



December 17, 2020

Janet Dhillon
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: Proposed Updated Compliance Manual on Religious Discrimination, RIN Number 3046-ZA01 / Document Number 2020-25736

Dear Chair Dhillon:

We write jointly to offer comments on the EEOC's proposed "Updated Compliance Manual on Religious Discrimination." Thank you for considering our concerns and suggestions.

For decades, the American Civil Liberties Union and Americans United for Separation of Church and State have been dedicated to safeguarding a fundamental American value: religious freedom. The First Amendment to the U.S. Constitution grants everyone in this country the right to believe—or not believe—without government interference or coercion. But it also ensures that no one can use religion as a justification for ignoring laws that protect the rights of others.

We generally support the use of reasonable and appropriately tailored accommodations to ease substantial, government-imposed burdens on the practice of religion. Such accommodations, however, must not be so broad as to harm third parties.

Before we offer our substantive concerns, we first note our concerns about the EEOC's unnecessarily rushed and truncated drafting and public-comment process. The 2008 Compliance Manual on Religious Discrimination was adopted after a six-year process that included a series of meetings in both 2003 and 2008 with "religious groups, employer groups, unions, and secular civil liberties groups."¹ At these meetings, the EEOC conveyed its "basic thinking" on the issues that would be put in the manual and "got input from these stakeholders regarding the issues that they thought should be addressed by the Commission."²

¹ *Meeting of July 22, 2008, Issues Facing Asian Americans and Pacific Islanders (AAPIs) in the Federal Workplace and Compliance Manual Chapter on Religious Discrimination*, EEOC (2008) (statement of Peggy Mastroianni, Associate Legal Counsel, EEOC, Office of Legal Counsel) available at <https://bit.ly/37nHaNo>.

² *Id.*

By contrast, the EEOC released the draft manual—a 120-page, single-spaced document with 320 footnotes—on November 17 and has provided the public a mere 30 days to respond, despite the intervening Thanksgiving and Hanukkah holidays. Moreover, while the General Counsel held dialogue sessions to “highlight the EEOC’s efforts on behalf of individuals facing religious discrimination” and discuss how the agency could “improve” its litigation of these claims,³ only a small number of stakeholders were invited, and these sessions were held the very same week the manual was released. This process is wholly insufficient to allow meaningful input from the public. As Vice-Chair Sonderling said at the November 2020 EEOC meeting, in his experience, public comments have “often provided invaluable insights that could be offered by those outside of the initial drafting process.”⁴ More time must be dedicated to obtaining such public input.

Moreover, many of the proposed changes to the manual undermine its purpose—to serve as a “practical resource for employers, employees, practitioners, and EEOC enforcement staff.”⁵ For example, the current manual offers clear criteria for determining whether an employer qualifies as a religious corporation entitled to the narrow religious exemption under Section 702 of Title VII, setting forth the common factors used by courts to make this determination. The reader of the current manual will understand, generally, what is a religious organization and what is not.

The proposed revision, however, removes these common factors from the main text and relegates them to a long and complicated footnote. The main text is now vague and focuses on legal issues that could be described, at best, as unsettled and controversial. The readers of the proposed manual—particularly employees and employers without legal training—will be left with little understanding—and perhaps a misunderstanding—of what constitutes a religious organization for purposes of the narrow Title VII religious exemption. This is a disservice to those whom the manual is intended to help.

Beyond these concerns, we have several substantive objections. Due to the inadequate and truncated feedback period, our comments are limited to the following issues:

- The Proposed Manual Misleadingly Characterizes Title VII’s Religious Exemption, the Ministerial Exception, and RFRA’s Interaction with Title VII
 - What Entities Are “Religious Organizations”?
 - The Scope of the Religious Organization Exemption
 - The Ministerial Exception
 - Additional Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)

³ Press Release, EEOC, EEOC General Counsel Holds Dialogue Sessions on Religious Discrimination with Agency Stakeholders (Nov. 19, 2020), available at <https://bit.ly/3qXzB36>.

⁴ Meeting of Nov. 9, 2020, Discussion of an Update to the Compliance Manual Section on Religious Discrimination, EEOC (2020) (statement of Vice-Chair Keith Sonderling), available at <https://bit.ly/3qYZ0hl>.

⁵ *Id.*

- The Proposed Manual Downplays the Risk of Religiously Based Harassment and Advances an Inaccurate View of Reasonable Accommodations
 - Disruption to and Harassment of Others in the Workplace
 - Church, Coats-Snowe, and Weldon Amendments
 - Differences Between Private and Public Employers
- The Proposed Manual Should Be Even More Respectful of Non-Religious and Minority-Faith Employees

The Proposed Manual Misleadingly Characterizes Title VII’s Religious Exemption, the Ministerial Exception, and RFRA’s Interaction with Title VII.

