

Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?

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ABSTRACT

A matter of keen debate in Europe and North America is the freedom of religious organizations to maintain their essential character by staffing with those of like-minded faith just as many nation-states are moving aggressively to eliminate forms of employment discrimination based on sexuality and the sexual practices of employees. In the United States the leading edge for addressing this issue is being worked out before a little known administrative office that oversees the terms and conditions of federal contracts. Effective April 2015, an amendment to a longstanding presidential executive order (EO) added 'sexual orientation' and 'gender identity' to the list of protected classes that are shielded from discrimination by private-sector employers that have secured a government contract. Enforcement fell to the Office of Federal Contract Compliance Programs in the US Department of Labor, the agency with oversight of all contracts for the purchase of goods and services. Even before this recent amendment, the EO exempted religious employers from some forms of regulation of their employment practices, the exemption having been borrowed from the plenary civil rights act governing federal oversight of employment discrimination nationwide. The principal question addressed in this article is whether religious organizations with US contracts now have to comply with the new restrictions on employment discrimination based on sexual orientation and gender identity, or does the EO's pre-existing religious exemption serve to adequately defend employers acting upon their sincerely held religious beliefs. The question is poignant because now, for the first time, the definitions of two federally protected classes appear to be at odds with sexual morality as historically taught by the nation's major religions. From the perspective of the religious employer, the new EO introduces a burden impacting longstanding religious beliefs. Religious employers, certainly those who are both vibrant and integrated in their faith practices, strive to build a community of employees that are faithful to a set of doctrinal beliefs and who are fully committed to the institution's faith-shaped mission. Nevertheless,

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unless exempt these religious employers are now ordered to act otherwise or forfeit valuable contracts—a classic dilemma of conscience and coercion.

Those who argue that the EO's religious exemption is inapplicable make two points. First, they maintain that the exemption is a defence available only when the initial claim by the employee-complainant is one of religious discrimination—as distinct from the onset claim being based on an employee's sex or sexual orientation. Second, they argue that the exemption is narrow, not one spanning the employer's religion in all its aspects but an exemption limited to the employer being able to prefer only those who identify with the employer's church or religious denomination. Neither point has support in the plain text of EO's religious exemption or in the plenary civil rights act from which the exemption was modelled. With respect to the first point the case law is indecisive, never really locking onto the issue and resolving it. But the weight of the practice is contrary to the point, for most courts have allowed religious employers to defend against a claim no matter the protected class by introducing evidence of the employer's religious motivation behind its adverse employment decision. And the second point directly contradicts the plenary act's definition of 'religion' as embracing all aspects of religious belief or practice, hence not amenable to a narrow reading. Much is at stake regarding the exemption's scope under the EO, for that resolution will likely dictate the sweep of the exemption under the civil rights act covering employment discrimination nationwide.

1. INTRODUCTION

A frequent matter of debate are religious exemptions from normative health, safety, and welfare duties that are the subject of general regulatory legislation. A ready example is the regulation of employment and other conditions at the workplace when it comes to discrimination on the bases of sexual orientation and gender identity. These issues have surfaced in Europe, both in the European Court of Human Rights and the European Court of Justice, and more generally in the world as indicated by the report of the UN Special Rapporteur on Freedom of Religion or Belief regarding religion in the workplace.¹ In the United States, the leading edge for addressing the issue of human sexuality and employment discrimination is occurring in an unexpected field of law. Rather than being addressed by Congress and rather than being made a part of the principal civil rights act that covers discrimination in employment nationwide, the matter is first being worked out by a little known administrative office overseeing the terms and conditions of federal contracts.

It has been 50 years since President Lyndon Baines Johnson issued Executive Order 11246, a venerable civil rights measure.² In its initial form, section 202 of the Executive Order prohibited federal contractors from discriminating in employment on the basis of race, colour, religion, sex, or national origin. Over the past five decades Executive Order 11246 has been amended seven times. Of interest to this article

1 Interim Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc A/68/290 (5 August 2014) <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>> accessed 24 August 2015. For an overview of European developments, see Lucy Vickers, 'Law Religion and the Workplace', in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 271–84; Katayoun Alidadi, Marie-Claire Foblets, and Jogchum Vrielink, *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012).

2 30 Fed Reg 12319 (24 September 1965).

are the amendments brought about by Executive Order 13279 in December 2002,³ and more recently by Executive Order 13672 in July 2014.⁴

Executive Order 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 welfare programmes more accessible to religious social service providers, all to the ultimate benefit of the poor and needy served by these charities.⁵ Among other changes, Executive Order 13279 amended Executive Order 11246 by adding an exemption for religious employers from the prohibition on employment discrimination. The exemption, appearing in section 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 1964.⁶ Accordingly, the Title VII exemptions are widely acknowledged to guide the scope of the exemption found in section 204(c).⁷ It is common to refer to the Title VII exemptions by their public law section numbers, 702(a) and 703(e)(2).⁸

President Barack Obama signed Executive Order 13672 which added sexual orientation and gender identity to the list of protected classes that Executive Order 11246 shields from employment discrimination.⁹ The Office of Federal Contract Compliance Programs, US Department of Labor, has issued regulations to implement the executive order which became effective April 2015.¹⁰ The non-discrimination requirements apply to all government contracts and subcontracts, as well as some purchase orders. Unless exempt, federal contractors must: (i) include in all contracts a clause that prohibits employment discrimination on the bases of sexual orientation and gender identity; (ii) update the equal opportunity language in its

3 67 Fed Reg 77141 (12 December 2002). Until just before the turn of the century religious organizations were assumed to not be eligible for government contracts because of stricter notions of church–state separation. It is for that reason that until about 15 years ago there was no need for a staffing exemption for religious organizations in EO 11246. That began to change with US Supreme Court decisions like *Agostini v Felton*, 512 US 203 (1997), and *Mitchell v Helms*, 530 US 793 (2000), upholding aid to K-12 religious schools. In Congress, grant aid became more readily available to religious social service providers with the adoption of ‘charitable choice’ in 1996 (see 42 USC s 604a), and then the Presidential-level Faith-Based and Community Initiatives started in January 2001.

4 79 Fed Reg 42971 (21 July 2014).

5 See Executive Order 13198, Agency Responsibilities With Respect to Faith-Based and Community Initiatives, 66 Fed Reg 8497 (31 January 2001); Executive Order 13199, Establishment of White House Office of Faith-Based and Community Initiatives, 66 Fed Reg 8499 (31 January 2001).

6 Title VII presently consists of 21 sections and is codified at 42 USC ss 2000e to 2000e-17.

7 See below n 23, and accompanying text.

8 Section 702(a) is codified at 42 USC s 2000e-1(a), and 703(e)(2) is codified at 42 USC s 2000e-2(e)(2).

9 A primary question here concerns what the federal government considers unlawful discrimination, and that requires using the government’s definitions for the protected classes. Accordingly, this article adopts the definitions of ‘sexual orientation’ and ‘gender identity’ prescribed by the US Department of Labor for EO 13672 and EO 11246, as amended. Those definitions are found at ‘Office of Contract Compliance Programs’, *Frequently Asked Questions, Definitions* <http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q28> accessed 24 August 2015. The definitions are sharply contested, however, principally by churches and other religious organizations. See, eg *Christian Legal Society v Martinez*, 130 S Ct 2971, 2990 (2010) (‘The Christian Legal Society ‘contends that it does not exclude individuals because of sexual orientation, but rather “on the basis of a conjunction of [homosexual] conduct and the belief that the conduct is not wrong”’). However, this disagreement over definitions is beyond the scope of this article.

10 41 CFR 60-1.3; 79 Fed Reg 72985, 72986 (effective 8 April 2015).

help-wanted listings; and (iii) place updated equal-opportunity posters in the workplace.¹¹

Now, for the first time, the definitions of two federally protected classes appear to be at odds with sexual morality as historically taught by the nation's major religions. From the perspective of the religious employer, far more is at stake than just increased church-state entanglement or the employer's autonomy diminished by more regulation. The new executive order introduces a burden of an entirely different character, one impacting longstanding religious beliefs. Religious employers, certainly those who are both vibrant and integrated in their faith practices, strive to build a community of employees that are faithful to a set of doctrinal beliefs and who are fully committed to the institution's faith-shaped mission. Nevertheless, unless exempt these religious employers are now ordered to act otherwise or forfeit valuable contracts—a classic free exercise case.¹²

A common practice by religious employers is the adoption of a moral code for employee conduct requiring, *inter alia*, that sexual intimacy take place only within the bond of marriage. The moral conduct rule is rooted in a religious belief or practice and applied even-handedly to its employees, male or female, gay or straight, and long enforced, for example, in instances of adultery and cohabitation. Thus the conduct rule neither differentiates on the basis of sex nor is it facially discriminates on the basis of sexual orientation. It is also true, however, that these religious employers define 'marriage' in the historic manner as between two persons of the opposite sex.¹³ So the employer's marriage definition together with the married-only conduct rule has the effect of prohibiting intimate sexual contact between two persons of the same sex even as the two are united in a state-recognized marriage. These employee moral codes thus end up distinguishing on the basis of sexual orientation as to those two persons.

The principal question addressed in this article is whether religious contractors in the United States now have to comply with the new restrictions on employment discrimination on the bases of sexual orientation and gender identity. Or does the religious exemption at section 204(c) of Executive Order 11246 serve to adequately defend employers acting upon their sincerely held religious beliefs? Those who maintain that 204(c) is inapplicable make two points. First, they say that 204(c) is a

11 Unlike some protected classes such as race and national origin, the regulations do not require affirmative action programmes, placement goals, and reporting obligations for sexual orientation and gender identity. 79 Fed Reg 72985, 72986.

12 See *Sherbert v Verner*, 374 US 398, 404 (1963) ('The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.'). As *Sherbert* indicates, the cause of religious liberty is not weakened because of the involvement of government funding in these contracts, the courts having long ago abandon the idea that an opportunity to obtain public funding is a privilege and not a right. See below n 31, and accompanying text.

13 It is common for religious organizations and their adherents to view the institution of marriage as religious, with civil marriage resting on the foundation of religious marriage. As a consequence, within their church these adherents do not recognize same-sex civil marriage as a valid marriage. Although increasingly countercultural, these refusals are sincere and deeply rooted in both the scriptures and historical traditions of these religious organizations. Indeed, recently the Supreme Court in its same-sex marriage ruling acknowledged that such beliefs and teachings were 'based on decent and honorable religious or philosophical premises'. *Obergefell v Hodges*, 135 S Ct 2584, 2602 (2015).

defence available only when the primary claim by the employee-plaintiff is one of religious discrimination—as distinct from, say, the initial claim being based on plaintiff's sex or sexual orientation. Second, they maintain that 204(c) is narrow, not an exemption as to the employer's religion in all its aspects but an exemption limited to the employer preferring only those who identify with the same church or denomination. This is called the 'co-religionist' preference. Neither point has support in the plain text of 204(c), nor in Title VII's 702(a) or 703(e)(2). With respect to the first point the case law is indecisive, never really locking onto the issue and resolving it. But the weight of the cases is to the contrary, for most all courts have allowed employers to defend against any claim by introducing evidence of their religious motivation. And the second point directly contradicts Title VII's definition of 'religion'. There has been no litigation over the scope of 204(c), so all of the cases are decided under Title VII.

