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U.S. Equal Employment Opportunity Commission
131 M Street, NE
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Subj: Proposed Updated Compliance Manual on Religious Discrimination
RIN No. 3046-ZA01

Dear Ms. Wilson:

On behalf of the United States Conference of Catholic Bishops and National Association of Evangelicals, we respectfully submit the following comments on the Equal Employment Opportunity Commission's proposed Updated Compliance Manual on Religious Discrimination ("Manual").

We are grateful to the Commission for this updated guidance and for the effort it has undertaken to explain Title VII with greater precision and clarity. Our comments relate to a section of the Manual (12-I, C.1) pertaining to the statutory exemptions for religious employers. In our view, two assertions in that section are either misleading or incorrect, perhaps unintentionally so in light of other language in this section.

First, the Manual states that under Title VII, a religious corporation, association, educational institution, or society (collectively "religious employer") is "permitted to give employment preference to members of its own religion." Manual, p. 19. This statement, while true, could be misconstrued to mean that the applicable exemptions (sections 702(a) and

703(e) of the Civil Rights Act of 1964) *only* permit employment preferences for co-religionists. As demonstrated below, the exemptions are *not* so limited.[1]

Second, the Manual states that the exemption set forth in section 702(a) "applies *only* to religious discrimination"[2] and that religious employers "are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, or national origin…." Manual, p. 21 (emphasis added). Although the Manual cites to the text of section 702(a) in support of these assertions, there is no textual basis for concluding that the section 702(a) or 703(e) exemptions are limited in their application to claims of religious discrimination. Other language in the Manual seems to concede that the exemptions apply to all of Title VII, not just claims of religious discrimination. Manual, pp. 24-25 (citing a case in which the religious exemptions barred claims of sex discrimination and retaliation); *id*. at 24 (stating broadly that "[t]he prerogative of a religious organization to employ individuals 'of a particular religion' … has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"). And while certainly it is true that in many scenarios religious employers remain subject to Title VII prohibitions against discrimination on the basis of other protected classes, the text of these exemptions dictates that they apply to cases in which adverse employment action is taken on the basis of employee conduct or beliefs inconsistent with the religious employer's beliefs, regardless of how the claim of discrimination is pled.

In Part I of these comments, we discuss the text of Title VII and explain why that text supports this two-fold conclusion. In Part II, we discuss additional support for this conclusion in case law and other authority. In Part III, we discuss contrary court decisions and explain why, in our view, they are flawed.

I. Analysis of the Statutory Text

Title VII has two exemptions that apply to religious employers. Section 702(a) of the Civil Rights Act of 1964 (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

[1] A later portion of the Manual is more nuanced in stating that "the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs." Manual, p. 24.

[2] A similar assertion appears in the block text on an earlier page of the Manual. Manual, p. 18 (stating that religious employers are "exempt from certain religious discrimination provisions").

> connected with the carrying on by such corporation, association, educational institution, or society of its activities.[3] [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 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.[4] [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*.[5] Use of the term "title" in each exemption requires that result.

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[3] 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." 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).

[4] 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, § 702, 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).

[5] 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 at 375 (noting that the religious exemptions provide a "sweeping override of everything else in all of Title VII").

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" make 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."[6] Because the definition expressly applies to the entire title, it applies to the religion of employers as well as that of employees.[7]

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 and 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 beliefs") (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 are not limited in their application to the employment of co-religionists, and those sections, 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 and other authority, to which we turn next.

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[6] 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."

[7] 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 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 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.").

II. Case Law and Other Authority

A. The religious exemptions are not limited to employment preferences for one's co-religionists.

While sections 702(a) and 703(e) allow a religious employer to give employment preferences to co-religionists, they do much more than that. *Larsen v. Kirkham*, *supra*, is illustrative. In that case, the plaintiff argued that section 703(e) only permitted a Mormon school to hire its co-religionists but did not permit the school to discriminate among various applicants who were all Mormons. The district court (499 F. Supp. at 966), forcefully rejected this argument:

> [The] notion that the religious school exemption permits no more than a religious school's preference for those ostensibly affiliated with the religion operating it ignores both reason and policy…. [I]t is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task. In short, nothing in the language, history or purpose of the exemption supports such an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference.

