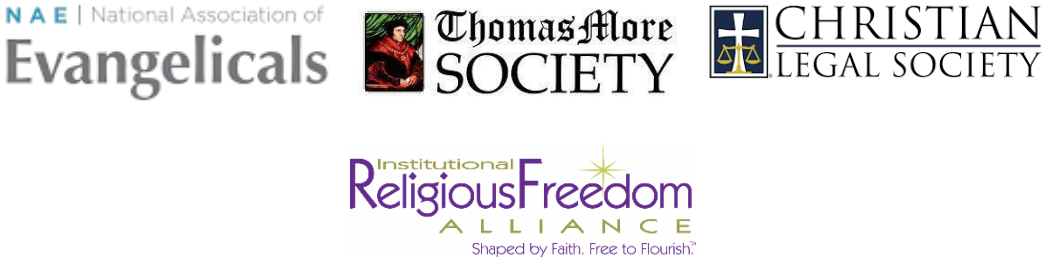

Filed via Federal eRulemaking Portal
http://www.regulations.gov

December 8, 2021

Tina Williams, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Subject: RIN 1250-AA09, Comment on proposal to rescind implementing legal requirements regarding the equal opportunity clause's religious exemption

Dear Ms. Williams:

On behalf of the Thomas More Society, National Association of Evangelicals, Institutional Religious Freedom Alliance, and Christian Legal Society, we submit this Comment in response to the Office of Federal Contract Compliance Programs' [OFCCP] Proposal to Rescind, publicly announced November 8 and published in the Federal Register on November 9, 2021.[1]

The notice proposes to rescind the regulations established in the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption,"[2] that took effect less than a year ago on January 8, 2021.

[1] 86 Fed. Reg. 62115 (November 9, 2021).
[2] 85 Fed. Reg. 79324 (December 9, 2020).

There is universal agreement that the scope of § 204(c) of EO 11246, as amended, is in all relevant respects the same as the two religious employer exemptions in Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq. The religious employer exemptions are commonly referred to by their Title VII public law section numbers, Public Law 88-352, § 702(a) [hereinafter "702a"][3] and Public Law 88-352, § 703(e)(2) [hereinafter "703e2"].[4]

We set forth three points in this Comment:

First, the plain text of 702a and 703e2 make these religious employer exemptions an affirmative defense to any and all primary claims that can be brought by a plaintiff under Title VII, even a claim for retaliation or a worker's request for a religious accommodation. The plain texts of the two exemptions are not at all limited to just those primary claims brought by a plaintiff alleging employment discrimination on the basis of religion.

Second, the religious employer exemptions are not and cannot be limited to employers that are "primarily" religious for two reasons. (i) The use of the word "primarily" to modify "religious" has no relation whatsoever to the plain text of either 702a or 703e2. Rather, the text simply extends the exemption to any "religious" organization, with the word "religious" not conditioned, modified, or limited. (ii) For a civil court—indeed, for any government official—to make a determination concerning whether an employer is "primarily" religious or not is to pose a religious question. This sets up a test to be answered, *to wit*: Just how central or important to the employer are its particular religious beliefs and practices? How central to the faith and important to the employer, or not essential and thus peripheral to the faith? When such a question is sought to be answered by a court or other public official it violates the First Amendment. It has long been the law that civil government and its officers cannot determine the validity, importance, centrality, or meaning of a religious claim, statement, or assertion. The law does not enter into theological debate. The government cannot take sides in a religious dispute.

Third, the Religious Freedom Restoration Act [RFRA],[5] as well as the "ministerial exception" to employment discrimination claims, operate to safeguard the religious staffing rights of religious employers. These safeguards are in addition to and independent of the defenses in 702a and 703e2 of Title VII, as well as the defense in 204(c). This overlap can be confusing to religious employers and their employees, as well as to others. True, the regulations implementing EO 11246 should not attempt to elaborate on the scope or operation of RFRA or the ministerial exemption concerning the employment discrimination matters addressed by these OFCCP regulations. However, these regulations should—in a neutral fashion—briefly acknowledge the existence and possible relevance of RFRA and the ministerial exception to

[3] 42 U.S.C. § 2000e—1(a).
[4] 42 U.S.C. § 2000e—2(e)(2).
[5] 42 U.S.C. § 2000bb to § 2000bb-4.

religious employers who are subject to 41 C.F.R. Part 60-1. This will help reduce the confusion, including that of the government regulators.