All sides agree that Congress did not intend that religious employers be totally exempt from Title VII's prohibitions on discrimination on the basis of race, color, national origin, religion, or sex. That would have entailed total immunity from suit, which was considered by Congress but ultimately rejected. Immunity would have meant that an employer only needed to show that it is a religious organization and the lawsuit would be dismissed. In contrast, a religious exemption like in Title VII would also require proof that the employment decision was motivated by the employer's religious beliefs or practices.

Section 2 of this article begins with the text of Title VII's exemptions, both as enacted in 1964 and as materially amended in 1972.¹⁴ Unlike immunity, 702(a) and 703(e)(2) are targeted in that they require a religious employer to prove, as an affirmative defence, two things: that the employer is a religious organization and that there is a religious belief or practice behind its staffing decision. So this methodology of first taking up the *prima facie* claim followed by affirmative defences would also apply to section 204(c). The two Title VII exemptions and 204(c), by their plain language, provide a defence not just when the employee-plaintiff's claim is one of alleged religious discrimination, but also when the discrimination is based on sex, sexual orientation, and so on. Indeed, the exemptions have been found to operate even as a defence to claims for retaliation and harassment.¹⁵ The plain text has no other limitations on an employer invoking the religious defences. Yet, the cases are mixed, and a few courts have read into Title VII that 702(a) and 703(e)(2) can only be invoked when the employee-plaintiff sues alleging religious discrimination.¹⁶ That gloss on the statute is unwarranted because the text is not ambiguous in the first place, nor is that interpretation otherwise compelled by reason.

Section 3 turns to the 'co-religionist' preference. The courts have said that the Title VII exemptions permit religious employers to staff on a basis that enables the

14 For discussion of the statutory language, see below Section 2A (the current text) and Section 2B (the text before the 1972 amendments).

15 See below nn 49–50, and accompanying text.

16 Compare below the cases discussed in Section 2C with those discussed in Section 4B.

maintenance of faith communities that are composed of employees committed to the employer's doctrinal and moral practices. The case law does not adopt a 'co-religionist' narrowing of the exemptions where job applicants need only identify with the employer's denomination. Sections 702(a) and 703(e)(2) speak in terms of the religious employer making employment decisions tied to the work of the employer. The employer, being religious, is obviously going to have religious criteria to do its work properly. Selecting employees that identify with the same denomination is not the same as meeting the needs of the employer to properly do its religious work. For example, a Catholic environmentalist organization needs to employ those whose religious beliefs meaningfully inform and shape their devotion to conserving and protecting the environment, not just hiring anyone who identifies as a Catholic.

There is acknowledgment all around that employment discrimination litigation involving religion can quickly get complex. So a helpful way to keep track of what is going on is to look at various types of claims from the perspective of a plaintiff and a defendant to a lawsuit. Section 4 illustrates three types of claims to show how litigation unfolds when first there is a charge of discrimination by an employee followed by an assertion by the employer of an affirmative defence under Title VII's religious exemptions. As a *prima facie* matter, Title VII does prohibit federal contractors, including religious contractors, from discriminating in employment on the basis of race, color, national origin, religion, or sex. This is an oft-repeated truism that religious employers are so bound, but it is only the beginning of the story.¹⁷ But the exemptions in Title VII act as an affirmative defence to a *prima facie* claim, so the employer will introduce evidence that its actions were rooted in religious practice. In turn, the employee-plaintiff will claim that the religious rationale is pretextual. The ultimate resolution of any contested facts will be by a jury.¹⁸ This analysis shows that 702(a) and 703(e)(2), and by extension 204(c), permit a religious employer, when seeking to maintain a workforce committed to its religious mission, to employ only those of like-minded faith, and do so notwithstanding that its employee conduct rules concerning sex or sexuality are sometimes at odds with protected classes.¹⁹

Moral conduct rules that concern sexual intimacy outside of marriage, as well as resistance to same-sex marriage, are increasingly countercultural—for many citizens an unwelcome point of view especially among younger adults. As a consequence, considerable opprobrium is now attached to churches and other religious groups that hold to these minority beliefs. So there is before us a real test of American civil liberty as classically protective of unpopular belief, not merely to be tolerated at the condescension of the majority, but as a legal right to dwell alongside their fellow citizens in genuine pluralism, each respectful of the other's deepest differences and each according to the dictates of religious conscience.²⁰

17 See below Section 4A.

18 See below nn 66–78, and accompanying text (Illustration #2).

19 See below nn 79–92, and accompanying text (Illustration #3).

20 Religious employers may also be excused from the new non-discrimination requirements imposed by EO 13672 by the 'ministerial exception', by the Religious Freedom Restoration Act, 42 USC ss 2000bb–2000bb-4, or by other First Amendment rights. These additional defences, however, are beyond the scope of this article.

2. THE PLAIN LANGUAGE OF THE RELIGIOUS EXEMPTIONS IN TITLE VII AND EXECUTIVE ORDER 11246

A. The Text of the Religious Exemptions Run to all Title VII Claims

Section 202 of Executive Order 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. Executive Order 11246 was amended by Executive Order 13279 in December of 2002,²¹ which added an exemption for religious employers. In addition to government efficiency, the purpose of the executive order was the removal of barriers to faith-based participation in federal grant programs.²² The exemption appears in section 204(c), and reads:

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

Section 204(c) cross-references section 202, the general non-discrimination mandate. Accordingly, by its plain language ('Section 202 . . . shall not apply') section 204(c) supersedes anything to the contrary in section 202. That is not all. Section 202 expressly acknowledges its status as subordinate to section 204(c). Section 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 widely acknowledged that section 204(c) of Executive Order 11246 is to be interpreted in the same manner as the two religious exemptions in Title VII. For example, the Office of Federal Contract Compliance Programs (OFCCP), US Department of Labor has stated that it 'interprets the nondiscrimination obligations under Executive Order 11246 in accordance with Title VII of the Civil Rights Act of 1964'.²³ There is a mild discontinuity in the scope of 204(c) being modelled after

21 The regulation implementing EO 13279 is found at 41 CFR s 60-1.5(a)(5), but it is unhelpful because the regulation just repeats the terms of the executive order.

22 '[I]n order to further the strong Federal interest in ensuring that the cost and progress of Federal procurement contracts are not adversely affected by an artificial restriction of the labor pool caused by the unwarranted exclusion of faith-based organizations from such contracts, section 204 of [EO 11246 is hereby amended to add a new Section 204(c)].' *Executive Order 13279, Equal Protection of the Laws*, 67 Fed Reg 77141 (12 December 2002).

23 United States Department of Labor *Office of Federal Contract Compliance Programs*, Directive 2014-02 (19 August 2014) <http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html> accessed 24 August 2015. See also Office of Federal Contract Compliance Programs, *Frequently Asked Questions, Religious Employers and Religious Exemption 3*, stating: 'This language mirrors the religious exemption of

Title VII's 702(a) and 703(e)(2), to wit: Title VII does not prohibit discrimination on the basis of sexual orientation and gender identity whereas the executive order does.²⁴

Title VII prohibits discrimination in the terms and conditions of employment on the basis of race, color, religion, sex, or national origin.²⁵ Two exemptions in Title VII address the situation where a religious employer takes into account its religious beliefs and practices in making staffing decisions. The first such exemption in Title VII appears at section 702(a), and provides:

This title [subchapter]²⁶ 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 connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The second exemption in Title VII appears at section 703(e)(2), as follows:

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.

Sections 702(a) and 703(e)(2) read as affirmative defences. They begin with a sweeping override of everything else in all of Title VII: 'This title shall not apply to an employer' and 'notwithstanding any other provision of this title'. The sweep of the two defences encompasses all of the rest of Title VII, presently spanning some 21 different sections. Moreover, the defences speak to 'religion', and Title VII defines

Title VII of the Civil Rights Act of 1964, and OFCCP will follow EEOC and courts' interpretations of Title VII when determining which organizations can claim the exemption and how it applies.' <http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q12> accessed 24 August 2015.

24 That difference between Title VII and Executive Order 11246 has been thrown into doubt. On 15 July 2015, the Equal Employment Opportunity Commission ruled that it will start interpreting Title VII as covering employment discrimination on the basis of sexual orientation as a type of sex discrimination. *Complainant v Foxx*, EEOC Appeal No 01201233080, 2015 WL 4397641 (15 July 2015). Although the ruling was against an agency of the federal government, the EEOC's rationale is applicable to employers in the private sector.

Earlier in 2015 the OFCCP indicated that in some instances it would regard employment discrimination on the basis of gender identity as a form of sex discrimination. See below n 80.

25 42 USC s 2000e-2(a)(1).

26 The statute enacted by Congress reads 'title'. Pub L 88-352, Title VII, s 702; 78 Stat.253, 256 (2 July 1964). Codifiers of the US Code changed 'title' to 'subchapter'. The subchapter is enumerated 'Subchapter VI', and is the entirety of Title VII comprising some 21 sections.

that term broadly to include ‘all aspects’ of the employer’s religion.²⁷ Finally, the sweep encompasses the entire role as an ‘employer’ (a term defined in 42 USC s 2000e(b)), albeit one limited to the ‘employment of individuals of a particular religion to perform work’ of said religious organization. There are no other limitations to the invoking of 702(a) and 703(e)(2). In particular, there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex.²⁸

This plain language sets a high priority for religious liberty. For example, one practical implication of the pre-empting language, according to the courts, is that neither 702(a) nor 703(e)(2) can be waived by the careless or contradictory actions of a religious employer.²⁹ This is said to be so because nothing a religious employer does or fails to do can unilaterally override the ‘This title shall not apply’ language by Congress.³⁰ By extension, the fact that federal contracts necessarily involve the receipt of federal funds does not work a waiver of 702(a) or 703(e)(2).³¹

A religious organization with 15 or more employees is considered a Title VII ‘employer’. Although 702(a) and 703(e)(2) do not grant total immunity to a religious organization from all of its 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 work’ of said organization. Accordingly, by way of an affirmative defence the employer must show two things: it is a religious organization and there is a religious belief behind its employment decision. It nowhere says that the exemptions are limited to when an employee-plaintiff’s primary claim is one of religious discrimination.

The texts of the Title VII exemptions also extend to the full meaning of the word ‘religion’. The term ‘religion’ is defined liberally to include ‘all aspects’ of religious belief and practice. Moral teachings are commonly ‘aspects’ of religion, including rules about the nature of marriage or the morality of one’s intimate sexual conduct. This open-ended definition of ‘religion’ not only shows that Congress was generally

27 Congress provided that for purposes of Title VII religion ‘includes all aspects of religious observance and practice, as well as belief. 42 USC s 2000e(j). While making no attempt to be exhaustive in defining religion (a task over which even theologians and philosophers struggle), clearly the definition is expansive.

28 The Supreme Court has rebuffed those who would add to Title VII’s plain language. See *EEOC v Abercrombie & Fitch Stores, Inc.*, 135 S Ct 2028, 2033 (2015) (‘The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress’s province. We construe Title VII’s silence as exactly that: silence.’).