Title VII was designed to protect *employees*. Its “primary objective” is “to bring employment discrimination to an end.”⁶ There is a religious exemption in Section 702 of Title VII, but it is narrow in scope, and for good reason: The broader the EEOC interprets this religious exemption, the greater the number of employees who will face discrimination. So, too, by construing RFRA and the ministerial exception more broadly than is mandated by the courts or the statutory language, the EEOC will weaken protections for employees. Unfortunately, the proposed manual takes an unnecessarily expansive view of these legal doctrines.

Moreover, the proposed manual implicitly suggests that these legal doctrines are jurisdictional when, in fact, they are affirmative defenses that must be raised by the employer; it is not the EEOC’s job to do so. It is important that the manual properly explain potential defenses, but broad and misleading readings, like those in the proposed manual, will only cause confusion. Employers and employees could misapply the law and EEOC enforcement staff could be discouraged from launching appropriate and necessary investigations, effectively denying important protections to the employees whom the EEOC is obligated to protect.

What Entities Are “Religious Organizations”?

The Title VII religious exemption, which “there is no denying . . . should be construed ‘narrowly,’”⁷ is generally understood to allow organizations whose “purpose and character are

⁶ *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); see also, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) (“The dominant purpose of the Title, of course, is to root out discrimination in employment.”); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001) (“What is clear from the law itself, its legislative history, and Congress’ subsequent actions, is that the goal of Title VII was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”).

⁷ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011) (O’Scannlain, J., concurring) (citing *EEOC v. Kamehameha Schools*, 990 F.2d 458, 460 (9th Cir.1993)); see also, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (“The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.”).

primarily religious” to prefer coreligionists in hiring.⁸ To determine whether an entity is “primarily religious,” courts weigh all significant “religious and secular characteristics” of that entity.⁹

The current manual provides a useful explanation of the exemption and summarizes many of the common factors used by the courts to determine whether an employer is “primarily religious.” An employer or employee reading the current manual would have a general understanding of which employers are likely to qualify for the exemption.

The proposed manual, by contrast, is vague and legally inaccurate, undermining its usefulness. It fails to explain that courts must apply a multi-factor test to determine whether an entity is “primarily religious,” and relegates the factors used by the leading cases—*EEOC v. Townley Engineering & Manufacturing*,¹⁰ *LeBoon v. Lancaster Jewish Community Center Association*,¹¹ and *Spencer v. World Vision*¹²—to the footnotes. The EEOC has changed the current manual’s language, which is accurate and helpful, to language suggesting that the statutory religious exemption is much broader than courts have held. The proposed manual even goes so far as to suggest (wrongly) that the exemption extends to for-profit corporations.

On the contrary, no federal appellate court, nor the Supreme Court, has ever extended the Title VII religious exemption to a for-profit entity. Whether an entity is a nonprofit is a main factor in the analysis of each of the leading cases, including all of those cited by the proposed manual.¹³ It is, in fact, considered “especially significant.”¹⁴ Rather than emphasize this factor’s importance in the legal analysis, the proposed manual goes out of its way to suggest it is not important at all and that the exemption should extend to for-profit corporations.

⁸ *EEOC v. Townley Eng’g & Mfg.*, 859 F. 2d 610, 618 (9th Cir. 1988); see also *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019); *World Vision*, 633 F. 3d at 729 (O’Scannlain, J., concurring); *LeBoon v. Lancaster Jewish Comm. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007).

⁹ *Garcia*, 918 F.3d at 1003 (quoting *Townley*, 859 F. 2d at 618); *World Vision*, 633 F.3d at 741 (O’Scannlain, J., concurring) (same); *LeBoon*, 503 F. 3d at 226 (same).

¹⁰ 859 F.2d 610.

¹¹ 503 F.3d 217.

¹² 633 F.3d 723.

¹³ *World Vision*, 633 F.3d at 724 (per curiam) (listing as a factor that the entity “not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts”); *id.* at 734, (O’Scannlain, J., concurring) (“The initial consideration, whether the entity is a nonprofit, is especially significant.”); *id.* At 745-48, (Kleinfeld, J., concurring) (using the factor “does not engage primarily or substantially in the exchange of good or services for money beyond nominal amounts” instead of the “nonprofit” factor, but not because he believed for-profits could qualify, rather because even nonprofits that engaged in such activities should *not* qualify for the exemption); *LeBoon*, 503 F. 3d at 226 (listing the first factor as “whether the entity operates for a profit”). It is noteworthy that, in upholding the Title VII exemption as applied to a nonprofit religious organization in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1986), four concurring Supreme Court justices suggested that their analysis would be different for for-profit corporations. *Id.* at 344 (Brennan, and Marshall JJ., concurring) (contrasting nonprofit and for-profit entities); *id.* at 346 (Blackmun, J., concurring separately with Justice O’Connor’s opinion); *id.* at 349 (O’Connor, J., concurring) (“It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization.”).

¹⁴ *World Vision*, 633 F.3d at 734 (O’Scannlain, J., concurring).

