IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC. *Plaintiff*, v. U.S. DEPARTMENT OF LABOR, *et al.*, *Defendants*.	Case No. 19-cv-3574 (APM)

***AMICUS CURIAE* BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF ORACLE AMERICA, INC.'S MOTION FOR SUMMARY JUDGMENT**

DISCLOSURE STATEMENT

The New Civil Liberties Alliance is a nonpartisan, nonprofit organization incorporated under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Executive Orders

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. NCLA views the administrative state as an especially serious threat to civil liberties. No other current legal development denies more rights to more Americans. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

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.[1]

The "civil liberties" of the organization's name include rights at least as old as the United States Constitution itself, such as the due process of law, jury trial, the right to be tried in front of an impartial and independent judge (not a partial and dependent ALJ), and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies like the Department of Labor ("DOL") and its Office of Federal Contract Compliance Programs ("OFCCP"), and even sometimes the courts have neglected them for so long. NCLA upholds these constitutional rights on behalf of all

[1] No counsel for any party authored this brief in whole or in part; and no person or entity other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Americans, of all backgrounds and beliefs, and we do this through original litigation, *amicus curiae* briefs, and other advocacy.

In this case, NCLA takes issue with the unconstitutional regulatory enforcement and adjudication apparatus that OFCCP has erected without *any* statutory authority. NCLA is also concerned with DOL's use of Administrative Law Judges ("ALJs") who violate Article II's Vesting Clause and Take Care Clause. NCLA represents clients before the Fifth, Ninth, and Eleventh Circuits who are challenging the multiple for-cause removal protections enjoyed by ALJs in the Securities and Exchange Commission. *See Cochran v. SEC*, No. 19-10396 (5th Cir. 2019); *Lucia v. SEC*, No. 19-56101 (9th Cir. 2019); *Gibson v. SEC*, No. 19-11969 (11th Cir. 2020); *see also* Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners, *Fleming v. U.S. Dept. of Agriculture*, Nos. 17-1246, 17-1249, 17-1250 (consolidated) (D.C. Cir. Mar. 5, 2020). OFCCP's ALJs appear to suffer from the same constitutional defect.

Too often in administrative enforcement and adjudication, the process is the punishment. Targets of agency investigations and enforcement actions are forced into years of administrative process tilted in favor of the government, depriving them of their civil liberties. Such concerns are magnified where the enforcement apparatus lacks any congressional authority. NCLA rarely gets involved as an *amicus* in district court proceedings, but this case is of utmost importance to the issue of unconstitutional administrative law actions.

FACTUAL 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*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/about (last visited Apr. 28, 2020). OFCCP's ostensible authority derives from Executive Order 11246 ("the

Order"), as amended.[2] *See* Exec. Order No. 11246, Equal Employment Opportunity, 30 Fed. Reg. 12319 (Sept. 24, 1965). Initially, the Order 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. 11375, Amending Executive Order No. 11246, Relating to Equal Employment Opportunity, 32 Fed. Reg. 14303 (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. 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77141 (Dec. 16, 2002); Exec. Order No. 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 76 Fed. Reg. 42971 (July 21, 2014).

The Order as initially issued authorized the Secretary of Labor to ensure compliance with Executive Order 11246's nondiscrimination and affirmative action provisions through limited enforcement mechanisms.[3] Exec. Order No. 11246 at § 201. Specifically, the Order permitted the Secretary to require contractors and subcontractors to file "Compliance Reports." § 203. The Secretary could investigate potential violations of the Equal Opportunity Clause by contractors and subcontractors. § 206(a). The Secretary, "or any agency, officer, or employee in the executive branch"

[2] OFCCP's enforcement and adjudication apparatus also derives authority from Section 503 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 793, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), as amended 38 U.S.C. § 4211, 4212. Neither of those statutes providing Congressional authorization is at issue here.

[3] Shortly after Executive Order 11246 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 11246 to OFCCP. *Id.*

could hold "such hearings" as the Secretary "deem[ed] advisable" for "compliance" or "enforcement." § 208(a).