29 *Hall v Baptist Memorial Health Care Corp.*, 215 F3d 618, 625 (6th Cir 2000) (that the employer received federal funding or held itself out as an equal opportunity employer caused no waiver of the Title VII exemptions); *Little v Wuerl*, 929 F2d 944, 951 (3d Cir 1991) (for a Catholic school to knowingly hire Lutheran teacher is not a waiver of Title VII exclusion); *Ward v Hengle*, 124 Ohio App 3d 396, 400, 706 NE 2d 392 (1997) (entries by employer in its employee’s handbook cannot cause waiver of Title VII religious exceptions).

30 See *Siegal v Truett-McConnell College, Inc.*, 13 F Supp 2d 1335, 1345 (ND Ga 1994) (the prior hiring of a Jewish faculty member at a Christian college did not waive the religious exemption in Title VII; because Congress has stated ‘[t]his title shall not apply’, nothing a religious employer does unilaterally can cause the reach of Congress’s Title VII to expand to cover that employer).

31 *Lown v Salvation Army, Inc.*, 393 F Supp 2d 223, 251-52 (SDNY 2005) (receiving federal assistance does not work a waiver of Title VII’s religious employer exemptions, nor does the availability of the exemptions violate the Establishment Clause because federal funding is involved).

sensitive to religious liberty, but that the definition of ‘religion’ calls for a broad and liberal scope to the application of 702(a) and 703(e)(2).³² It is likely that Congress sought to parallel the US Supreme Court’s open-ended reading of ‘religion’ as compelled by the First Amendment.³³ The regulation confirms this.³⁴

B. The Initial Scope of Section 702(a), Its 1972 Expansion, and Defining Religion

When first enacted in 1964 the scope of 702(a) was narrower. The reasons behind the 1972 amendments shed some additional light on the scope of 702(a).

The original 702(a) ran only to religious organizations respecting their need ‘to perform work connected with the carrying on by such [religious organization] of its *religious* activities’ (emphasis added).³⁵ Accordingly, only jobs that entailed sacerdotal, ecclesiastical, ministerial, or otherwise explicitly religious duties were exempted. That required civil authorities, and eventually the courts, to attempt to sort out which jobs were religious and which secular.³⁶ Inevitably there would be disagreements between the parties over that task, with disagreements stemming from differing views between ecclesiastics and government officials over ‘what is religious’ or ‘what is a doctrinal application in the workplace’ of the employer’s religion.

32 By its plain terms the definition of ‘religion’ in 42 USC s 2000e(j) applies throughout all 21 sections of Title VII. In this regard, the text is unambiguous. If Congress had intended the definition to not apply to 702(a) and 703(e)(2), it would have been very easy to have said so. For a case rejecting the argument that the definition of ‘religion’ did not apply to the exemption in 703(e)(2), see *Larsen v Kirkham*, 499 F Supp 960, 966 (D Utah 1980), *aff’d*, 1982 WL 20024 (10th Cir 1982) (per curiam), *cert denied*, 464 US 849 (1983). *Larsen* reaches a sensible result because no court would want to defend having two definitions for ‘religion’ in one comprehensive, integrated act.

33 The open-ended definition of ‘religion’ in 42 USC s 2000e(j) is similar to that of the Supreme Court in cases such as *Thomas v Review Bd*, 450 US 707 (1981), *Hobbie v Unemployment Appeals Comm’n*, 480 US 136 (1987), and *Frazee v Illinois Dep’t of Empl Security*, 489 US 829 (1989). In *Thomas*, a recent convert to the Jehovah’s Witnesses denomination claimed that certain factory work was contrary to his pacifistic beliefs. The state offered testimony by officials in that denomination that Thomas was mistaken about the teachings of his church. The High Court disallowed the testimony, indeed prohibited any evidence on the inquiry, because civil courts are not to become arbitrators of theological disputes. Rather, the First Amendment requires that civil magistrates defer to claims of religious belief so long as sincere. *Thomas*, 450 US at 714–16. In *Hobbie*, the Court gave protection under the Free Exercise Clause to a new convert to a given religion that held to Saturday as its Sabbath. It made no difference that it was a change in religion by claimant that created the unexpected burden. *Hobbie* at 143–44. In *Frazee*, the Court gave protection under the Free Exercise Clause to someone claiming to be a Christian even though he did not hold membership in any church. *Hobbie* at 832–33. Religion is wholly unlike holding membership in a social club where either you are a member, with all the rights and privileges of membership, or you are not a member, hence without any recognized relationship to the club or rights therein. Affiliation with a religion is far more fine-grained or nuanced, and the Court in its cases—and Congress in 701(j) of Title VII—have taken this into account.

34 The Equal Employment Opportunity Commission says it defined ‘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 CFR s 1605.1.

35 Pub L 88-352, Title VII, s 702(a); 78 Stat 253, 255 (2 July 1964).

36 See *Corporation of the Presiding Bishop v Amos*, 483 US 327 (1987), 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’. *ibid* at 336.

As part of the Equal Employment Opportunity Act of 1972, the scope of 702(a) was increased to embrace all of the employees, secular and religious, at a religious organization.³⁷ In appearance the amendment was modest: striking the adjective 'religious' in the phrase 'of its religious activities'.³⁸ Also added was a broad definition of 'religion' in section 701(j). The combined effect was substantial. As the federal court observed in *Lown v Salvation Army, Inc.*,³⁹ the 702(a) defence now extends to all employment positions and 'any activities of religious organizations, regardless of whether those activities are religious or secular in nature'.⁴⁰

In *Corporation of the Presiding Bishop v Amos*,⁴¹ the expansion of 702(a) was challenged as an unconstitutional religious preference. A unanimous US Supreme Court rejected that challenge. The Court in *Amos* observed that:

[The] law ... simply ... allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' [such that it violates the Establishment Clause,] it must be fair to say that the government itself has advanced religion through its own activities and influence.⁴²

Thus, a statutory religious exemption is understood by the Supreme Court as a case of Congress choosing to 'leave religion alone', and the government does not establish religion by leaving it alone.

C. Beyond the Plain Text: What the Cases Say

Some cases say forthrightly that 702(a) and 703(e)(2) are a defence to an employee's claim of discrimination no matter the employee-plaintiff's protected class. In *EEOC v Mississippi College*,⁴³ the court of appeals held that 702(a) was available to a Baptist College defending against claims of sex and race discrimination brought by a female applicant for a faculty position. When hiring new faculty, Mississippi College had a

37 Pub L 92-261, s 3; 86 Stat 103, 103-04 (24 March 1972).

38 Unlike 702(a), 703(e)(2) never was restricted to a religious organization's 'religious' activities. Pub L 88-352, Title VII, s 703(e)(2); 78 Stat 253, 256 (2 July 1964). From the outset 703(e)(2) 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 703(e)(2) was limited to religious educational institutions, 702(a) covers all religious organizations. On the other hand, 703(e)(2) has always been more explicit in its definition of what institutions qualify as religious employers. That said, it is fair to say that the current 702(a) applies to every religious institution now exempt under 703(e)(2), as well as several more religious organizations that are not educational.

39 393 F Supp 2d 223 (SDNY 2005).

40 *ibid* at 247. Courts have routinely held, for example, that a religious employer can have an explicit preference in employing persons of a given church, denomination, or religious belief. See, eg *EEOC v Mississippi College*, 626 F2d 477, 485-87 (5th Cir 1980), *cert denied*, 453 US 912 (1981) (noting the lawfulness of religious College's preference for hiring Baptists when filling faculty positions); *Wirth v College of the Ozarks*, 26 F Supp 2d 1185, 1187-88 (WD Mo 1998), *aff'd* 208 F3d 219 (8th Cir 2000) (non-denominational Christian college permitted to have a religious preference as to faculty employment, albeit preference was not specific as to any one belief or tenet); *Newbrough v Bishop Heeland Catholic Schools*, 2015 WL 759478, *12-13 (ND Iowa 2015) (upholding K-12 Catholic school's new policy to prefer the employment of Catholics in all employment positions).

41 483 US 327 (1987).

42 *ibid* at 337 (emphasis in original).

43 626 F2d 477, 485-86 (5th Cir 1980).

policy of preferring Baptists. Patricia Summers, an unsuccessful applicant, sued alleging discrimination on the bases of sex and race. She was a Presbyterian, whereas a white male, Bailey, who was a Baptist, got the job. The College sought to retain its religious preference and relied on 702(a). The litigation became far more complex when the Equal Employment Opportunity Commission (EEOC) intervened against the College. However, as to the individual claimant the court of appeals first found that the 'ministerial exception' did not apply to regular faculty positions. Turning to the College's defence under 702(a), the court of appeals said:

[A]s pointed out above, § 702 may bar investigation of [Summers'] individual claim[s of race and sex discrimination]. The district court did not make clear whether the individual employment decision complained of by Summers was based on the applicant's religion. Thus, we cannot determine whether the exemption of § 702 applies [and so will remand].⁴⁴

Acting as an affirmative defence, 702(a) was found to be available to the College even though the primary claims were for race and sex discrimination. On remand, should the College convince the trier of fact that it refused to employ Summers because of its preference for Baptists, then 702(a) would require a dismissal in favor of the College. The court of appeals said:

If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, then § 702 exempts that decision from the application of Title VII . . . On the other hand, should the evidence disclose only that the College's preference policy could have been applied, but in fact it was not considered by the College in determining which applicant to hire, § 702 does not bar the EEOC's investigation of Summers' individual sex discrimination claim.⁴⁵

Another example where a case of alleged sex discrimination was found exempt under 702(a) and 703(e)(2) is *Maguire v Marquette University*.⁴⁶ A female applicant for a faculty position brought a charge of sex discrimination. The University replied that the plaintiff's beliefs concerning abortion did not align with the doctrines of the Catholic Church and disqualified her from the faculty appointment. Notwithstanding Maguire's insistence that she remained Catholic, she was regarded by the Church as not in line with its doctrine. Civil courts will not delve into the question of who is a Catholic in good standing, such issues being barred by the First Amendment as a religious question. The district court dismissed the sex discrimination claim with express reliance on 702(a) and 703(e)(2).⁴⁷ The court of appeals affirmed, dismissing

44 *ibid* at 485–86.

45 *ibid* at 486. This quotation also demonstrates the interaction between a 702(a) defence and an employee's response by offering evidence of pretext. Pretext is discussed below at n 70, and accompanying text.

46 627 F Supp 1499 (ED Wis 1986), *aff'd on other grounds*, 814 F2d 1213 (7th Cir 1987).

47 *Maguire*, 627 F Supp at 1502–06.

the claim because the employee failed to even make out a *prima facie* case of sex discrimination.⁴⁸

Title VII's religious exemptions even apply to claims for retaliation and harassment.⁴⁹ This is so because the plain language of 702(a) ('This subchapter shall not apply') runs to the whole of Title VII ('subchapter'), not just the non-discrimination mandate in 42 USC s 2000e-2(a). As the Fourth Circuit reasoned in *Kennedy v St. Joseph's Ministries, Inc.*:

[T]he 'subchapter' referred to in [702(a)] includes both § 2000e-2(a)(1), which covers harassment and discriminatory discharge claims, and § 2000e-3(a), which covers retaliation claims. . . . Thus, [plaintiff's] three claims—discharge, harassment, and retaliation—all arise from the 'subchapter' covered by the religious organization exemption, and they all arise from her 'employment' by St. Catherine.⁵⁰

The logic of *Kennedy* necessarily applies to claims for discrimination on the basis of race, color, sex, or national origin. All claims involve the employee-plaintiff's 'employment' and all are within the 'subchapter' that comprises the 21 sections of Title VII. Thus any and all Title VII claims, whatever the protected class, are subject to the plain language of 702(a). By parallel, this would be true for 204(c) and the protected classes of sexual orientation and gender identity.

