New Civil Liberties Alliance

December 9, 2021

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

Re: *Department of Labor, Office of Federal Contract Compliance Programs Proposed Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, RIN 1250-AA09

Dear Ms. Williams,

The New Civil Liberties Alliance ("NCLA") submits the following comment in response to the notification of proposed rescission issued by the Office of Federal Contract Compliance Programs ("OFCCP"), Dep't of Labor, *Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 86 Fed. Reg. 62,115 (Nov. 9, 2021) ("NPRM"). The NPRM rescinds a final rule clarifying the scope and application of religious exemption so that federal contractors and subcontractors could better understand their obligations. *See* Dep't of Labor, *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 85 Fed. Reg. 79,324 (Dec. 9, 2020) ("2020 Rule"). As explained below in more detail, Congress never authorized the creation of OFCCP or its regulatory enforcement and adjudication apparatus. And, even if the Procurement Act could be read so broadly as to permit OFCCP to issue or enforce the NPRM, the NPRM is legally problematic for several reasons: (1) it lacks a nexus to economy and efficiency; (2) it incorrectly portrays the 2020 Rule as being inconsistent with precedent; and (3) it ignores the Religious Freedom Restoration Act of 1993 ("RFRA").

Statement of Interest

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people. Although Americans still enjoy a shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent. This unconstitutional state within the United States is the focus of NC La's attention.

In this instance, NCLA takes issue with the unconstitutional regulatory enforcement and adjudication apparatus that OFCCP has erected without any statutory authority. As a civil rights group, NCLA takes accusations of discrimination very seriously and does not condone discriminatory attitudes or conduct in the slightest. At the same time, as a civil liberties organization, NCLA recognizes the irreplaceable role of due process rights and other constitutional guardrails in sorting out plausible (but ultimately erroneous) allegations from illegal discriminatory actions.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative power, NCLA encourages agencies to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies have a duty to follow the law and avoid unlawful modes of governance. All agencies must ensure that their modes of rulemaking, adjudication, and enforcement comply with the APA and the Constitution.

Background

OFCCP administers an enforcement and adjudication apparatus to hold federal government contractors and subcontractors "responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of" certain identified protected classes and statuses. OFCCP, *About Us*, Dep't of Labor, https://www.dol.gov/agencies/ofccp/about (last visited Dec. 9, 2021). OFCCP's ostensible authority derives from Executive Order 11,246, as amended. *See* Exec. Order No. 11,246, *Equal Employment Opportunity*, 30 Fed. Reg. 12,319 (Sept. 24, 1965). Initially, E.O. 11,246 required federal contracts to include a proviso prohibiting discrimination and requiring affirmative action based on "race, creed, color, or national origin" in employment by government contractors and subcontractors (the "Equal Opportunity Clause"). *Id.* at § 202. President Johnson subsequently amended the Order in 1967 to bar sex discrimination. Exec. Order No. 11,375, *Amending*

Executive Order No. 11,246, Relating to Equal Employment Opportunity, 32 Fed. Reg. 14,303 (Oct. 17, 1967). Presidents George W. Bush and Barack Obama amended the Order to include protections for religion, sexual orientation, and gender identity. *See respectively* Exec. Order No. 13,279, *Equal Protection of the Laws for Faith-Based and Community Organizations*, 67 Fed. Reg. 77,141 (Dec. 16, 2002); Exec. Order No. 13,672; *Further Amendments to Executive Order 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order 11,246, Equal Employment Opportunity*, 76 Fed. Reg. 42,971 (July 21, 2014).

Shortly after Executive Order 11,246 was issued, OFCCP was created by order of the Secretary. Dep't of Labor Secretary's Order No. 26-65, Office of Federal Contract Compliance (EEO), Establishment (Oct. 5, 1965), 31 Fed. Reg. 6921 (May 11, 1966). The Secretary also delegated responsibilities under Executive Order 11,246 to OFCCP. *Id.* In 1977, OFCCP created the comprehensive enforcement and adjudication apparatus to enforce the Equal Opportunity Clause. The 1977 regulations marked a significant departure from Executive Order 11,246's limited enforcement mechanisms. *See generally* OFCCP, *Equal Employment Opportunity*, 42 Fed. Reg. 3,454 (Jan. 18, 1977) ("1977 Final Rule"). The 1977 Final Rule established, for the first time, an administrative adjudication process for violations of E.O. 11,246 and the Equal Opportunity Clause. *See* 41 C.F.R. § 60-1.26 (1977). It established the basis for finding violations, requirements for the "form, filing, service of pleadings and papers," and procedures for hearings (including pre- and post-hearing processes). 41 C.F.R. §§ 60-1.26(a)(1), 60-30.1–30.30 (1977).

