March 14, 2023

Filed Electronically

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500
VIA REGULATIONS.GOV

Re: Partnerships with Faith-Based and Neighborhood Organizations— RIN 1840-AD467, RIN 1601-AB02, RIN 0510-AA008, RIN 0412-AB10, RIN 2501-AD91, RIN 1105-AB64, RIN 1290-AA45, RIN 2900-AR23, and RIN 0991-AC13

Dear Sir or Madam:

Alliance Defending Freedom ("ADF") submits the following comment on the Notice of Proposed Rulemaking ("NPRM") regarding "Partnerships with Faith-Based and Neighborhood Organizations," 88 Fed. Reg. 2,395 (Jan. 13, 2023) ("2023 Proposed Rule"), issued by the Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, and Department of Health and Human Services. ADF specifically comments on the NPRM's proposal to remove language from certain regulations regarding the religious exemption in Title VII of the Civil Rights Act of 1964. 88 Fed. Reg. 2,402.

ADF is an alliance-building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding.

Since its launch in 1994, ADF has handled a large number of matters involving the religious freedom principles addressed by the NPRM. ADF has represented religious employers with respect to their eligibility for Title VII's religious exemption and as well as the scope of the exemption. *See, e.g., Billard v. Charlotte Catholic High Sch.*, 2021 WL 4037431 (W.D.N.C. Sep. 3, 2021), appeal filed Apr. 25, 2022, No. 22-1440 (amicus brief). ADF has been involved in other cases regarding the freedom of religious employers to staff on a religious basis. *See, e.g., Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094 (2022); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018); *Wyoming*

Rescue Mission v. E.E.O.C., No. 1:22-cv-00206 (D. Wyo. Sep. 20, 2022); *Sacred Heart of Jesus Parish v. Nessel*, No. 1:22-cv-01214 (W.D. Mich. Filed Dec. 12, 2022). ADF also submitted a comment on the Department of Labor's notice of proposed rulemaking regarding "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," RIN 1250-AA09 (located at https://www.regulations.gov/comment/OFCCP-2019-0003-98684).

Accordingly, ADF respectfully submits that it is well-qualified to comment on the NPRM.

ADF's comment focuses on the NPRM's proposal to limit the scope of the Title VII religious exemption. The proposal would remove language added in 2020 clarifying the scope of the religious exemption. *See* Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037 (Dec. 17, 2020) ("2020 Rule"). In that rule, six agencies, the Department of Education, Department of Health and Human Services, Department of Housing and Urban Development, Department of Labor, Agency for International Development, and Department of Veterans Affairs (collectively, the "Agencies"), clarified that "a religious organization's exemption from [Title VII] is not forfeited when the organization receives financial assistance from [the Agencies]." *E.g.*, 34 C.F.R. 75.52(g). The 2020 Rule clarified that an organization qualifying for the Title VII religious exemption may select employees "on the basis of their acceptance of or adherence to particular religious tenets." 85 Fed. Reg. 82,096; *see also* 85 Fed. Reg. 82,128 (revising 34 C.F.R. 75.52(g)); 85 Fed. Reg. 82,146 (revising 45 C.F.R. 87.3(h)). The Agencies now propose to remove that added text.

As explained further below, the 2020 Rule was consistent with the text of Title VII, case law, and the U.S. Constitution. It should remain in the rules to avoid contradicting or violating such authorities. The NPRM is based on the Agencies' mistaken assertion that "[t]he Title VII religious exemption generally allows qualifying religious organizations to hire only people of a particular religion in the absence of any inconsistent statutes, but [that] the Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees' sex)." 88 Fed. Reg. 2,402. The Agencies thus wrongly assert that religious organizations that qualify for the Title VII religious exemption cannot "insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question." *Id.* Such assertions are inconsistent with the text of Title VII, the U.S. Constitution, and the case law interpreting such authorities.

ADF thus asks the Agencies to preserve the freedom of religious employers to select employees "on the basis of their acceptance of or adherence to the religious tenets of the organization."

I. THE AGENCIES SHOULD NOT REMOVE LANGUAGE STATING THAT THE TITLE VII RELIGIOUS EXEMPTION PROTECTS RELIGIOUS ORGANIZATIONS' EMPLOYMENT DECISIONS MADE ON THE BASIS OF A PERSON'S "ACCEPTANCE OF OR ADHERENCE TO THE RELIGIOUS TENETS OF THE ORGANIZATION.