The Order also prescribed limited prospective "sanctions and penalties" including: (1) publishing the names of noncompliant contractors; (2) recommending the U.S. Department of Justice ("DOJ") to bring proceedings to enforce the Equal Opportunity Clause—including seeking injunctive relief—where substantial or material violation of the clause exists or is threatened; (3) recommending that the Equal Employment Opportunity Commission ("EEOC") or DOJ institute proceedings under Title VII of the Civil Rights Act; (4) recommending criminal proceedings to DOJ for furnishing false information; (5) cancelling, terminating, or suspending contracts for failure to comply with the Equal Opportunity Clause; and, (6) debarment. § 209(a). Only an order for debarment required the "opportunity for a hearing." § 208(b). The Order also encouraged the Secretary to "secure compliance" with the Equal Opportunity Clause "by methods of conference, conciliation, mediation, and persuasion" before instigating proceedings. §§ 205, 209(b).

In 1977, OFCCP created the comprehensive enforcement and adjudication apparatus at issue here. The 1977 regulations marked a significant departure from Executive Order 11246's limited enforcement mechanisms. *See generally* Office of Federal Contract Compliance Programs, Equal Employment Opportunity, 42 Fed. Reg. 3454 (Jan. 18, 1977) ("1977 Final Rule"). The 1977 Final Rule established for the first time an administrative adjudication process for violations of the Order 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 the Order, which permits a recommendation to DOJ to seek appropriate proceedings for injunctive relief, the 1977 Final Rule purports to permit the DOL 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.

Under current regulations, OFCCP may institute enforcement proceedings for alleged violations of the Order or the Equal Opportunity Clause based on the results of complaint investigations and compliance reviews, the analysis of a contractor's affirmative action program, or a contractor's refusal to take certain actions. 41 C.F.R. § 60-1.26(a)(i)-(x). OFCCP may refer and recommend the matter to the Solicitor of Labor for administrative enforcement proceedings. 41 C.F.R. § 60-1.26(b)(1).[4] The enforcement proceedings are "conducted under the control and supervision of the Solicitor of Labor" and are subject to the processes set forth in the regulations. *Id.*; 41 C.F.R. part 60-30 ("Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246").

Part 60-30's Rules of Practice designate DOL ALJs to conduct initial proceedings in matters alleging violations of the Order and delineate their authority and responsibilities. 41 C.F.R. § 60-30.14, 60–30.15. Under these rules, DOL ALJs may "rule on motions [including motions for summary judgment], and other procedural [issues]"; "regulate the course of the hearing and conduct of the participants"; "examine and cross-examine witnesses"; introduce evidence into the record; "impose sanctions"; "issue subpoenas"; hold oral argument; and make recommended "findings, conclusions, and a decision." *See, e.g.,* 41 C.F.R. §§ 60-30.15, 30.21, 30.23, 30.27. An ALJ's recommendations and

[4] The regulations permit Expedited Hearing procedures in limited circumstances. 41 C.F.R. §§ 60-30.31–30.37.

record are certified to DOL's Administrative Review Board ("ARB"). 41 C.F.R. § 60-30.27. Parties may submit to the ARB exceptions to the ALJ's recommendations. 41 C.F.R. § 60-30.28. The ARB "make[s] a decision, which shall be the Administrative [O]rder" on behalf of the Secretary. 41 C.F.R. § 60-30.29.[5] Under OFCCP's rules, if the ARB find violations, the ARB "shall make a decision" and issue an "Administrative Order" that "enjoin[s] the violations and require[s] the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above." 41 C.F.R. § 60-30.30. "[F]ailure to comply with the Administrative Order shall result in the immediate cancellation, termination and suspension of the respondent's contracts and/or debarment." *Id.* Such "appropriate" sanctions include "back pay and other make whole relief." *See* 41 C.F.R. § 60-1.26(a)(2).