The 1977 Final Rule also established new retrospective remedies not contemplated in the Order, described as "affirmative step[s] which [are] required to eliminate discrimination or the effects of past discrimination." 42 Fed. Reg. at 3456; 41 C.F.R. § 60-1.26(a)(2) (1977) ("appropriate relief" "may include affected class and back pay relief"). In contrast to E.O. 11,246, which permits a recommendation to DOJ to seek appropriate proceedings for injunctive relief, the 1977 Final Rule purports to permit DOL itself to commence enforcement proceedings and to issue Administrative Orders enjoining violations. *See* 42 Fed. Reg. at 3456; 41 C.F.R. §§ 60-1.26(a)(2), 60-1.26(d), 60-30.30(a) (1977). While DOL has amended the 1977 Final Rule several times, the core processes, procedures, and remedies established in 1977 remain in place.

Summary of Proposed Rule Changes

On December 9, 2020, the OFCCP of the U.S. Department of Labor ("DOL") published the 2020 Rule, after notice and comment, which clarified the application and scope of the religious

exemption to Executive Order 11,246's equal opportunity requirements. Dep't of Labor, *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 85 Fed. Reg. 79,324 (Dec. 9, 2020). The 2020 Rule incorporates recent Supreme Court holdings, including that the Free Exercise Clause prohibits the government from "exclud[ing] an entity from a generally available public benefit because of its religious character, unless that decision withstands the strictest scrutiny," *id.* at 79,325 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017)), and that obligations under RFRA govern federal regulations of closely held for-profit organizations, *id.* (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014)).

To provide greater clarity regarding which organizations are religious and thus are entitled to the religious exemption, the 2020 Rule adopted, with modification, the multi-factor test used in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam). "The test's underlying inquiry is whether an organization's 'purpose and character are primarily religious.'" 85 Fed. Reg. 79,336 (quoting *World Vision, Inc.*, 633 F.3d at 726 (O'Scannlain, J., concurring)). The 2020 Rule also incorporated OFCCP's obligations under RFRA, which "operates as a kind of super statute." 85 Fed. Reg. 79,324 (quoting *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020)). Consistent with RFRA's "very broad protection of religious liberty," *id.* at 79,351 (quoting *Hobby Lobby*, 573 U.S. at 693), the 2020 Rule stated that OFCCP "has a less than compelling interest in enforcing E.O. 11246 when a religious organization takes employment action solely on the basis of sincerely held religious tenets that also implicate a protected classification, other than race," *id.* at 79,354. OFCCP concluded that the 2020 Rule would enable more religious organizations to participate in federal contracting. *Id.* at 79,370 ("OFCCP expects that the number of new contractors may increase because religious entities may be more willing to contract with the government after the religious exemption is clarified.").

Less than a year later, OFCCP reversed course and issued a notice of proposed rulemaking on November 9, 2021, to rescind the 2020 Rule. Dep't of Labor, *Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 86 Fed. Reg. 62,115 (Nov. 9, 2021). The NPRM concluded the 2020 Rule's religious-organization test based on Ninth Circuit's Title VII precedent was actually a "departure from Title VII precedent." *Id.* at 62,118. The NPRM also concluded that it was inappropriate for OFCCP to take a "categorical approach" by incorporating RFRA obligations in rulemaking, *id.* at 62,120, even though the Supreme Court explained that agencies' rulemaking should consider RFRA obligations when they are an important aspect of the problem in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383-84

(2020). The NPRM claimed rescission of the 2020 Rule would "promote economy and efficiency in federal procurement by preventing the arbitrary exclusion of qualified and talented employees" because religious organizations that contract with the government could no longer base employment decisions on sincere religious beliefs. The NPRM, however, did not address whether this would result in fewer religious organizations being willing to contract with the government and the potential effects of that on the "economy and efficiency" of procurement.

I. Executive Order 11,246 Was Not Authorized by Congress, so OFCCP Is Without Power to Issue or Enforce the NPRM

Executive Order 11,246 by its own terms only states generally that it is issued "[u]nder and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States." *Id.* It does not identify any statutory grant from Congress to the President to issue E.O. 11,246 or its requirements. Nor could it, because no statute authorizes E.O. 11,246 or the regulations implementing OFCCP's enforcement and adjudication apparatus—which are implicated by both the issuance of this NPRM and, if ultimately promulgated, through its eventual enforcement. E.O. 11,246 and the regulations promulgated pursuant to it would likely be fine if they did not seek to bind the conduct of anyone outside the Executive Branch. But they clearly are written to bind the conduct of third parties, *i.e.*, government contractors and subcontractors, and thus, the regulations must be authorized by a statute and not just an Executive Order. Otherwise, they arrogate legislative power from Congress and judicial power from the courts, contravening the Vesting Clauses of Article I and Article III.