It is also common sense. The rationale for the exemptions is to safeguard the religious liberty of religious organizations to a high degree—albeit, stopping short of complete immunity. That same high degree of liberty is threatened without regard to the nature of plaintiff's protected class, be it religion, sex, or sexual orientation. Any of these three claims, if not tempered, is equally damaging to an employer's religious liberty. It would be completely arbitrary to protect from one such harm to religious liberty but not the other two. As a canon of construction, courts do not attribute such capriciousness to Congress. It follows that 702(a) and 703(e)(2), as well as 204(c), must be available as affirmative defences no matter what the protected class of the plaintiff's primary claim.

3. THE 'CO-RELIGIONIST' PREFERENCE IS NEITHER CONSISTENT WITH THE TEXT NOR SUPPORTED BY THE CASE LAW

In *Hall v Baptist Memorial Health Care Corp.*,⁵¹ a female alleging discrimination sued a Baptist school that trained health-care professionals. Hall's job entailed working closely with student groups to organize and plan activities. Hall was attending a

48 *Maguire*, 814 F2d at 1218.

49 *Kennedy v St Joseph's Ministries, Inc.*, 657 F3d 189, 192-94 (4th Cir 2011); *Saeemodarae v Mercy Health Services*, 456 F Supp 2d 1021, 1041 (ND Iowa 2006) (by plain text of the statute, a retaliation claim is subject to 702(a) defence); *Lown v Salvation Army, Inc.*, 393 F Supp 2d 223, 254 (SDNY 2005) (same). But see *EEOC v Pacific Press Publishing Ass'n*, 676 F2d 1272, 1280 (9th Cir 1982) (finding that free-exercise defence did not succeed in claim for retaliation, but without considering 702(a) or doing the careful textual analysis of the statute that the court of appeals did in *Kennedy*).

50 *Kennedy v St Joseph's Ministries, Inc.*, 657 F3d 189, 193-94 (4th Cir 2011).

51 215 F3d 618 (6th Cir 2000).

gay-friendly church where she was training to become a lay minister. When Hall informed her Baptist employer that she was a lesbian she was dismissed, the school explaining that the position entailed considerable influence over students.⁵² Hall's sexual orientation was thought antithetical to Baptist teaching and not suitable for an administrator being held out as a mentor for students. The court held that 702(a) and 703(e)(2) permitted the termination 'of an employee whose conduct or religious beliefs are inconsistent with those of the employer'.⁵³ It was irrelevant to the school that Hall was not a Baptist or that she attended a church of another denomination. To paraphrase the text of the exemption, the Baptist school could seek 'the employment [of student mentors] of a particular religion', namely mentors not living openly as a lesbian.

In *Little v Wuerl*,⁵⁴ a Catholic school had dismissed a longstanding teacher who was of the Lutheran faith. The teacher filed a claim of religious discrimination. The Catholic school's defence was not lost because the teacher when hired was known to be a Lutheran instead of Catholic. Rather, at some point in the past the teacher was divorced. The teacher's dismissal came about because she had recently remarried and thus was now in a marriage not recognized by the Catholic Church. The school was found to have acted lawfully on its Catholic teachings. Both 702(a) and 703(e)(2) were found to apply.⁵⁵ To paraphrase the text of the exemption, the Catholic school could seek 'the employment [of teachers] of a particular religion', namely teachers who do not remarry following a divorce not recognized by the Catholic Church.

In *Killinger v Samford University*,⁵⁶ a Baptist professor sued when he was dismissed from a Baptist university over a doctrinal disagreement with the dean of his college. The University successfully relied on 702(a) and 703(e)(2) for its defence. The court of appeals said that it made no difference that the plaintiff was a Baptist. Religion is about beliefs and practices not wooden labels like attending the same church or denomination, and to think otherwise is to be ignorant about how religion is actually observed. The court said that 702(a) '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'.⁵⁷ To paraphrase the text of the exemption, the Baptist University could seek 'the employment [of professors] of a particular religion', namely professors not holding unorthodox beliefs as determined by the dean of the college.

Hall, Little, Killinger, and similar cases⁵⁸ permit religious employers to have religious conduct rules, as well as a creed or statement of faith, which must be adhered

52 *ibid* at 623, 627.

53 *ibid* at 624.

54 929 F2d 944 (3d Cir 1991).

55 *ibid* at 945, 950–51.

56 113 F3d 196, 199–200 (11th Cir 1997).

57 *ibid* at 200.

58 See *Wirth* (n 40); *Maguire v Marquette University*, 627 F Supp 1499 (ED Wis 1986) (upholding hiring denial by university of female faculty applicant deemed not a Catholic in good standing because of her view on abortion), *aff'd on other grounds*, 814 F2d 1213 (7th Cir 1987); *Larsen* (n 32) (religious school not limited to preferring only individuals 'ostensibly affiliated with the religion operating' the school because that would be contrary to broad definition of 'religion' in 701(j) and would interfere with authority to decide who are its members best able to propagate its religion; thus, court rejected argument that

to by employees. Such a conduct code could apply to all employees. Or the code could be binding on top administrators and faculty, for example, but not building custodians, grounds keepers, clerks, and others in routine positions not thought to be integral to the purpose of the ministry. Any such codes or creeds, of course, have to be rooted in the religious beliefs or practices of the employer.

It is true that *Hall*, *Little*, and *Killinger*, were cases where the plaintiff's primary claim was one of religious discrimination, as opposed to sex discrimination or a claim based on some other protected class. But that is a distinction without a difference. Again, 702(a) and 703(e)(2) permit an organization that holds a 'religion'—as broadly defined in 701(j)—to make employment decisions 'with respect to the employment of individuals of a particular religion to perform work' of said organization. The text of the exemption has no other qualifying language. It makes no sense to argue that the phrase 'employment of individuals of a particular religion to perform work [of the organization]' changes in meaning depending on the plaintiff-employee by chance invoking the protected class of religion but not others. Title VII nowhere says that or even suggests it.

The key phrase in both 702(a) and 703(e)(2) is directed to a religious organization 'with respect to the employment of individuals of a particular religion to perform work' of said organization. The same phrase appears in section 204(c). Given the open-ended definition of 'religion' in 701(j), it is entirely sensible that the courts have interpreted 'employment of individuals of a particular religion to perform work' of the religious organization to include 'permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts', as the court concluded in *Little v Wuerl*.⁵⁹ For example, a Presbyterian faith-based marriage counselling centre may very well seek employees of religious convictions that discourage cohabitation as well as counsel against divorce, even as positions on these issues cut across denominational lines. Unlike race, color, gender, or national origin, which are immutable characteristics, one's religion is multi-faceted and subject to change, correction, and even conversion. Thus a Presbyterian organization seeking employees 'of a particular religion to perform work [of that organization]' may well find some Presbyterians suitable and other Presbyterians unsuitable. Such would be the case where a particular moral behaviour sought in employees is to never have an abortion or to refrain from sexual relations outside of marriage, for Presbyterians are divided on these issues.

The definition of 'religion' as 'all aspects' of faith pushes beyond wooden labels like 'Protestant', 'Presbyterian', or even a particular Presbyterian denomination, and permits the religious employer to seek multilayered 'aspects' of a lived faith in employees that are thought most suitable 'to perform work' in accord with the religious precepts and purposes of that organization. Only those wilfully ignorant of how religion is actually lived could think that 'religion' in 702(a) and 703(e)(2) was a matter of nominal church identification. The court of appeals in *Little* observed that 'Congress intended the explicit exemptions to Title VII to enable religious

703(e)(2) permits Mormon school to discriminate in hiring in favour of Mormons but not permit the school to discriminate among various persons on the basis of religion all of whom are Mormons), *aff'd*, 1982 WL 20024 (10th Cir 1982) (per curiam), *cert denied*, 464 US 849 (1983).

59 929 F2d 944, 951 (3d Cir 1991).

organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices'.⁶⁰

A helpful way to think about the phrase 'with respect . . . to the employment of individuals of a particular religion to perform work [of the religious organization]' is to ask, 'Who is selecting these individuals?' Obviously the selection is by the religious employer in accord with the needs of its work. And the needs of the organization's work includes employees conforming to the employer's religious beliefs or practices. So logic requires that the adjective 'particular' means the religion particular to that employer.

Readers of 702(a) and 703(e)(2) sometimes come with a preconception that the exemptions are narrow. They proceed to read the prepositional phrase 'of a particular religion' with a focus on the adjective 'particular' while overlooking the noun 'religion'. With the eye of their mind they proceed to read the text as 'particular denomination' or 'particular church', all while claiming to be giving the exemptions their 'most natural reading'. But these renderings, of course, are not the words of the text. Rather, the plain text has the noun 'religion', and religion is defined expansively and liberally in the immediately prior section (ie 701(j)). That definition makes 'religion' essentially the religion thought best by the employer to further its work. 'Particular', thus, means the religion particular to each employer. Any other interpretation would have the EEOC, and eventually the courts, telling a religious employer the religious qualifications its employees require 'to perform [the employer's] work'. The First Amendment's prohibition on government involvement in religious questions prohibits that. So the texts of the exemptions are not in any sense narrow. Unsurprisingly, the circuit courts in *Hill*, *Little*, and *Killinger* have so held.

It is for the foregoing reasons that the federal courts have refused to adopt a narrow 'co-religionists' interpretation of the exemptions. Prudence also comes into play. If the plain meaning of 702(a) and 703(e)(2) is ignored, as well as that of section 204(c), religious organizations might adjust by taking another avenue to safeguard their religious character. They could adopt a hard-and-fast religious preference with respect to their staffing. For example, a religious employer could adopt a preference to hire only members of its local church or denomination, one that presumably has a traditional view of homosexual conduct and same-sex marriage. Such a religious preference, while lawful, would exclude many other individuals from being considered for employment, thereby increasing the barriers to employment overall. That is hardly desirable, for there is no virtue in an Executive Order being interpreted in manner that results in religious employers being even less inclusive in their workforce.

4. THE COMPLEXITY OF TITLE VII RELIGION CASES

Title VII's prohibition on religious discrimination is *prima facie* binding on all covered 'employer[s]' (42 USC s 2000e(b)), whether a given employer is religious or not.⁶¹ That said, Title VII claims implicating religion are especially complex. In part,

60 *ibid.*

61 See *Shapolia v Los Alamos National Laboratory*, 992 F2d 1033, 1038 (10th Cir 1993) (non-religious employer would be liable for religious discrimination where employee filing the claim was subjected to the

this is because Title VII's exemptions for religious organizations not only allow religious discrimination based on an employee's religion, but also allow religious discrimination when an employee fails to comply with the employer's religion.⁶² And, in part it is because Title VII also requires employers to affirmatively adapt the workplace to the religious practices of job applicants and employees, provided that the accommodation does not impose an undue burden on the employer.⁶³

A. Three Kinds of Cases, Each Illustrated

It is helpful to approach these complex lawsuits by thinking first in terms of the *prima facie* case and then proceeding to affirmative defences. As a starting proposition, Title VII does not permit any 'employer', including a religious one, to discriminate on the basis of any protected class. Accordingly, there is an oft-repeated truism that religious organizations cannot discriminate on the basis of race, color, sex, or national origin.⁶⁴ That is true as a beginning proposition, but not the whole story. Rather, religious organizations can lawfully discriminate *provided* they are able to mount a successful defence under 702(a) or 703(e)(2). The *proviso* is compelled by the plain language that begins both 702(a) and 703(e)(2) ('This title shall not apply to an employer ...' and 'Notwithstanding any other provision of this title ...'). That text is pre-empting and, when the other elements of the affirmative defence are proven, will sweep away all possible claims by a Title VII plaintiff, even claims for retaliation. Three illustrations follow to sketch the various permutations of a Title VII religion case.