On February 21, 2020, DOL issued an order permitting the Secretary to conduct "discretionary review" of ARB decisions. *See* Dep't of Labor Secretary's Order No. 01-2020, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13186 (Mar. 6, 2020). Generally, if no discretionary review is undertaken, ARB decisions may become final action of DOL 28 days after the decision is issued. But if review is undertaken, then the Secretary's decision is the final agency action. *See* Secretary's Order 01-202, § 6. Only after a decision becomes final may a party finally,[6] seek review of the ARB or Secretary's decision in an Article III court under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

[5] On March 6, 2020, the Secretary issued a direct final rule amending, *inter alia*, 41 C.F.R. §§ 60-30.29 and 60-30.30 to remove "references to final decisions of the ARB" to "harmonize the manner in which the ARB issues decisions on behalf of the Secretary under the Department's regulations with the scope of the final decision-making authority delegated to the ARB." Discretionary Review by Secretary, 85 Fed. Reg. 13024, 13026 (Mar. 6, 2020).

[6] The OFCCP process can take years. After some two years of pre-hearing processes, including compliance review and attempted resolution, OFCCP initiated enforcement proceedings against Oracle for alleged violations of Executive Order 11246. *See* Complaint, *Oracle America, Inc. v. U.S. Dep't of Labor*, et al., No. 1:19-cv-03574-APM (D.D.C. Nov. 11, 2019), at ¶ 122-136 (describing the related but separate OFCCP enforcement proceedings). This instant case followed. *Id.*

ARGUMENT

By explicit design, the Constitution "vest[s] the authority to exercise different aspects of the people's sovereign power in distinct entities"—the legislative, executive, and judicial branches. *Gundy v. United States*, 139 S. Ct. 2116, 2133-35 (2019) (Gorsuch, J., dissenting). The Constitution vests "[a]ll legislative Powers" in Congress, "executive Power" in the President, and the "judicial Power" in the courts. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1. Each branch is defined by the power with which it is entrusted. While this structure prescribes "lawful avenues for issuing edicts that constrain the public, the government often takes other paths." Philip Hamburger, *Is Administrative Law Unlawful?* 1 (U. Chicago Press 2014). The Constitution "authorizes the government to issue binding edicts through legislative and judicial acts and to exercise force through executive acts." *Id.* But, despite these lawful avenues, "the government frequently prefers to drive off-road, pursuing binding power down paths of its own choosing." *Id.* at 2. While exhilarating for those in the driver's seat—predominantly administrative agencies—this impulse to "leave the roads laid out by the Constitution" is "unlawful and dangerous." *Id.*

The Constitution attempts to curb this impulse by balancing the power granted to the federal government among the government's three branches. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (discussing historical understanding of the Framers' Constitutional design). But this balance is delicate and is subject to accretions of power by one branch of government—here the lawless assumption of power by the Executive Branch from the Legislative Branch.

While such power grabs are hallmarks of tyrants, they can also occur for less nefarious, or even well-intentioned, reasons. OFCCP's enforcement and adjudication regime appears to be an example of the latter. But whatever the reason why OFCCP lacks statutory authorization, the Constitution still requires obtaining it. To be sure, rooting out discrimination is a laudable goal, but

the societal benefit does not and cannot justify the unconstitutional pathways the Order, DOL, and OFCCP have taken to get there.

I. The Enforcement and Adjudication Apparatus Developed by DOL and Administered by OFCCP Is Unconstitutional

A. Congress Did Not Authorize Executive Order 11246 or OFCCP's Regulatory Enforcement and Adjudication Apparatus

Executive Order 11246 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.* The Order does not identify any statutory grant from Congress to the President to issue the Order or its requirements. Nor could it, because no statute authorizes Executive Order 11246 or the regulations implementing OFCCP's enforcement and adjudication apparatus. The Executive Order 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 to the extent they do seek to bind the conduct of third parties (such as government contractors), the regulations must be authorized by a statute and not just an Executive Order. Otherwise they are unconstitutional because they arrogate legislative power from Congress and judicial power from the courts, contravening the vesting clauses of Article I and Article III.

Any reliance on the Procurement Act as providing statutory authority in support of Executive Order 11246 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 Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979) ("nowhere in the Act is there a specific reference to employment discrimination"). Thus, Executive Order 11246 cannot provide a constitutionally sufficient basis for OFCCP's 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).

