ETHICS AND PUBLIC POLICY CENTER

February 5, 2024

EO 12866 Meeting
"Partnerships With Faith-Based and Neighborhood Organizations"
RIN 0412-AB10, 0510-AA00, 0991-AC13, 1105-AB64, 1290-AA45, 1601-AB02, 1840-AD46, 2501-AD91, 2900-AR23

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Thank you for the opportunity[1] to provide comments on OIRA's review of the Nine Agency Rule "Partnerships with Faith-Based Neighborhood Organizations" that would modify regulations for faith-based organizations that partner with the nine agencies to provide services to beneficiaries of various agency programs.[2]

My name is Rachel Morrison, and I direct the HHS Accountability Project at the Ethics and Public Policy Center (EPPC). I am a former attorney advisor at the Equal Employment Opportunity Commission, and relevant to the proposed regulation, I am an expert on issues related to religious discrimination in employment, including Title VII's religious organization exemption. Also attending is my EPPC colleague Natalie Dodson.

Throughout this nation's history, faith-based organizations have been vital to providing services to those in need. Indeed, as President Biden recognized in Executive Order 14015, faith-based organizations are essential to the delivery of services in our nation's neighborhoods, and it is important to strengthen the ability of such organizations to deliver services in partnership with the federal government while adhering to all applicable law.[3] Yet, without any demonstrated need, the agencies' proposed rule would gut religious protections for faith-based organizations partnering with the agencies to serve beneficiaries.

Today, we will share 5 ways the agencies' rule is arbitrary and capricious, and contrary to law. We urge OIRA to ensure that the agencies engage in reasoned rulemaking and are not regulating a solution in search of a problem.

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars' input on this rule. *See* Rachel N. Morrison, "Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion," *National Review*, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] 88 Fed. Reg. 2395 (Jan. 13, 2023), https://www.federalregister.gov/documents/2023/01/13/2022-28376/partnerships-with-faith-based-and-neighborhood-organizations. The nine agencies are 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.
[3] 86 Fed. Reg. 10007.

1. The agencies failed to establish a need for this rulemaking.

- For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. In the proposed rule, the agencies failed to demonstrate sufficient need for their rulemaking, making it arbitrary and capricious, and contrary to law.

- The agencies identified two reasons for their rulemaking in the proposed rule, both without sufficient justification. We'll address each in turn.

    - Reason 1: "It is central to the Agencies' missions that federally funded services and programs . . . reach the widest possible eligible population, including historically marginalized communities."[4]

        - In the proposed rule, the agencies failed to explain how the 2020 Rule does not allow the agencies' federally funded services and programs to "reach the widest possible eligible population, including historically marginalized communities."[5] The agencies fail to identity a single population or historically marginalized community that is not currently being reached by the agencies' services and programs, much less as a result of the 2020 rule. The agencies also failed to explain how its proposal would increase reach to additional populations not already served. Relying on this reason to justify the rulemaking is arbitrary and capricious.

    - Reason 2: "To address and correct inconsistencies and confusion raised by the 2020 Rule."[6]

        - The agencies failed to provide evidence of "inconsistencies and confusion." For example, the proposed rule stated the agencies "are *concerned* that [the 2020 Rule has] engendered confusion," the 2020 Rule "raised a *possible* misunderstanding," "the changes *could cause* some confusion and *possible* misunderstanding."[7] These are merely speculative statements, not concrete evidence. The agencies failed to point to any agency, organization, or beneficiary that is confused or misunderstood the 2020 regulations, or a situation where an award was improperly granted, or a beneficiary was wrongly denied a service, making this reason for rulemaking arbitrary and capricious.

        - Ironically, the agencies' proposal creates its own confusion and inconsistencies with law, especially its misunderstanding and misstatement of Title VII law, which we turn to next.

2. The agencies' articulation of the scope of Title VII's religious organization exemption is contrary to law and arbitrary and capricious.

- Regarding the discussion of the scope of Title VII's religious organization exemption in the proposed rule, the agencies misinterpreted or ignored the plain text of Title VII, relevant caselaw, and EEOC's religion guidance, making the proposal contrary to law and arbitrary and capricious.

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[4] 88 Fed. Reg. at 2398.
[5] *Id*.
[6] *Id*.
[7] *Id.* at 2400 (emphasis added).