INTRODUCTION

It has been 56 years since President Lyndon Baines Johnson issued EO 11246, a venerable civil rights measure.[6] In its initial iteration, § 202 of the EO prohibited federal contractors from discriminating in employment on the basis of race, color, religion, sex, or national origin. Over the past five and a half decades EO 11246 has been amended eight times. Of interest here are the amendments brought about by EO 13279 in December 2002,[7] and EO 13672 in July 2014.[8]

EO 13279 was issued by President George W. Bush as part of his Faith-Based and Community Initiatives, an undertaking of regulatory reform to make federal social service programs more accessible to religious providers, all to the ultimate benefit of the poor and needy that are served by these charities. Among other changes, EO 13279 amended EO 11246 by adding an exemption for religious employers from the prohibition on employment discrimination. The exemption, appearing in § 204(c) of the amended executive order, was modelled after the two exemptions for religious employers in Title VII of the Civil Rights Act of 1964. Accordingly, the interpretation of the Title VII exemptions are widely acknowledged to control the scope of the religious employer exemption found in § 204(c). It is common to refer to the Title VII exemptions by their public law section numbers, §§ 702(a) and 703(e)(2). Sections 702a and 703e2 have existed in their present sweep since passage of the Equal Employment Opportunity Act of 1972.[9]

President Barack Obama issued EO 13672, which added sexual orientation and gender identity to the list of protected classes that EO 11246 safeguards from discrimination. The OFCCP issued regulations to implement this executive order that became effective in April 2015.[10] Unless exempt, the nondiscrimination requirements apply to government contracts and subcontracts, as well as some purchase orders. Among other duties, federal contractors must include in any subcontracts a clause that prohibits employment discrimination, update the equal opportunity language in the subcontractor's help-wanted listings, and place updated equal-opportunity posters in the workplace.

One of America's greatest strengths is that the nation is populated by an array of nongovernmental organizations with a rich diversity of thought. The resulting social pluralism is a source of creative energy and entrepreneurial spirit. Religious employers have always been a valued part of this mix, certainly those who are both vibrant in their faith observances and integrated in their religious and day-to-day habits. Especially effective in their outreach are those who strive to build a community of employees that are faithful to a common set of doctrinal

[6] 30 Fed. Reg. 12319 (September 24, 1965).
[7] 67 Fed. Reg. 77141 (December 12, 2002).
[8] 79 Fed. Reg. 42971 (July 21, 2014).
[9] Pub. L. 92-261 (March 24, 1972).
[10] 41 C.F.R. 60.1.3; 79 Fed. Reg. 72985, 72986 (effective April 8, 2015).

beliefs and who are fully committed to the organization's faith-shaped mission. However, unless tolerated, these religious employers might now be ordered to act against their conscience lest they be compelled to forfeit valuable public contracts—a prototypical case of religious free exercise.

POINT ONE: The plain texts of 702a and 703e2 establish an affirmative defense to any primary claim brought by a plaintiff under Title VII when the defense is timely raised by a religious employer acting on its sincere religious beliefs or practices.

The principal question is whether federal religious contractors always have to comply with the restrictions on employment discrimination on the bases of sexual orientation and gender identity. Or does the religious employer exemption in § 204(c) of EO 11246 serve as an affirmative defense available to religious employers when acting in accord with their sincerely held religious beliefs or practices? As noted above, the scope of § 204(c) is the same as the sweep of 702a and 703e2 in Title VII.

There is agreement all around that Congress did not intend religious employers to be totally exempt from Title VII's prohibitions on employment discrimination. That would have entailed an absolute or categorical immunity from suit, which was considered by Congress but ultimately rejected. Such an absolute immunity would have meant that an employer would only need to show that it is a religious organization and the primary lawsuit would be summarily dismissed. In contrast, a religious exemption like those in Title VII is an affirmative defense. Once sued, a religious employer raising such a defense is required to prove that its employment decision—one said to be averse to the plaintiff—was motivated by its sincere religious beliefs or practices. This, in turn, is typically contended by the plaintiff. If the employer can prove this religious motive, then the suit will be dismissed—the charge of unlawful discrimination is lifted.