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 that place 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*, 441 U.S. at 302-03. However, the mere fact that an agency's rule is substantive is not dispositive of whether it has the "force and effect of law" because "exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* at 302.

The Procurement Act did not grant President Johnson the power to establish Executive Order 11246's nondiscrimination and affirmative action enforcement apparatus. Hence, the substance of the Executive Order cannot bind anyone outside the Executive Branch. Similarly, OFCCP's enforcement and adjudication regulations, promulgated under the constitutionally deficient authority of Executive Order 11246, are not rooted in any grant of power from Congress. Hence, they are also incapable of binding third parties.

Tellingly, Congress has provided specific statutory authorization for enforcement and adjudication regimes in other contexts, including ones that oversee employment practices and protect employees' rights. For example, in 1935, Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* The NLRA created the National Labor Relations Board ("NLRB" or "the Board") and articulated a comprehensive administrative enforcement scheme to protect the rights of employees to organize, collectively bargain, and be free from unfair labor practices that curtail those rights. *Id.*[7] Under the NLRA, the Board is authorized to "make, amend, and rescind … such rules and regulations as may be necessary to carry out" the Act. 29 U.S.C. § 156. The NLRA specifically empowers the Board to "to prevent any person from engaging in any unfair labor practice … affecting commerce" by authorizing the NLRB to initiate administrative proceedings against a person or entity accused of unfair labor practices. 29 U.S.C. § 160(a), (b). If after the hearing the Board determines that violations occurred, it may provide remedies to those harmed, including "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the NLRA. 29 U.S.C. § 160(c).

Not only does Congress know how to design and authorize enforcement and adjudication regimes through statute generally, Congress can and has authorized OFCCP itself to administer *other*

[7] In addition to protecting employees' rights, the NLRA also provides protections for employers and labor unions.

enforcement and adjudication regimes that Congress designed. *See* 29 U.S.C. § 793 (Section 503 of the Rehabilitation Act); *see also* 38 U.S.C. §§ 4211, 4212 (VEVRAA).[8] In 1972, Congress passed VEVRAA requiring that certain government contracts include a proviso requiring the contractor to "give special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era." *See* Pub. L. No. 92-540, title V, § 503(a), Oct. 24, 1972, 86 Stat. 1097; *see also* 38 U.S.C. § 4212(a). To ensure compliance with VEVRAA's affirmative action provision, the DOL is authorized to receive and investigate complaints from qualified veterans who believe a contractor has not complied with such provision. *See* 38 U.S.C. § 4212(b); *see also* Pub. L. No. 92-540, title V, § 503(b), Oct. 24, 1972, 86 Stat. 1097. The DOL is also authorized to "take such action" on the complaint "as the facts and circumstances warrant" consistent with the contract's terms and applicable laws and regulations. *Id.*

Similarly, in 1973, Congress passed the Rehabilitation Act which, among other stated purposes, aimed to "promote and expand employment opportunities in the public and private sectors for handicapped individuals." *Stutts v. Freeman*, 694 F.2d 666, 668 (11th Cir. 1983) (internal quotation and citation omitted). Section 503 of the Rehabilitation Act requires certain government contracts to include a proviso requiring the contractor to "take affirmative action to employ and advance in employment qualified individuals with disabilities." 29 U.S.C. § 793(a); *see also* Pub. L. No. 93-112, title V, § 503(a), Sept. 26, 1973, 87 Stat. 393. To ensure compliance with Section 503's affirmative action provision, the DOL is authorized to receive and investigate complaints from individuals with disabilities who believe a contractor has not complied with such provision. 29 U.S.C. § 793(b); Pub. L. No. 93-112, title V, § 503(b), Sept. 26, 1973, 87 Stat. 393. The DOL is also authorized to "take such action" on the complaint "as the facts and circumstances warrant" consistent with the contract's terms

[8] The linguistic similarities between the VEVRAA, Rehabilitation Act, and 1977 Final Rule provisions are striking. Given that the 1977 Final Rule was adopted years after these acts raises the possibility that DOL took these statutorily authorized mechanisms and simply applied them more broadly, but it could not do that. If that is what occurred, then DOL should have gone to Congress and asked for permission, but it did not. It just implemented the 1977 Final Rule.

and applicable laws and regulations. *Id.* As amended, Section 503 of the Rehabilitation Act also provides standards for determining is a violation has occurred. 29 U.S.C. § 793(e).

