December 17, 2020

Bernadette B. Wilson, Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: RIN 3046-ZA01, Sikh Coalition Comments in Response to *Proposed Updated Compliance Manual on Religious Discrimination*

Dear Colleagues:

As the largest community-based Sikh civil rights organization in the United States, the Sikh Coalition respectfully submits the following comments to the U.S. Equal Employment Opportunity Commission (EEOC) in response to the *Proposed Updated Compliance Manual on Religious Discrimination* (Draft Manual).

The Sikh Coalition was founded nearly two decades ago to address violence and discrimination against Sikh Americans in the post-9/11 environment. Since then, we have led several high-profile efforts to combat and prevent employment discrimination against Sikh Americans.[1] Observant Sikhs are often targeted for employment discrimination because of their actual or perceived race, ethnicity, national origin, and religion. Sikh religious practices include wearing a dastaar (turban) as a reminder to lead an ethical life, maintaining kesh (uncut hair) out of respect for God's will, carrying a kanga (small wooden comb) as a reminder to maintain physical and spiritual cleanliness, wearing kachera (long cotton undershorts) as a reminder of the importance of marital fidelity, wearing a kara (steel bracelet) as a reminder to act honestly, and carrying a kirpan (article of faith resembling a knife) as a reminder to defend the rights of the oppressed. These articles of faith have deep religious significance for observant Sikhs but are poorly understood by most Americans, including employers.

Sikhs are one of the most vulnerable minority groups in America. Federal hate crime statistics suggest that Sikhs may be hundreds of times more likely than other Americans to experience discrimination and bias.[2] Studies also show that Sikh Americans experience disproportionately

[1] *See, e.g.,* Matt Flegenheimer, *M.T.A. Agrees to Allow Its Workers to Wear Religious Headgear*, New York Times (May 30, 2012), *available at* https://www.nytimes.com/2012/05/31/nyregion/mta-agrees-that-workers-may-wear-religious-headgear.html; Dan Weikel, *Sikh truck drivers reach accord in religious discrimination case involving a major shipping company*, Los Angeles Times (Nov. 15, 2016), *available at* https://www.latimes.com/local/lanow/la-me-ln-sikh-truckers-20161115-story.html.

[2] *See* U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *2019 Hate Crime Statistics* (Nov. 16, 2020), *available at* https://ucr.fbi.gov/hate-crime/2019.

high rates of workplace discrimination.[3] As an organization, we receive a high volume of intakes from Sikh Americans alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII) and other federal, state, and local civil rights laws.

First and foremost, given the complexity of the subject matter and little time to adequately address all concerns, we strongly urge that implementation of the Draft Manual be suspended, or in the alternative the deadline for submitting public comments be extended by 180 days. This suspension and/or extension is justified based on the complexity of the subject matter in the Draft Manual, the passage of 12 years since the last revision, that the Draft Manual is being circulated for public comment in a compressed timetable during a global pandemic in the midst of the holidays, and the fact that the Draft Manual is being circulated during a presidential transition in which there are sharp differences of opinion between the outgoing and incoming administrations on the rights of women, LGBTQ communities, and people with disabilities vis-à-vis religion.

Our request for its suspension is rooted not only in practicality but also in disappointment. Despite nearly two decades of collaboration between the Sikh Coalition and EEOC, including dialogue about the 2008 manual and participation in community forums to raise public awareness about legal remedies for post-9/11 discrimination,[4] we were not consulted prior to the publication of this Draft Manual. It must be noted that over the course of several years leading up to the publication of the 2008 manual, our organization was involved in a collaborative dialogue with the EEOC to update the manual based on the types of discrimination complaints we were receiving from the Sikh community. Our proactive relationship with the EEOC resulted in the publication of more culturally competent guidance that better addressed discrimination challenges Sikhs were facing at the time. We have no doubt that several of the deficiencies we have identified in the Draft Manual could have been avoided if the EEOC had not excluded key stakeholders and subject matter experts, such as the Sikh Coalition, from the drafting process.