In so doing, the proposed manual misapplies *Burwell v. Hobby Lobby Stores, Inc.*,¹⁵ construing the case to suggest that the nonprofit factor is in question.¹⁶ Although the Supreme Court held in *Hobby Lobby* that closely held for-profit corporations could assert claims under RFRA, RFRA is an entirely different statutory scheme than the Title VII religious exemption. RFRA applies to “persons,” which the Court, relying on the Dictionary Act, interpreted to mean “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”¹⁷ The Court ruled that the RFRA definition encompassed at least some for-profit entities because the Dictionary Act did not specify that “persons” applied only to “some but not all corporations.”¹⁸ The Title VII exemption, in contrast, does not apply to the more expansively defined “persons.” It explicitly applies to *some* but not all corporations—it applies only to “religious corporations,” and courts have consistently held these are limited to nonprofit entities. Indeed, the Ninth Circuit decided *Garcia v. Salvation Army*¹⁹ five years after the *Hobby Lobby* decision and continued to apply the requirement that a religious corporation, at a minimum, be nonprofit.²⁰

The EEOC should restore to the main text of the manual language explaining that an employer must be “primarily religious” to qualify for the religious exemption and setting out the factors commonly used by courts to make this determination. It should also remove the misleading language that suggests for-profit corporations are eligible for the exemption.

The Scope of the Religious Organization Exemption

The scope of the Title VII religious exemption is also narrow. Religious organizations may consider religion—and only religion—in their employment practices. The exemption “does not confer upon religious organizations a license to make those [employment] decisions” on the basis of race, national origin, sex, sexual orientation, or gender identity.²¹ The exemption “merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with discrimination on another protected basis.”²² Indeed, when debating the Civil Rights Act of 1964 and amendments in 1972, Congress considered and rejected blanket exemptions that would allow religious employers to discriminate against other protected classes.²³

¹⁵ 573 U.S. 682 (2014).

¹⁶ Footnote 63 is particularly inappropriate for a compliance manual. The text cites the Department of Health and Human Services brief in *Hobby Lobby* and attempts to make inferences from issues that were briefed but not even addressed by the Supreme Court. Employers, employees, and practitioners need to understand what the law is. Speculation based on government briefs has no precedential value.

¹⁷ *Hobby Lobby*, 573 U.S. at 707-08.

¹⁸ *Id.* at 708.

¹⁹ 918 F.3d 997, 1004 (2019).

²⁰ The court determined that the entity was a nonprofit because it did not “engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Id.* (quoting *World Vision*, 633 F.3d at 724 (per curiam)).

²¹ *Rayburn*, 772 F.2d at 1166.

²² See *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

²³ See *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1276-77 (9th Cir. 1982) (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

The current manual explains this critical point well and includes clear examples. Although the proposed manual properly states that the scope of the exemption only applies to religion, it then muddies the water. It suggests that the exemption can be asserted as a defense to other forms of discrimination against protected classes. This is not so.

The proposed manual ignores case law that makes clear that religious employers *do not* get a license to discriminate on other grounds, even when such discrimination is motivated by religion²⁴ or carried out under a “code of conduct.”²⁵ The current manual provides clear examples that demonstrate this prohibition: (1) “a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races;” and (2) “a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.”²⁶ The proposed revision, however, deletes these examples.

Moreover, the proposed manual wrongly asserts that the EEOC cannot inquire as to whether religious discrimination was a “pretext” for other forms of discrimination.²⁷ Tipping its hand, the proposed manual relies on a 1980 case that erroneously suggested that the EEOC may not even have jurisdiction to investigate pretext. Federal courts have since rejected this view.²⁸

Finally, the proposed manual asserts that the Title VII “exemption allows religious organizations to prefer to employ individuals who share their religion, defined . . . by the employer’s religious observances, practices, and beliefs,” thus attempting to expand the scope of the exemption. To

²⁴ For example, courts have consistently held that it is “fundamental that religious motives may not be a mask for sex discrimination in the workplace.” *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998); see also, e.g., *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1320 (11th Cir. 2012); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

²⁵ Title VII mandates that, if an employer has a code of conduct, that it must “be applied equally” to all employees. See *Boyd*, 88 F.3d at 414; see also, e.g., *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *Ganzy*, 995 F. Supp. at 348; *Dolter v. Wahlert High Sch.*, 483 F. Supp 266, 270 (N.D. Iowa 1980).

²⁶ U.S. Equal Employment Opportunity Commission, *Compliance Manual, Section 12: Religious Discrimination*, 18 (July 22, 2008), available at <https://bit.ly/2WoXPtq> [hereinafter 2008 EEOC *Compliance Manual*].

²⁷ See, e.g., *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2d Cir.1993) (“[W]here a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as pretextual the employer’s justification.”); *Redhead v. Conference of Seventh-day Adventists*, 566 F. Supp. 2d 125, 134 (E.D.N.Y. 2008) (“[A]n employer’s simple assertion of a religious motive usually will not prevent a reviewing court from asking whether that motive ‘was in fact pretext.’”) (quoting *DeMarco*, 4 F.3d at 171)).