That the Title VII religious exemptions are not limited in their application to employment preferences for one's co-religionists is also supported by *Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997). In that case, a Baptist university terminated a Baptist professor whose theological views differed from those of the dean of the university's divinity school. The court said that section 702(a) "allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities." *Id*. at 200. Thus, the university could decide to employ only professors whose theological views were in sync with those of the dean. There is "no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption." *Id*. at 199-200.[8]

[8] For additional authority, *see Maguire v. Marquette Univ*., 627 F. Supp. 1499 (E.D. Wis. 1986) (Title VII exemptions shielded a Catholic university from employment discrimination claims brought by a Catholic teacher who it declined to hire because she disagreed with Church teaching on abortion), *aff'd in part on other grounds*, *vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Wirth v. College of the Ozarks*, 26 F. Supp.2d 1185, 1188 (W.D. Mo. 1998) (claim that a non-denominational Christian college fired a professor because of his Catholic faith was barred by the Title VII exemptions even though Catholicism is a Christian faith), *aff'd*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001); *O'Connor v. Roman Catholic Church of Diocese of Phoenix*, No. CV 05-1309 PHX-SMM, 2007 WL 1526736 (D. Ariz. May 23, 2007) (Title VII religious exemption barred a Catholic employee's retaliation claim against a Catholic diocese where undisputed evidence showed that the employee was fired because she had married outside the Catholic Church). (Continued on next page.)

More broadly, the section 702(a) and 703(e) exemptions create, as to Title VII, a right on the part of religious employers to have religion-based employee conduct standards. Given the definition of religion in section 701 and the broad sweep of those exemptions signaled by the reference to "this title," such standards can be applied to any employee, whether or not he or she shares the employer's religious affiliation.

The leading case on the application of the Title VII exemptions to employee conduct is *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). In that case, a Catholic elementary school declined to renew the contract of a tenured non-Catholic teacher, Susan Little, after she entered into a second marriage without annulment of her first marriage. Little sued for religious discrimination under Title VII. The question therefore was not whether the Title VII exemptions allowed a Catholic school to hire only Catholics—the school had hired her "with full awareness that she was a Protestant." *Id*. at 945. Rather, the question was whether a Catholic school, after knowingly hiring a Protestant teacher, could fire her "because her *conduct* does not conform to Catholic mores." *Id*. (emphasis added). The Third Circuit held that allowing such a claim would raise serious Free Exercise and Establishment Clause questions, and it read the Title VII religious exemptions to bar the claim.[9]

The Third Circuit noted that an evaluation of whether Little's conduct made her unfit for the religious employer's mission was unsuited to resolution by a civil court (*id*. at 949):

> [I]nquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs *or practices* make her unfit to advance that mission. [Emphasis added.] It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by the secular courts. [Original emphasis.] Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.

The problem of impermissible entanglement exists whether or not the employee plays a direct role in the employer's religious activities. *Id*. at 951. The Third Circuit (*id*. at 951) placed

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Earlier this week, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor similarly concluded that the religious exemption applicable to federal contractors—an exemption that mirrors and is derived from the religious exemptions in Title VII—is not limited to employment preferences for the religious employer's co-religionists. 41 C.F.R. § 60-1.3 (defining the phrase "particular religion"), published at 85 Fed. Reg. 79324, 79371 (Dec. 9, 2020); *see* 85 Fed. Reg. at 793444 (preamble) ("As explained in the NPRM, the religious exemption is not restricted to a purely denominational preference.").

[9] *Little* follows the approach to statutory construction required by *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). Under *Catholic Bishop*, "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id*. at 500. *Catholic Bishop* calls for a two-tiered analysis. First, a court must determine whether the proposed interpretation of a statute would give rise to a serious constitutional question. *Id*. at 501. If it would, then the court must determine whether Congress clearly expressed an intent that the statute be so construed. *Id*. Absent such a clearly expressed intent, the statute should be construed to avoid the constitutional question.

particular emphasis on the impermissibility of a civil court, in the context of a religious employer, evaluating employee *conduct*:

> … Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals *faithful to their [i.e., the organization's] doctrinal practices*, whether or not every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs *and conduct* are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in *conduct regarded by the school as inconsistent with its religious principles.* [Emphasis added.]