In the event our request for the suspension of the Draft Manual, or an extension of the comments period, is denied, we submit the below comments. These comments are organized into broad topic categories for ease of reference only, not in order of importance. Though our comments focus on Sikhs, the underlying issues affect a broader group of religious minorities, and we request adoption of all of our recommendations. We also request the opportunity to meet with

[3] In 2006, the Sikh Coalition surveyed over 1,000 Sikhs in New York City; nine percent of respondents reported that they had been refused employment or denied a job promotion because of their Sikh identity. In 2009, the Sikh Coalition surveyed over 1,300 Sikhs in the California Bay Area; 12 percent of respondents believed that they had been refused employment because of their religious identity. *See* Sikh Coalition, *Making Our Voices Heard: A Civil Rights Agenda for New York City's Sikhs* 5, 12 (2008), *available at* https://www.sikhcoalition.org/wp-content/uploads/2016/11/Making-Our-Voices-Heard.pdf and *Sikh Coalition Bay Area Civil Rights Report 2010* 5, 8, 21 (2010), *available at* http://www.sikhcoalition.org/documents/pdf/Bay_Area_Civil_Rights_Agenda.pdf.

[4] *See, e.g.,* Press Release, U.S. Equal Employment Opportunity Commission, *EEOC CONFERS WITH MINORITY GROUPS ON COMBATING SEPTEMBER 11 BACKLASH DISCRIMINATION* (Dec. 12, 2001), *available at* https://www.eeoc.gov/newsroom/eeoc-confers-minority-groups-combating-september-11-backlash-discrimination.

EEOC Commissioners and key EEOC staff to discuss implementation of our recommendations prior to the final publication of any proposed guidance.

A. COMMENTS ON SIKHS AND SIKH RELIGIOUS PRACTICES

Revision 1 – Add Sikhism to list of traditional, organized religions

Page 7 of the Draft Manual should include Sikhism in the list of organized religions that includes Christianity, Judaism, Islam, Hinduism, and Buddhism. With an estimated global following of more than 25 million, Sikhism is the fifth largest world religion.[5] In our experience, the omission of Sikhism from lists of major world religions in government publications, history textbooks, and the media perpetuates ignorance that underlies much of the violence and discrimination endured by Sikh Americans in the post-9/11 environment, including in the workplace.

Despite our best efforts to educate Americans about Sikhs, the level of ignorance we encounter is disappointing. For example, a 2013 study by Stanford University and the Sikh American Legal Defense and Education Fund found that 70 percent of survey respondents could not correctly identify a Sikh.[6] Similarly, a 2015 survey by the National Sikh Campaign and Hart Research found that the number of Americans who could not identify a Sikh was at least 60 percent.[7] Bridging this knowledge gap will require acknowledgment by government agencies, including the EEOC, that Sikhism is a major world religion and that Sikhs are an integral part of America's fabric.

Revision 2 -- Change definition of kirpan for accuracy and consistency

On page 33 of the Draft Manual, footnote 120 defines kirpan as a "ceremonial sword." Later, on page 83, the Draft Manual defines kirpan as a "miniature sword." A more accurate definition for a kirpan is a "religious article of faith resembling a knife."[8] The EEOC should use this definition whenever it mentions the kirpan in the guidance.

Revision 3 – Rewrite Example 40 on the kirpan, a Sikh article of faith

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[5] Religion News Foundation, *Sikhism: A Reporter's Guide* 2 (2017), *available at* https://www.sikhcoalition.org/wp-content/uploads/2018/01/Sikhism-Reporters-Guide-Electronic.pdf.

[6] Stanford University Peace Innovation Lab and Sikh American Legal Defense and Education Fund, *Turban Myths: The Opportunities and Challenges for Reframing Sikh American Identity in Post-9/11 America* 17 (2013), *available at* https://issuu.com/saldefmedia/docs/turbanmyths_121113.

[7] Hart Research Associates and National Sikh Campaign, *Sikhism in the United States: What Americans Know and Need to Know* (2015), *available at* https://d3n8a8pro7vhmx.cloudfront.net/sikhcampaign/pages/105/attachments/original/1467171428/sikh-report-final.pdf?1467171428.