Congress could have authorized Executive Order 11246's nondiscrimination and affirmative action policy or the enforcement regime in DOL's 1977 Final Rule, but it did not. Congress's failure to act should be dispositive. Furthermore, *amicus* is unaware of any other enforcement or adjudication regime that purports to draw its authority solely from an Executive Order.

The reliance on the Procurement Act's general authority to provide a basis for Executive Order 11246 and OFCCP's enforcement and adjudication apparatus is a *post hoc* rationalization invented to save the program. Notwithstanding the fact that the Procurement Act empowers the 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). A review of subsequent executive orders amending Executive Order 11246 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 Executive Order 13279, amending Executive Order 11246 to include certain religious protections. *Compare* Exec. Order No. 11246 (no mention of specific statutory authority); Exec. Order No. 11375 (no mention of specific statutory authority); 1977 Final Rule (authority for rule is based exclusively on Executive Order 11246) *with* Exec. Order No. 13279. The stated authority for that order included only part of the Procurement Act: 40 U.S.C. § 121(a). *See* Exec. Order No. 13279.[9] 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* Affirmative Action and Nondiscrimination

[9] Executive Order 13279 also states authority under 3 U.S.C. § 301 which authorizes the President to delegate certain functions. Executive Order 13279 is the only order amending Executive Order 11246 that states authority under 3 U.S.C. § 301.

Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities, 68 Fed. Reg. 56392 (Sept. 30, 2003).[10]

Similarly, when President Obama issued Executive Order 13672 to include protections based on sexual orientation and gender identity, the stated specific statutory authority for the order was only part of the Procurement Act: 40 U.S.C. § 121. *See* Exec. Order No. 13672. As with the final rule implementing Executive Order 13279, the 2014 final rule implementing Executive Order 13672 and amending Executive Order 11246 also makes no mention of 40 U.S.C. § 121(a) or the Procurement Act more generally as the authority for the regulations. *See* Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72985 (Dec. 9, 2014). In fact, OFCCP did not assert that the Procurement Act provided any authority for it to conduct rulemaking or operate its enforcement and adjudication apparatus until 2016. Even then it did so only in its analysis of a final rule, not in the rule itself. *See* Discrimination on the Basis of Sex, 81 Fed. Reg. 39108, 39118 & n. 80 (June 15, 2016). Further, this year's final rule implementing discretionary review by the Secretary, which amends 41 C.F.R. § 60-30.29 and § 60-30.30, makes no mention of 40 U.S.C. § 121(a) or the Procurement Act more generally as the authority for the regulations. *See* 85 Fed. Reg. at 13041.[11]

The absence of statutory authority for most of what DOL and OFCCP have done is not a mere technical or semantic critique of Executive Order 11246'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. Courts have already recognized that the statutory basis for E.O. 11246 is "obscure." *See Chrysler*, 441 U.S. at

[10] Similarly, the 2003 final rule amending the relevant sections of OFCCP's enforcement and adjudication regulations makes no mention of 3 U.S.C. § 301.

[11] Notably, the March 6, 2020 final rule states that the authority for 41 C.F.R. part 60-30 should continue to include 29 U.S.C. § 793, as amended, (Section 503 of the Rehabilitation Act) and 38 U.S.C. § 4212, as amended (VEVRAA).

304. But that characterization overstates the case: the OFCCP house is built on sand. Aside from the Rehabilitation Act and VEVRAA, the statutory basis for OFCCP is nil.

The Procurement Act does not provide any standard to guide the President or the agency's discretion in creating and overseeing OFCCP. A statute that delegates to the Executive Branch without even providing an intelligible principle to guide agency policymaking violates the nondelegation doctrine. If the Procurement Act were somehow interpreted as authorizing OFCCP's enforcement programs, then that act (rather than just OFCCP) would be unconstitutional for violating the nondelegation doctrine. *See A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 541 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). In *Schechter Poultry*, the Court declared a statute unconstitutional because it "supplies no standards" for guiding the President's discretion. *Id.* at 541. In finding such, the Court noted that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-38. Similarly, in *Panama Refining*, the Court found a statute unconstitutional because it "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415. The exercise of unfettered power and discretion by the executive branch is improper, and when the President, or agencies, exercise such unconstrained power their actions are unconstitutional.