We begin with a little history as to how this framework—familiar to litigators—came about. Section 202 of EO 11246, as amended, prohibits employment discrimination by federal contractors, as well as subcontractors and vendors, on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. EO 11246 was amended by EO 13279 in December of 2002, which added to the text an explicit exemption for religious employers. In addition to government efficiency, the President's stated purpose for the explicit exemption was the removal of barriers to faith-based organizations participating in procurements beneficial to the government. The exemption appeared in § 204(c), and reads:

> Section 202 of this [Executive] Order shall not apply to a Government contractor or subcontractor that is 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. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

The second sentence quoted directly above ("Such contractors . . . are not exempted or excused from . . . *other* requirements contained in this Order.") is entirely consistent with the Title VII text (see below) that establishes a prima facie claim as to all covered employers (including religious employers) followed by an affirmative defense available only to religious employers acting on their sincere religious beliefs.

Section 204(c) references § 202, the general nondiscrimination mandate. Accordingly, by its plain language ("Section 202 . . . shall not apply . . . ."), § 204(c) supersedes anything to the contrary in § 202 (the prima facie claim). That is not all. Section 202 goes on to expressly acknowledges its status as subordinate to § 204(c). The prima facie claim in § 202 begins:

> Except in contracts exempted in accord with Section 204 of this [Executive] Order, all Government contracting agencies shall [not discriminate in employment].

It is universally acknowledged that § 204(c) of EO 11246 is to be interpreted as having the same scope as the two religious employer exemptions in Title VII. For example, OFCCP has stated that it "interprets the nondiscrimination obligations under Executive Order 11246 in accordance with Title VII of the Civil Rights Act of1964."[11]

So, we now turn to Title VII. As to covered employers, the logic of Title VII typically begins with the duty to prohibit discrimination in the terms and conditions of employment on the basis of race, color, religion, sex, or national origin.[12] This is the subsection under which a plaintiff pleads his or her prima facie claim of employment discrimination against a covered employer. *See* Fed'l Rules of Civil Proc. 8(a). However, two exemptions to such a primary claim address the situation where a religious employer takes into account its religious beliefs or practices in making staffing decisions. These exemptions read as affirmative defenses, namely first a defendant *confesses* the elements of the prima facie claim but then—given new information supplied by the defendant/employer—the defendant *avoids* liability. *See* Fed'l Rules of Civil Proc. 8(c). Here, a covered employer first conditionally *confesses* to employment discrimination but—given that it is a religious employer acting on its religious beliefs—then *avoids* liability because of the employer exemption. If not timely raised, of course, the affirmative defense is waived. *Id*.

The first such exemption in Title VII appears at 702a, and provides:

> *This title [subchapter]*[13] *shall not apply to an employer with respect … to* a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work

[11] United States Department of Labor *Office of Federal Contract Compliance Programs*, Directive 2014-02 (August 19, 2014), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.
[12] 42 U.S.C. § 2000e—2(a)(1).
[13] The statute enacted by Congress reads "title." Pub. L. 88-352, Title VII, § 702, 78 Stat. 253, 256 (July 2, 1964). Codifiers of the U.S. Code changed "title" to "subchapter." The subchapter is enumerated as "Subchapter VI," and is the entirety of Title VII presently consisting of some 21 sections, 42 U.S.C. § 2000e through § 2000e—17.

> connected with the carrying on by such corporation, association, educational institution, or society of its activities. (italics added)

The second exemption in Title VII—one applicable only to religious educational institutions—appears at 703e2, and provides:

> *Notwithstanding any other provision of this title [subchapter]* . . . (2) *it shall not be an unlawful employment practice for* a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part,owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. (italics added)

Sections 702a and 703e2 are constructed as affirmative defenses to a plaintiff's prima facie claim found at § 2000e—2(a)(1). Most importantly, in both instances the text begins with a sweeping override of everything else in all 21 sections of Title VII: "This [subchapter] title shall not apply to an employer with respect to . . . ", and "[n]otwithstanding any other provision of this [subchapter] title . . . it shall not be an unlawful employment practice for . . . ." By their plain texts, the vast sweep of each of these affirmative defenses encompasses the entirety of Title VII, presently spanning twenty-one different sections from 42 U.S.C. § 2000e to § 2000e—17. That means 702a and 703e2 are affirmative defenses not only to claims of employment discrimination adverse to a protected class (see § 2000e—2(a)(1)), but also to such Title VII claims as retaliation (see § 2000e—3(a)) and failure to honor requests from employees for a religious accommodation (see § 2000e(j)).