²⁸ The proposed manual relies on *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). Since then, the Supreme Court ruled in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006), that Congress must clearly state whether a statutory requirement is jurisdictional. In *Smith v. Angel Food Ministries, Inc.*, 611 F. Supp. 2d 1346, 1347-48, 1350 (M.D. Ga. 2009), the court explained that “Arbaugh eviscerat[ed] the precedential value of the *Mississippi College* decision” on claims relating to jurisdiction and held that the court could “examine [the case’s] merits.” See also *Garcia*, 918 F. 3d at 1006-07.

justify this expansion, the proposed manual points to the statutory definition of religion used to describe the protected activities of *employees*,²⁹ which “seems intended to broaden the prohibition against discrimination—so that religious practice as well as religious belief and affiliation would be protected.”³⁰ But the Title VII religious exemption protects *employers* and allows religious employers a narrow exemption to prefer coreligionists in hiring. Applying Title VII’s broad definition of religion to the Section 702 exemption for *employers* improperly expands the reach of the exemption far beyond its intent.³¹

The EEOC should restore language that makes clear that the Section 702 exemption is limited to employers’ consideration of employees’ religion; employers cannot use religion as a pretext for discrimination against other protected classes; and the EEOC has a duty to investigate these cases.

The Ministerial Exception

The ministerial exception, which is based on the Constitution rather than statute, is likewise narrow. It allows religious institutions to make decisions about who can preach and teach the faith without governmental interference. The exception applies only to those particular employees who qualify as “ministers” in the constitutional sense. Title VII thus still protects a religious institution’s non-ministerial workers. The ministerial exception is also narrow in that it does not confer absolute immunity from suit; rather, it is a fact-bound affirmative defense that requires an employer to demonstrate that it is a religious institution subject to the ministerial exception and that a particular employee’s duties are ministerial in nature.³²

Two recent Supreme Court cases have addressed how to determine whether an employee should be treated as a “minister,” setting out several factors to consider.³³ “What matters, at bottom, is what an employee *does*.”³⁴ The proposed manual, however, emphasizes only one of the factors—the religious institution’s own view of the employee’s role—instead of the range of factors that demonstrate what the employee does. The proposed manual should clarify that taking employers at their word is not the legal standard.³⁵

²⁹ U.S. Equal Employment Opportunity Commission, *Proposed Updated Compliance Manual on Religious Discrimination* 24, n.75 (Nov. 17, 2020), available at <https://bit.ly/3npAdAO> [hereinafter *Proposed Manual*].

³⁰ *Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991).

³¹ See *id.* (“There appears to be no legislative history to indicate that Congress considered the effect of this definition on the scope of the exemptions for religious organizations.”).

³² See, e.g., *Tucker v. Faith Bible Chapel Int’l*, No. 19-CV-01652-RBJ, 2020 WL 2526798, at *6 (D. Colo. May 18, 2020).

³³ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Soc’y Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

³⁴ *Our Lady of Guadalupe*, 140 S. Ct. at 2064 (emphasis added).

³⁵ This expansive view was espoused by only two justices, rather than the majority, in the most recent Supreme Court case on the ministerial exception. See *Our Lady of Guadalupe*, 140 S. Ct. at 269-70 (Thomas and Gorsuch, JJ., concurring).

Additional Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)

The proposed manual includes a new section that addresses RFRA and the First Amendment. Unfortunately, it, too, is misleading and will cause confusion for employers and employees alike. The proposed manual's expansive interpretation of RFRA is inaccurate and will surely result in more employees facing discrimination without recourse.

Private Sector Employers

Congress did not intend for RFRA to affect Title VII law. Indeed, the House Judiciary Committee's report on the legislation states, "Nothing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964."³⁶ And, even though RFRA was enacted in 1993, the current manual from 2008 correctly avoided suggesting that RFRA could be a defense.

The proposed revision, however, creates a new section of the manual for the purpose of suggesting that RFRA is a viable defense for private sector employers against Title VII claims, even in cases involving only private parties.³⁷ It is not.

To support this assertion, the proposed manual points to *EEOC v. Harris Funeral Homes*.³⁸ There, a funeral home asserted a RFRA claim in defending against EEOC charges that it had unlawfully discriminated against a transgender employee. The funeral home did not win on its RFRA claim, however.³⁹ The EEOC itself rejected the claim, "argu[ing] that the Funeral Home's RFRA defense must fail," and the Sixth Circuit agreed.⁴⁰ After merely assuming, but not deciding, that the employer could raise a RFRA defense against the EEOC, the court held that it

³⁶ H. Rep. No. 103-88 at 9 (1993).

³⁷ The weight of the case law indicates that RFRA is not available as a defense in lawsuits between private parties, where no governmental adversary is involved. See, e.g., *EEOC v. Harris Funeral Homes*, 884 F.3d 560, 584 (6th Cir. 2018) ("We have previously made clear that 'Congress intended RFRA to apply only to suits in which the government is a party.'") (citing *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010)); see also *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999). This is in keeping with the plain text of the statute, its legislative history (see *Listecki*, 780 F.3d at 736 (quoting and citing S. Rep. No. 103-111, at 4, 8-9 (1993)), and its operation (see, e.g., *McGill*, 617 F.3d at 410 ("Where, as here, the government is not a party, it cannot 'go[] forward' with any evidence.")) (internal quotation marks omitted)).