As in *Panama Refining*, here too "Congress has declared no policy, has established no standard, has laid down no rule" permitting either Executive Order 11246 or OFCCP's regulations implementing its enforcement. *Id.* at 430. The Procurement Act is silent on matters of nondiscrimination and affirmative action and cannot be read to provide any standard to guide the President's discretion in developing and issuing Executive Order 11246 or OFCCP's enforcement and adjudication apparatus. Nor can the Procurement Act's general authority to "prescribe policies and

directives that the President considers necessary" to carry out the act and its stated policy—to provide for "an economical and efficient contract procurement system"—be read to provide any standard.

1. Subjecting Regulated Parties to Unconstitutional Investigations, Enforcement, and Adjudications Violates those Regulated Parties' Constitutional Rights

As a policy matter, massive societal benefits accrue from the types of nondiscrimination policies OFCCP enforces. But, by focusing on the perceived societal value of OFCCP's enforcement program—asserting that it is a sound policy that the government should continue—Proposed Intervenors and *amici* miss the important fact that the program necessarily violates the regulated contractors' civil rights and civil liberties.[12] The arrogation of judicial power by the executive through binding adjudication denies regulated entities their right to an independent judge, jury, and the full due process of law. *See* U.S. CONST. art. III, § 1; U.S. CONST. art. III, § 2 cl. 3; U.S. CONST. amend. V.[13] These harms cannot be mitigated by the provision of some (limited) process rights for the accused, because the entire adjudication is unconstitutional—at least where Congress has not authorized it via statute. Nor can the harm be relieved by the eventual availability of review in an Article III court because contractors have a right not to be tried before an unconstitutional tribunal. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Moreover, justice delayed is justice denied.

[12] The structure of the Constitution is antithetical to policy usurpations by the executive branch and functions to "ensure[]…that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J. concurring).

[13] Moreover, administrative investigation, enforcement, and adjudication processes are inherently coercive, forcing regulated parties into settlement when there has been no finding of proof or admission of legal wrongdoing. The Administration recently recognized as much and sought public comment on ways to improve administrative enforcement and adjudication *See* Office of Mgmt. and Budget, Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483 (Jan. 30, 2020)*; cf.* NCLA Comment to Office of Management and Budget's January 30, 2020 *Improving and Reforming Regulatory Enforcement and Adjudication* Notice at 5-15, 24-26 (Mar. 16, 2020), *available at* https://nclalegal.org/wp-content/uploads/2020/03/2020.03.16-NCLA-Comment-to-OMB-85-Fed.-Reg.-5483.pdf.

OFCCP lacks any statutory authority to promulgate rules or to maintain an administrative adjudication regime enforcing Executive Order 11246. Thus, all OFCCP adjudications enforcing the Executive Order, and the obligations and rules that allegedly flow from it, are likewise unconstitutional. Requiring government contractors to be subjected to unconstitutional adjudications violates their civil rights and liberties. If the Executive Branch seeks to vindicate the rights of others, it must do it through proceedings authorized by Congress.

2. OFCCP's Remedies that Sound in Equity Are Ultra Vires *and Unconstitutionally Usurp Legislative Power*

In addition to the constitutional deficiencies noted above, OFCCP's regulations ordering remedial relief fail for independent reasons. First, Executive Order 11246 only enumerates *prospective* sanctions and penalties, but the 1977 Final Rule, which cites only the Order as the source of its authority, delineates new *retrospective* relief. *Compare* Exec. Order No. 11246 § 209(a) *with* 1977 Final Rule at § 60-1.26(a)(2) (permitting proceedings "to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions.").[14] Absent a statutory grant, the creation of new remedies by administrative agencies is improper. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). Similarly, even if one assumes that rights and remedies can be granted by Executive Orders, rights and remedies beyond those specified in the Executive Order cannot be created by administrative agencies "no matter how desirable that might be as a policy matter, or how compatible with [the Executive Order]." *Id.* At a minimum, these new remedies exceed the Executive Order's grant of authority and are thus *ultra vires* and invalid.

