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From: Christian Legal Society

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RE: Proposed Enforcement Guidance on Harassment in the Workplace (Published 09-29-2023)

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The undersigned organizations commend the Equal Employment Opportunity Commission ("EEOC" or "the Commission") for seeking to eliminate unlawful harassment in the American workplace. No one should be bullied, mocked, preyed upon sexually, or otherwise illegally harassed because of protected status. As followers of Jesus, we laud

efforts to recognize and protect in the workplace the dignity of all persons as image-bearers of God their Creator.

We wish to identify several "coral reefs" on which these Proposed Guidelines could shipwreck, so that the Commission can steer clear of illegal enforcement action. An employer that is a house of worship, religious corporation, religious nonprofit organization, religious association, religious educational institution, or religious society has a legal right to:

1. discuss with an employee the latter's decision to abort her pregnancy (fn. 27, p. 11 of 100), assuming the employer has a sincere religious creedal or conduct standard for staff or students that unborn life is not to be aborted.

2. decline to accommodate, reinforce, or otherwise be complicit in an employee's request that supervisors or co-workers use particular pronouns or other descriptors, where this would violate an employer's sincere religious beliefs. (see discussion of "misgendering" in fn. 33 and text at fn. 33, p. 12 of 100 of the Proposed Guidelines).

3. protect the privacy, dignity, safety, and workplace environment for employees wishing to use a restroom or other sex-segregated space without exposure to persons of the opposite biological sex (fn. 33 and fn. 34).

A. APPLICABLE LAW

These Proposed Guidelines should clearly and prominently state that they are to be read as subject to the superseding authority of:

- the Religious Organization Exemption of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a) ["ROE"],
- the First Amendment to the United States Constitution, and
- the Religious Freedom Restoration Act of 1993.

By educating Title VII enforcers, employers, and employees of religious employers alike about these superseding legal authorities, the Commission can – and, respectfully, should – avoid the three potential scenarios of confusion and resulting litigation discussed below in Part B.

1. The Religious Organization Exemption of Title VII

In adding the ROE to Title VII, Congress withheld from the Commission the authority to affect employment practices of "religious corporations, associations, educational institutions or societies." This disqualification has been in place almost six decades. The exemption(s) function with respect to "This subchapter"—all of Title VII. In the Religious Organization Exemption, Congress thus excluded from the Commission's remit and jurisdiction anything falling within a religious organization's employment practices based upon its religion. In Section 701j, Congress made plain and broad the scope

of the "religion" being protected by 702a: "all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j). Moreover, Congress amended Section 702a in 1972 to eliminate "religious" so that a religious employer may make protected religion-based decisions about any and all of the employment activities of its employees.[1]

Courts affirm this reading of Section 702. The leading case on the application of the Title VII exemptions to employee conduct is *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). The Third Circuit placed particular emphasis on the impermissibility of a civil court, in the context of a religious employer, evaluating employee *conduct*:

> Congress intended the explicit exemptions [702a and 703e2] to Title VII to enable religious organizations to create and maintain communities composed solely of individuals *faithful to their [i.e., the organization's] doctrinal practices*, whether every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs *and conduct* are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in *conduct regarded by the school as inconsistent with its religious principles.*

Id. at 951 (emphasis added).

Other courts have similarly concluded that the Title VII religious exemptions apply to employee conduct to which an employer has a religious objection. *See Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices…. [P]ermission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons "of a particular religion" under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Serv.*, 456 F. Supp. 2d 1021, 1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to

[1] Equal Employment Opportunity Act of 1972, Pub.L No. 92–261, § 3, 86 Stat. 103, 104; *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (holding that Congress' purpose in amending was to minimize governmental "interfer[ence] with the decision-making process in religions"); *Spencer v. World Vision*, 619 F. 3d 1109, 1117 (9th Cir. 2011), *amended and superseded by* 633 F.3d 723 (9th Cir. 2011).

terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough v. Bishop Heelan Catholic Sch.*, 2015 WL 759478 *12-13 (N.D. Iowa 2015) (citing *Little* and *Saeemodarae* for the same proposition).