Although the proposed manual notes that the Second and Eighth Circuits have applied RFRA where the government was not a litigant, *Hankins v. Lyght*, 441 F.3d 96, 103-04 (2nd Cir. 2006); *In re Young*, 141 F.3d 854, 861 (8th Cir. 1998), the courts' reasoning in these cases is untenable in light of RFRA's text and history. Indeed the Second Circuit has expressed strong "doubts" about the conclusion reached in *Hankins*. See *Rweyemamu v. Cote*, 520 F.3d 198, 204 n.2 (2d Cir. 2008) (explaining that because RFRA's text plainly "requires the government to demonstrate that application of a burden to a person is justified by a compelling governmental interest," the court could "not understand how it can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue."); see also *Mathis v. Christian Heating Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 326 (E.D. Pa. 2016) (disagreeing with *Hankins* and holding that RFRA does not apply if the government is not a party).

³⁸ 884 F.3d 560.

³⁹ *Id.* at 589-90.

⁴⁰ *Id.* at 585.

would fail.⁴¹ And, as the Sixth Circuit explained in *Harris*, RFRA is not even a viable defense in Title VII suits between private parties: “If Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit.”⁴² The proposed manual omits this vital context and also fails to note that its citation to *Bostock v. Clayton County* relies on dicta—the Supreme Court did not, in fact, consider a RFRA defense in any of the three consolidated cases.

Importantly, in rejecting a RFRA defense, the Sixth Circuit in *Harris* explained that the government has a compelling interest in eradicating employment discrimination.⁴³ Yet, the proposed manual stops short of affirming that the government’s interest in combating all forms of discrimination protected under Title VII is compelling, even though courts have clearly stated that it is.⁴⁴ And to compound the problem, the manual also fails to explain that RFRA’s reach is limited by the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause bars the government from granting religious exemptions that detrimentally affect third parties.⁴⁵ Needless to say, allowing an employer to use RFRA to engage in employment discrimination violates this principle.

The EEOC should clarify that RFRA is not a viable defense for private sector employers against Title VII claims. It should also remove the references to the dicta in *Bostock* to support the false claim that RFRA can be used to escape the nondiscrimination protections in Title VII.

Federal Employees

The proposed manual correctly states that federal courts have almost unanimously held that Title VII preempts RFRA claims in cases where federal employees seek religious accommodations, but then cites an older, unpublished District Court opinion to raise doubts about this widely agreed upon understanding.⁴⁶ Given that federal district and appellate courts have held time and again that “Title VII provides the exclusive remedy” for religious

⁴¹ *Id.* at 586.

⁴² *Id.* at 584.

⁴³ *Id.* at 581.

⁴⁴ See, e.g., *Fremont*, 781 F.2d at 1369; *Pac. Press*, 676 F.2d at 1281 (“Title VII establishes a compelling governmental interest in eliminating employment discrimination.”); *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 810 (S.D. Ind. 2002) (finding that in analyzing a RFRA claim that the government had a compelling government interest in “the eradication of employment discrimination based on the criteria identified in Title VII”).

⁴⁵ See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985) (holding that the Establishment Clause forbids religious exemptions that fail to take account of other state interests such as “the imposition of significant burdens on other employees”); see also *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005) (stating that when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries and ensure it is “measured so that it does not override other significant interests.”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (explaining that religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

⁴⁶ The manual cites *Lister v. Defense Logistics Agency*, No. 2:05-CV-495, 2006 WL162534, at *3 (S.D. Ohio Jan. 20, 2006), but in that case, the court dismissed the Title VII claims and the plaintiff was unable to move forward with both his Title VII claim and a RFRA claim simultaneously.

discrimination claims,⁴⁷ the inclusion of an outlier district court case from 15 years ago unnecessarily creates confusion for federal employees and should be removed.

Government Employers

The proposed manual should more clearly state that the Establishment Clause's obligations on the government may require an employer to deny an employee's requested religious accommodation.⁴⁸ Rather than strengthening this point, the proposed manual instead deletes citations in the current manual to the cases explaining that government employers have a valid Establishment Clause defense.⁴⁹ The text of the guidelines should strive to provide clarity, not create ambiguity. The case citations and explanations should be restored.

The Proposed Manual Downplays the Risk of Religiously Based Harassment and Advances an Inaccurate View of Reasonable Accommodations

Religious accommodations are vital to ensuring that people of all faiths, and the nonreligious, may participate equally in the workplace. Under Title VII, an employer must grant an employee a reasonable accommodation (e.g., to wear hijab while on duty) unless the accommodation would impose an "undue hardship" on the employer. An undue hardship "occurs when an employer must bear more than a 'de minimis cost' in accommodating the employee's religious beliefs."⁵⁰ Title VII's religious accommodation requirement does not give employees carte blanche to demand any religious accommodation they may want, no matter its effect on fellow employees, customers, clients, or the business overall.