This country's founders knew from experience that letting secular authorities decide spiritual questions was a recipe for disaster. The founders thus drafted the First Amendment in part to prohibit the government from exercising jurisdiction over matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872).

Years later, Congress drafted Title VII to respect that independence from secular control by granting faith-based organizations a broad exemption from the requirements of Title VII. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1754 (2020) ("[W]orries about how Title VII may intersect with religious liberties . . . predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations." (citing 42 U.S.C. § 2000e–1(a))).

As originally enacted, the Title VII religious exemption stated that Title VII "shall not apply" to religious entities who wish to employ "individuals of a particular religion" to carry on the religious entities' "*religious* activities." Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-1 as amended) (emphasis added). Recognizing that the First Amendment demanded far more, Congress later expanded the exemption to cover individuals hired to carry out *any* of the organizations' "activities"— religious or not. Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04 (codified at 42 U.S.C. § 2000e-1); *see also Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("The revised provision, adopted in 1972, broadens the exemption to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature."). Moreover, Congress defined "religion" (found in the phrase "of a particular religion") to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

Here, the Agencies seem to agree that the Title VII religious exemption, protects a religious entity's right to make at least some religiously-motivated employment decisions. But the Agencies wrongly assert that Title VII allows such employment decisions only if they do not otherwise violate Title VII. The government cannot place such limits on religious organizations' freedom in employment decisions. Section 702 says that Title VII—the whole thing—"shall not apply" to religiously-motivated employment actions. Nothing in § 702 limits that autonomy.

Contrary to the Agencies' assertions, Title VII and the U.S. Constitution allow religious organizations to make employment decisions based on whether an applicant's or employee's

beliefs or conduct are inconsistent with the organization's religious tenets. The Agencies should thus continue to provide that the Title VII religious exemption allows a religious organization to "select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."

A. Title VII's plain text protects all religiously-motivated employment actions.

The plain text and purpose of Title VII's religious exemption protect all religiously-motivated employment actions, including employment decisions made on the basis of a person's "acceptance of or adherence to the religious tenets of the organization."

1. *The religious exemption's plain text protects religiously-motivated employment actions.*

The plain text of § 702 allows religious groups to make religiously-motivated employment actions that are based on an applicant's or employee's religious beliefs *or* conduct. When interpreting a statute, courts must start with the statute's text. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text."). "Statutes must 'be read as a whole,'" *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135 (2007) (citation omitted), and courts have "no license to give statutory exemptions anything but a fair reading," *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021) (citation omitted). Section 702 of Title VII provides:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

If the words "of a particular religion" in § 702 "were all we had to go on," *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021), perhaps the Agencies could argue that the exemption protects only a preference for employees of a particular religion or denomination. *See Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991) (acknowledging and then rejecting this reading). But Title VII provides "an explicit definition" of the term religion that courts "must follow." *Van Buren*, 141 S. Ct. at 1657 ("When 'a statute includes an explicit definition' of a term, 'we must follow that definition, even if it varies from a term's ordinary meaning.'"). Section 702 states that the "term 'religion' includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j) (emphasis added). "Any temptation to limit this exception to authorizing the employment of co-religionists [narrowly defined], and not any other form of religious selectivity, is squelched by th[at] definitional clause in § 2000e(j), which tells us that religion includes 'all aspects of religious observance and practice, as well as belief.'"

Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring).

Section 702's protection for religious groups is not confined to hiring based on mere religious or denominational labels but instead allows religious groups to make employment decisions based on whether an employee lives his or her life "by word and deed . . . in accordance with the faith." *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020); *see also Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); *Little*, 929 F.2d at 951 (religious groups may "employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."). For example, in *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2011), the Fourth Circuit found that § 702's "plain language" and "purpose" permitted a Catholic facility to fire a nursing assistant for wearing Church of the Brethren attire that conflicted with the facility's religious principles. *Id.* at 190–91, 194, 196. The facility did not let her go for attending the wrong church; instead, the facility fired her because her beliefs and conduct about how to dress were "inconsistent with those of [her] employer." *Id.* at 192.

That decision makes sense because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Courts and other government officials are not equipped to assess when conduct shows a lack of adherence to a particular religion. The plain text of Title VII thus lets religious groups decide when a person's beliefs and conduct are consistent with the group's religious precepts and allows religious groups to employ only those persons with consistent beliefs and conduct.