[14] To the extent equitable remedies were contemplated by Executive Order 11246, they were limited to cases where a recommendation was made to DOJ to bring "appropriate proceedings," presumably in a court, to enforce "substantial or material violation or the threat of substantial or material violation of the [Equal Opportunity Clause]." *Id.* § 209(a)(2). And the equitable remedy was limited to enjoining regulated parties from preventing compliance with the Order. *Id.*

These additional forms of relief create another constitutional problem because they are forms of equitable relief, and the executive branch has no vested or inherent equitable powers. Nor can the President or the agencies make law. *See Loving*, 517 U.S. at 758. The judicial power of the courts extends to cases in "Equity." U.S. CONST. art. III, § 2. The remedies authorized by OFCCP's regulations are not authorized by Congress and improperly seek to supplant the adjudicatory powers assigned to the judiciary by Article III of the Constitution.

B. OFCCP's Enforcement and Adjudication Apparatus Impermissibly Evades Legislative Control

When the government chooses to exercise power through unlawful administrative shortcuts rather than constitutionally permissible pathways the government's actions breathe new life into the basic elements of absolute power. *See* P. Hamburger, *supra* p. 7 at 7. Two of these elements are implicated by OFCCP's enforcement and adjudication apparatus: (1) the administrative adjudication system is extralegal because it evades legislative processes; and (2) the enforcement apparatus impermissibly consolidates legislative and judicial power in OFCCP and DOL. *See, e.g., id.* at 6. The harm created by OFCCP's extralegal enforcement and adjudication apparatus is significant given that the agency exerts power over contractors employing about 25 percent of America's workforce. *See* News Release, U.S. Department of Labor Announces Record Year for Monetary Settlements and Compliance Assistance by the Office of Federal Contract Compliance Programs, Release No. 19-1884-NAT (Oct. 25, 2019), https://www.dol.gov/newsroom/releases/ofccp/ofccp20191025.

Under our constitutional system, binding power—power that confers legal obligations on individuals and entities—can only be exercised through acts of Congress and the courts. *See* Philip Hamburger, *The Administrative Threat* 22-23 (Encounter Books 2017). Attempts to bind or impose legal obligations through other pathways, such as binding Executive Orders and administrative adjudications that lack a statutory foundation, are extralegal and invalid. *See id.* at 17, 18. These

extralegal actions are harmful to civil liberties in at least two ways. First, binding administrative rules "deny Americans their right under Article I to be subject to only such federal legislation as is enacted by an elected Congress" thereby diluting their constitutional right to self-government. *Id.* at 23. Second, "binding agency adjudications deprive Americans of their right under Article III to be subject only to such federal judicial decisions as come from a court, with a real judge, and the full due process of law." *Id.*; *see also* U.S. CONST. art. III, § 1; U.S. CONST. art. III, § 2 cl. 3; U.S. CONST. amend. V.

OFCCP's regulatory enforcement and adjudication apparatus is extralegal and invalid. The Executive Order and OFCCP's rules implementing its enforcement affect contractors' rights and place binding obligations on them outside of constitutionally and statutorily prescribed statutorily pathways. Further, the 1977 Final Rule, as amended, supplements and changes Executive Order 11246's edicts by expanding the Order's limited enforcement mechanisms and creating a full adjudication process out of whole cloth to oversee compliance with the Order. *See supra* at 4-5 (discussing the 1977 Final Rule). Contractors accused of violating Executive Order 11246 or OFCCP's regulations may be subjected to OFCCP's adjudication processes and bound by the agency's final order. *See supra* at 6 (discussing final orders, sanctions, and penalties). No legislation adopted by Congress authorizes these rules.