The proposed manual, however, introduces unnecessary confusion by attempting to undermine the undue hardship standard. After setting forth the standard, the proposed manual inexplicably cites dicta in Justice Alito's concurrence in the denial of a petition for certiorari in *Patterson v. Walgreen Co.*, suggesting that the Court should reconsider the current law defining undue hardship as more than a *de minimis* burden.⁵¹ There is no reason to include this citation, as it does not provide useful information: The Court did not consider the case on the merits; Justice

⁴⁷ See, e.g., *Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011) ("[Appellant's] claims under RFRA are barred because Title VII provides the exclusive remedy for his claims of religious discrimination."); *Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007) ("It is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite [Appellant's] attempt to rely upon the provisions of RFRA."); see also *Holly v. Jewell*, 196 F. Supp. 3d 1079, 1090 (N.D. Cal. 2016) ("District courts uniformly have held that where a federal employee asserts a RFRA claim that addresses the same basic injury as a parallel claim asserted under Title VII, the RFRA claim is barred because Title VII provides the exclusive remedy.") (citing *Tagore v. United States*, No. CIV. A. H-09-0027, 2009 WL 2605310, at *7-*9 (S.D.Tex. Aug. 21, 2009), *aff'd in part, rev'd in part* 735 F.3d 324 (5th Cir. 2013)).

⁴⁸ See, e.g., *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 164-65 (2d Cir. 2001); *Moore v. Metro. Human Serv. Dist.*, No. 09-6470, 2010 WL 3982312, at *5 (E.D. La. Oct. 8, 2010).

⁴⁹ Footnote 117 of the proposed manual deletes the citations in the current manual to *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir.), and *Helland v. South Bend Cmty. Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996).

⁵⁰ *Patterson v. Walgreen Co.*, 727 F. App'x 581, 586 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (2020) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n.15 (1977)).

⁵¹ 140 S. Ct. 685 (2020) (Alito, J., concurring).

Alito's concurrence was joined by only two other Justices; and a concurrence in a denial of certiorari has no precedential value. As the Eleventh Circuit recognized in a *per curiam* opinion in the same case, the prevailing standard remains the one set by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*: an undue hardship is defined as more than a de minimis burden.⁵²

Another instance of the proposed manual's effort to downplay the undue hardship standard occurs in example 43. The example demonstrates that it is a reasonable accommodation to permit a pharmacist to discreetly signal to a coworker to take over, should the pharmacist be unwilling to participate in distributing contraceptives. But while the current manual explains that the reasonable accommodation "might pose an undue hardship in a different case where there was no qualified co-worker on duty to whom such customer service duties could be transferred, or where it would otherwise pose more than a de minimis burden on the operation of the employer's business,"⁵³ the proposed manual deletes this important explanatory language. This clarification should not be removed, as it emphasizes both that the undue hardship standard's *de minimis* burden definition remains applicable, and that substantial harms to others—in this case, a denial of service to people seeking contraception—are a valid reason to reject an accommodation request.

In offering this inaccurate view of the employers' religious-accommodation obligations, the proposed manual could cause readers to wrongly believe that employers must accommodate their employees' religious exercise even if it would harm others by, for example, constituting harassment based on protected characteristics, or even if it would, in the case of a government employer, violate the Establishment Clause. The proposed manual should be reworked to emphasize that, while important, the Title VII religious accommodation requirement is limited in nature.

Disruption to and Harassment of Others in the Workplace

Religious accommodations are not required when they would harm others in the workplace, including by disrupting or harassing coworkers, customers, patients, or clients.

The current manual makes that clear, asserting that "an employer *never* has to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of co-workers, because that would pose an undue hardship for the employer."⁵⁴ The proposed manual, however, inexplicably eliminates this straightforward directive. The proposed manual states that "[r]eligious expression can create undue hardship if it disrupts the work of other employees or constitutes unlawful harassment"⁵⁵ but gives as the only example an employer's duty under Title VII to protect employees from *religious* harassment. In fact, employers also have a duty to protect employees from harassment based on race, color, religion, national origin, and sex—which includes discrimination based on sexual

⁵² *Patterson*, 727 F. App'x at 586.

⁵³ *2008 EEOC Compliance Manual* at 69 n.175.

⁵⁴ *Id.* at 43 (emphasis added).

⁵⁵ *Proposed Manual* at 95.

orientation and transgender status.⁵⁶ These protections are equally important and necessary. Nonetheless, the proposed manual does not explain that religious expression could constitute impermissible harassment on these other bases.

Moreover, religious accommodations may also constitute an undue hardship even if they do not rise to the level of unlawful harassment—they need only be disruptive. The proposed manual cuts the current manual’s clarification that religious expression could create an undue hardship even if it only *threatens* to constitute unlawful harassment. The EEOC should include this important context in the proposed manual.⁵⁷ Employers need not wait until certain religious expression amounts to harassment as a legal matter to protect their employees.