As a prima facie matter, a religious organization with 15 or more employees is considered an "employer" covered under Title VII.[14] Although 702a and 703e2 do not grant a total immunity to a religious organization from all of its statutory obligations as an "employer," they do permit such an organization to make employment decisions with respect to "the employment of individuals of a particular religion to perform [the] work" of said organization. Accordingly, by way of an affirmative defense the religious employer must show two things: (i) it is a religious organization; and (ii) there is a sincere religious belief behind the employment decision said to be averse to the plaintiff/employee. Nowhere is there statutory text in 702a, 703e2, or anywhere else in Title VII stating that the exemptions are limited to when an employee-plaintiff's primary claim is one of religious discrimination.

The plain texts of 702a and 703e2 also extend to the full meaning of the word "religion" (see § 2000e(j)). Added in 1972, the term "religion" is defined liberally to include "all aspects" of religious belief and practice.[15] Moral teachings are commonly "aspects" of religion, including

[14] 42 U.S.C. § 2000e(b).

[15] Congress provided that for all 21 sections of Title VII the meaning of religion "includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Without making an attempt of be exhaustive in defining religion (a task over which even theologians and philosophers struggle), clearly this definition is expansive.

rules about the nature of marriage or the morality of one's intimate sexual conduct. This open-textured definition of "religion" demonstrates how Congress was sensitive to protecting religious freedom. In this regard, Congress sought to parallel the U.S. Supreme Court's open-ended reading of "religion" as compelled by the First Amendment. Congress took care to not have a crabbed definition of religion that leaves some religions out, thereby violating the First Amendment. The regulation confirms this.[16]

With reference to the plain text, there are no other limitations to invoking the affirmative defenses of 702a and 703e2. In particular, there is no limitation that turns on the chance that the employee-plaintiff's pleading alleges a case of religious discrimination as opposed to discrimination based on some other protected class such as sex. Such a limitation makes no sense. There is simply no consistency in Congress providing a defense that protects a religious employer when sued for religious discrimination but not providing a like defense that protects the religious employer when sued for discrimination on the basis of sex. In either instance, the burden on the employer's religious freedom is absolutely the same. If religious freedom is to be protected, logic dictates that it should be protected the same in all like instances.

A few courts have relied on a passage in the legislative history from 1972 for this counter-textual interpretation.[17] But these courts have themselves misread the congressional report. The *Section-by-Section Analysis of H.R. 1746, Equal Employment Opportunity Act of 1972*, 92 Cong. Rec. S. 3461 (1972), states that religious employers "remain subject to the provisions of Title VII with regard to race, color, sex or national origin." That statement is true, *to wit*: As a prima facie matter, all covered employers (including religious employers) remain subject to the prohibition on discrimination in employment on the bases of race, color, sex, and national origin. However, religious employers (unlike other covered employers) *also* have an affirmative defense (per 702a and 703e2) to such a prima facie claim when the staffing decision in question is based on the employer's religious beliefs or practices.

The federal case law is sharply divided, with several cases permitting (correctly) 702a to serve as an affirmative defense to a claim of discrimination no matter what the protected class.[18] Indeed, there are several reported cases where 702a is (correctly) held to be a defense to a claim of an entirely different character, namely, a claim of retaliation[19]—retaliation being a

[16] The Equal Employment Opportunity Commission defines "religious practices" in accord with Supreme Court case law "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1.

[17] *See* Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1276-77 (9th Cir. 1982).

[18] *See, e.g.*, Curay-Cramer v. Ursuline Academy, 450 F.3d 130 (3d Cir. 2006) (plaintiff's primary claims of sex and pregnancy discrimination); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (plaintiff's primary claims of race and sex discrimination); Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986) (claim of sex discrimination), *aff'd in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

[19] *See, e.g.*, Kennedy v. St. Joseph's Ministries, 657 F.3d 189, 193-94 (4th Cir. 2011) (plaintiff's primary claims of discharge, harassment, and retaliation all subject to 702a); Lown v. Salvation Army, Inc., 393 F. Supp.2d 223, 254 (S.D.N.Y. 2005).

claim wholly separate and independent of a claim of discrimination.[20] This further demonstrates that 702a is not just an exemption to claims by plaintiffs of discrimination, but an exemption to any and all claims that may be brought under Title VII. Alas, there are other reported cases limiting (mistakenly) 702a to where the primary claim is one of discrimination on the basis of religion.[21] But a resort to these latter cases to determine the law is to look in the wrong place. Congress makes the law here, not the courts. And so long as the plain text provided by Congress is clear, no interpretive rules need be looked to by the regulators and judges seeking to determine the meaning of the Title VII legislation. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all person are entitled to its benefit.").