Neither the President nor an agency has any inherent power to make law. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity."). This limitation is a constitutional barrier to an exercise of legislative power by the executive branch. Agencies have "no power to act … unless and until Congress confers power upon [them]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Agency rules, like the NPRM, that place or define binding obligations or prohibitions on regulated parties are "legislative rules." *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). Stated differently, a rule that "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy" is a legislative rule. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). "Legislative rules" have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979).

The NPRM proposes a legislative rule because it would effect a substantive change in existing law, and its ability to bind third parties would give it the force and effect of law. OFCCP issued the NPRM without any power to do so. Congress could have authorized E.O. 11,246's nondiscrimination and affirmative action policy or the 1977 Final Rule's enforcement regime, but it did not. Congress's failure to act should be dispositive regarding OFCCP's inability to promulgate or enforce its rules for want of constitutional power to do so.

Any reliance on the Procurement Act as providing statutory authority in support of E.O. 11,246 is, at best, an unconvincing *post hoc* rationalization. The Procurement Act does not mention employment discrimination, and it includes no language authorizing the enforcement scheme imposed by the 1977 Final Rule. *See Chrysler*, 441 U.S. at 304 n.34 ("nowhere in the Act is there a specific reference to employment discrimination"). Thus, E.O. 11,246 cannot provide a constitutionally sufficient basis for OFCCP's power or adjudicative regime. The Procurement Act states that the President may "prescribe policies and directives that the President considers necessary to carry out" the provisions of the Act. 41 U.S.C. § 121(a). Any policies prescribed by the President must be "consistent" with 40 U.S.C. § subtitle I. *Id.* The Procurement Act is intended "to provide the Federal Government with an economical and efficient system for" specified activities, including "[p]rocuring and supplying property and nonpersonal services, and performing related functions;" using and disposing of property, and "records management." 40 U.S.C. § 101. The Act also empowers the Administrator of the General Services Administration ("GSA")—not the President or federal agencies—to promulgate regulations that are necessary to give effect to the GSA's Procurement Act responsibilities. 40 U.S.C. § 121(c). Under this statutory scheme, agency heads are only empowered to "issue orders and directives" considered necessary to carry out the GSA's regulations, unless the GSA has delegated its authority to another agency head. 40 U.S.C. § 121(d).

A review of the subsequent executive orders amending E.O. 11,246 and OFCCP's implementing regulations establishes that the Procurement Act was not cited as a basis of authority until at least 2002 when President Bush issued E.O. 13,279, which is implicated by the NPRM. *Compare* Exec. Order No. 11,246 (no mention of specific statutory authority); Exec. Order No. 11,375 (no mention of specific statutory authority); 1977 Final Rule (authority for rule is based exclusively on Executive Order 11,246) *with* Exec. Order No. 13,279. The stated authority for E.O. 13,279 included only part of the Procurement Act: 40 U.S.C. § 121(a). *See* Exec. Order No. 13,279. However, the 2003 final rule amending the relevant sections of OFCCP's enforcement and adjudication regulations makes

no mention of 40 U.S.C. § 121(a) or the Procurement Act more generally as the authority for the regulations. *See* Dep't of Labor, *Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities*, 68 Fed. Reg. 56,392 (Sept. 30, 2003). Thus, even OFCCP seemingly does not know what authority its power derives from, most likely because its reliance of the Procurement Act is a *post hoc* rationalization intended (albeit futilely) to save it from its lack of statutory authorization.

The Procurement Act did not grant President Johnson the power to establish Executive Order 11,246's nondiscrimination and affirmative action enforcement apparatus—nor did he claim such. Executive Order 11,246 cannot bind anyone outside the Executive Branch. Similarly, OFCCP's existing enforcement and adjudication regulations, like the newest one proposed by the NPRM, promulgated under the constitutionally deficient authority of E.O. 11,246, are not rooted in any grant of power from Congress. Hence, they are also incapable of binding third parties.