Judge Brennan on the United States Court of Appeals for the Seventh Circuit recently elucidated on the proper reading of Section 702a:

> The debate as to whether the exemption applies is with the qualifying clause: "with respect to the employment of individuals of a particular religion." § 2000e–1(a). Under Title VII, "religion" is a defined term that "includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). But who decides the requisite religious belief, observance, or practice? And what must courts do when a covered employer supplies a religious reason for an adverse employment decision that implicates a protected class other than religion? These questions reveal the fault lines when considering the statutory text, caselaw, and the parties' arguments. [Plaintiff] posits that the "religion" referenced in the exemption is the individual's religion. But were that the focus, the exemption would read differently, as the "individual's religion." Instead, the exemption states, "individuals of a particular religion." § 2000e–1(a) (emphasis added). "Of" in ordinary usage has both a possessive and a descriptive meaning, and to choose between the two, context is instructive. Of, GARNER'S MODERN ENGLISH (4th ed. 2016). The term "particular" in the phrase "individuals of a particular religion" already hints at a religious employer's selectivity in employment. Considered as a whole, the exemption's text applies only to a religious employer and only "with respect to the employment of individuals … to perform work connected with the carrying on by such [religious employer] of its activities." § 2000e–1(a). This context shows that the § 702(a) exemption is concerned with "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). The focus is on a religious employer's ability to perform its religious activities.

Fitzgerald v. Roncalli High Sch., 73 F.4th 529, 535 (7th Cir. 2023) (Brennan, J., concurring).

Section 702a shields religious employers from all *other* Title VII claims when their action is due to their religious convictions, not just claims of religious discrimination. At least four decisions—two from federal circuit courts and two from federal district courts—have applied the Title VII exemptions as a defense to a Title VII claim of *sex discrimination* when the religious employer asserted a theological or doctrinal basis for its challenged employment decision. *See Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds*,

vacated in part, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

In a case decided just last year, Circuit Judge Frank Easterbrook, concurring, noted that when religious employer exemptions apply, they shield the employer from *all* claims under Title VII, not just claims of religious discrimination. *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022). Judge Easterbrook observes that some courts have mistakenly interpreted Section 702(a) to apply only to claims of discrimination based on religion. He notes, as we do, that religious organizations are not categorically exempt from Title VII. But he emphasizes, with a certain incredulousness that more courts were not picking up on this straightforward textual point, that "when the [adverse employment] decision is founded on the employer's religious belief, then *all of Title VII drops out*." *Id*. at 946 (emphasis added).

The Commission's own Religious Guidelines note that Section 702a exempts employers from more than religious discrimination claims:

> Consistent with applicable EEOC laws, the prerogative of a religious organization to employ individuals "'of a particular religion'. . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."

EEOC, Compliance Manual on Religious Discrimination, issued 1/15/22, § 12.I.C.1, footnotes 76-78 and accompanying text, *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

The U.S. Department of Justice likewise has recognized that the Title VII religious exemptions apply to conduct and encompass more than a mere right to hire co-religionists:

> Under [702(a)], religious organizations may choose to employ only persons whose beliefs *and conduct* are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or *only those willing to adhere to a code of conduct* consistent with the precepts of the Lutheran community sponsoring the school.

Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), 82 Fed. Reg. 49668, 49670 (Oct. 26, 2017) at 6 (emphasis added), *available at* https://www.justice.gov/opa/press-release/file/1001891/download.

Therefore, Section 702a determines that Title VII shall not apply to—*i.e.*, the Commission can neither regulate nor exhort by "guidelines"—any religious organization with respect to the latter's employment practices that touch on *any aspect of religious observance, practice, or belief* (including a staff code of personal conduct that upholds the sanctity of human life or the immutability of God-given gender) by *any employee*

performing *any activities* of the organization—from CEO to facilities assistant—regardless of the form of discrimination (religious or otherwise).

2. The First Amendment to the U.S. Constitution

The Proposed Guidelines would trigger serious conflict with defenses under the First Amendment. The Free Exercise and Establishment Clauses protect the autonomy of churches and religious organizations.[2] A subset of the church autonomy doctrine is the ministerial exception, which would invalidate any Guidance to the extent it could be construed to extend to a religiously key employee of a church or religious organization.[3] Moreover, the three scenarios of concern raised here impinge upon the First Amendment right of expressive association, similarly well-enunciated by the Supreme Court.[4]

The Commission should avoid such constitutional conflicts by clarifying that religious employers will not be accused of harassment for merely enforcing a religious creed or conduct standard on abortion, transgender issues, or bathroom privacy. Exempt religious organizations should not be distracted from their religious mission nor have to divert precious resources to legal defense costs.