Other courts have similarly concluded that the Title VII religious exemptions apply to conduct. *Kennedy v. St. Joseph's Ministries*, 657 F.3d at 194 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices…. [P]ermission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *see also Henry v. Red Hill Evangelical Lutheran Church*, 201 Cal.App.4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons "of a particular religion" under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Services*, 456 F. Supp.2d 1021, 1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough*, 2015 WL 759478, *12-13 (citing *Little* and *Saeemodarae* for the same proposition).

The U.S. Department of Justice likewise recognizes that the Title VII religious exemptions apply to conduct and encompass more than a mere right to hire co-religionists. Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), at 6, https://www.justice.gov/opa/press-release/file/1001891/download, 82 Fed. Reg. 49668, 49670 (Oct. 26, 2017), which states:

> Under that exemption [i.e., the religious exemptions in Title VII], religious organizations may choose to employ only persons whose beliefs *and conduct* are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only

> practicing Christians, or *only those willing to adhere to a code of conduct* consistent with the precepts of the Lutheran community sponsoring the school. [Emphasis added.]

B. <u>The exemptions may be asserted as a defense to Title VII claims when the religious employer's employment decision is based on sincerely-held religious reasons.</u>

Little, to be sure, involved a Title VII claim of *religious* discrimination, but the Title VII exemptions also shield religious employers from *other* Title VII claims as well.

At least three decisions, for example—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*:

> 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. *Id*. 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.").[10]

[10] Indeed, the Manual itself (p. 24-25) describes the fact pattern in *Curay-Cramer*, and cites to that decision, as an example of a case in which the religious exemptions bar sex discrimination and retaliation claims, an apparent concession that the exemptions apply not just to claims of religious discrimination.

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.[11]

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]."); *Curay-Cramer*, *supra* (religious exemptions barred retaliation claim against religious employer); *Saeemodarae*, 456 F. Supp.2d at 1041 (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 …

[11] 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.

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 (9th Cir. 2019) (Section 702(a) barred retaliation claim against religious employer).

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.

A. The Co-Religionist Theory

Some courts have stated that the Title VII exemptions only enshrine a right to employ one's co-religionists. *Boyd v. Harding Academy of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that section 702(a) "merely indicates that [religious] institutions may choose to employ members of their own religion"); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) ("Title VII provides only a limited exemption enabling [a religious employer] to discriminate in favor of co-religionists.").

This assertion, usually made without careful attention to the language of the statute, is debunked by the text of Title VII and other case law, discussed in Parts I and II respectively.

B. The Religious-Discrimination Theory

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*, No. 1:19-cv-13153, 2020 WL 6434979, at *4 (S.D. Ind. Oct. 21, 2020) (stating that "[t]he plain language of Title VII indicates that the [section 702(a)] exception applies to one specific reason for an employment decision—one based upon religious 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*, 88 F.3d at 413 (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 text of Title VII—not in the exemptions themselves, nor in the definition of religion, or anywhere else in Title VII. Esbeck at 374-80 (underscoring this point); Phillips 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*,[12] it is the text of the statute that must govern.[13]

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. 1746, the Equal Employment Opportunity Act of 1972, 92 Cong. Rec. S. 3461 (1972)); *Pacific Press*, 676 F.2d at 1276-77 (same); *Starkey*, at *5

[12] *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.").

[13] 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*, at *5 ("The exemption under Section 702 should not be read to swallow Title VII's rules."). This too is a fallacy. The fact that the exemptions apply in some cases does not demonstrate that they apply in all cases.

(same). It is often true that religious employers are subject to Title VII, but as noted above, it is not always true because of the exemption defenses. 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).

Conclusion

For the reasons stated above, we respectfully request that the Manual be modified to make clear that the section 702(a) and 703(e) exemptions (1) do more than simply protect the right of a religious employer to prefer its co-religionists, and (2) may be asserted by a religious employer as a defense to any claims under Title VII—not just claims of *religious* discrimination—when that employer bases its adverse employment decision on beliefs or conduct of an applicant or employee that are inconsistent with the employer's sincerely-held religious convictions.

Thank you for your consideration of these comments.

Respectfully submitted,

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