GENDER JUSTICE

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To Whom It May Concern:

We appreciate this opportunity to provide comment in response to the EEOC's Proposed Updated Compliance Manual on Religious Discrimination.[1] Gender Justice is a 501(c)(3) legal and policy advocacy organization based in St. Paul, Minnesota. We work to address the causes and consequences of gender inequality through strategic and impact litigation, policy advocacy, and public education. Our mission is broader than women's rights: we fight any discrimination based on sex, gender, sexual orientation, or gender identity. We work to address discrimination in the workplace, schools, health care, and in public accommodations. We believe in the critical importance of eliminating discrimination in employment so that people of any gender can support themselves and their families with dignity.[2]

Gender Justice submits this comment on behalf of itself and a number of organizations in Minnesota dedicated to promoting civil rights in employment, education, healthcare, and other areas. Jewish Community Action brings together Jewish people from diverse traditions and perspectives to promote understanding and take action on racial and economic justice issues in Minnesota. Outfront Minnesota's mission is to create a state where LGBTQ people are free to be who they are, love who they love and live without fear of violence, harassment, or discrimination. JustUs Health works for equitable health care access and outcomes for people who experience injustice at the intersection of health status and identity.

In its current form, the proposed Manual undermines the goal of eliminating discrimination by unnecessarily suggesting that Title VII's protections against sex discrimination are especially vulnerable to challenges under the Religious Freedom Restoration Act (RFRA). We strongly urge the EEOC to reject this proposed Manual and take care to ensure that any future guidance accurately reflects the state of the law. The EEOC must treat sex discrimination claims equally to other Title VII claims in the proposed Manual, and not rely on dicta found in *Bostock v. Clayton County*[3] concerning RFRA and other non-binding authority. This recommendation is described in more detail below.

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1 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, Proposed Updated Compliance Manual on Religious Discrimination (Nov. 16, 2020), https://beta.regulations.gov/document/EEOC-2020-0007-0001.

2 We would like to thank attorney Kate Bjorklund for her *pro bono* work on the preparation of this comment.

3 __U.S.__, 140 S.Ct. 1731 (2020).

The proposed Manual begins with an overview of Title VII, noting that it "protects workers from discrimination based on their race, color, religion, sex, national origin, or protected activity."[4] There is a footnote on the term "sex" describing the Supreme Court's recent holding in *Bostock v. Clayton County*—that under Title VII, an employer engages in sex discrimination by discriminating against LGBTQ employees.[5] The proposed Manual immediately follows with the observation that in *Bostock*, "several issues related to religious liberty were not being addressed."[6] The context of this footnote—particularly its placement in the introduction, its unprompted nature, and the absence of any similar qualification for any other protected category—seems to suggest that Title VII protections against sex discrimination are weaker than protections against other forms of discrimination. This is simply not the case. Title VII does not protect a transgender employee from sex discrimination any less than it protects a Black employee from race discrimination.

In footnote 121, the proposed Manual cites the same statement from *Bostock* again, discussing the interaction between Title VII, RFRA, and the First Amendment. This entire section is a mess of imprecise guidance about what Title VII defendants might argue, rather than clarity about the actual state of the law. In footnote 116, the proposed Manual quotes dicta from *Bostock* referring to RFRA as a "super statute" with little context or explanation about this term.[7] This declaration is irrelevant because "[d]ictum settles nothing, even in the court that utters it."[8] Further, the term "super statute" is not widely used or well-defined. We found one law review article defining a "super statute" as a statute providing a new legal framework that ultimately looms so large in discourse and culture that it exceeds the reach of a typical statute.[9] One of the authors' primary examples of such a statute was Title VII itself.[10] For the EEOC to echo dicta unnecessarily that RFRA "might supersede Title VII's commands in appropriate cases" goes wildly beyond settled case law. There is no reason to assume, particularly in an EEOC compliance manual, that RFRA must be the stronger of two potential super statutes in this unlitigated issue. The EEOC is the agency tasked with enforcing Title VII. Yet it utterly fails to forcefully advocate or even identify the state's strong interest in protecting employees from discrimination. The existence and meaning of "super statutes," RFRA's status as a super statute, and the relative weight to give RFRA or Title VII in this hypothetical battle are not resolved, and citation to this dicta is excessive and counterproductive to the proposed Manual's goal of providing clear guidance on Title VII.

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4 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 2.

5 Id. at n.2

6 Id.

7 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 32 n.116.

8 Jama v. Immigration and Customs Enf't, 543 U.S. 335, 251 n.12 (2005).

9 *See* William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L. J. 1215, 1216 (2001).

10 *See* id. at 1237.