Illustration #1: The simplest of Title VII cases involving a religious employer is where there is a charge of race, color, sex, or national origin discrimination, and the employer simply denies the claim. There is no mention of religion. In such a case, at most what is at stake in terms of religious liberty is some additional church-state entanglement or a loss of institutional autonomy due to increased regulation. In an Illustration #1 case, the oft-repeated truism is unconditionally true, to wit: a religious employer is prohibited from discriminating on the bases of race, color, sex, and national origin.

Executive Order 11246, as amended, is to the same effect. After setting forth the exemption, section 204(c) goes on to state the truism that, 'Such contractors and

religious expectations of his supervisors); *Blalock v Metals Trades, Inc*, 775 F2d 703, 708–09 (6th Cir 1985) (non-religious commercial organization can be liable for religious discrimination where employee filing the claim was treated with less tolerance for poor performance when his religious views were out of favour with religion of his superiors).

62 *Hall*, 215 F3d at 624; *Killinger*, 113 F3d at 198; *Little*, 929 F2d at 952; *Wirth*, 26 F Supp 2d at 1187–88; *Maguire*, 627 F Supp at 1502–06.

63 See, eg *EEOC v Abercrombie* (n 28) (holding that a job applicant seeking to prove a disparate treatment claim of religious discrimination need only show that her need for an accommodation was a motivating factor in the decision not to hire her).

64 See, eg *Cline v Catholic Diocese of Toledo*, 206 F3d 651, 658–59 (6th Cir 2000); *Boyd v Harding Acad of Memphis, Inc*, 88 F3d 410, 413–14 (6th Cir 1996). This oft-repeated truism can be traced back to *McClure v Salvation Army*, 460 F2d 553, 558 (5th Cir 1972). The recitation of the truism in *McClure* made little sense, however, because it was not a case that had to rule on the meaning of 702(a). Instead, *McClure* is a 'ministerial exception' case involving the dismissal by a church of an ordained female. *ibid* at 558–60. In *EEOC v Mississippi College* (n 40), the Fifth Circuit limited *McClure* to its holding on the 'ministerial exception'. *ibid* at 485.

subcontractors are not exempted or excused from complying with the other requirements contained in this Order.⁶⁵

Illustration #2: In yet other Title VII cases, when charged with discrimination on the basis of race, colour, sex, or national origin, a religious employer will not only deny the discrimination but also will aver that the employment decision in question was made on a 'legitimate, nondiscriminatory' basis,⁶⁶ with the employer maintaining that it acted not on the basis charged by the employee but in accord with its religion. Exemplarily are cases such as *Cline v Catholic Diocese of Toledo*⁶⁷ and *Boyd v Harding Acad of Memphis, Inc.*⁶⁸ In *Cline* and *Boyd*, a religious school sued by a female teacher for pregnancy (sex) discrimination defended by saying that it was not motivated by sex but by religion. This should cause one to pause and ask: How is it that such an adverse employment decision can be said to be 'legitimate, nondiscriminatory'? After all, Title VII also prohibits religious discrimination and the employer is openly admitting that it acted against the employee on the basis of religion. What is implicit in *Cline* and *Boyd* is that the adverse employment decision is 'legitimate' only because 702(a) and 703(e)(2) make the religious discrimination lawful. So 702(a) and 703(e)(2) are integral to the result.

In cases like *Cline* and *Boyd*, the religious employer could have just denied the sex discrimination, as in Illustration #1. But the employer did not stop there. The best way for an employer to convince the trier of fact that it was not acting on the basis of sex is to show it was acting on its religion. So the employer took the step of affirmatively defending on the basis of religion. Indeed, under the rules of evidence a court could hardly prevent an employer from doing so. Accordingly, *Cline* and *Boyd* are not Illustration #1 cases, but Illustration #2 cases. By defending on the basis of religion, an employer necessarily admits religious discrimination. Such discrimination is 'legitimate', however, because of 702(a) and 703(e)(2). So, again, 702(a) and 703(e)(2) are doing real and necessary work—whether acknowledged by the court or not.

65 A similar statement of *prima facie* liability appears in a post-enactment analysis of the 1972 amendments to Title VII. The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong Rec 7166 (6 March 1972), references the amendment expanding 702(a). The Report then says, 'Such [religious] organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.' *ibid* at 7167. This is yet another recitation of the truism that, as a *prima facie* matter, religious organizations are subject to the full non-discrimination mandate of 42 USC s 2000e-2(a). This is true as we saw in Illustration #1. But the Conference Report did not go on to consider the next level of cases, namely those presented in the text as Illustrations #2 and #3. Thus the Report is silent as to what happens when a religious employer offers evidence, as an affirmative defence, that it acted adversely to the complaining employee based on the employer's religious beliefs or practices. The tender of such a defence by the employer is permitted by the rules of evidence and can hardly be refused. And, as we are about to explore, the courts have allowed religious employers to introduce such evidence in its defence. See below nn 67–76, and accompanying text.

66 The phrase 'legitimate, nondiscriminatory' basis originally comes from *McDonald Douglas Corp v Green*, 411 US 792, 802 (1973). In a case where there is no direct evidence of discrimination, *McDonald Douglas* sets forth the elements that an employee-plaintiff must show to shift the burden to the employer to prove that it did not discriminate.

67 206 F3d 651, 658 (6th Cir 2000).

68 88 F3d 410, 413 (6th Cir 1996).

As should now be evident, there are two slightly different approaches to an Illustration #2 case. Path A is where there is a claim of sex discrimination and the court openly relies on 702(a) or 703(e)(2) to exempt what is really an adverse employment decision based on religion. We see Path A in cases like *Mississippi College* and *Maguire*.⁶⁹ Path B is where the court declares the employer's religious reasons for the adverse employment decision 'legitimate', as in *Cline* and *Boyd*, with that conclusion logically possible only because of 702(a) or 703(e)(2).

But we are not done. Whether a court takes Path A or Path B, the employee-plaintiff—when faced with the religion defence—will frequently come back and aver that the employer's religion was not the real reason for the adverse employment decision. That is, the employee-plaintiff is permitted to try to prove that the employer's defence is pretextual. Pretext does not permit the employee-plaintiff to challenge the truth or validity of the employer's religious doctrine; it only allows proof that the employer's religious belief was not the real reason for the dismissal. The burden of proving pretext remains with the employee throughout.⁷⁰

Whether Path A or Path B is chosen, the ultimate result is the same. That is, where a primary Title VII claim is one of sex discrimination (or some other protected class like national origin), under the rules of evidence an employer may raise a religion defence. The litigation procedure unfolds in the same way: the employee-plaintiff carries the burden of proof to show sex discrimination, the religious employer carries the burden of proof to show it was acting on the basis of its religion, and the plaintiff is permitted to reply by carrying the burden of showing pretext.

There are several cases of the Illustration #2 sort where an unmarried female employee is dismissed by a religious employer when it is learned that she is pregnant—a type of sex discrimination.⁷¹ The employee files a Title VII claim of sex discrimination alleging that she was fired for becoming pregnant, adding that unmarried men are not treated the same. The employer denies that men are treated differently and further avers, as an affirmative defence, that it was enforcing a religious conduct rule prohibiting sexual intimacy outside of marriage. If true, this is a 'legitimate, nondiscriminatory' reason.⁷² Enforcement of the religious conduct rule would

69 See above nn 43–48, and accompanying text (discussing *Mississippi College* and *Maguire*).

70 *Texas Dept of Community Affairs v Burdine*, 450 US 248, 256 (1981). Pretext is also not a challenge to whether the asserted religious belief is sincere. The employee-plaintiff could challenge the sincerity of the religious employer in claiming to hold to a particular religious belief or observance. See *US v Ballard*, 322 US 78 (1944). However, such challenges are rare because it is easier for the plaintiff to concede that the employer holds to a particular religious precept but that the employer was not following that precept when it made the adverse employment decision as to plaintiff.

71 The Pregnancy Discrimination Act of 1978 made discrimination on the basis of pregnancy a type of sex discrimination. 42 USC s 2000e(k).

72 *Cline*, 206 F3d at 658–59; *Boyd*, 88 F3d at 413–14. For additional Illustration #2 cases involving gender-neutral application of religious conduct rules concerning sex outside of marriage, see *Ganzy v Allen Christian Sch*, 995 F Supp 340, 349 (EDNY 1998) ('So long as religious requirements are applied equally to both males and females, the court will not evaluate the underlying [religious] dogma. . . . [R]estrictions on sexual activity, applied equally to males and females, are not discriminatory.'). *Dolter v Wahlert High Sch*, 483 F Supp 266, 270 (ND Iowa 1980) ('The only issues the court need decide are whether those moral precepts [of religion] . . . are applied *equally* to defendant's male and female teachers; and whether Ms Dolter was in fact discharged only because she was pregnant rather

ordinarily be religious discrimination violative of Title VII, but 702(a) and 703(e)(2) prevent that result. So there can be no doubt that the two statutory exemptions are doing essential work in a Path B case.⁷³

In Illustration #2, a motion for summary judgment will often be filed by the religious employer. The employer will present evidence that the adverse

than because she obviously had pre-marital sexual intercourse in violation of defendant's moral code.')(footnotes omitted).

- 73 For additional Illustration #2 cases, see *Herx v Diocese of Fort Wayne-South Bend, Inc.*, 48 F Supp 3d 1168 (ND Ind 2014); *Vigars v Valley Christian Center of Dublin, Cal.*, 802 F Supp 802 (ND Cal 1992). In *Herx*, a district court did the right thing by allowing a religious defence to a plaintiff's Title VII claim of pregnancy discrimination, as a type of sex discrimination. 48 F Supp 3d at 1173, 1178–79. In doing so, however, the court declined to rely on 702(a) or 703(e)(2). *ibid* at 1174–76. A Catholic Diocesan school defended the dismissal of a plaintiff-teacher as motivated not by her sex but because of non-compliance with Catholic doctrine concerning in vitro fertilization (IVF). To that defence, the teacher averred pretext. Summary judgment was denied because, on this record, the question of pretext was in genuine dispute and thus one for the jury.