- *Agencies wrongly claim Title VII's religious organization exemption is "limited."* Claiming to follow the text of the statute and caselaw, the agencies view the Title VII religious organization exemption as "limited," merely allowing religious organizations "to hire only people of a particular religion in the absence of any inconsistent statutes."[8]

    - As the proposed rule explained, 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)."[9]

    - As such, the agencies proposed removing text from the 2020 Rule that reads: "An organization qualifying for [a religious] exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[10] The agencies claimed that this provision "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."[11]

- *Federal financial assistance does not limit Title VII protections for religious organizations.* Generally, agencies have recognized that receipt of direct or indirect federal financial assistance does not lead religious organizations to lose protections under Title VII's religious organization exemption.

- *Agencies' position is contrary to the plain text of Title VII.* Title VII provides: "This subchapter shall not apply to ... [a qualifying religious organization] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious organization] of its activities."[12]

    - "This subchapter" includes Title VII's prohibitions against discrimination on the basis of race, color, religion, sex, and national origin. Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color, sex, national origin, those nondiscrimination prohibitions do not apply with respect to "the employment of individuals of a particular religion."[13]

    - "Employment" covers the full range of the employer-employee relationship, and religion is defined broadly in Title VII to include "all aspects of religious observance and practice, as well as belief."[14] Thus, Title VII permits religious organizations to make employment decisions based on religion, which includes beliefs, observations, and practices. This understanding is recognized by numerous courts.[15]

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[8] *Id*. at 2402.
[9] *Id*.
[10] 85 Fed. Reg. 2974, 2986.
[11] 88 Fed. Reg. at 2402.
[12] 42 U.S.C. § 2000e-1(a).
[13] *Id*.
[14] 42 U.S.C. § 2000e(j).
[15] *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

- "Of a particular religion" is not limited to "co-religionists." Courts agree.[16] To hold otherwise would require the government to determine what it truly means to be of a "particular" religion, violating the Free Exercise and Establishment Clauses.[17]

- Under the plain text of Title VII, Title VII's religious organization exemption protections apply even if the employment decision is based on the religious organization's religious beliefs, observances, or practices. This does not change if the employment decision based on religion is recharacterized as discrimination based on another protected basis, such as sex.[18]

- *Agencies' reliance on "numerous courts" while ignoring other courts is arbitrary and capricious.*

  - The proposed rule incorrectly stated, "numerous courts have held, 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)."[19]

  - The agencies cited to three cases in support: *Kennedy v. St. Joseph's Ministries, Inc.*,[20] *Cline v. Catholic Diocese of Toledo*,[21] and *DeMarco v. Holy Cross High Sch*.[22] But these cases fall short of supporting the agencies' position. First, *Kennedy* involved only claims of religious discrimination, harassment based on religion, and retaliation, and explicitly recognized that "permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the

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individuals faithful to their doctrinal practices…. [P]ermission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *see also Henry v. Red Hill Evangelical Lutheran Church 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 terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough*, 2015 WL 759478, *12-13 (citing *Little* and *Saeemodarae* for the same proposition).

[16] *Cf. Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980) (rejecting arguments that Title VII religious organization exemption permitted school affiliated with LDS Church only to hire co-religionists and did not permit school to discriminate among various Mormon applicants), *aff'd*, 1982 WL 20024 (10th Cir. 1982), *cert. denied*, 464 U.S. 849 (1983); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (explaining Title VII's religious organization exemption "allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.").

[17] *See Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (explaining evaluation of whether teacher's conduct made her unfit for her religious employer's mission was not suited to resolution by a civil court based on excessive entanglement concerns).

[18] Of course, other nondiscrimination and relevant laws are not subject to Title VII's religious organization exemptions, which only apply to Title VII. Thus, there may be other ways a nondiscrimination requirement could be imposed, such as in the race context, that does not run afoul of Title VII, RFRA, or the Constitution.

[19] 88 Fed. Reg. at 2402.

[20] 657 F.3d 189, 192 (4th Cir. 2011).

[21] 206 F.3d 651, 658 (6th Cir. 2000).