The texts of 702a and 703e2 are plain and unambiguous. Accordingly, there is no license here to resort to rules of judicial interpretation. If a party, judge, regulator, or the majority of citizens at large do not approve of this result, then he, she, or it should prevail upon Congress to amend the legislation. Anything else undermines the rule of law, a path where might makes right.

POINT TWO: By the plain text of Title VII, the religious employer exemptions extend to all "religious" organizations. The word "religious" in 702a and 703e2 is not conditioned or modified in any way, and it most certainly is not limited to "contractors with *primarily* religious purpose and character." Indeed, the word "religion" is expansive as defined in § 701(j). Moreover, for civil authorities to sort employers as between those who are "primarily" religious and those that are not is to necessarily pose a religious question, one forbidden by the First Amendment.

In its "Supplementary Information: Part II. Proposal to Rescind" the regulations effective January 8, 2021, OFCCP states that the regulations misstate the meaning of who is a religious employer for purposes of 702a and 703e2. The commentary goes on to claim that "the government's long-standing policy" is that the meaning of qualifying religious employers is those "contractors with primarily religious purpose and character."

A regulatory test focused on employers who are "*primarily* religious" is a double mistake. First, the test has no relation whatsoever to the actual text of 702a or 703e2. Second, it poses a religious question that neither the civil courts nor government regulators have the legal competence to adjudicate. Questions that go to the validity, meaning, centrality, or importance of a religious belief, declaration, or dispute have long been forbidden by the First Amendment. These two errors are not rectified by reliance on a couple of cases decided in the

[20] 42 U.S.C. § 2000e—3(a).

[21] *See, e.g.,* Herx v. Diocese of Fort Wayne-South Bend, 48 F. Supp.3d 1168 (N.D. Ind. 2014) (claim of sex discrimination not subject to 702a exemption).

federal circuits,[22] cases which reach conflicting results and over which judicial panels cannot agree. In this arena the law is made by Congress as it conforms to the strictures of the First Amendment, not federal circuit panels glossing the statutory text.

A. By its plain text 702a does not require that an employer be ***primarily*** religious. Rather, the textual requirement is that the employer be a ***religious*** employer. Full stop.

The only task assigned by Congress in 702a is to determine if the employer is religious. What the proposed regulation does is concoct an unconstitutional religious question about whether religion is (or is not) central to or important enough to the employer such that it is exempt under 702a.

The drafting of a regulation that merely determines if an employer is religious has been done successfully. The manner by which this is worked out consistent with the First Amendment is illustrated by a recent administrative labor-law ruling. For reasons of avoiding religious questions, lay faculty at a religious college are not permitted to organize a labor union under the National Labor Relations Act.[23] Prior case law had recognized collective bargaining rights for lay faculty unless a college was deemed "substantially religious in character."[24] That put the National Labor Relations Board in the position of making exacting inquiries into the curriculum, faculty tasks, and faith tenor of the student culture on campus, and then probing the religious importance the college puts on these matters. However, judging the degree of religiosity concerning matters of campus life would be unconstitutionally entangling.[25] To avoid transgressing the rule against civil authorities resolving religious questions, the NLRB's new three-part inquiry looks only to whether a college: (1) was formed as a religious corporation or similar business organization; (2) currently holds itself out to the public as religious; and (3) is affiliated with a church, denomination, or a defined body of creedal or religious teachings (e.g., sacred Scriptures or the Apostle's Creed).[26] All three criteria must be met. These three findings are factual inquiries about a religious institution, that is, its characteristics evidenced in public sources and thus facts that can be objectively determined by civil authorities without entangling the federal government in the internal matters of religious governance, religious meaning, or what is spiritually important to the faith-based employer and what is not.