Employees requesting accommodations that would harm others in the workplace is not a theoretical concern. For example, a law enforcement officer who refused to be scheduled to work alone with women and a teacher who refused to refer to transgender students using the students’ identified names and pronouns have brought claims under Title VII for denial of religious accommodations.⁵⁸ In each case, the employees argue that they could not comply with their employers’ policies (whether they be duties to train deputies or nondiscrimination policies) because of their religious beliefs. The EEOC should stand firmly behind employers that decline to offer accommodations that would result in discrimination against others.

The EEOC should reinstate the language from the current manual that an employer *never* has to accommodate religious expression where it could constitute harassment of co-workers, including harassment based on race, color, sex, and national origin; clarify that such conduct does not need to be accommodated even if it does not rise to the level of unlawful harassment, but is merely disruptive; delete the citation to *Patterson*; and reinstate the clarification that an accommodation may pose an undue hardship where it would result in a denial of service.

Church, Coats-Snowe, and Weldon Amendments

The proposed manual also creates confusion by referencing the Church, Coats-Snowe, and Weldon Amendments, which are all provisions of law that address certain healthcare providers’ rights to refuse care, among other things. To begin with, it is entirely misleading for the EEOC to purport to address a covered entity’s obligations under these amendments: As the proposed manual even acknowledges, they are not enforced by the EEOC, but rather by the Department of Health and Human Services (“HHS”). Moreover, the amendments do not provide the broad employment protections that the proposed manual alludes to. Weldon, for example, is an appropriations rider that binds HHS, not employers. Yet, the proposed manual speciously states

⁵⁶ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020).

⁵⁷ The EEOC could easily fix this by either restoring the current manual’s language or by adding the following italicized language to what already appears in the proposed manual, so that the text would read: “Since an employer has a duty under Title VII to protect employees from religious harassment, *as well as harassment based on race, color, sex, and national origin*, it would be an undue hardship to accommodate such expression that rises to the level of illegal harassment or could likely rise to that level.”

⁵⁸ Complaint, *Torres v. Carter*, No. 5:19-cv-327 (E.D.N.C. July 31, 2019); First Amended Complaint, *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 1:19-cv-2462 (S.D. Ind. July 15, 2019).

that the hospital may have “additional obligations to accommodate” an employee under the amendments.⁵⁹ This incorrectly implies that, to the extent the amendments even apply in the employment context, the standard for accommodations under the amendments is higher than the undue hardship standard that applies in Title VII law. That is not the case.

On the contrary, multiple courts have vacated a recent rule promulgated by HHS that interpreted the amendments to change the “accommodation” standard for covered entities by eschewing the Title VII burden-shifting framework. Specifically, the rule’s definition of “discrimination” eliminated any balancing between the employer’s and the employee’s interests, and rejected Title VII’s governing standard of undue hardship, instead imposing an absolute accommodation requirement on employers, regardless of the impact on other employees or the provision of care.⁶⁰ The courts declared HHS’s interpretation of the amendments unlawful, in part, because the rule would not allow employers to consider the potential effect of an accommodation on patients, coworkers, public safety, and other legal obligations.⁶¹

In *New York v. United States Department of Health & Human Services*, the court was clear that Congress did not grant HHS authority to jettison the longstanding Title VII framework for purposes of the amendments: “While Congress was at liberty to displace [the reasonable accommodation and undue hardship] aspects of the Title VII framework and adopt a unique definition of “discrimination” for purposes of the [amendments,] . . . HHS has not pointed to any evidence of congressional intent to supersede the Title VII framework.”⁶² Despite this explicit holding, the proposed manual does not cite *New York*. Instead, it twice implies (wrongly) that the amendments may require additional accommodations.

The EEOC should delete any reference to potential obligations under the Church, Coats-Snowe, and Weldon Amendments.

Differences Between Private and Public Employers

The proposed manual further misconstrues the reasonable accommodation obligations of employers by eliding the difference between private and public employers. Both are subject to Title VII’s prohibition on discrimination in employment, but governmental employers and employees are also constrained by the Establishment Clause. The Establishment Clause “mandates governmental neutrality” toward religion,⁶³ and dictates that “the government may not favor one religion over another, or religion over irreligion.”⁶⁴

⁵⁹ *Proposed Manual* at 75.

⁶⁰ See Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,191 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

⁶¹ *New York v. U.S. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 536–37 (S.D.N.Y. 2019), *appeal docketed*, (2nd Cir. Jan. 3, 2020).

⁶² 414 F. Supp. 3d at 536.

⁶³ *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982) (quoting *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968)).

⁶⁴ *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) (upholding injunction against display of Ten Commandments at county courthouses).