3. The Religious Freedom Restoration Act of 1993 ("RFRA")[5]

Almost 30 years to the day, Congress passed RFRA explicitly to restore the highest level of legal protection against government action when it substantially burdens the Free Exercise of Religion. While not applicable to state law and state policy, RFRA remains applicable to any action of the Commission, of any other federal actor, or any state government action in a program with a dollar or more of federal funding.

As discussed below, each of the three scenarios we identify presents a possible risk of triggering RFRA. If a religious employer were to show that the Guidelines forced it to say nothing of an employee's abortion or her demand that others identify her according to her self-chosen gender identity rather than her sex or another employee's demand to use the restroom set aside for the opposite sex, any of these might well impose a substantial (not nominal) burden on the employer's free exercise. If so, the Commission[6] would have to justify that burden by meeting the highest standard the law recognizes—that the Commission: (1) has a compelling interest in eradicating creed or conduct standards in these three areas at this particular, exempt religious workplace; and (2) has no way to

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[2] *Watson v. Jones*, 80 U.S. 679, 727-29 (1871); *Serbian E. Orthodox v. Milivojevich*, 426 U.S. 696, 70-13 (1976).

[3] *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 181 (2012).

[4] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000); *Hurley v. Irish-American Gay. Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572-73 (1995); *Slattery v. Hochul*, 61 F.4th 278, 289 (2d Cir. 2023) (holding that state law disallowing hiring discrimination based on employee's "reproductive health decision making" violated anti-abortion non-profit's free association right to hire only pro-life employees).

[5] Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

[6] The federal circuits are split on the question of whether RFRA applies when the federal government, including the Commission, is not a named party in the litigation.

reduce discrimination at such workplaces in a manner less restrictive of this employer's free religious exercise. Those are extremely challenging requirements for the EEOC to meet.

B. THESE BOUNDARY CLARIFICATIONS ARE NEEDED IN THE COMMISSION'S PROPOSED GUIDELINES

1. Allegation of "Harassment" Based on Employee's Decision to Abort Her Pregnancy

For millennia, Christians, as well as many other world religions, have considered elective abortion (that is, any abortion that is not necessary to save the physical life and health of the mother) to be the killing of sacred human life.

Many religious employers sincerely and logically desire to employ people of the same religion who uphold this view of the dignity and worth of each human being, born or unborn. As recognized by Congress in defining "religion"[7] when enacting Title VII, to hire people of the same religion may legitimately comprehend hiring only those who share and uphold in their personal conduct this practice and belief about abortion.

The Commission includes abortion as a decision on which an employer – even an exempt religious organization or school – could not comment without risking a claim of harassment. In this way, the Proposed Guidelines would usurp from the religious employer: (1) the determination of whether having an abortion complied with the employer's religious standard of conduct; and (2) the power to evaluate and reward or penalize the employee's performance in this regard. In effect, the Guidelines, as proposed, would remove abortion from the employer's religious conduct standards, no matter what the employer's religion says about abortion. This would ignore not only Section 702a of Title VII, but also the First Amendment Religion Clauses and the Religious Freedom Restoration Act, as discussed in Part A, *supra*.

We urge that the finalized Guidelines address this entirely foreseeable problem by adding a prominent carveout – i.e., that nothing in the Guidelines should be misconstrued to affect the legal right of a religious employer to enforce a religious belief or conduct standard about elective abortion. By so doing, the Commission will respect the express will of Congress in Section 702a, including the broad definition of "religion" it employs from the preceding Section 701j, as well as the resulting wide scope of employment criteria that Section 702a allows religious employers. It will also avoid protracted and distracting litigation over the religious employer's rights under the First Amendment and RFRA. The EEOC will better protect the rights and interests of both religious employers and their employees and prospective employees by promulgating a regulatory provision that makes plain the boundaries set by applicable statutory and constitutional law.

[7] "The term 'religion' includes all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j) [Section 701j of Title VII].

2. "Misgendering" A Transgender Employee

The discussion of "misgendering" in the Proposed Guidelines[8] would mislead the religious employer that has a sincere religious belief against transgender practices and their verbal reinforcement by fellow religious believers. Like abortion, many religions for millennia have understood gender to be a fixed and immutable gift from God. We understand that some people may sincerely believe that their gender is fluid or that their gender identity has been misidentified or is something they can change, including by appearance and self-identification. That employee, however, does not have a right to force co-workers employed by a religious employer to reinforce that assumed identity, nor the power to compel a religious employer to pressure its employees to affirm that employee's belief or self-identification.