B. To alter the text of 702a from a "*religious*" organization test to a "*primarily* religious" organization test violates the church autonomy doctrine of the First Amendment. The principle

[22] *See* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (attempting to develop an approach for determining who is a religious organization and thus able to invoke the religious employer exemption in Title VII); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) (same).
[23] University of Great Falls v. NLRB, 278 F.3d 1335, 1342 (D.C. Cir. 2002). *See also* Duquesne University v. NLRB, 947 F.3d 824 (D.C. Cir. 2020); Carroll College v. NLRB, 558 F.3d 568 (D.C. Cir. 2009).
[24] *See* Bethany College and Thomas Jorsch and Lisa Guinn, 369 NLRB 1, 2-3 (No. 98, June 10, 2020).
[25] Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1265 (10th Cir. 2008) (ruling by circuit panel that "pervasively religious" test was unconstitutionally entangling); *see* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality op.) (criteria for educational benefit eligibility unconstitutionally requires government officials to go "trolling through a person's or institution's religious beliefs").
[26] *Bethany College*, 369 NLRB at 3-4.

of church autonomy has long entailed the judiciary *inter alia* avoiding issues that cause it to probe into the religious meaning of words, practices, or events.[27] The civil courts must avoid making determinations concerning the centrality or importance of a religious belief or practice to the employer in question.[28] The courts can't be exploring if a religious employer is highly religious or largely secularized. Often referred to as the "religious question doctrine," the rule bars the judiciary—indeed all civil officials and authorities—from attempting to resolve questions about the orthodoxy of what a person or organization professes, and from taking up any issue concerning the validity, meaning, centrality, or importance of a religious belief or practice. It makes no difference if a religious freedom claimant is uncertain about or questioning in her beliefs, if she is a new convert, or if she is not a part of any organized church or denomination.[29] Same would be true for a religious employer. This is because the law takes the religious claimant as we find him or her or it. As the Court pronounced in *Watson v. Jones*, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[30] The purpose of the religious question doctrine is to keep the government from picking sides concerning a religious matter—a purpose rooted in the Establishment Clause—as well as to not deter a person's (or an organization's) observance of religion, a Free Exercise Clause matter.

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[27] *See, e.g.,* Rosenberger v. Rector & Visitors of UVA, 515 U.S. 819, 843-44 (1995) (state university must avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Bob Jones University v. U.S., 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice by religious college); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 271 n.9, 272 n.11 (1981) (holding that inquiries into religious significance of words or events conducted by student religious organization are to be avoided); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (not within judicial function or competence to resolve religious differences between people of same denomination); Gillette v. U.S., 401 U.S. 437, 450 (1971) (Congress permitted to accommodate "all war" but not "just war" pacifists because to broaden the exemption invites increased church-state entanglements); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (courts should avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (ruling that petty officials may not to be given discretion to determine what is a legitimate "religion" for purposes of issuing civil permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down city charitable solicitation ordinance that required government officials to distinguish between "spiritual" and secular purposes underlying solicitations by a religious organization).

[28] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting as entanglement government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) (religious centrality test violates First Amendment).

[29] *See* Frazee v. Illinois Dep't of Empl. Security, 489 U.S. 829 (1989) (state could not withhold unemployment compensation from Sabbath observer because he was not a member of any church).

[30] 80 U.S. 679, 728 (1872).

The most frequently cited case for the rule is *Thomas v. Review Board*.[31] In *Thomas*, a state sought to defeat a former employee's Free Exercise Clause claim challenging the government's denial of unemployment compensation. Thomas was laid off from a factory when he refused to work on parts for military tanks because he was a religious pacifist. By using the testimony of a co-worker, who was also a longtime member of the same church as Thomas, the state sought to show that Thomas, as a new convert, was misapplying the teachings of his church. The Supreme Court would have none of it, observing that Thomas "drew a line" concerning his beliefs that the state had to accept, lest the civil courts become "arbiters of scriptural interpretation."[32]

The prohibition on civil courts taking up religious issues or questions is frequently an important reason for rejecting an argument raised by a party opposing a religious claimant. For example, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the teachers in a Catholic elementary school argued that they could not be "ministers" for purposes of the "ministerial exception" unless as a condition of employment they were required to be Catholic, like the sponsoring schools. The Court rejected that suggestion because civil judges cannot determine when an employee is a co-religionist with the employer. Is an Orthodox Jew a co-religionist with a Conservative Jewish employer, asked the Court majority? Is a Southern Baptist teacher seeking employment at a Primitive Baptist school a co-religionist? For a civil magistrate to have the final say as to who is a co-religionist to whom violates the constitutional prohibition on religious questions.[33]

Our Lady of Guadalupe further rejected the co-religionist criterion because a civil court would have no way of independently determining whether an employee/teacher remained in good standing with her church (thus still a co-religionist) without transgressing the rule against religious questions. Is a teacher who says she is Catholic to be regarded by a civil court as a Catholic in good standing when she attends mass only on Easter and Christmas and favors women's reproductive rights?[34] Civil judges are not competent to say.