These speculations about the interplay between RFRA and Title VII protections against sex discrimination also present practical issues. Under RFRA:

> If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.[11]

But the proposed Manual, while acknowledging that RFRA applies only to federal government action, invites private parties to raise novel RFRA defenses in litigation with other private parties.[12] Allowing an employer to defend itself against a private party's Title VII sex discrimination claim by stating that the law burdens its free exercise of religion places an unwarranted and illogical burden on employees. The charging party or plaintiff, who may or may not have access to private counsel to assist them, would be tasked with defending the government's interest in preventing discrimination. The balancing test under RFRA must be left for a judicial proceeding with the federal government as a party to defend its interest in the challenged law.

The proposed Manual also stretches far past the bounds of precedent in discussing the religious organization exception that permits such an organization to prefer members of its own religion.[13] The proposed Manual states that "[w]hether a for-profit corporation can constitute a religious corporation under Title VII is an open question."[14] But this is extremely misleading standing alone and suggests that the exception is far broader than any court has found. Indeed the citation in the proposed Manual for this proposition is simply a comparison with *Burwell v. Hobby Lobby Stores, Inc.*, which is about RFRA rather than this very narrow Title VII exception. And while courts use a multi-factor test with no dispositive factor to identify religious organizations, no court that we are aware of has granted the exception to a for-profit corporation. Instead, circuit courts have repeatedly held that "[o]f course the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity."[15]

It is also important to emphasize that the religious organization exception is not an exception to Title VII broadly. It does not permit religious organizations to discriminate based on sex, race, or other protected categories *even if these forms of discrimination are couched in terms of church doctrine*. For example, a religious organization was unable evade the

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11 Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 694–95 (2014) (quoting 42 U.S.C. § 200bb–1(b))

12 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 31 n.115.

13 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 19-25.

14 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 20.

15 LeBoon v. Lancaster Jewish Cmty. Ctr., 503 F.3d 217, 229 (3d Cir. 2007) (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)).

anti-discrimination provisions of Title VII when it sought to fire a plaintiff for participating in litigation against the church—even though the church embraced a doctrine that prohibited lawsuits against it.[16] The proposed Manual, meanwhile, suggests the opposite. It overstates and relies on *Curay-Cramer v. Ursuline Academy. of Wilmington, Delaware., Inc.*, a 3rd Circuit case with a unique fact pattern that was decided on First Amendment grounds, rather than on this Title VII exception, as its only support and for the only Example presented in this section.[17]

Finally, the proposed Manual cites a letter from Roger Severino, the current Director of the Office of Civil Rights (OCR) for the Department of Health and Human Services (HHS) in footnote 235, in which OCR found that a hospital violated the Church Amendments.[18] The Manual cites the letter to support Example 35, which describes federal laws, including the Church Amendments,[19] that protect doctors and nurses with religious objections to assisting with abortions if they work at federally funded hospitals. Setting aside the substance of this specific example, we contest the proposed Manual's unnecessary citation to this letter, which lacks precedential value. One court has found that HHS's OCR, under Mr. Severino's leadership, attempted to promulgate rules expanding the Church Amendments and similar statutes beyond what Congress intended.[20] The court found that, if enforceable, these expansive definitions "would upset the balance drawn by Congress between protecting conscientious objectors versus facilitating the uninterrupted provision of health care to Americans."[21] We therefore urge the EEOC to rely only on the controlling federal laws, and not Mr. Severino's interpretation of these laws.

Gender Justice finds that the proposed Manual has strained to undermine Title VII protections against sex discrimination, and to inappropriately expand RFRA beyond its statutory purpose and any controlling judicial interpretations. We urge the EEOC to reject the proposed Manual in its entirety and revisit any updates to this Manual with the goal of clarifying the actual state of the law.

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16 E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982) (abrogated on other grounds as recognized by American Friends Serv. Comm. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991)).

17 U.S. Equal Emp't Opportunity Comm'n, *supra* note 1, at 22-25 (citing Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130 (3d Cir. 2006)).

18 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1, at 75, n.235 (citing Letter from Roger T. Severino, Dir., Off. of Civ. Rts., Dep't of Health & Hum. Svcs. & Luis E. Perez, Deputy Dir., Off. of Civ. Rts., Dep't of Health & Hum. Svcs. (Aug. 28, 2019), https://www.hhs.gov/sites/default/files/uvmmc-nov- letter_508.pdf.).

19 42 U.S.C. § 300a-7.

20 City and County. of San Francisco v. Azar, 411 F.Supp.3d 1001, 1024 (N.D. Ca. 2019).

21 Id. at 1011.

We are thankful for the opportunity to comment on this important civil rights law.

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