As explained above, Congress withheld from the Commission's authority such interference with the religious workplace. This does not mean that a transgender employee at a religious organization must submit to bullying. But it does mean that the employee may not claim a Title VII right to have his or her belief be verbally reinforced as a matter of right at a religious workplace. The only guidance needed for employees and employers of religious organizations should be the mirroring of reciprocal dignity: from co-workers based on the equal dignity of the transgender employee and from the latter out of respect for the religious conscience and creed about transgender practice held by their exempt religious employer.

3. Employee Use of Restrooms at the Religious Workplace

Footnotes 33 and 34 in the Proposed Guidelines could be misconstrued by religious organizations, including schools, as limiting or undermining how and where they can protect the dignity, privacy, safety, and workplace environment for employees, students, volunteers, vendors, and other visitors wishing to use a restroom without exposure to persons of the opposite sex as determined by one's biological sex.

For many Americans, religion is not just a creed or an hour a week spent in a church or temple. That is one reason why Congress gave "religion" a broad definition.[9] In the legislation that created the Commission, Congress expressed an intent to keep the government away from interfering with the workplace of "religious corporations, associations, educational institutions and societies." Section 702a. That wide berth recognizes that religious belief often determines a broad range of behaviors, activities, and practices – including the propriety of having mixed gender restrooms.

As explained in Part A, *supra*, because of the wide protections of Sections 701j and 702a of Title VII, not to mention the First Amendment (and RFRA in federally funded religious workplaces), it is inappropriate for the Commission to suggest that a religious employer must allow an employee to choose to use a restroom designated for a person of the opposite sex. Where a religious organization or school has a religious belief about

[8] Footnote 33 and the text of the Proposed Guidelines at fn. 33, p. 12 of 100.
[9] "[A]ll aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j).

transgenderism, Title VII clearly reserves those judgments to each religious employer. An exempt employer can protect the privacy and safety of its employees, and maintain a workplace consistent with its religious convictions, by requiring employees to use the restroom that corresponds to their sex, not a later-chosen gender.

The issue of bathroom access is currently the subject of much litigation and acrimonious debate nationally. Congress exempted religious organizations from Title VII in matters of the workplace precisely so that they may be undistracted from their religious mission and not have to spend donor funds on legal defense. The Proposed Guidelines should clarify that Section 702 employers are exempt from its restroom guidance.

* * *

In summary, we identify three sections of the Proposed Guidance that could lead to onerous and unlawful Commission supervision and to excessive self-regulation by otherwise exempt religious employers in areas of legally protected autonomy. These are three coral reefs that can be avoided by the Commission in final Guidelines. We respectfully submit that the Commission can and should do so.

Expertise and Interest of the Signatories:

Christian Legal Society ("CLS") is a national association of Christian attorneys and law students dedicated to glorifying God by nurturing Christian faith and discipleship within the legal profession, providing legal aid to those in need and protecting religious freedom and the sanctity of human life. Since 1975, CLS has done the latter through its Center for Law & Religious Freedom.

The National Association of Evangelicals ("NAE") is the nation's largest umbrella group representing evangelical Christian denominations, churches, schools, and charities. The NAE seeks to be an influence for good and promotes human rights and religious freedom for all Americans.

Council for Christian Colleges and Universities ("CCCU") is a higher education association representing over 185 institutions around the world, including more than 140 in the United States. Our institutions enroll approximately 520,000 students annually, with over 10 million alumni. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. As the leading national voice for Christian higher education, we provide a unified voice to highlight the contributions of our institutions, and of our students, to the common good.

Christian Medical & Dental Associations® ("CMDA") founded in 1931 is the largest Christian membership organization comprised of healthcare professionals serving throughout the United States and overseas. We provide programs and services supporting its mission to "change hearts in healthcare." CMDA is unequivocally pro-life.

The Center for Public Justice ("CPJ") is a Christian, nonpartisan organization devoted to policy research and civic education. Working outside the familiar categories of right and left, conservative and liberal, we seek to help citizens and public officeholders respond to God's call to do justice. Our mission is serving God by equipping citizens, developing leaders, and shaping policy to advance justice for the transformation of public life.

The Institutional Religious Freedom Alliance ("IRFA"), a program of the Center for Public Justice, works with a multi-faith and multi-sector network of faith-based organizations and associations, and with religious freedom advocates and First Amendment lawyers, to protect and advance the religious freedom that faith-based organizations need in order to make their distinctive and best contributions to the common good.

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