OFCCP's enforcement and adjudication apparatus also impermissibly consolidates legislative and judicial power in OFCCP and DOL. In this way, the expansion of administrative power collapses the Constitution's tripartite government. Consolidation of sovereign power within a single body is a particularly pernicious aspect of administrative power; and such consolidation was rightly feared at the time of America's founding. "The Framers perceived that '[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.'" *I.N.S. v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J. concurring) (quoting THE FEDERALIST NO. 47, p. 324 (James Madison)

(J. Cooke ed. 1961)). To avoid such tyrannical outcomes, the Constitution's structure was designed chiefly to stop consolidations or usurpations of sovereign power by a single entity. *See Chadha*, 462 U.S. at 960.

But such consolidations have persisted via administrative law. OFCCP's expansive assumption of power through its enforcement and adjudication apparatus is a prime example. OFCCP's apparatus illicitly consolidates legislative and judicial power in violation of the Constitution's design.

II. The *Ultra Vires* Nature of OFCCP's Enforcement and Adjudication Apparatus Is Further Highlighted by Its Reliance on the Determinations of ALJs Who Are Unconstitutionally Protected by Multilevel Tenure Protections in Violation of the Vesting and Take Care Clauses

Even if this Court were to determine that there is some statutory support for OFCCP's enforcement apparatus—there is not—the system is still unconstitutional. Case law strongly suggests that Congress may not grant agency ALJs multilevel tenure protection because it contravenes Article II's design. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492, 501, 514 (2010). Multiple layers of for-cause removal protection effectively immunizes executive officers from removal by the President. Justice Breyer called this the "embedded constitutional question" in *Lucia*, 138 S. Ct. at 2057 (2018) (Breyer, J., concurring). *Amicus* recognizes that Oracle has not directly raised this constitutional issue in this proceeding. But the dubious constitutional status of DOL ALJs who oversee proceedings alleging violations of Executive Order 11246 further highlights the *ultra vires* nature of OFCCP's enforcement apparatus.

OFCCP's enforcement architecture necessarily requires determinations by DOL ALJs. These officials are inferior officers of the United States subject to the Appointments Clause and are afforded multiple layers of tenure protection. *See OFCCP v. Oracle America, Inc.*, 2017-OFC-00006, Order Denying Defendant's Motions To Reconsider, To Dismiss, or To Hold in Abeyance (Dep't of Labor

Jan. 11, 2019) (noting that the DOL "conceded that DOL ALJs are inferior officers subject to the Appointments Clause"); *see also* 5 U.S.C. § 3105; 5 U.S.C. § 7521(a).

Regulations that, as here, prevent the President from exercising control over Executive Branch activity violate the Constitution because they prevent the President from carrying out his Article II responsibility to ensure that the laws are faithfully executed. *See Free Enterprise Fund v. Pub. Co.,* 561 U.S. 477 (2010). Under OFCCP's current enforcement and adjudication apparatus, contractors accused of violating the Order or the Equal Opportunity Clause and seeking to defend themselves must appear in a hearing before an officer lacking constitutional authority. Subjecting them to such enforcement proceedings that violate their due process rights. *See Lucia*, 138 S. Ct. at 2055.

CONCLUSION

NCLA urges the Court to find that DOL and OFCCP's enforcement and adjudication apparatus is unconstitutional and grant Oracle America, Inc.'s motion for summary judgment. This Court cannot fix the gaping constitutional hole in OFCCP's foundation. However, by granting Oracle's motion, the Court can effectively call Congress's attention to the lack of statutory authorization for much of OFCCP's enforcement regime. In that way, the Court can do its part to ensure that the problem is fixed in the near future—in whatever manner Congress sees fit—so that illegal discrimination does not go unpunished at some future date. Any other outcome here risks leaving another court that recognizes the constitutional deficiencies pointed out here to clean up the mess, and that future court may then be forced to let a truly egregious instance of discrimination in federal contracting off the hook.

Dated: May 1, 2020

Respectfully Submitted,

Kara Rollins

Kara Rollins (D.C. Bar No. 1046799)
Richard A. Samp (D.C. Bar No. 367194)

New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: (202) 869-5210
Facsimile: (202) 869-5238
Kara.Rollins@ncla.legal

Attorneys for Amicus Curiae New Civil Liberties Alliance