As the Agencies explained in support of the 2020 Rule:

> The ordinary meaning of the phrase 'of a particular religion' in the section 702 exemption encompasses the language . . ., 'acceptance of or adherence to religious tenets.' Religion as ordinarily understood is more than a label people use to self-identify or which others may use to identify them or their backgrounds. It encompasses profound beliefs about the nature of all things and about how one should live based on those beliefs. . . . The Agencies' determination that 'of a particular religion' encompasses adherence to or acceptance of a set of religious beliefs is, thus, supported by the . . . ordinary meaning of the words."

85 Fed. Reg. 82,097.

2. *The religious exemption covers all religiously-motivated employment actions, even actions that also allegedly discriminate based on another protected classification, such as sex.*

Section 702 protects all religiously-motivated employment actions, even actions that also allegedly discriminate on the basis of another protected classification. Again, starting with the text, § 702 states that "[t]his subchapter"—meaning Title VII—"shall not apply with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. § 2000e-1. The word "shall" is a "command." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). "[T]he mandatory 'shall[]' . . . normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). So, when the exemption says that Title VII "shall not apply," it contains no "implicit exception, for it is absolute." *Bozeman*, 533 U.S. at 153. Moreover, § 702 "makes no distinction among different kinds of" decisions, *id.* at 154, regarding the "employment of individuals of a particular religion to perform work connected with the carrying on . . . of [a religious organization's] activities," 42 U.S.C. § 2000e-1. Accordingly, "we must assume that *every*" such religious employment action "triggers" the exemption. *Bozeman*, 533 U.S. at 154 (holding that because the speedy trial statute made "no distinction among different kinds of [prisoner] 'arrivals,' . . . . *every* prisoner arrival . . . trigger[ed the statute's] 'no return' requirement" (emphasis in original)). Title VII "does not contain any . . . language . . . limiting" the religious exemption "*solely* to" claims of one type. *BP P.L.C.*, 141 S. Ct. at 1538 (emphasis in original). "Instead," the clause exempts religiously-motivated actions from Title VII's reach "without any further qualification." *Id.*

In other words, Title VII lays down a broad rule that religiously-motivated employment actions are exempt from Title VII. And "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. . . . [T]hat is exactly how [the Supreme Court] has always approached Title VII." *Bostock*, 140 S. Ct. at 1747. There is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Id.* Once a religious organization triggers the exemption, Title VII "shall not apply." 42 U.S.C. § 2000e-1(a). Section 702 "lays down a general rule placing *all* [of the enumerated conduct] outside the . . . Act's reach." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (finding that a provision stating that anti-trust statute "shall not apply" to foreign trade placed "*all*" such foreign trade "outside the Sherman Act's reach" (emphasis in original)).

Examples help demonstrate that Title VII exempts religiously-motivated employment actions that also allegedly discriminate on the basis of another protected classification. Section 702 allows the Catholic Church to rely on the Bible's understanding that only men can enter the priesthood. *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring) ("One function of § 702(a) is to

permit sex discrimination by religions that do not accept women as priests."). Section 702 also allows an Orthodox synagogue to allow only men to serve as rabbis and allows an Islamic school to require women to wear a hijab but not men. Such actions are based on sex, but everyone agrees those decisions are religiously motivated and no one thinks they fall outside Title VII's religious exemption. *Id.* at 947 (Easterbrook, J., concurring) ("The Diocese is carrying out its theological views; that its adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based."); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) ("They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary."). Under § 702, "when [an employment] decision is founded on religious beliefs, then all of Title VII drops out, even if the decision allegedly discriminates on the basis of sex or another protected classification." *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring).

The Agencies assert that the "Title VII religious exemption does not permit [religious] organizations to discriminate against workers on the basis of a[] protected classification [other than religion], even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees' sex)." 88 Fed. Reg. 2,402. In other words, the Agencies assert that "the exemption permits religious discrimination but no other kind." *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring). "But where does the 'no other kind' limitation come from?" *Id.* Courts "cannot arbitrarily constrict [an exemption] by adding limitations found nowhere in its terms." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (emphasis removed). While Title VII does not give religious organizations a license to make *non-religiously motivated* employment decisions on the basis of other protected classifications, such as race, sex, or national origin, *Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000), the statute does not limit the total exemption for religiously-motivated employment decisions.