The proposed manual discusses potential accommodations for public employees, without properly explaining the Establishment Clause’s limits. Certain accommodations are not constitutionally permissible if they result in official governmental promotion or imposition of religious beliefs or activities. For example, employees like police officers and firefighters, as well as county clerks, cannot discriminate when providing services to the public.⁶⁵ Nor, for example, may public-school teachers demand a religious accommodation that allows them to proselytize students, even if the teachers’ religious beliefs counseled them to do so.⁶⁶ The EEOC should not merely state that “[c]ourts may come to different conclusions” on this point,⁶⁷ but should amend the manual to explain that religious accommodations that allow government employees to discriminate against members of the public or otherwise use their official positions to advance religion would be unconstitutional.

The proposed manual also fails to clearly delineate which policies may be acceptable for a private employer, but unacceptable for a public employer. For example, the proposed manual states that “[s]ome employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so.”⁶⁸ However, a governmental employer would not be entitled to integrate religious beliefs into the workplace, as the government must remain religiously neutral and may not directly or indirectly religiously coerce its employees.⁶⁹

Likewise, Example 53 in the proposed manual notes that Title VII does not prohibit employers from placing wreaths and a tree in shared spaces each December, and states that the “result under Title VII on these facts would be the same whether in a private or government workplace.”⁷⁰ But this is misleading: Wreaths and a tree have been held to be secular, so they are not representative of other religious displays. And even if the analysis is the same under Title VII, other displays could lead to a very different analysis under the Establishment Clause. Both the example and accompanying footnote elide these differences instead of reinforcing the Establishment Clause standards that governmental employers must meet.

⁶⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

⁶⁶ See, e.g., *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (“To permit ... [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment.”); *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) (“Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment’s [E]stablishment [C]lause.”); see also, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 690 (4th Cir. 2007) (holding that public school did not violate teacher’s rights by removing items promoting religion posted in his classroom); *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1275 (N.D. Cal. 2005) (“In the view of the Court, there is a well-defined difference between *being* an elementary school teacher who is an avowed Christian, which Williams is free to be, and *expressing* the Christian faith in the classroom.”).

⁶⁷ *Proposed Manual* at 45, n.154.

⁶⁸ *Proposed Manual* at 99.

⁶⁹ See, e.g., *Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38, 48 (1st Cir. 2016) (holding that a government employer, a police department, was not entitled to qualified immunity for coercing employee officer into prayer).

⁷⁰ *Proposed Manual* at 101.

The Proposed Manual Should Be Even More Respectful of Non-Religious and Minority-Faith Employees

Title VII extends protections to employees who face discrimination because of their religious views—whether traditional or non-traditional—or because they are nonreligious. Although the proposed manual accurately states these principles, it makes changes from the current manual that undermine that guidance and does not demonstrate respect for all employees.

The current manual states that Title VII prohibits covered entities from (1) treating applicants or employees differently in any aspect of employment; (2) subjecting employees to harassment; or (3) denying a requested reasonable accommodation of an employee’s sincerely held religious beliefs, if the treatment is because of the employee’s religious beliefs or practices *or lack thereof*. The proposed manual, however, deletes “or lack thereof” from the text of those points, eliminating clarifying language that Title VII protections extend to religious discrimination based on a lack of religious faith. There is no valid reason for this deletion, and that text should be reinstated.

The proposed manual also deletes mention of an “atheist” employee from Example 3, and in Example 9, the proposed manual switches a scenario where an applicant is not hired due to his lack of religious beliefs, to one where he is not hired because he is an Evangelical Christian. The change is even more notable because the proposed manual does not alter the religious affiliations of the subjects in any of the other examples, and two of the three mentions of atheists in the text of the manual describe them as discriminating against other religious employees. The EEOC should reverse these changes and take care to ensure that members of minority faiths and the nonreligious are just as protected by Title VII.

The proposed manual also fails to be inclusive and respectful of minority-faith employees. For example, it does not always use correct terms to describe minority faith groups’ religious practices,⁷¹ and it tends to perpetuate misunderstandings or myths about these practices.⁷² At the same time, the manual fails to make fully clear that segregation from customers based on an employee’s religious appearance is never a reasonable accommodation. For example, the manual states that segregation in a position with lower pay violates Title VII, potentially implying that segregation with the same pay would be permissible.⁷³ However, any form of segregation would constitute discrimination. Religious minorities are instead likely entitled to an accommodation from a corporate image policy. These are critical points that the proposed manual should clarify.

⁷¹ For example, using a Christian term (“baptized”) to describe an observant Sikh. *Proposed Manual* at 83, example 40.

⁷² For example, suggesting that beards, including those worn as part of a person’s religious observance, are relevant to hygiene. *Proposed Manual* at 90, example 47.

⁷³ See *Proposed Manual* at 37, example 9C.

We urge you to suspend this process, extend the time period for public comment, and robustly engage with stakeholders so that any revisions to the manual reflect current law and are useful to employers, employees, practitioners, and enforcement staff. We also ask that you account for our comments and suggestions, which are necessary to protect religious freedom and the civil rights of employees whom the EEOC are obligated to protect.

If you have further questions, please contact Heather Weaver, ACLU, hweaver@aclu.org or Maggie Garrett, Americans United, garrett@au.org.

Sincerely,



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