[22] 4 F.3d 166, 173 (2d Cir. 1993).

employer's religious precepts."[23] Second, while *Cline* supports the agencies' position it it failed to adhere to the plain language of the statute that states, "This title shall not apply to an employer…."[24] Further, the Supreme Court's direction in *Bostock* to apply the plain statutory text of Title VII undercuts *Cline*'s non-textual holding. Finally, *DeMarco* was an Age Discrimination in Employment Act case, not a Title VII case.[25]

- At the same time, the agencies failed to address several court decisions, including by federal circuit courts, that have recognized Title VII's religious organization exemption can be a defense to a sex discrimination claim when the employer asserts a religious rationale for the challenged employment decision.[26] Other courts have recognized that the religious organization exemption acts as a bar to Title VII retaliation claims.[27] As Seventh Circuit Judge Frank Easterbrook wrote in a concurrence, "when the [adverse employment] decision is founded on the employer's religious belief, then all of Title VII drops out."[28]

- The agencies also fail to grapple with *Bostock v. Clayton County*[29] where the Supreme Court indicated that Title VII's religious organization exemption could serve as a valid defense to a sex discrimination claim. In *Bostock,* the Supreme Court held that Title VII's prohibition against sex discrimination means an employer cannot make hiring and firing decisions based on an individual's homosexuality or transgender status. The Court recognized that Title VII's religious organization exemption (in addition to the First Amendment's ministerial exception and the Religious Freedom Restoration Act (RFRA)), could apply in appropriate cases.

- Ignoring these relevant precedents makes the agencies' rule arbitrary and capricious.

- *Agencies ignore EEOC Religion Guidance*. The agencies' proposal is at odds with the religion guidance[30] issued by the Equal Employment Opportunity Commission, the federal agency tasked with enforcing Title VII.

    - EEOC religion guidance cites relevant caselaw and explains that Title VII's religious organization exemptions "allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged

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[23] 657 F.3d at 191, 196.
[24] 206 F.3d 651.
[25] 4 F.3d at 168.
[26] *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).
[27] *Kennedy*, 657 F.3d at 193-94; *Curay-Cramer*, 450 F.3d 130; *Saeemodarae*, 456 F. Supp.2d at 1041; *Lown v. Salvation Army, Inc.*, 393 F. Supp.2d 223, 254 (S.D.N.Y. 2005); *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019).
[28] *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring).
[29] 140 S. Ct. 1731, 1754 (2020).
[30] EEOC, Compliance Manual: Religious Discrimination §12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination. EEOC's religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC's positions and contains extensive footnotes to caselaw in support.

employment decision on the basis of religion."[31] For reference, we provide the excerpt of EEOC's religion guidance discussion on the scope of the religious organization exemptions in Attachment 1.

- It would be inappropriate for the agencies to espouse a different interpretation and applications of Title VII, and arbitrary and capricious for the agencies to ignore EEOC's religion guidance.

3. The agencies' "available secular alternatives" factor is arbitrary and capricious, and contrary to law.

- The agencies proposed to add a sentence to the definition of "indirect Federal financial assistance," that would state, "the availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice."[32] The agencies suggested that adding this sentence will "eliminate any confusion about the continuing relevance of alternative secular providers in determining whether a particular aid program is indirect."[33] While the agencies represented that this test will not be used to "disqualify[] religious providers" or to justify "any other kind of religious discrimination," that promise is not sufficient as the test itself is contrary to law.

  - As we explain in our public comment at pages 5-8,[34] this proposal is contrary to law because it conflicts with Supreme Court Religion Clause decisions: *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[35] *Espinoza v. Montana Department of Revenue*,[36] *Kennedy v. Bremerton School District*,[37] and *Carson v. Makin*.[38]

  - The proposed "adequate secular alternatives" standard arbitrary and capricious because it is undefined and unworkable in practice. The standard is fraught with unanswered questions: What criteria will be used to make such a determination? Who will make it? How far away does an alternative have to be before it is not considered an "adequate" alternative? How "secular" does an alternative have to be before it is considered an "adequate" alternative? What does "adequate" mean? Is this determined by number of providers, location of providers, size of providers, etc.? Is a faith-based organization's rights contingent on whether there is an adequate secular provider?