The absence of statutory authority for most of what DOL and OFCCP have done is not a mere technical or semantic critique of E.O. 11,246's statutory authority (nor by implication such a critique of OFCCP's implementing regulations). Rather, the utter lack of a statutory grant of authority for Executive Order 11246 is a fundamental problem undermining the entire edifice—including this latest NPRM. Courts have already recognized that the statutory basis for E.O. 11246 is "obscure." *See Chrysler*, 441 U.S. at 304. But that characterization overstates the case: the OFCCP house is built on sand. Aside from the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, the statutory basis for OFCCP is nil.

Hence, OFCCP is without power to issue this NPRM or to enforce its provisions.

II. The Proposed Rule Lacks a Nexus to Economy and Efficiency

Even if OFCCP could issue regulations under the Procurement Act—it cannot—those regulations are valid only if there is a "nexus between the regulations and some delegation of requisite legislative authority by Congress," which allows "the reviewing court [to] reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Chrysler*, 441 U.S. at 308. No nexus exists when the policy in question is "too attenuated to allow a reviewing court to find the requisite connection between procurement cost and social objectives." *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2 164, 171 (4th Cir. 1981). The Procurement Act does not "write a blank check for the President to fill in at his will." *AFL-CIO v. Kahn*, 618 F.2d 784, 794-95 (D.C. Cir. 1979) (en banc). Rather, there

must at least be a "close nexus" between a regulation and the Procurement Act's "values of 'economy' and 'efficiency.'" *Id.* at 792.

"'Economy' and 'efficiency' are not narrow terms," *id.* at 789, and a "close nexus" standard using only those ill-defined terms "would amount to an unconstitutional delegation of legislative authority to the executive branch." *id* at 797 (MacKinnon, J., dissenting). The only way to avoid this nondelegation problem is to interpret Congress to have supplied necessary guidelines when it enacted the Competition in Contracting Act ("CICA") of 1984, which mandates that federal agencies "shall obtain full and open competition through the use of competitive procedures" in their procurement activities unless otherwise authorized by law. 10 U.S.C. § 2304(a)(1)(A) (defense agencies); 41 U.S.C. § 253(a)(1)(A) (civilian agencies). A "full and open competition" means that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. § 403(6).

The NPRM inhibits "full and open competition," and thus lacks a close nexus to the Procurement Act's values of "economy and efficiency." As the 2020 Rule's preamble indicated, "religious organizations have been reluctant to participate as federal contractors because of the lack of clarity or perceived narrowness of the E.O. 11246 religious exemption." *See* 85 Fed. Reg. 79,370. As a result of the 2020 Rule, "OFCCP expect[ed] that the number of new contractors may increase because religious entities may be more willing to contract with the government after the religious exemption is clarified." *Id.*

The 2020 Rule's definition for religious organizations includes faith-based companies. 41 C.F.R. 61-1.3. One example is a small kosher catering company that aims "to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals." *Id.* Under the 2020 Rule, this kosher company is not deterred from participating in federal contracting by confusing and costly regulations and could thus compete to provide kosher meals to federal government customers without having to compromise its religious identity. Rescinding the 2020 Rule would have the opposite effect and discourage faith-based businesses from competing for federal contracts. This is inconsistent with CICA's "full and open competition" requirement and undermines economy and efficiency in procurement.

III. The Proposed Rule Incorrectly Portrays the 2020 Rule as Being Inconsistent with Precedent

OFCCP previously stated that the 2020 Rule is "consistent with the Supreme Court's religion and Title VII jurisprudence." 85 Fed. Reg. 79,325. It now asserts a new belief that the 2020 Rule must be rescinded because it "departs from OFCCP's long-standing reliance on Title VII principles and case law." 86 Fed. Reg. 62,117. The explanation for this sudden turnabout is unconvincing and appears to be pretextual.

To start, there is no coherent line of "Title VII case law" from which departure can be measured. OFCCP concluded in 2020 that courts "used a confusing variety of tests" to determine whether an organization is religious, "and the tests themselves often involve unclear or constitutionally suspect criteria." 85 Fed. Reg. 79,331. Accordingly, OFCCP "decline[d] to attempt to write a definition that purports to synthesize all the Title VII case law on this subject" and was "doubtful that such a task could be done," especially since some tests were inconsistent with others. *Id.* at 79,332 (noting some judges have observed "that several factors used by other courts are constitutionally suspect."). The NPRM concedes "there is no uniform test." 86 Fed. Reg. 62,118. Given the wide variety of religious-employer tests, the fact that 2020 Rule may "depart" from a test that some judges consider "constitutionally suspect" anyway is not a valid basis for rescission.