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[31] 450 U.S. 707 (1981). For example, *Our Lady of Guadalupe* relied on *Thomas*. 140 S. Ct. at 2063 n.10. It also relied on *Presbyterian Church*, where the Court said the judiciary must avoid "resolving underlying controversies over religious doctrine," and that "First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 2063 n.10 (citing Presbyterian Church v. Hull Mem'l Church, 393 U.S. 440, 449 (1969)). It also relied on *Milivojevich*. 140 S. Ct. at 2063 n.10 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 715 n.8 (1976)) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these [religious] bodies as the ablest men in each are in reference to their own.") (citation and internal quotation marks omitted).

[32] 450 U.S. at 715, 716. Thomas was a Jehovah's Witness. He believed his religion prohibited him from working in a factory on the task of fabricating turrets for military tanks. *Id.* at 710.

[33] *Our Lady of Guadalupe*, 140 S. Ct. at 2068-69 (quoting petitioners' reply brief).

[34] *Id*. at 2069. There was a time when those hostile to the 702a exemption argued that it was available as an affirmative defense only when the employer sought to hire co-religionists. But a co-religionist test violates the prohibition on religious questions, as demonstrated by this passage in *Our Lady of Guadalupe*.

In *NLRB v. Catholic Bishop of Chicago*,[35] the rule prohibiting religious questions helped to prevent a religious K-12 school from being subjected to mandatory collective bargaining under the National Labor Relations Act [NLRA].[36] The Court painted a picture of church-state entanglements that could arise if ecclesiastical authorities operating a school were forced to answer to charges of unfair labor practices.[37] The specter posed was of a bishop or mother superior being harshly examined by an administrative law judge concerning his or her truthfulness when characterizing as substantially religious the educational policy being challenged by the union representing lay teachers. This is another way of saying that government-supervised collective bargaining would frequently call for the administrative resolution of religious disputes. The NLRA had no statutory exemption for religious organizations, including religious schools. Yet by adopting a rule of statutory construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle the government in matters of internal religious governance, the Supreme Court held that the NLRA did not apply to these schools.[38] The result is best explained by the church autonomy doctrine.

When first enacted in 1964 the scope of 702a was narrower. The reasons behind the 1972 amendments shed additional light on the now broad scope of 702a. The original 702a ran only to religious organizations respecting their need "to perform work connected with the carrying on by such [religious organization] of its *religious* activities."[39] Accordingly, only jobs that entailed sacerdotal, ecclesiastical, ministerial, or otherwise explicitly religious duties were exempt. That required civil regulators, and eventually the courts, to attempt to sort out which jobs were religious and which were secular. See *Corporation of the Presiding Bishop v. Amos*, where the Supreme Court observed that the pre-1972 exemption was seen to work

> a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.[40]

Inevitably there would be disagreements between the parties over that task, as well as entanglement between church and government officials, with disagreements stemming from differing views between ecclesiastics and civil officials over "what is religious"or "what is a doctrinal application in the workplace" of the employer's religion. A senatorial sponsor behind

[35] 440 U.S. 490 (1979). The Catholic Church, of course, has no doctrine opposing labor unions. Rather, what Catholic schools oppose is government entanglement with their internal governance. It is the latter that is affirmed here by the Supreme Court.
[36] 29 U.S.C. §§ 151 to 169.
[37] 440 U.S. at 496, 498-99, 501-04.
[38] *Id*. at 504-07. *See also* Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir. 2020); Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). These cases are best understood as applications of the rule prohibiting civil authorities taking up religious questions.
[39] Pub. L. 88-352, Title VII, § 702(a); 78 Stat. 253, 255 (July 2, 1964) (italics added).
[40] 483 U.S. 327, 336 (1987) (note omitted).

this 1972 amendment was Sam Ervin (D-N.C.) of Watergate fame, who was considered by his colleagues to be a constitutional expert. He pressed for the need to expand 702a in terms of separation of church and state:

> [T]he purpose of the amendment was to "take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972).

Amos, 483 U.S. at 333 n.9.