- *Available non-discriminatory alternatives the agencies should consider.* Instead of judging service providers based on their religiosity, the agencies should instead develop neutral metrics to determine whether an area has adequate social services available—regardless of whether the

[31] § 12-I-C-1.
[32] 88 Fed. Reg. at 2401.
[33] *Id.*
[34] EPPC, EPPC Scholars Comment Opposing the Nine Agency Proposed Rule "Partnerships With Faith-Based and Neighborhood Organizations," RIN 0412-AB10, 0510-AA00, 0991-AC13, 1105-AB64, 1290-AA45, 1601-AB02, 1840-AD46, 2501-AD91, 2900- AR23 (Mar. 14, 2023), https://eppc.org/wp-content/uploads/2023/03/EPPC-Scholars-Comment-Opposing-Nine-Agency-Faith-Based-Partnership-Proposed-Rule.pdf.
[35] 137 S. Ct. 2012 (2017).
[36] 140 S. Ct. 2246 (2020).
[37] 142 S. Ct. 2407 (2022).
[38] 142 S. Ct. 1987 (2022).

existing providers are faith-based or secular. The agencies have at their disposal many constitutional, nondiscriminatory means to address such situations and should consider the following alternatives.

- First, the agencies could create incentives to draw new service providers into the area or to prompt existing providers to add needed services or service areas. This approach would likely result in new secular service providers, without the government taking any steps that would discriminate against faith-based providers on the basis of religion.

- Second, the government is always free to establish new government-run programs that would provide the needed services. The availability of such alternative non-discriminatory solutions makes clear that any government efforts to selectively recruit secular providers would fail strict scrutiny.[41]

4. The agencies gratuitously minimize religious exercise protections of faith-based organizations.

- *The agencies claim that the 2020 rule's language about religious accommodation protections caused confusion is arbitrary and capricious.* The proposed rule claims "the 2020 Rule introduced confusion regarding the protections the law affords to faith-based organizations and others" by creating "the misimpression" that the agencies would be required to make religious accommodations to program requirements for faith-based organizations.[39]

  - Nothing in the 2020 Rule mandated that the agencies were required to provide religious accommodations not required under federal law.

  - The agencies failed to point to specific language in the 2020 Rule that caused this alleged misimpression or provide any evidence of actual misimpression by any agency, individual, or organization. This is arbitrary and capricious.

- *The agencies proposed deletion of language identifying laws protecting religious freedom is arbitrary and capricious.* The agencies proposed deleting language in the regulations that clarify which provisions of law could require an accommodation. These laws include the Religious Clauses of the Constitution, the Religious Freedom Restoration Act, the Weldon Amendment, and other conscience protection laws.

  - The agencies fail to explain why it would delete these references, making it arbitrary and capricious. Deleting the names of laws protecting religious freedom is gratuitous and demonstrates an animus towards religious freedom rights. Removing references to specific laws will induce confusion, not clarity.

- *The agencies' treatment of "religious exercise" protections is contrary to law.* The agencies proposed deleting from their regulations references to "religious exercise" and the requirement that the agencies will not disqualify a faith-based organization "because such organizations are motivated or influenced by religious faith to provide social services, because of their religious character or affiliation, or on grounds that discriminate against organizations on the basis of the organizations' religious exercise."[40]

[39] 88 Fed. Reg. at 2401.
[40] *Id*. at 2412.

- In its place, the agencies claim that they will state "more directly" that when the agencies select service providers, they will not "discriminate on the basis of an organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization such as one that has the same capacity to effectively provide services."[41] But faith-based organizations and secular organizations are not similarly situated. Faith-based organizations have protections for religious exercise under the First Amendment and federal law that secular organizations do not have for the same conduct.

- The proposal would gut the religious nondiscrimination and accommodation protections to which faith-based organizations are entitled under law. It is no protection to ignore a religious organization's free exercise rights and merely view such organizations' conduct in the same light as secular organizations.

- *The agencies' proposal to eliminate a provision allowing religious organizations with religious objections to applying for tax-exempt status to qualify as a nonprofit organization for purposes of the regulations is arbitrary and capricious.* "[T]o enhance clarity and reduce confusion," the agencies proposed removing an alleged "confusing and unnecessary" provision from the 2020 Rule that allowed applicants that hold "a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code'' to demonstrate nonprofit status by providing "evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization."[42]

  - We suspect very few organizations would fall under the scope of this provision making its removal gratuitous and discriminatory towards those few groups with religious objections to applying for tax-exempt status.