The Diocese says that the treatment would be no less immoral if a male teacher agreed with his wife that they would proceed with in vitro fertilization, so the Diocese wouldn't allow the hypothetical male teacher to remain at the school, either. And a jury might well agree . . . But a jury wouldn't be compelled to accept that avowed gender-neutrality. . . . [A] jury [] isn't required to accept a party's factual proposition [but] is free to disbelieve evidence and draw a permissible contrary inference. Even in the face of such evidence from the Diocese, a jury that resolved every factual dispute, and drew every reasonable inference, in Mrs. Herx's favor could infer that Mrs. Herx's contract would have been renewed had she been male and everything else remained the same.

ibid at 1178–79. If the trier of fact finds that Herx's teaching contract was not renewed because she transgressed Catholic teaching on IVF, judgment must be entered for the school. Further, allowing Herx to try to prove pretext did not mean that the law barred adherence to the Catholic teaching on IVF. As the district court explained:

[Submitting the matter to a fact-finder] isn't to agree with Mrs. Herx's contention that the Pregnancy Discrimination Act prohibits religious organizations from drawing a line at infertility treatments they sincerely believe to be gravely immoral. The triable issue is whether Mrs. Herx was nonrenewed [by the school] because of her sex, or because of a sincere belief [by the school] about the morality of in vitro fertilization.

ibid at 1179. In other words, a jury verdict that the school's reason for non-renewal was Herx's gender because a male teacher in the same situation would not have been dismissed is not to bar a Catholic school from having an employee conduct rule against IVF. In *Herx*, an immediate appeal pursuant to the collateral order doctrine was dismissed for want of appellate jurisdiction. 772 F3d at 1088–92. The case was promptly remanded to the district court for further proceedings. Accordingly, the Seventh Circuit never did reach the merits.

Vigars is like *Herx* in that the court rightly allowed a religious defence to a claim of sex discrimination (802 F Supp at 805), but declined to rely on 702(a) as the basis for doing so (*ibid* at 806–07):

[T]here is a dispute in the record as to the exact reason for plaintiff's termination. Therefore, the primary question before this Court is whether defendants' change in position raises material questions of fact which require resolution by a jury. . . . [I]t is apparent to this Court that defendants' "new" position—that plaintiff was fired for adultery, and not on account of her pregnancy—would not give rise to a Title VII claim. . . .

However, defendants' "old" position—that plaintiff was fired because she was pregnant and not married—raises the possibility of sex discrimination.

ibid at 805. Summary judgment was denied because of a genuine dispute as to the facts. Again, this is the correct procedure for a court taking Path B. What is ultimately important is that the jury will be allowed to fully consider evidence on the employer's religious defence.

employment decision was due to its religious precepts. To defeat summary judgment, the employee-plaintiff cannot merely rely on bald allegations of discriminatory treatment and pretext. The motion will be granted unless the plaintiff can uncover some definite and competent evidence creating a genuine issue of fact. For example, there may have been an e-mail or remark by plaintiff's supervisor that the real motive was prejudice against women. Or the plaintiff might point to an unmarried male teacher who was cohabiting and not punished. To show discrimination, however, it will not do to point to a male teacher who engaged in a different violation of the conduct code—eg lying by calling in sick to get a paid day off—and was not punished or punished as severely.⁷⁴ Civil courts will not engage in comparing why a male was treated less harshly for the violation of a different religious precept. It is a forbidden religious question for a court to try to measure and equate the relative degrees of severity for disparate violations of religious doctrine.⁷⁵

Where the employee-plaintiff has evidence creating doubt as to the employer's true motive, lawsuits over pretext can get prolonged, expensive, and entangling, with expansive pretrial discovery and a highly publicized public trial on the merits before a jury.⁷⁶ There is also a risk that the judge or jury will reach the wrong conclusion as to the facts, thus religious liberty is denied. But that is the nature of modern litigation, and that is the balance between liberty and equality that Congress has struck when enacting Title VII.⁷⁷ These regulatory and litigation burdens are increased

74 No inquiry into pretext may lead to a civil court to probe the validity, meaning, or importance of a religious belief or practice. See *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 132 S Ct 694, 715 (2012) (Alito, J, concurring) (Even when employee is not a minister, the First Amendment prohibits weighing 'the importance and priority of the religious doctrine in question with a civil fact-finder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.').

75 *Curay-Cramer v Ursuline Academy, Wilmington*, 450 F3d 130 (3d Cir 2006). In *Curay-Cramer*, a female teacher brought a Title VII claim for sex discrimination stemming from her dismissal by a religious school for pro-abortion advocacy. Plaintiff sought to show sex discrimination by comparing herself to other male teachers who allegedly committed moral offenses but were not punished. The alleged offenses were different than the one for which plaintiff was dismissed. *ibid* at 137–42.

76 See *Herx v Diocese of Fort Wayne-South Bend, Inc*, 772 F3d 1085, 1091 (7th Cir 2014) (the exemptions of 702(a) and 703(e)(2) are not grants to religious employers of categorical immunity from suit, but are defences that sometimes turn on the facts of each case). Immunity for religious employers would mean that they could discriminate on the basis of race, color, sex, or national origin even if the reason had nothing to do with the organization's religious beliefs or practices.

77 The framework in an Illustration #2 case is likewise presented when an employee claims age discrimination and the employer answers by giving a religious reason for the adverse employment decision. See *Geary v Visitation of the Blessed Virgin Mary*, 7 F3d 324, 329 (3d Cir 1993) (primary claim of discharge for alleged age discrimination was properly met by school's defence based on employee's divorce and remarriage contrary to Catholic teaching); *DeMarco v Holy Cross High School*, 4 F3d 166 (2d Cir 1993) (primary claim was age discrimination, with successful defence that employee failed at his religious duties). The Age Discrimination in Employment Act, 29 USC ss 621ff (2012), has no religious-exemption clause. Nevertheless, the courts have permitted a religious employer to defend itself by showing that the adverse employment decision was based on religion. That is, by showing that the employer's decision was not age discrimination but religious discrimination. But how is it that the employer's religious discrimination was not unlawful under Title VII? The courts in *Geary* and *DeMarco* do not say, but the answer has to be because of Title VII's 702(a) and 703(e)(2).

church–state entanglement, but those sorts of burdens do not implicate religious conscience.⁷⁸

Illustration #3: Illustration #3 is where the religious employer defends by invoking a religious precept *that by its very terms* makes a distinction that coincides with the employee's protected class. Such a case is going to happen now as a result of Executive Order 11246, as amended, addressing non-discrimination on the bases of sexual orientation and gender identity (SOGI).⁷⁹ These newly protected classes are defined based on an employee's sexuality and sexual conduct.⁸⁰

78 See *EEOC v Southwestern Baptist Theological Seminary*, 651 F2d 277 (5th Cir 1981); *EEOC v Mississippi College*, 626 F2d 477, 487–89 (5th Cir 1980). Both cases distinguish between regulatory and litigation burdens as harm and coercion of conscience as a different type of harm. In *Southwestern Baptist* there was no charge of discrimination on any basis. Rather, the EEOC sought employment information reporting via Form EEO-6 from institutions of higher education, including seminaries. Section 702(a) was raised in passing by the Seminary, but the defence was no part of the court's partial ruling in favour of the EEOC. This is because the EEOC denied 'that it is seeking to enforce any substantive provision of Title VII'. 651 F2d at 282. Citing the 'ministerial exception', the court denied the EEOC any employment information on Seminary faculty. However, such information as sought by Form EEO-6 was ordered supplied concerning administrative and support staff. *ibid* at 284. The latter were not 'ministers', and the Seminary could point to no religious tenet violated by the requirement to routinely supply such information:

Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin, the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief.

ibid at 286 (footnotes omitted). But see *ibid* at 285 n 5, 286 nn 7 and 8 (while the issue is hypothetical on this record, if there was a claim of sex discrimination and it conflicted with a religious tenet, that would state a free exercise claim). The court said it did not have before it, and thus was not deciding, whether the Free Exercise Clause might shield the Seminary if a lawsuit was ever filed that made a specific claim of sex discrimination as a result of gender-difference religious doctrine. *ibid* at 285 n 5, 286.

79 Regulations implementing EO 13672 are found at 41 CFR Part 60-50 (effective 8 April 2015). The regulations are unhelpful, however, because they merely track the terms of the Executive Order. The US Department of Labor has provided a set of responses to frequently asked questions at <http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q12> accessed 24 August 2015. Additionally, on 10 April 2015, the Department of Defence, General Services Administration, and NASA issued an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13672, entitled 'Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity' <<https://www.federalregister.gov/articles/2015/04/10/2015-08309/federal-acquisition-regulation-further-amendments-to-equal-employment-opportunity>> accessed 24 August 2015. The FAQs and FAR likewise skirt the issue here. See also below nn 85–86, and accompanying text.

80 The Office of Federal Contract Compliance Programs (OFCCP), US Department of Labor, is moving to have the EO 11246 prohibition on sex discrimination extend to adverse treatment of an employee for failure to conform to gender norms and expectations, which OFCCP construes as treatment incurred on the bases of same-sex relationships and gender identity. See *Discrimination on the Basis of Sex*, 80 Fed Reg 5246, 5277, 5279 (30 January 2015).

This move is based on an expansive administrative interpretation of Title VII. The federal courts of appeal, however, have uniformly held that Title VII does not forbid discrimination on the basis of sexual orientation. *Larson v United Air Lines*, 482 F App'x 344, 348 n 1 (10th Cir 2012); *Gilbert v Country Music Ass'n*, 432 F App'x 516, 520 (6th Cir 2011); *Pagan v Gonzalez*, 430 F App'x 170, 171–72 (3d Cir 2011); *Dawson v Bumble & Bumble*, 398 F3d 211, 217–18 (2d Cir 2005); *Osborne v Gordon & Schwenkmeyer Corp*, 10 F App'x 554, 554 (9th Cir 2001); *Richardson v BFI Waste Systems*, 2000 WL 1272455, *1 (5th Cir 15 August 2000); *Hamner v St Vincent Hospital & Health Care Center, Inc*, 224 F3d 701, 704, 707 (7th Cir 2000); *Higgins v New Balance Athletic Shoe*, 194 F3d 252, 259 (1st Cir 1999); *Hopkins v Baltimore Gas & Elec Co*, 77 F3d 745, 751–52 & n 3 (4th Cir 1996); *Williamson v AG Edwards and Sons*,

An Illustration #3 example is where the protected classes of SOGI coincide with traditional sexual morality as historically taught by the nation's major religions.⁸¹ It could also be where an Orthodox Jewish employer, for religious reasons, will only employ individuals of Jewish ethnicity, or the same employer will only assign men and women to job duties where the sexes do not comingle. The former practice may lead to claims of religion or race discrimination, the latter to a claim of sex discrimination. Yet another example is where a K-12 religious school breaks off its employment of a female teacher who just married, believing that married women of childbearing age should be fully engaged in homemaking.⁸² Anytime where the religious employer defends by invoking a religious precept *that by its very terms* makes a distinction coinciding with the definition of a claimant's protected class, it is an Illustration #3 case. And when following a religious precept and making an employment distinction adverse to a protected class are the same act, the plain language of 702(a) ('This subchapter shall not apply . . .'), of 703(e)(2) ('Notwithstanding any other provision of this title . . .'), and of 204(c) ('section 202 of this Order shall not apply . . .') resolve the apparent conflict in favour of the religious employer.