As part of the 1972 amendments, the scope of the exemption in 702a was broadened to embrace the entire workforce of a religious employer.[41] In appearance the amendment was modest: merely striking the adjective "religious" in the phrase "of its *religious* activities."[42] But the 1972 amendment also added a broad definition of "religion" in § 701(j). The combined effect was substantial. As the federal district court observed in *Lown v Salvation Army, Inc.*, the 702a defense now extends to all employment positions and "any activities of religious organizations, regardless of whether those activities are religious or secular in nature."[43]

Given that the congressional purpose behind the 1972 amendment to 702a was to avoid church-state entanglements and civil authorities ("Caesar," to quote Senator Ervin) having to grapple ("political hands") with religious questions, it would be ironic to now—fifty years later—impose by policy preference an extratextual "primarily" religious test on employers ("institutions of God") who invoke the 702a exemption. In 1972, Congress showed that its intent was to reduce church-state entanglements, as the First Amendment demands, not increase them.

POINT THREE: <u>It is proper and helpful for 42 C.F.R. Part 60-1 to acknowledge that RFRA and the "ministerial exception" may also be relevant to a dispute over the employment nondiscrimination duties of a religious contractor.</u>

The Religious Freedom Restoration Act,[44] as well as the "ministerial exception" to employment discrimination claims,[45] operate to independently safeguard the religious staffing rights of religious employers. These two safeguards are in addition to the defenses in 702a and

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[41] Pub. L. 92-261, § 3; 86 Stat. 103, 103-04 (March 24, 1972).

[42] Unlike 702a, 703e2 never was restricted to a religious organization's "religious" activities. Pub. L. 88-352, Title VII, § 703(e)(2); 78 Stat. 253, 256 (July 2, 1964). From the outset, 703e2 pertained to all of an employer's job positions, but it focused only on educational institutions as employers. Accordingly, the 1972 amendments made the two exemptions more alike. While 703e2 is limited to religious educational institutions, 702a covers all religious organizations. That said, it is fair to say that the current 702a applies to every religious organization now exempt under 703e2, as well as several more religious organizations that are not educational institutions.

[43] 393 F. Supp. 2d 223, 247 (S.D.N.Y. 2005).

[44] The Office of Legal Counsel, U.S. Department of Justice, has determined that RFRA permitted a religious grantee to staff on a religious basis notwithstanding nondiscrimination provisions in the underlying congressional legislation. *See* https://www.justice.gov/olc/opinion/application-religious-freedom-restoration-act-award-grant-pursuant-juvenile-justice-and (issued June 29, 2007).

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

703e2, as well as the defense provided by § 204(c). This overlap can be confusing to religious employers and their employees, as well as to federal administrators and others. We agree that the regulations implementing EO 11246 should not attempt to elaborate on the full scope or operation of RFRA and the ministerial exemption concerning the employment discrimination matters addressed by the OFCCP regulations. That is not the main purpose of 41 C.F.R. Part 60-1. However, these regulations should—in a neutral fashion—acknowledge the existence of RFRA and the ministerial exception to religious employers who are subject to Part 60-1. Such an acknowledgement would help to reduce confusion by interested parties on all sides, including confusion by government regulators themselves, all while not expanding the reach of Part 60-1 beyond the scope of EO 11246.

CONCLUSION

Throughout the November 9, 2021, "Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," the OFCCP says that going back to the Bush/Obama regulations will lead to greater clarity and less uncertainty. We agree that clarity and consistency should be primary regulatory goals. However, under this proposed recission greater clarity and reduced uncertainty will not follow, and in part this is because the legal commentary that accompanies the recission fails to account for the plain text adopted by Congress in the Equal Employment Opportunity Act of 1972 by: (i) assigning to the affirmative defense in 702a and 703e2 too narrow a scope; and (ii) limiting the religious employer exceptions to only those employers who are "primarily" religious. When the plain text says one thing and the regulations promulgated thereunder say another, the consequence will surely be more confusion and thereby more contention. Congress makes the law on these two points, not the federal judiciary purporting to construe 702a and 703e2, when some circuit opinions have rendered crabbed interpretations that go against the plain textual meaning to expand protection for the religious freedom of religious employers.

Mischief will follow. Existing religious contractors will pull back from participation, while other religious organizations who are contemplating bidding on federal contracts will surely fear to do so because of the high risk to their religious freedom. This is not in the interests of the American people, who are better served when there is an increase in the number of contractors competing to provide goods and services to the U.S.

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RIN 1250-AA09 This Comment is submitted on behalf of the:

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