  - The agencies failed to provide evidence that this provision was confusing or that it was not clear. Indeed, it is very straightforward and not complicated. The agencies failure to provide sufficient justification for this proposal makes it arbitrary and capricious.

5. The agencies must consider the rule's costs and transfers.

- *Costs and Transfers.* OIRA determined that this is an economically significant rule that requires meaningful economic analysis under EO 12866 and OMB Circular A-4.[43] The agencies should consider the following costs and transfers associated with its proposed modifications of the religious accommodation process, which they did not do in their proposal.

  - The effect of the regulations on existing faith-based providers leaving each program under all nine agencies and new faith-based providers not joining in the future.

[41] *Id*. at 2402.
[42] 88 Fed. Reg. at 2404. The Department of Housing and Urban Development (DHS) proposes "a slightly different standard" where an entity may provide evidence that "the DHS awarding agency determines to be sufficient" to establish that it would otherwise qualify as a nonprofit. *Id*.
[43] EO 12866 states: "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless, essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."

- The availability of alternative providers to fill any gaps in service.
- The harms to beneficiaries who are unable to receive services from a faith-based provider.
- Any irreparable harm of the loss of First Amendment and religious free exercise rights, including by an incorrectly denied accommodation or lack of appeal process.
- Any distributional effects of federal funds transferring from faith-based providers that leave the program under the regulations to new providers.

Conclusion

We urge OIRA to ensure that the statutory and regulatory process is upheld, that this rulemaking is not a solution in search of a problem, and that the agencies' rule reflects its obligations under the Constitution, the Administrative Procedure Act, federal laws protecting religious freedom, and all other relevant legal authority.

Attachment 1

Excerpt from EEOC, Compliance Manual: Religious Discrimination §12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination

SECTION 12: RELIGIOUS DISCRIMINATION

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12-I COVERAGE

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C. Exceptions

1. Religious Organizations

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Scope of Religious Organization Exemption. Section 702(a) states, "[t]his 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 . . . of its activities."[104] Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and may not engage in related retaliation.[105] However, sections 702(a) and 703(e)(2)[106] allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.[107] The definition of "religion" found in section 701(j) is applicable to the use of the term in

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[104] 42 U.S.C. § 2000e-1(a). The Supreme Court, in dicta in a case focused on religious discrimination, has characterized section 702 by stating it "exempts religious organizations from Title VII's prohibition against discrimination on the basis of religion." Amos, 483 U.S. at 329. Section 703(e)(2) states, "it shall not be an unlawful employment practice" for certain schools, colleges, universities, or other educational institutions "to hire or employ employees of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

[105] *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption "does not … exempt religious educational institutions with respect to all discrimination"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin"); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); *cf. Garcia*, 918 F.3d at 1004-5 (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by religious organization exception, but adjudicating disability discrimination claim on the merits).

[106] 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of [Title VII], it shall not be an unlawful employment practice for [certain religious educational organizations] . . . to hire and employ employees of a particular religion . . . .").

[107] Courts take varying approaches regarding the causation standard and proof frameworks to be applied in assessing this defense. *See Kennedy*, 657 F.3d 189 at 193-94 (holding that plaintiff's claims of discharge, harassment, and retaliation based on religion were covered by section 702(a) religious exemption and thus barred); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) ("Thus, we will not apply Title VII to [plaintiff's sex discrimination] claim because Congress has not demonstrated a clear expression of an affirmative intention that we do so in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision."); *DeMarco*, 4 F.3d at 170-71 ("[T]he [McDonnell Douglas] inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding race and sex discrimination claims barred by section 702 exemption where religious employer presents "convincing evidence" that employment practice was based on the employee's religion).

sections 702(a) and 703(e)(2), although the provision of the definition regarding reasonable accommodations is not relevant.[108]

Courts have held that the religious organization's assertion that the challenged employment decision was made on the basis of religion is subject to a pretext inquiry where the employee has the burden to prove pretext.[109] Courts also have held that any inquiry into the pretext of a religious organization's rationale for its decision must be limited to "sincerity" and cannot be used to challenge the validity or plausibility of the underlying religious doctrine.[110] For example, one court has held that a religious organization could not justify denying insurance benefits only to married women by asserting a religiously based view that only men could be the head of a household when evidence of practice inconsistent with such a belief established "conclusive[ly]" that the employer's religious justification was "pretext" for sex discrimination.[111]