Assume that a religious contractor has an employee conduct code that, *inter alia*, prohibits intimate sexual conduct outside the bond of marriage. Because the religious employer's rule is enforced equally as to its employees, male or female, gay or straight, there is no sex discrimination nor is there facial discrimination based on sexual orientation. Concerning two hypothetical employees, assume Diana begins to cohabit with her boyfriend and Jake moves in with his male partner. Diana and Jake are in violation of the moral conduct rule and are discharged. If Diana files an administrative complaint with the OFCCP alleging sex discrimination, it will be an Illustration #2 case. The religious employer will deny sex discrimination and defend by averring that the conduct rule was a religious distinction and thus 'legitimate' under section 204(c). If Jake files an administrative complaint alleging sexual orientation discrimination, it will be an Illustration #2 case. The religious employer will deny sexual orientation discrimination and defend by averring that the conduct rule

876 F2d 69, 70 (8th Cir 1989); *Blum v Gulf Oil Corp*, 597 F2d 936, 938 (5th Cir 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981; see *Bonner v City of Prichard*, 661 F2d 1206 (11th Cir 1981)). Furthermore, Title VII says nothing about gender identity. *Etsitty v Utah Transit Authority*, 502 F3d 1215, 1221 (10th Cir 2007) ('This Court agrees with . . . the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.').

While some courts have allowed Title VII sex discrimination claims by transsexual employees on the *Price Waterhouse* theory of 'sex stereotyping', most have held that such stereotyping is a distinct legal category that is not congruent with gender identity. See, eg *Smith v City of Salem*, 378 F3d 566, 574–75 (6th Cir 2004) (noting that an individual's status as a transsexual is irrelevant to the availability of Title VII protection under *Price Waterhouse*); cf *Price Waterhouse v Hopkins*, 490 US 228 (1989) (holding that an accounting firm's failure to admit a female employee to partnership because it considered her to be too 'macho' was sex stereotyping in violation of Title VII's prohibition of sex discrimination).

81 See above nn 9 and 13, and accompanying text.

82 See *Dayton Christian Schools v Ohio Civil Rights Comm'n*, 766 F2d 932, 942–61 (6th Cir 1985) (in teacher's employment claim alleging sex discrimination by religious school that did not renew her contract when she married, held that Religion Clauses of First Amendment protected school from employment claims that ran counter to religious beliefs concerning differing roles of men and women in the workforce), *rev'd on other grounds*, 477 US 619 (1986) (holding that lower federal courts should have abstained from taking jurisdiction over matter pending before state administrative commission).

was a religious distinction and thus 'legitimate' under section 204(c). However, if a third employee, Paul, has moved in with Sam over the weekend because they were just married, enforcement of the conduct rule against Paul is because of Paul's sexual orientation. Paul would not be discharged if he had married a woman. If Paul files a complaint with OFCCP over the difference in treatment,⁸³ the matter will be an Illustration #3 case. Given the interplay between section 202 and section 204(c) as a controlling exemption thereto, the conflict should be resolved in favour of the employer.

From the perspective of a religious employer, far more is now at stake in Illustration #3 than just increased church-state entanglement or an employer's diminished regulatory autonomy. Rather, there is a clash of a non-discrimination law with religiously informed conscience. The employer seeks to build a community of employees that are faithful both to doctrine and moral practice, as well as to form a team that understands and is committed to the vision and success of the religious ministry. Faith-based team building is allowed by cases like *Hall*, *Little*, and *Killinger*. The religious contractor, however, is seemingly directed by the command of section 202 of Executive Order 11246 to forego staffing with those of like-minded faith if it entails SOGI discrimination. The employer would, in the alternative, be forced to forfeit valuable federal contracts. Were it not for the religious exemption in section 204(c), this would be a classic case of conscientious objection.⁸⁴ By its plain language, however, section 204(c) should override and thereby avoid the potential conflict.

The US Department of Labor has issued guidelines to assist in the application of the SOGI provisions of Executive Order 11246. The guidance states that '[i]n general' the Executive Order permits 'religious organizations to employ only members of a particular faith' while prohibiting them from discriminating on other bases including sexual orientation and gender identity.⁸⁵ This is a restatement of the truism that as a *prima facie* matter ('in general') a religious employer cannot discriminate on the basis of any of the protected classes.⁸⁶ However, as we have seen with Illustrations #2 and #3 that is just the beginning of the typical employment lawsuit. The religious employer can be expected to defend itself by putting into evidence that the employment decision adverse to the employee-plaintiff was motivated by the employer's religious belief or practices. Section 204(c) permits it.

In both Title VII and Executive Order 11246, the exemption's plain text is unambiguous and clearly states that the exemption controls over the rule of non-discrimination ('This title shall not apply to an employer', 'Notwithstanding any other provision of this title', and 'Section 202 ... shall not apply'). Recall that

83 Complaints of sexual orientation and gender identity (SOGI) discrimination are to be filed with OFCCP. Office of Federal Contract Compliance Programs, *Handling individual and systemic sexual orientation and gender identity discrimination complaints*, Directive 2015-01 <http://www.dol.gov/ofccp/regs/compliance/directives/DIR_2015-01_EO_13672ComplaintAuthority_JRF_QA_508c.pdf> (16 April 2015).

84 See above n 12.

85 Office of Federal Contract Compliance Programmes, *Frequently Asked Questions EO 13672 Final Rule* <http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q13> accessed 24 August 2015.

86 See above nn 64–65, and accompany text (discussing 'truism' that as a general matter all employers, including religious employers, are subject to non-discrimination as to all protected classes).

Kennedy v St Joseph's Ministries, Inc.,⁸⁷ held that the text of the religious exemption in Title VII is plain and unambiguous, so its terms are to be given their ordinary meaning. As to the broad sweep of the exemptions, *Kennedy* observed that:

the 'subchapter' referred to in [702(a)] includes both § 2000e-2(a)(1), which covers harassment and discriminatory discharge claims, and § 2000e-3(a), which covers retaliation claims. . . . Thus, [plaintiff's] three claims—discharge, harassment, and retaliation—all arise from the 'subchapter' covered by the religious organization exemption, and they all arise from her 'employment' by St. Catherine.⁸⁸

Any doubt as to the construction in *Kennedy* is lifted by the risk-avoidance rule in *NLRB v Catholic Bishop of Chicago*.⁸⁹ *Catholic Bishop* sets forth an analytical process for determining whether a general regulatory statute presents a significant risk that the First Amendment will be infringed if the law is applied to religious organizations.⁹⁰ Where there is such a risk, courts are to assume that Congress did not intend the statute to bind religious organizations. As we have seen, there is no clear, affirmative expression by Congress confining the operation of 702(a) and 703(e)(2) to when the primary claim is one for religious discrimination, thus *Catholic Bishop* instructs government officials to eschew any additional regulation of religious employers.⁹¹ *Catholic Bishop* is a healthy reminder that we are dealing with a matter of high First Amendment sensitivity and government officials are to err on the side of religious freedom.

In an Illustration #3 case, the argument is not that religious contractors are categorically immune from all claims of employment discrimination on the basis of SOGI. They are not.⁹² Discrimination prohibitions based on race, sex, sexual orientation, etc, apply as a *prima facie* matter to every contractor, including a religious

87 657 F3d 189, 191–93 (4th Cir 2011). See above nn 49–50, and accompanying text (discussing *Kennedy*).

88 657 F3d at 193–94. See also *Saeemodarae* (n 49) (by its plain text, a Title VII retaliation claim is subject to 702(a)); *Lown* (n 49) (text is plain and unambiguous).

89 440 US 490 (1979).

90 440 US at 501–07. *Catholic Bishop* requires asking two questions. First, a court must determine whether the proposed application of a general regulatory law to a religious organization 'would give rise to serious constitutional questions'. *ibid* at 501. If so, the court cannot find the statute applicable unless there is an 'affirmative intention of Congress clearly expressed' to apply it. *ibid*.

91 For Title VII cases applying the *Catholic Bishop* canon, see *Curay-Cramer* (n 75) (following the interpretive rule of *Catholic Bishop* and dismissing Title VII claim brought by female teacher against Catholic school alleging sex discrimination stemming from her dismissal for pro-choice advocacy); *Little v Wuerl*, 929 F2d 944, 949–50 (3d Cir 1991) (*Catholic Bishop* followed to support dismissal of teacher alleging religious discrimination because of divorce and remarriage contrary to Catholic doctrine); *Scharon v St Luke's Episcopal Presbyterian Hosp*, 929 F2d 360, 361 (8th Cir 1991) (in case of alleged sex discrimination, *Catholic Bishop* followed to support dismissal of Title VII claim against religious hospital).

These cases were decided after 1990, so it is clear that the rule in *Catholic Bishop* survives the holding in *Employment Div v Smith*, 494 US 872 (1990).

92 Immunity for religious employers would mean that they could discriminate on the basis of race, color, sex, or national origin even if the reason had nothing to do with the organization's religious beliefs or practices. A clause granting religious employers immunity from being sued for SOGI discrimination is not what is argued for in the text. Various religious organizations asked for immunity in EO 13672, but President Obama denied that request. The construction argued for here still requires a religious employer to point to a relevant religious precept in answer to a charge of discrimination on the basis of SOGI. And, of course, to such a precept the employee may in turn argue that the religion defence is pretextual.

contractor. See Illustration #1. Moreover, a religious contractor raising a section 204(c) defence to a SOGI complaint must, if raised by the employee, deal with pretext. See Illustration #2. Pretext is also available to a complaining employee in an Illustration #3 case. So there are plenty of legitimate ways for a religious contractor to be found liable under Executive Order 11246 for employment discrimination on the bases of SOGI. Consequently, it must be admitted that adding SOGI to the executive order did expand the liability of religious contractors. But section 204(c) operates to exempt the religious contractor from liability when the adverse employment decision based on SOGI was motivated by religious belief or practice.

The argument here does not collapse section 204(c) into the ‘ministerial exception’. The ‘ministerial exception’ is derived from the First Amendment’s doctrine of church autonomy and applies without regard to whether the religious employer has at stake an employment practice rooted in a religious belief or precept.⁹³

B. *Pacific Press* and *Fremont Christian* are Distinguishable

Two Title VII cases from the 1980s, both arising in the Ninth Circuit, involved claims of sex discrimination lodged against a religious employer. Both give the appearance of being Illustration #3 cases, but on closer examination they are not. They both have ill-considered obiter dictum that suggest 702(a) is available only when the employee’s primary claim is for religious discrimination.

In *EEOC v Pacific Press Publishing Ass’n*,⁹⁴ a publishing house associated with the Seventh-day Adventist Church was sued by the EEOC. A long-time female employee, Lorna Tobler, had filed an administrative charge with the EEOC alleging that she held the job of ‘editorial secretary’ and was compensated less than similarly situated male employees.⁹⁵ Married men were paid higher wages than single men, who in turn were paid more than women. Pacific Press admitted that its female employees, married or single, received lower wages than men, and that women also received lower allowances for rent and utilities than men doing similar work.⁹⁶ Nowhere did Pacific Press claim that the difference in pay and benefits was out of religious belief or practice. Indeed, the court reasoned that ‘[p]reventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discrimination against women . . . and that its policy is to pay wages without discrimination on the basis of race, religion,

93 In *Hosanna-Tabor* (above n 74), the claims of employment discrimination were not based on religion but on disability and retaliation. The church school claimed no harm to its religious conscience in having to follow disability non-discrimination law. But that made no difference. Application of the ‘ministerial exemption’ does not require a religious justification. *ibid* at 709. In contrast, section 204(c) of the EO, and 702(a) and 703(e)(2) of Title VII, prevail over the general non-discrimination mandate only when there is a religious belief or practice at stake. See, eg *Hall, Little, and Killinger*. These three exemptions are about protecting religious conscience. In contrast, *Hosanna-Tabor* and the ‘ministerial exception’ are about church autonomy. The difference between the two is marked: conscience would permit a religious employer to dismiss a minister because of an employee’s religion but not an employee’s disability, whereas church autonomy would permit a religious employer to dismiss a minister because of the employee’s religion or the employee’s disability.