These "two propositions can be true at the same time." *United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020). Religious colleges can be liable for sex discrimination against professors "[i]f religion played no role in the [allegedly discriminatory] decision." *Ritter v. Mount St. Mary's Coll.*, 495 F. Supp. 724, 729 (D. Md. 1980). And seminaries can be liable for sexual harassment against their novices if they "do not offer a religious justification for the harassment" but "condemn it as inconsistent with their values and beliefs." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). But § 702 does "permit sex discrimination by religions that do not accept women as priests. The exemption does this by declaring all of 'this subchapter' to be inapplicable." *Starkey*, 41 F.4th at 946–47 (Easterbrook, J., concurring).

Finally, notice how courts have interpreted the same exemption language in other contexts. The first part of § 702 states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1(a). "[N]o one disputes that the

provision excludes coverage to aliens employed outside the states." *Boureslan v. Aramco, Arabian Am. Oil Co.*, 892 F.2d 1271, 1273 (5th Cir. 1990) (citation omitted), *aff'd sub nom. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *see also Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring) ("That language has been understood to mean what it says: none of Title VII's substantive rules applies to aliens covered by § 702(a)."). "What is true for the alien exemption must be true for the religious exemption as well." *Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring).

Section 702 thus protects all religiously-motivated employment actions, even actions that also allegedly discriminate on the basis of another protected classification, such as sex.

3. *The religious exemption's purpose also shows that the exemption protects all religiously-motivated employment actions.*

Because "the statute's language is plain," the "inquiry should end." *Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019). But it is worth noting that the religious exemption's purpose also shows that the exemption protects all religiously-motivated employment actions. "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." *Kennedy*, 657 F.3d at 194 (quoting *Little*, 929 F.2d at 951). Employing "only those committed to that mission . . . is . . . a means by which a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Taking that hiring freedom away "would undermine not only the autonomy of many religious organizations but also their continued viability." *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., concurring in the denial of certiorari).

The statute's text and purpose thus agree: § 702 protects all religiously-motivated employment actions. When a religious organization makes a religiously-motivated employment action, the exemption is triggered, and Title VII no longer applies.

B. The Constitution protects all religiously-motivated employment actions.

In addition to Title VII's plain text and purpose, the Constitution also protects religious organizations' freedom to make religiously-motivated employment decisions. The First Amendment gives religious groups autonomy to decide questions of faith and internal governance, including the right to employ only those persons who accept or adhere to the religious tenets of the organization. The Agencies should thus read Title VII's exemption broadly to avoid violating the First Amendment rights of religious organizations.

1. *The United States has long protected religious organizations' autonomy to decide questions of faith, doctrine, and internal governance*

This country has long given religious groups an "independence from secular control or manipulation," and the "power to decide for themselves, free from state interference, matters of

church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The First Amendment guarantees this autonomy.

One of the First Amendment's "leading architects," James Madison, staunchly defended the rights of conscience from government meddling. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011). He believed "that religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence," making it "wholly exempt from [government's] cognizance." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 64 (1947).

Before the First Amendment was even applied to the states, the Supreme Court recognized that "civil courts exercise no jurisdiction" over matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733. In the same case, the Supreme Court observed that civil authorities are "incompetent judges of matters of faith, discipline, and doctrine," and any authorities "so unwise as to attempt" to judge such matters, "would do anything but improve either religion or good morals." *Id.* at 732 (citing *German Reformed Church v. Seibert*, 3 Pa. 282, 282 (1846)).

This longstanding religious autonomy doctrine prevents the government from deciding "what does or does not have religious meaning," *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977), from interpreting "church doctrines and the importance of those doctrines to the religion," *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969), and from regulating "church administration, the operation of the churches, [or] the appointment of clergy," *Kedroff*, 344 U.S. at 107–08. The doctrine also gives religious groups independence to choose who carries out their missions. Any other rule would allow the government to weigh in and second-guess a religious group's beliefs and operations.

Leaving language in the 2023 Proposed Rule that § 702 allows religious organizations to hire on the basis of a person's "acceptance of or adherence to the religious tenets of the organization" thus respects the religious autonomy doctrine by "mak[ing] clear that faith-based organizations can preserve their autonomy and identities when participating in federally funded programs." 85 Fed. Reg. 82,098.

