constitutional questions because it would require the court to evaluate the relative seriousness of various violations of Church teaching. The court (450 F.3d at 139) drew upon *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991):

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definition of "religion" in section 701 applies to the section 703(e) religious exemption), *aff'd*, 1982 WL 20024 (10th Cir. 1982), *cert. denied*, 464 U.S. 849 (1983); Esbeck, *supra* at 377 n.32 ("If Congress had intended the definition [of religion] to not apply to 702(a) and 703(e)(2), it would have been very easy to have said so.").

> While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas Curay-Cramer's third Count alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII.

In the absence of a clearly expressed affirmative intent on the part of Congress to render such employment decisions subject to Title VII, the court concluded that Title VII did not apply. *Curay-Cramer*, at 141 ("Even assuming such a result is not expressly barred by 42 U.S.C. § 2000e-2(e)(2), the existence of that provision and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of Church doctrine.").

In the second decision, *Mississippi College*, Patricia Summers alleged that a Baptist college's failure to hire her for a full-time teaching position in the college's psychology department was a result of sex and race discrimination. The Fifth Circuit held that if the college presented convincing evidence that it preferred a Baptist candidate over Summers (the person the college hired was Baptist, while Summers was not), then the Title VII religious exemption "would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination." 626 F.2d at 486.

In short, the Title VII exemption would bar investigation of Summers' sex and race discrimination claims if the college had religious reasons for its decision not to hire her. The court (*id*. at 485-86) elaborated:

> … [Section] 702 may bar investigation of [Summers'] individual claim [for sex and race discrimination]. The district court did not make clear whether the individual employment decision complained of by Summers was based on [her] religion. Thus, we cannot determine whether the exemption of § 702 applies. If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, *then § 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination*…. [Emphasis added.]

In the third decision, *Maguire*, Marquette University refused to hire Marjorie Maguire as a theology professor because she rejected Catholic teaching on abortion. The district court concluded that the adjudication of Maguire's Title VII sex discrimination claim would raise free

exercise and establishment clause problems. To avoid such problems, the court construed the Title VII exemption to bar her claim. 627 F. Supp. at 1506-07.[6]

The Title VII religious exemptions likewise shield religious employers from retaliation claims. *Kennedy*, 657 F.3d at 193-94 ("[T]he 'subchapter' referred to in [section 702(a)] includes both § 2000e-2(a)(1), which covers harassment and discriminatory discharge claims, and § 2000e-3(a), which covers retaliation claims…. Thus, [plaintiff's] three claims—discharge, harassment, and retaliation—all arise from the 'subchapter' covered by the religious organization exemption, and they all arise from her 'employment' by [the defendant]."); *Saeemodarae v. Mercy Health Services*, 456 F. Supp.2d 1021, 1041 (N.D. Iowa 2006) (section 702(a) exemption barred employee's retaliation claim against religious employer), citing *Lown v. Salvation Army, Inc*., 393 F. Supp.2d 223, 254 (S.D.N.Y. 2005) ("Plaintiff's Title VII retaliation claim must be dismissed because the broad language of Section 702 provides that '[t]his subchapter shall not apply … to a religious … institution … with respect to the employment of individuals of a particular religion' …. Title VII's anti-retaliation provision … is contained in the same subchapter as Section 702. Accordingly, it does not apply here."); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1004-06 (9th Cir. 2019) (section 702(a) barred retaliation claim against religious employer).

Based on the text of the statute and the case law, it is erroneous to assert, as OFCCP does in the preamble to the proposed rescission, that the religious exemptions in Title VII are only a shield against claims of religious discrimination. This conclusion has even more force when a refusal to recognize an exemption for a religious employer substantially burdens that employer's religious beliefs and practices because in such cases the employer enjoys the added protections of both the Religious Freedom Restoration Act (RFRA) and Free Exercise Clause.[7]

III. Contrary Authority

Contrary authority exists but, in our view, is flawed. The most common error involves neglecting the text of Title VII, or reading into the statute conditions or requirements that simply are not to be found there.

Some courts assert, based on the "plain language" of Title VII, that the religious exemptions only bar religious discrimination claims. *E.g.*, *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 496 F. Supp.3d 1195, 1202 (S.D. Ind. 2020) (stating that "[t]he plain language of Title VII indicates that the [section 702(a)] exception for religious institutions applies to one specific reason for an employment decision—one based upon religious

[6] The court of appeals affirmed on other grounds, finding that Maguire had failed to establish a prima facie case of sex discrimination because, by her own admission, her beliefs about abortion, not her sex, were the but-for cause of the university's decision not to hire her. 814 F.2d at 1217-18.

[7] The failure to recognize a *religious* exemption when the underlying statute recognizes any comparable *secular* exemption (Title VII has many secular exemptions), violates the Free Exercise Clause. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

preference."). These courts, however, tend to focus on the phrase "particular religion" in isolation, without taking into account the statutory definition of religion or Congress's use of the phrases "*This title* shall not apply" and "Notwithstanding *any other provision of this title*" in sections 702(a) and 703(e), respectively.

