Comment of Eric W. Treene to Nine-Agency Proposed Rule: *Partnerships With Faith-Based and Neighborhood Organizations*

I am an attorney in Washington, D.C., an Adjunct Professor at the Catholic University Columbus School of Law, and a Fellow at the Catholic University Center for Religious Liberty. For nineteen years in four Administrations, I was the Special Counsel for Religious Discrimination at the Civil Rights Division of the U.S. Department of Justice. I write in my personal capacity to point out what I think is an erroneous recitation of the law in the proposed nine-agency rule (the "Proposed Rule"), which will lead to greater confusion and needless litigation.

The Proposed Rule calls for the rescinding of existing regulatory language that clarifies the scope of the Title VII Section 702 exemption, 42 U.S.C. 2000e-1(a) (the "Section 702 exemption"). The Section 702 exemption permits religious organizations to employ "individuals of a particular religion" to carry out their work. The existing regulatory language states that "individuals of a particular religion" under the Section 702 exemption includes "acceptance or adherence to religious tenets of the organization." See Proposed Rule at 2402. This existing regulatory language, as explained below, accurately describes the text of Title VII and the way that courts universally have interpreted this text. The current regulatory language also reflects the manner in which the EEOC, the principal federal agency charged with interpreting and enforcing Title VII, has interpreted the Section 702 exemption. The Proposed Rule, however, would rescind this text. The Proposed Rule's change, and its description of why it is making that change, simply has no basis in law. Deleting this explanatory language would lead to greater confusion in this important statutory protection for the autonomy of religious institutions. Indeed, the cases which the agencies cite to support the change in regulatory language in fact undermine their argument. These cases, and every other cases of which I am aware, hold that the Section 702 exemption extends not merely to religious identity or status, but to religious beliefs and tenets. The proposed rule's deletion of this language has no valid basis in law and should be removed.

The Proposed Rule's explanation of why the "acceptance or adherence to religious tenets" language should be removed is that the Section 702 exemption does not apply to discrimination based on protected classifications other than religion, like race or sex, and the existing regulatory text "could mistakenly

suggest that Title VII permits religious organizations that qualify for the Title VII religious exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question." *Id.* The agencies then cite several court cases to support this proposition. But, as discussed below, none of these cases support this proposition, or shed light on what sort of facts the agencies may be hypothesizing where "acceptance or adherence to religious tenets" could also at the same time be a "tenets-based employment condition[ ] that would otherwise violate Title VII . . . ."

The Title VII Section 702 exemption only permits religious organizations to select "individuals of a particular religion" to carry out their work. It does not permit them to select employees on other protected bases, such as race, sex, or national origin. While the constitutional "ministerial exception" permits religious organizations to choose ministers on any basis whatsoever, *see*, *e.g.*, *Our Lady of Guadeloupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), Section 702 does not permit choosing employees on any basis except being "of a particular religion." Thus a Ukrainian Orthodox Church could require that its priests be ethnic Ukrainian, but cannot say that its janitor must be Ukrainian as well. Such national origin discrimination against applicants for the janitor position would be forbidden by Title VII, and Section 702 simply would not apply. But such national origin discrimination has nothing to do with whether the janitorial employee may be required to "accept[] or adhere[]to [the] religious tenets," of the Ukrainian Orthodox Church. The church would be free to require this based on the Section 702 exemption. The Proposed Rule appears to confuse this situation where the religious employer claims some religious basis for discrimination based on national origin, sex, or some other protected classification, and the situation, addressed by the current regulations, where an employer selects employees who "accept[] or adhere[ ] to [the] religious tenets" of the religious organization.

Accepting and adhering to certain religious beliefs is, after all, what it means to be an adherent of a given religion, both in common understanding, and in terms of the legal definition of what it means to practice a religion. *See, e.g., Burwell v. Hobby Lobby*, 573 U.S. 682, 710 (2014) (explaining that religious exercise includes both "belief and profession" and "the performance of (or abstention from) physical acts that are engaged in for religious reasons."). Title VII in fact defines religion as "all aspects of religious observance and practice, as well as belief." 42 U.S.C. 2000e(j). *See also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015) (observing that Congress specifically did not "limit[ ] the meaning

of 'religion' in Title VII to religious *belief*" but included "all aspects of religious observance and practices, as well as belief.")

To say that a person may be an "individual[ ] of a particular religion" under the Section 702 exemption but yet *not* someone who accepts or adheres to that particular religion undermines the very concept of what it means to be an individual "of a particular religion." This is why every case that has considered the issue of which this commenter is aware has concluded that "individual of a particular religion" means an individual accepting and adhering to the religion in question. *See, e.g., Cooray-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 141 (3rd Cir. 2006) (Congress intended Section 702 exemption "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices" and thus teacher at Catholic school engaging in public pro-abortion rights activities could be dismissed); *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' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (holding that Section 702 exemption protected right of Catholic diocese to require that non-Catholic teacher adhere to Catholic canons on remarriage); *Maguire* v. *Marquette Univ.*, 627 F. Supp. 1499, 1503 (E.D. Wis.1986), *aff'd in part and vacated in part,* 814 F.2d 1213 (7th Cir. 1987) (rejecting argument of professor fired by Catholic university that Section 702 inquiry was limited to whether he was Catholic, and holding that conflict of his views with Church's could be grounds for dismissal). It is also why the EEOC, the only federal agency charged with enforcing Title VII against non-governmental entities such as religious organizations, has concluded that the Section 702 exemption "allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs." EEOC Compliance Manual, Religion, Chapter 12.

The agencies in the Proposed Rule cite to no cases that support a contrary understanding to the explanation in the current regulations that the Section 702 exemption encompasses "acceptance or adherence to religious tenets of the organization." The agencies cite to three cases for the proposition that an employer may not discriminate based on sex or race "even where an employer takes such action for sincere reasons related to its religious

tenets." Proposed Rule at 2402. As discussed above, discrimination on bases other than religion is a completely separate issue from whether the Section 702 exemption includes acceptance and adherence to religious tenets. The cases the agencies cite shed no further light on the issue, or why they want to remove the clarifying language about Section 702 covering acceptance or adherence to religious tenets. The first case, *Kennedy v. St. Joseph's Ministries, Inc*., 657 F.3d 189 (4th Cir. 2011), is simply a religious discrimination case that notes correctly, in dicta, that the Section 702 exemption doesn't cover other forms of discrimination. *Id.* at 192. But the *Kennedy* case, on the merits of the case, in fact stresses the very point that the agencies are trying to de-emphasize in their rule change: that "[t]he decision to employee individuals 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." *Id.* Likewise the agencies cite *Cline v. Catholic Diocese*, 206 F.3d 651 (6th Cir. 1999), for this proposition as well. But this case holds that a Catholic school could in fact fire a teacher for acting inconsistently with Catholic doctrine by engaging in premarital sex, so long as this policy was applied equally to men and women. *Id.* at 658. The third case they cite, *Demarco v. Holy Cross High Sch*., 4 F.3d 166 (2d Cir. 1993), is an Age Discrimination in Education Act (ADEA) case that does not refer to Section 702 at all, which is not surprising since the Section 702 exemption has no relation to the ADEA.

The agencies, without presenting any reason that can hold up to minimal scrutiny, seek to remove accurate language from the existing rules that explains that hiring individuals of a particular religion means individuals who accept and adhere to the religious tenets of that religion. This clear explanation, which reflects what the courts and the EEOC universally understand to be the meaning of the Section 702 exemption, is helpful to prospective grant applicants, existing grantees, and the public generally in understanding their obligations and their legal protections. There is no valid basis for removing this accurate language from the existing agency rules.