2. *Religious organizations have an absolute right to employ only those persons who accept and adhere to the religious tenets of the organization.*

Consistent with this country's historical protection of religious autonomy, the First Amendment's Religion Clauses protect religious groups' right to employ only those persons whose religious beliefs and conduct are consistent with the religious tenets of the group. "[T]he Religion Clauses foreclose certain employment discrimination claims" that intrude on an organization's "independence in matters of faith and doctrine and in closely linked matters of

internal government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061. The Clauses thus protect "the freedom of religious groups to select their own" representatives, *Hosanna-Tabor*, 565 U.S. at 184, and reject those persons who contradict the religious group's faith.

a) The ministerial and coreligionist exemptions.

"The First Amendment [thus] gives 'special solicitude to the rights of religious organizations' to operate according to their faith without government interference." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1094 (Alito, J., concurring in the denial of certiorari). One aspect of that freedom given to religious organizations is the right to decide that only those persons who share the group's beliefs—or are at least committed to its religious practices—should help to "define and carry out [the group's] religious missions." *Amos*, 483 U.S. at 335. Such independence is protected by the First Amendment through doctrines known as the "ministerial" and "coreligionist" exceptions. Like § 702, these exceptions are not limited to hiring someone of a particular religion or denomination. Rather, the exceptions give religious organizations the freedom to make employment decisions based on an applicant's or employee's religious beliefs and conduct.

The ministerial and coreligionist exceptions give religious groups the autonomy "to shape [their] own faith and mission through [their] appointments," so religious organizations can ensure that all personnel will contribute, rather than detract from, the group's shared ideals. *Hosanna-Tabor*, 565 U.S. at 188. Specifically, the ministerial exception "bars interference with the selection and control of a religious organization's ministers." *Starkey*, 41 F.4th at 935; *see also Bostock*, 140 S. Ct. at 1754 ("This Court has also recognized that the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers.'"). Under the ministerial exception, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions," regardless of whether the employment action in question is faith-based or hinges on secular concerns. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

The coreligionist exception expands such protection beyond employment decisions regarding formal ministers because "[t]o force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., concurring in the denial of certiorari); *see also Amos*, 483 U.S. at 342–43 (Brennan, J., concurring) ("[A] religious organization should be able to require that only members of its community perform those activities" that "constitute part of a religious community's practice."). But the coreligionist exception is limited to religiously-motivated employment actions. "If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most

vigorously." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., concurring in the denial of certiorari).

Thus, while the ministerial exception recognizes that deciding "whose voice speaks for the church is *per se* a religious matter," *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 805 (4th Cir. 2000), the co-religionist exemption further recognizes that all religiously-motivated employment actions are *per se* religious. Hiring or firing an employee for openly contradicting an organization's religious tenets—even if that employee is not classified as a spiritual leader—directly affects the group's religious expression. The exceptions thus guarantee that if a religious organization "possess[es] a religious reason" for firing someone, that decision is protected. *Our Lady of Guadalupe*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

Consistent with the First Amendment protections provided by the ministerial and coreligionist exceptions, including language in the 2023 Proposed Rule that § 702 allows religious organizations to hire on the basis of a person's "acceptance of or adherence to the religious tenets of the organization," "ensures that the people who carry out programs [at a religious organization] will share the organization's faith." 85 Fed. Reg. 82,098. "Faith-based organizations' religious autonomy and identities would be diminished substantially if those organizations could not ensure that their staffs accepted and adhered to their religious tenets." *Id.*

b) Courts have applied the ministerial and coreligionist exemptions broadly.

Numerous Supreme Court decisions establish that the ministerial and coreligionist exemptions provide broad protection to religious organizations' employment decisions. *Amos*, for example, considered whether § 702 allowed a Mormon organization "to discriminate on religious grounds in hiring for nonreligious jobs" consistent with the Establishment Clause. 483 U.S. at 331. The Court said yes because the "government may (and sometimes must) accommodate religious practices" to allow religious groups "to define and carry out their religious missions." *Id.* at 334–35. And "intrusive" inquiries into whether a job was sufficiently religious, *id.* at 339, could create a "significant burden" by requiring a religious group "to predict which of its activities a secular court will consider religious," and pressuring the group to alter "the way [it] carrie[s] out . . . its religious mission" due to "[f]ear of potential liability," *id.* at 336. As Justice Brennan explained in his influential concurrence, religion is what a religious organization does. When it comes to non-profits dedicated to service, "the activities themselves are infused with a religious purpose." *Id.* at 344 (Brennan, J., concurring). The First Amendment thus protects these organizations' right to decide for themselves "that certain activities are in furtherance of [their] religious mission, and that only those committed to that mission should conduct them." *Id.* at 342 (Brennan, J., concurring).