94 676 F2d 1272 (9th Cir 1982).

95 *ibid* at 1275.

96 *ibid*.

sex, age or national origin.⁹⁷ The Church's admission here is fatal to a defence under 702(a). Without a religious basis for the differential treatment of women and men there can be no 702(a) defence. Indeed, because of the lack of a gender-based religious belief, it is not an Illustration #3 case.

With reference to the legislative history that led to 702(a), the *Pacific Press* court said that religious organizations were subject to the Title VII mandate against sex discrimination.⁹⁸ The court also said that religious organizations were 'not immune from liability' under Title VII, and that 702(a) was no 'blanket exemption'.⁹⁹ All of these statements by the court are true, as is demonstrated by Illustrations #2 and #3. But it does not reach the issue here, to wit: the ability of the employer to raise religion as an affirmative defence. The *Pacific Press* court went on to repeat the truism, citing to both *Southwestern Baptist* and *Mississippi College*.¹⁰⁰ Again, so far as it goes this is all correct. But, as we have seen, the truism is true only as a *prima facie* matter, and *Southwestern Baptist* and *Mississippi College* buttress the limitation on the truism rather than rebut it.¹⁰¹ Importantly, *Pacific Press* never takes up the plain language argument concerning 702(a). The parties apparently neglected to raise the argument and the court missed it as well.

The Ninth Circuit goes on to find that the 'ministerial exception' did not apply to the job position held by Lorna Tobler, which is surely correct as to Tobler's position of 'editorial secretary'.¹⁰² However, the 'ministerial exception' has nothing to do with the application of 702(a).

More relevant—but still never fully engaging the issue here—is *EEOC v Fremont Christian School*.¹⁰³ *Fremont Christian* involved a matter of sex discrimination in the compensation of women resulting in a claim by the EEOC. The Fremont Christian Church operated a preschool, primary, and secondary school. The school provided health insurance only to 'head of household', which it defined as single persons and married men.¹⁰⁴ The head-of-household distinction was said to be based on an application of a biblical verse on the roles of husband and wife. An administrative charge of sex discrimination was filed with the EEOC by Ruth P Frost, a married female employee. The Church argued that 702(a) applied 'beyond hiring practices and encompasses all other employment practices (eg the health insurance compensation program)'.¹⁰⁵ The initial response of the Ninth Circuit panel was to conflate 702(a) with the prohibition on 'state involvement in ecclesiastical decisions of employment', citing *Rayburn v General Conference of Seventh-Day Adventists*.¹⁰⁶ *Rayburn* is a 'ministerial exception' case, but that defense and 702(a) are totally different. The Ninth

97 *ibid* at 1279.

98 *ibid* at 1276–77.

99 *ibid* at 1276, 1277.

100 *ibid* at 1277.

101 *Mississippi College* is discussed above nn 43–45, and accompanying text. *Southwestern Baptist* is discussed above n 78.

102 676 F2d at 1277–78. See *Hosanna-Tabor* (above n 74) 708–09 (discussing judicial approach for determining who is a 'minister').

103 781 F2d 1362 (9th Cir 1986).

104 *ibid* at 1364.

105 *ibid* at 1365–66.

106 772 F2d 1164, 1166 (4th Cir 1985), *cert denied*, 478 US 1020 (1986).

Circuit panel next quoted with approval a passage in *Mississippi College*,¹⁰⁷ to the effect that 702(a) causes the EEOC to lose jurisdiction.¹⁰⁸ But then the Ninth Circuit wrongly limited *Mississippi College* to hiring alone, quoting *Pacific Press*. But *Pacific Press* was not about hiring; it was about a gender differential in compensation. To further confound things, the *Fremont Christian* panel then quoted from legislative history to the effect that 702(a) was limited to hiring alone.¹⁰⁹ For this erroneous proposition,¹¹⁰ the panel cited to the 1964 version of 702(a), which version while not limited to hiring was limited to ‘religious’ jobs. The Ninth Circuit panel next acknowledged that the 1972 amendment extended 702(a) to all jobs, secular and religious.¹¹¹ But then the panel proceeded to elide this expanded 702(a) by quoting from the 1972 legislative history a passage reciting the truism.¹¹² As shown above, however, the truism is indeed true, but only as a *prima facie* matter. See Illustration #1. As to cases like Illustrations #2 and #3, the truism is no longer true if a religious employer can prove as an affirmative defence that it was following a religious precept.

If the foregoing is not reason enough to discount *Fremont Christian*, the Ninth Circuit panel went on to affirm a crucial finding by the district court that the religion defence was pretextual:

... We uphold the district court’s finding on issue (f) that Mrs. Frost’s demonstration of the employer’s justification as a pretext for discrimination, was so conclusive that as a matter of law *Fremont Christian* could not justify or rebut it.¹¹³

The ‘issue (f)’ referred to in the quote was the question of pretext.¹¹⁴ So both the district court and the Ninth Circuit panel found that there was no credible claim by *Fremont Christian School* that it was following a religious precept when discriminating on the basis of sex. That conclusion explodes any 702(a) defence. Once again, a successful 702(a) defence must entail a religious belief or practice. And, as with *Pacific Press*, without a credible gender-based religious belief *Fremont Christian* is not an Illustration #3 case.

Neither *Pacific Press* nor *Fremont Christian* squarely focuses on the 702(a) defence discussed here. Neither case had before it the plain-language argument of 702(a) (‘This title shall not apply . . .’). Neither case had a credible religious precept or tenet at odds with sex as a protected class, and thus was never a true Illustration #3 case. Neither case seemed to appreciate that the 702(a) defence is wholly separate and distinct from a ‘ministerial exception’. Both cases simply ignored the earlier case of *Mississippi College* which held that 702(a) was a defence to claims of sex and race

107 *Mississippi College*, 626 F2d at 485.

108 *Fremont Christian*, 781 F2d at 1366.

109 *ibid*.

110 Sections 702(a) and 703(e)(2) are not limited to instances of hiring and discharge, but apply to all the terms and conditions of employment, such as pay and promotion. *Kennedy v St Joseph’s Ministries, Inc*, 657 F3d 189, 192–94 (4th Cir 2011); *Hopkins v Women’s Div*, General Bd of Global Ministries, 238 F Supp 2d 174, 179–80 (DDC 2002). The court of appeals in *Kennedy* rejected a contrary rule in the *EEOC Compliance Manual* that attempted to limit 702(a) to hiring and discharge. 657 F3d at 194 n 9.

111 *Fremont Christian*, 781 F2d at 1366.

112 *ibid*.

113 *ibid* at 1368 n 1.

114 *ibid* at 1367 n 1.

discrimination. Both cases end with a discussion of the Free Exercise and Establishment Clauses, but such rulings are of little interest here because when 702(a) applies a court has no need to reach the constitutional questions.¹¹⁵

5. CONCLUSION

The interpretative question here is not a policy choice or judgment call within the discretion of an administrative agency. It is about whether the USA is a nation under the rule of law. To diverge from the plain text would be lawless. In implementing Executive Order 11246, as amended by the addition of sexual orientation and gender identity, the plain text of section 204(c) states that ‘Section 202 . . . shall not apply’ when 204(c) does apply. By those words, section 204(c) is a controlling defence when a religious employer’s religious belief or practices concerning human sexuality come into conflict with the protected classes recently added to section 202.

Sections 702(a) and 703(e)(2) of Title VII are the model for the scope and meaning of section 204(c). The Title VII analysis in this article has been that the plain and unambiguous text of 702(a) and 703(e)(2), along with the broad definition of ‘religion’ that goes to religion in all its aspects, ought to settle the matter. Nonetheless, the case law is quite helpful (see *Hall*; *Little*; *Killinger*; *Maguire*) and fully supportive in allowing a religious defence to a primary claim no matter the employee’s protected class (see *Mississippi College*; *Maguire*; *Cline*; *Boyd*; *Ganzy*; *Dolter*), even as to claims for retaliation and harassment (see *Kennedy*; *Saeemodarae*; *Lown*). Moreover, the Supreme Court’s interpretive canon in *Catholic Bishop*¹¹⁶ serves as a reminder to avoid provoking constitutional concern for religious conscience, and erases any doubt that 702(a) and 703(e)(2)—and, by parallel, section 204(c)—are pre-empting defences.¹¹⁷

115 The free exercise analysis in *Pacific Press* and *Fremont Christian* is not binding for three additional reasons. First, the standard of review in these two Ninth Circuit cases was less rigorous than we now know is required by the Religious Freedom Restoration Act. See *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2779–84 (2014). Second, the interest balancing required by strict scrutiny is tailored as to each particular religious claimant, that is, the government must demonstrate that application of the religious burden to the specific claimant before the court is in furtherance of a compelling interest of the government. *ibid* at 2779. Third, there are federal circuit courts that have decided the same constitutional questions the other way, and the analysis has been more thorough and careful. See, eg *Dayton Christian Schools v Ohio Civil Rights Comm’n*, 766 F2d 932, 942–61 (6th Cir 1985) (in employment claim by teacher alleging sex discrimination and retaliation by religious school, held that Religion Clauses of First Amendment protected school from employment claims that ran counter to religious beliefs concerning differing roles of men and women in the workforce), *rev’d on other grounds*, 477 US 619 (1986) (holding that lower federal courts should have abstained from taking jurisdiction over matter pending before state administrative commission). Accordingly, the outcome in the instances weighed by *Pacific Press* and *Fremont Christian* are not controlling in other types of strict-scrutiny cases involving differently situated religious claimants and SOGI discrimination.

116 See above nn 89–91, and accompanying text (discussing *Catholic Bishop*).

117 The 204(c) arguments in this article, while salient, are not meant to be exhaustive. Religious contractors may have additional defences, including under the Administrative Procedure Act, the Religious Freedom Restoration Act, and the First Amendment. See above n 20. For an important instance where the federal government has acknowledged that RFRA overrides a congressional statutory prohibition on employment discrimination with respect to a religious grantee, see Office of Legal Counsel, Opinion of 31 June 2007 <http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf> accessed 24 August 2015.

There are lessons here for the larger international community. The balance struck between the shared goals of safeguarding religious liberty and preventing SOGI discrimination at the workplace is manifestly even-handed. Most all employment discrimination on the bases of sexual orientation and gender identity is prohibited by Executive Order 11246, including some discrimination by religious employers. On the other hand, where the employer can prove both that it is a religious organization and that it is acting on religious beliefs or practices, then the exemption in section 204(c) obtains. Lastly, where there are genuine issues of fact as to the employer's true motivations, the ultimate resolution is placed in the hands of a jury or other finder of fact with the parties bound to the verdict. Both pluralism and equality are well served.