In *EEOC v. Mississippi College*, the court held that if a religious institution presents "convincing evidence" that the challenged employment practice resulted from discrimination on the basis of religion, section 702 "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[112] Despite the court's use of "jurisdiction" here, it has been held in light of the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, that Title VII's religious organization exemptions are not jurisdictional.[113]

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[108] "For the purposes of this subchapter … [t]he term "religion" includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

[109] *See Curay-Cramer*, 450 F.3d at 141 (distinguishing the case "from one in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct"); *DeMarco*, 4 F.3d at 171 (stating pretext inquiry "focuses on . . . whether the rule applied to the plaintiff has been applied uniformly"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 n.1 (9th Cir. 1986) (finding that Title VII's exemption did not apply when the religious employer's practice and justification were "conclusive[ly]" a pretext for sex discrimination).

[110] *See Curay-Cramer*, 450 F.3d at 141 ("[T]he existence of [section 702(a)] and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of [Catholic] Church doctrine."); *DeMarco*, 4 F.3d at 170-71 ("The district court reasoned that, where employers proffered religious reasons for challenged employment actions, application of the McDonnell Douglas test would require 'recurrent inquiry as to the value or truthfulness of church doctrine,' thus giving rise to constitutional concerns. However, in applying the McDonnell Douglas test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action." (citations omitted)); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in determining whether an agency rule contravened a closely held corporation's rights under the Religious Freedom Restoration Act, "it is not for the Court to say that . . . religious beliefs are mistaken or unreasonable"; rather the Court's "'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction'").

[111] *Fremont Christian Sch.*, 781 F.2d at 1367 n.1; *see also Miss. Coll.*, 626 F.2d at 486 (if evidence disclosed that the college "in fact" did not consider its religious preference policy in determining which applicant to hire, section 702 did not bar EEOC investigation into applicant's sex discrimination claim).

[112] *Fremont Christian Sch.*, 781 F.2d at 1366 (quoting Miss. Coll., 626 F.2d at 485).

[113] *See Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organizations exemption is not jurisdictional and can be waived if not timely raised in litigation). "Because Congress did not rank the religious exemption as jurisdictional, this Court will 'treat the restriction as nonjurisdictional in character.'" *Smith v. Angel Food Ministries, Inc.*, 611 F. Supp. 2d 1346, 1351 (M.D. Ga. 2009) (quoting Arbaugh, 546 U.S. 500, 515 (2006)).

The religious organization exemption is not limited to jobs involved in the specifically religious activities of the organization.[114] Rather, "the explicit exemptions to Title VII . . . enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[115] In addition, the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs.[116] Consistent with applicable EEO 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."[117] Some courts have held that the religious organization exemption can still be established notwithstanding actions such as holding oneself out as an equal employment opportunity employer or hiring someone of a different religion for a position.[118]

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[114] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (addressing the issue of whether the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment, the Court held that "as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("The revised [religious organization exemption] 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.").

[115] *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding religious organization exemption barred religious discrimination claim by parochial school teacher who was discharged for failing to follow church canonical procedures with respect to annulment of a first marriage before remarrying).

[116] *See* 42 U.S.C. § 2000e(j) (defining religion to include "all aspects of religious observance and practice, as well as belief"); *see also Little*, 929 F.2d at 951 (concluding 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").

[117] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see, e.g.*, *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (holding that under religious organization exemption School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership); *Little*, 929 F.2d at 951 (holding that religious organization exemption barred religious discrimination claim challenging parochial school's termination of teacher who had failed to validate her second marriage by first seeking an annulment of her previous marriage through the canonical procedures of the Catholic church).

[118] *See Hall*, 215 F.3d at 625 (finding that Title VII's religious organization exemption was not waived by the employer's receipt of federal funding or holding itself out as an equal employment opportunity employer); *Little*, 929 F.3d at 951 (finding that Title VII's religious organization exemption was not waived by Catholic school knowingly hiring a Lutheran teacher); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organization exemption is not jurisdictional and can be waived).