The Supreme Court affirmed related principles in *Our Lady of Guadalupe*, in which the Court held that the ministerial exception protected the actions of two Catholic schools who fired

two religion teachers. 140 S. Ct. at 2066. The Court emphasized that "titles" were unimportant; rather, "[w]hat matters . . . is what an employee does," *id.* at 2064, and a religion teacher's job was "loaded with religious significance," *id.* at 2067. The two dissenting Justices disagreed on this last point, but even they agreed that religiously-motivated actions are different. *Id.* at 2072, 2078–79, 2081 (Sotomayor, J., dissenting) (stressing that the schools did not provide a "religious reason" for their actions). The dissenting Justices also connected the dots to religious exemptions like § 702 that "protect a religious entity's ability to make employment decisions . . . for religious reasons." *Id.* at 2072 (Sotomayor, J., dissenting).

In *Hosanna-Tabor*, moreover, the Supreme Court similarly held that the ministerial exception protected a religious schools' decision to fire a grade-school teacher. 565 U.S. at 191–92. In finding that the exemption applied, the Court explained that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188.

In a concurrence, Justice Alito, joined by Justice Kagan, explained that the "'ministerial' exception should . . . . apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* at 199 (Alito, J., concurring). The concurrence further underscored that "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith." *Id.* at 200–01 (Alito, J., concurring). Religious groups' "very existence is dedicated to the collective expression and propagation of shared religious ideals." *Id.* at 200 (Alito, J., concurring). So "[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Id.* at 201 (Alito, J., concurring). That principle is true not only of ministers but of any representative of a religious organization who disagrees with the organization's theological views.

Other courts have consistently applied the exceptions broadly in employment cases, including in cases brought by professors, teachers, music directors, and organists. *See, e.g.*, *Starkey*, 41 F.4th at 938, 945 (finding that the ministerial exception protected a Catholic school's decision to not renew the contract of the Co-Director of Guidance after she informed the school that she was in a same-sex union); *Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 985 (7th Cir. 2021) (finding that the ministerial exception protected a Catholic Church's decision to ask for the resignation of a music director, choir director, and organist who was entering a same-sex marriage); *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 569, 572 (7th Cir. 2019) (finding that the ministerial exception protected a Catholic church's decision to fire an organist and music director); *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (finding that the Title VII exemption protected the decision of a Baptist university to

remove a Baptist faculty member from his teaching position because his religious beliefs differed from those of the dean); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464–65 (D.C. Cir. 1996) (applying the exception to protect a Catholic university's decision not to give tenure to one of its professors); *Little*, 929 F.2d at 951 (finding that the Title VII exemption protected the decision of a parochial school to terminate a tenured Protestant teacher who had failed to validate her second marriage by first seeking an annulment of her previous marriage through the proper canonical procedures of the Catholic church).

History and case law thus establish that the First Amendment, through the ministerial and coreligionist exceptions, provides broad protection to religious organizations' employment decisions, including decisions made on the basis of an applicant's or employee's "acceptance of or adherence to particular religious tenets." 85 Fed. Reg. 82,096. The Agencies should thus leave language in the 2023 Proposed Rule that § 702 allows religious organizations to hire on the basis of a person's "acceptance of or adherence to the religious tenets of the organization."

c) <u>The ministerial and co-religionist exceptions do not create immunity from all secular laws</u>.

Despite the broad scope of the Title VII religious exemption, the ministerial and co-religionist exceptions do not create a "general immunity from secular laws." *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *see also Commonwealth v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020) ("The ministerial exception protects a church's autonomy with respect to matters of doctrine and church government, but those are not affected here."). The Supreme Court has noted that "[t]he Establishment Clause does not exempt religious organizations from such *secular* governmental activity as fire inspections and building and zoning regulations." *Demkovich*, 3 F.4th at 982 (alteration in original) (emphasis added). But the exceptions do "demarcate[] a sphere of deference with respect to those activities most likely to be religious . . .[,] in which discrimination is most likely to reflect a religious community's self-definition." *Amos*, 483 U.S. at 345 (Brennan, J., concurring). And that self-definition, as James Madison wrote, is wholly outside the government's cognizance.