In considering what sorts of claims are barred by the religious exemptions, many courts fail to consider, or to consider carefully, the relevant statutory text in their analysis. *Herx v. Diocese of Fort Wayne-South Bend*, 48 F. Supp.3d 1168 (N.D. Ind. 2014), is illustrative. In that case, the district court considered whether the Title VII exemptions barred a sex discrimination claim against a Catholic school brought by a teacher who, in violation of Church teaching, had undergone in vitro fertilization. In its opinion, the court says nothing about the statutory definition of "religion." The court does *quote* the text of the exemptions (*id*. at 1174) but then fails to *discuss* the statutory text where it says the exemptions apply to all Title VII claims (*id.* at 1175-76), relying instead on case law. *Id*. at 1175-76 (beginning by saying that "The court doesn't read the case law the same way the Diocese does," and then discussing those decisions without reference to the text of the statute).

From the fact that Title VII does not create a categorical exemption for religious employers, some courts illogically conclude that Title VII does not exempt the religious employer from discrimination claims in the specific case under review. This involves the logical fallacy of arguing that a trait, if not universally present, must be universally absent, as when one argues that because it does not rain *every* Wednesday, it does not rain on *any* Wednesday. From the fact that a particular legal defense cannot be asserted in *every* case within a particular universe of cases, it does not follow that the same defense cannot be asserted in *any* such case. Yet some courts continue to make this basic error when considering whether the Title VII exemptions apply. *See*, *e.g*., *Boyd v. Harding Academy*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that section 702(a) does not "exempt religious educational institutions with respect to *all* discrimination," as if this answered the question whether the exemptions applied in the case under review) (emphasis added).

Everyone agrees that Title VII does not *categorically* exempt religious employers from liability under Title VII. If Congress had intended a categorical exemption for religious employers, it would have enacted an exemption saying that no Title VII claims apply to religious organizations. But from the absence of such a total or complete exemption, it does not follow that the exemptions Congress actually enacted do not apply in a specific case, nor does it mean the exemptions may *only* be invoked as a defense to claims of *religious* discrimination. No such limitation is expressed anywhere in the text of Title VII—not in the exemptions themselves, nor in the definition of religion, or anywhere else in Title VII. Esbeck, *supra* at 374-80 (underscoring this point); Phillips, *supra* at 298-315 (same). Most importantly, the text of the religious exemptions and the definition of "religion" in Title VII affirmatively *contradict* the claim that the religious exemptions in Title VII are so limited, as explained in Part I and as the cases discussed

in Part II indicate. And since the text is the leading guide to the meaning of Title VII, a point emphasized in *Bostock*,[8] it is the text of the statute that must govern.[9]

Some courts rely on legislative history for the proposition that religious employers "remain subject to the provisions of Title VII with regard to race, color, sex or national origin." *Rayburn v. General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (quoting Section-by-Section Analysis of H.R. 1946, the Equal Employment Opportunity Act of 1972, 92 Cong. Rec. S. 3461 (1972)); *EEOC v. Pacific Press*, 676 F.2d 1272, 1277 (9th Cir. 1982) (same); *Starkey*, 496 F. Supp.3d at 1202 (same). It is *often* true that religious employers are subject to Title VII, but as noted above, it is, owing to the religious exemptions, not *always* true. Moreover, if statutory text and legislative history give different answers to a question about the meaning of a statute, then legislative history must yield to statutory text. *Bostock*, 140 S. Ct. at 1737 (indicating that the express terms of a statute control over extratextual considerations).

IV. Problems with Inquiring into Whether an Organization Is "Primarily Religious"

To be sure, at least two federal courts of appeals have used the phrase "primarily religious" as shorthand for determining whether an organization qualifies for the Title VII religious exemptions, but (a) neither of those decisions is consistent with each other, (b) the first used a multi-factor test, some of which is constitutionality suspect, and (c) the second yielded no consensus but rather a three-way split among the three-judge panel that participated in the decision. *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007); *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011).

When federal judges have such a hard time articulating and agreeing upon a standard for determining whether an organization qualifies for the Title VII religious exemptions, it is no wonder that federal agencies would struggle with articulating one.

Out of this sea of confusion, however, two points rise to the surface.

First, most cases in this area are not hard. Usually it is quite clear when an organization is religious. A religiously-affiliated charity, hospital, or school almost invariably qualifies for purposes of the religious exemptions of Title VII. There may be cases on the margins, but they are few and far between. The 2020 regulations had the virtue of providing an effective filter

[8] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[9] Some courts seem to make the reverse argument, i.e., that if the religious exemptions can sometimes apply to claims of discrimination on bases other than religion, then those exemptions will always apply, rendering Title VII a dead letter as to religious organizations altogether. *E.g.*, *Starkey*, 496 F. Supp.3d at 1203 ("The exemption under Section 702 should not be read to swallow Title VII's rules."). This too is incorrect. The fact that the exemptions apply in some cases does not demonstrate that they apply in all cases.

that allowed genuinely religious organizations to qualify. The proposed rescission has the vice of rescinding what was clear and leaving nothing in its place.