The NPRM further claims the 2020 Rule departs from a shared aspect of all tests because it adopted "a religious employer test that largely did not account for … the ultimate requirement that the employer's purpose and character be primarily religious." 86 Fed. Reg. 62,118. But OFCCP explicitly explained that under the 2020 Rule, "[t]he test's underlying inquiry is whether an organization's 'purpose and character are primarily religious.'" 85 Fed. Reg. 39,336. The precise contours of the 2020 Rule's "purpose and character" test is based on the Ninth Circuit's approach in *World Vision*, 633 F.3d 723, because it avoids subjectivity inherent in other tests. 85 Fed. Reg. 79,332. If OFCCP now believes a different religious-employer test is superior at assessing an organization's purpose and character—perhaps one that is more subjective than the *World Vision* test—it must explain why. Instead of providing a reasoned explanation, the NPRM disingenuously pretends that the 2020 Rule did not make the "purpose and character" inquiry at all.

IV. The Proposed Rule Ignores the Religious Freedom Restoration Act

RFRA "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. [42 U.S.C.] § 2000bb–1." *Bostock*, 140 S. Ct. at 1754. "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. [42 U.S.C.] § 2000bb–3." *Id.* When an agency promulgates regulations concerning religious entities or beliefs, it must consider RFRA and create appropriate exemptions to ensure religious beliefs are not unduly burdened. *Little Sisters of the Poor*, 140 S. Ct at 2384.

The 2020 Rule incorporated, for the first time, RFRA obligations in OFCCP's regulations. 85 Fed. Reg. 79,354. The NPRM takes the opposite approach and states that RFRA should not be considered in a "categorical" manner, which is simply another way of saying that RFRA should not be considered as part of the rulemaking process. 86 Fed. Reg. 62,120. Instead, the NPRM would permit OFCCP to consider "only RFRA claims raised [as a defense] by contractors on a case-by-case basis." *Id.* at 62,121. Such an approach is inconsistent with the government's affirmative obligation under RFRA to avoid substantially burdening the exercise of religion absent a compelling interest and narrow tailoring. 42 U.S.C. § 2000bb–1.

For instance, after the Supreme Court held in *Hobby Lobby*, 573 U.S. at 736, that application of a healthcare mandate violated RFRA, the government responded by proposing and adopting a "categorical" rule to address RFRA. 79 Fed. Reg 51,118 (proposing to extend accommodation to closely held corporations in light of *Hobby Lobby*); 80 Fed. Reg. 41324 (final rule explaining that "[t]he Departments believe that the definition adopted in these regulations complies with and goes beyond what is required by RFRA and *Hobby Lobby*"). What the government could not have done was to continue enforcing the mandate against religious corporations while considering their RFRA defenses solely on a case-by-case basis. But that is precisely the disallowable approach being proposed in the NPRM. 86 Fed. Reg. 62,120.

The NPRM apparently grounds this improper approach in the Supreme Court's recent decision in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021), which it contends "reemphasized the inadequacy of a categorical approach," *i.e.*, rule-based approach, "to defining the government's compelling interest." 86 Fed. Reg. at 62,120. But *Fulton* was not a RFRA case and its application to a proposed federal rule which is subject to RFRA is limited. *Fulton* turned on the fact

that the city imposed a contractual non-discrimination requirement that explicitly provided for discretionary grants of exceptions which it denied to the religious foster care providers but made available to others. 141 S. Ct. at 1878, 1881-82. In *Fulton*, the ability to seek an exception to the non-discrimination requirement arose before enforcement for a violation or rescission of the contract at issue. Here, OFCCP proposes the exact opposite: RFRA can only be invoked after OFCCP undertakes an investigation or enforcement action. Such a wait-and-see application of RFRA not only undermines that law's purpose but likely undermines economy and efficiency in procurement as well because it inserts additional uncertainty in the government contracting process. At bottom, neither *Fulton* nor any other Supreme Court decision discourages agencies from incorporating RFRA obligations into their rules. Indeed, the Court in *Little Sisters of the Poor* explicitly encouraged agencies to do so. 140 S. Ct. at 2384 ("If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem."). The NPRM cannot ignore the Supreme Court's instruction simply by calling rulemaking a "categorical approach" to RFRA.

Conclusion

For the foregoing reasons, OFCCP should not rescind the 2020 Rule.

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Sheng Li at sheng.li@ncla.legal and Kara Rollins at kara.rollins@ncla.legal.

Sincerely,

NEW CIVIL LIBERTIES ALLIANCE

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