True, religious employment decisions "may at times result from preferences wholly impermissible in the secular sphere." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1170–71 (4th Cir. 1985). A secular employer, for example, could never designate a job category that could be held only by men. But "[w]here the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of [the government]." *Id.* at 1171. And when a religious practice or "belief implicates a difficult and important question of religion and moral philosophy," it is even more important for civil authorities not to dictate that certain "beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). "The First Amendment ensures that religious organizations and

persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015).

C. The Authorities Cited by the Agencies Do Not Support Their Assertions.

As explained above, the Agencies are wrong to assert that "the Title VII religious exemption does not permit [qualifying religious] organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets." 88 Fed. Reg. 2,402. Rather, Title VII and the First Amendment protect all of a religious organization's religiously-motivated employment decisions. The authorities that the Agencies cite in support of their assertion merely hold that the Title VII religious exemption does not protect *non-religiously motivated* employment decisions that discriminate against workers on the basis of another protected classification. The cases do not hold that the exemption does not apply to a religious organization's religiously-motivated employment decisions.

For example, while *Kennedy* states, with no explanation, that "[s]ection 2000e–1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin," 657 F.3d at 192, the holding of the case is that the Title VII religious exemption protected all three of the religious organizations' allegedly discriminatory actions—discharge, harassment, and retaliation on the basis of religion, *id.* at 193–94. The Court found that the exemption covers hiring decisions based on "any activities of religious organizations, regardless of whether those activities are religious or secular in nature," including the "decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." *Id.* at 192. The Court in *Kennedy* never held that such religiously-motivated employment decisions are exempt only to the extent they do not discriminate on the basis of another protected classification.

Moreover, in *Cline*, the Sixth Circuit assessed a teacher's claim that a religious school did not renew her contract at the school because she was pregnant. 206 F.3d at 658. While the Court noted that Title VII's religious exemption does not exempt religious organizations "with respect to all discrimination," the Court also held that "courts have made clear that if the school's purported '[pregnancy] discrimination' is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII." *Id.*; *see also id.* ("The central question in this case, therefore, is whether St. Paul's nonrenewal of Cline's contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy. While the former violates Title VII, the latter does not."). The Court thus acknowledged that if the school's decision was religiously motivated, the Title VII exemption applied, even though the action also allegedly discriminated on the basis of sex.

Finally, in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), the Second Circuit assessed a claim brought under the Age Discrimination in Employment Act ("ADEA") by a Catholic school teacher whose contract at the school was not renewed. *Id.* at 168. The Court found that the ADEA would apply to the teacher's claims if his contract was not renewed because of his age, but the Act would not apply if the decision was based on the teacher's failure to perform religious duties. *Id.* at 172. *DeMarco* is not applicable here. As an initial matter, while the Court noted, in making an analogy to the ADEA, that Title VII's religious exemption allows religious organizations "to discriminat[e] based on religion with the understanding that provisions relating to *non-religious* discrimination would apply to such institutions," *id.* at 173 (emphasis added), the case did not actually assess the applicability of Title VII to the case. More importantly, *DeMarco* was decided long before the Supreme Court made clear in *Hosanna Tabor* and *Our Lady of Guadalupe* that the ministerial exception applied to employment decisions regarding religious schoolteachers.

The cases the Agencies cite thus do not hold that the Title VII religious exemption does not protect religiously-motivated employment decisions made by religious organizations on the basis of an employee's or applicant's "acceptance of or adherence to particular religious tenets." 85 Fed. Reg. 82,096.

II. CONCLUSION

The plain text and purpose of Title VII establish that the statute's religious exemption protects all religiously-motivated employment actions, including actions that allegedly discriminate on the basis of another protected classification. The U.S. Constitution also protects such actions. The Agencies should thus leave language in the 2023 Proposed Rule that organizations qualifying for the Title VII religious exemption may select employees "on the basis of their acceptance of or adherence to the religious tenets of the organization." Such language makes clear that, consistent with Title VII and the U.S. Constitution, faith-based organizations can preserve their religious autonomy and identities when participating in federally funded programs.

Respectfully submitted,

Gregory S. Baylor

Andrea Dill

Andrea Dill