Second, because it invites the type of inquiry that courts have found to be constitutionally impermissible, the phrase "primarily religious" should be permanently retired from the agency's vocabulary for determining whether an organization qualifies for the exemption. Court decisions involving the National Labor Relations Board illustrate the reason why. The seminal case is *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). There, the D.C. Circuit held that it was constitutionally impermissible for the NLRB to inquire into whether a university had a "substantially religious character." Why? Because such an inquiry required the government to impermissibly "troll[] through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University." *Id*. at 1342; *see also Duquesne Univ. v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020); *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). *Great Falls* makes clear that it is not the place of government to determine whether an organization has religion as its "primary" or "central" purpose. Tellingly, in enacting the RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress had the wisdom to exclude such considerations from the determination of a religious organization's ability to invoke the protection of those statutes. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7). Federal agencies should not smuggle such constitutionally impermissible standards into some *other* regulatory scheme; if they do, they engage in the same sort of entanglement of which *Great Falls* warned and that Congress avoided when it enacted RFRA and RLUIPA.

V. <u>The Proposal Rescinds Regulations That Clearly and Faithfully Reflect the Law, Leaving Stakeholders without Guidance</u>

The 2020 regulations were nothing if not clear. Moreover, they faithfully reflect the law.

Four virtues of the 2020 regulations are particularly noteworthy.

First, as OFCCP stated when they were first proposed, the 2020 regulations helpfully clarified that "religion" is not limited to religious beliefs but includes "all aspects of religious observance and practice, as well as belief." 84 Fed. Reg. 41677, 41691 (Aug. 15, 2019). As OFCCP pointed out (*id*. at 41679), this definition appropriately tracks Title VII. 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief"). This definition is not only helpful, but sensible. A secular contractor receiving federal funds may not lawfully refuse to hire someone because he or she is, for example, Catholic. By the same token, the contractor may not lawfully exclude someone from employment because, for example, he or she attends Mass before the start of his or her shift. No one would reasonably dispute that the latter, like the former, is religious discrimination. Thus, religion is properly understood, in the context of EO 11246, to include religious observance and practice as well as belief.

Second, the 2020 regulations clarified that the right of a religious organization to employ persons of a "particular religion" to carry on its work—a right that EO 11246, § 204(c) expressly recognizes—means more than just the right to employ co-religionists. It also includes the right to employ persons who "accept" and "adhere" to the religious tenets espoused by, and "as understood by," the employer, "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." 84 Fed. Reg. at 41690-91. This right is affirmed in case law construing Title VII, as OFCCP noted. *Id*. at 41679 (citing cases). The right to choose persons who accept and adhere to the religious tenets of the religious organization is grounded in the constitutional right of such organizations to advance their religious message and to direct their religiously-motivated mission. *See, e.g*., *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Again, this is entirely sensible. Just as a faith-based organization can lawfully give employment preference to those who espouse the organization's faith, message, and mission, it can lawfully prefer for employment those who, by word and conduct, accept and adhere to that faith as the organization understands it, regardless of the applicant's or employee's nominal religious affiliation.

Third, the 2020 regulations adopted an appropriately broad understanding of what sorts of organizations count as "religious." The religious exemption in EO 11246 "covers not just churches" (84 Fed. Reg. at 41679), but employers that are organized for a religious purpose, hold themselves out to the public as religious, and exercise religion consistent with, and in furtherance of, a religious purpose. *See id.* at 41682-83, 41691. We believe this was a helpful and appropriate clarification as to what it means to be a religious organization.

Fourth, the 2020 regulations appropriately adopted a rule of construction favoring "a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993…." 84 Fed. Reg. at 41691. Such a broad construction reflected the very best of American traditions in that it gave religious exercise the special, indeed paramount, protection that constitutional text and history counsel. *See Zorach v. Clauson*, 343 U.S. 306 (1952) (government accommodation of religious beliefs and practices "follows the best of our traditions").

OFCCP has now proposed to rescind those helpful regulations and, compounding the problem, to leave nothing in their place. This is doubly unfortunate as stakeholders will now be without the regulations that previously guided them and will, indeed, be left with no guidance at all as to the meaning and scope of the religious exemption.

Conclusion

The proposed rescission of the 2020 regulations is based on an erroneous construction of the law. The 2020 regulations, by contrast, add clarity to, and faithfully apply, the law. For these reasons, we respectfully request that OFCCP abandon the proposed rescission of the 2020 regulations, and instead leave the 2020 regulations in place.

Thank you for your consideration of these comments.

Respectfully submitted,

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