[8] Religion News Foundation, *Sikhism: A Reporter's Guide* 14 (2017), *available at* https://www.sikhcoalition.org/wp-content/uploads/2018/01/Sikhism-Reporters-Guide-Electronic.pdf; See also *Sikhism and The Sikh Kirpan Fact Sheet* (Aug. 2018), *available at* https://www.sikhcoalition.org/wp-content/uploads/2016/12/kirpan-factsheet-aug2018.pdf.

On page 83 of the Draft Manual, Example 40 is a hypothetical involving a Sikh who wears a kirpan. Several edits are required:

- Instead of describing Harvinder as a "baptized" Sikh, it would be more accurate to describe her as an "observant" Sikh. Baptism is a Christian concept, and Sikhs are not Christians.

- Instead of using words like "symbol" or "artifact" to describe the Sikh articles of faith, including the kirpan, we insist on using the phrase "article of faith" to emphasize that they cannot be arbitrarily changed in form or size or reduced to pictorial representations, as suggested by non-Sikhs who have sought to limit Sikh religious rights in many of our cases.

- Instead of suggesting arbitrary limits on Sikh religious practice, which could lead employers and EEOC investigators who know little or nothing about the Sikh faith to take a narrow-minded approach to kirpan accommodations, we request deletion of limiting words and phrases – including "small (4-inch), dull" and "strapped and hidden underneath her clothing" and "no sharper than butter knives" – and inclusion of language that more accurately describes the modern office environment. Whether a kirpan can be reasonably accommodated without undue hardship in a particular case is a highly fact-specific inquiry, particularly in modern office environments where scissors, box cutters, cake knives, paper cutters, tools of trade and other similarly secular objects are commonly found.

Incorporating the feedback above, we recommend that Example 40 be rewritten as follows:

> Harvinder, an observant Sikh who works in a hospital, wears a kirpan (article of faith resembling a small knife) as a reminder of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a coworker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with her religious tenets and gave him literature explaining that the kirpan is an article of faith, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than scissors, box cutters, cake knives, paper cutters, and other secular objects in the office. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work. Absent evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.

Revision 4 – Delete Footnote 264 to prevent confusion about the kirpan

On page 83 of the Draft Manual, footnote 264 references 18 U.S.C. § 930, a statute which governs possession of firearms and other dangerous weapons in federal facilities. Inclusion of this footnote misleadingly implies that kirpans are dangerous weapons, even though Example 40

emphasizes that kirpans are articles of faith that are often consistent in size and shape with other secular objects that are commonly permitted in modern office environments, including federal facilities.

As we noted earlier, whether a kirpan can be reasonably accommodated without undue hardship in a particular case is an individual fact-based inquiry, particularly in modern office environments where scissors, box cutters, cake knives, paper cutters, tools of trade and other similarly secular objects are commonly found. Indeed, it must be noted that the U.S. Department of Homeland Security specifically allows for the accommodation of kirpan-wearing Sikhs in the roughly 9,000 federal facilities it secures consistent with 18 U.S.C. § 930, regardless of the length or sharpness of a kirpan.[9] This underscores that kirpans are not subject to the same legal treatment as weapons consistent with the protections of the First Amendment and the Religious Freedom Restoration Act (RFRA). To prevent bias and confusion among employers and EEOC investigators who are not familiar with Sikh religious practices, footnote 264 should be deleted.

Revision 5 – Rewrite Example 9B to prevent confusion about Sikh religious headcoverings

On page 36 of the Draft Manual, Example 9B is a hypothetical about religious discrimination in hiring. While the legal principle expressed in the example is helpful, we request replacement of the words "chunni (religious headscarf)" with "dastaar (turban)" to better reflect common Sikh religious practices. While Sikh American women often wear chunnis to cover their heads at gurdwaras (Sikh houses of worship), and chunnis may be worn as religious headcoverings, it is more common for Sikh women and men to wear dastaars in American workplaces. Example 9B should be revised to reflect this practical reality.

Revision 6 – Rewrite Example 9C on workplace segregation

On page 37 of the Draft Manual, Example 9C is a hypothetical about workplace segregation based on religion. In 2011, the Sikh Coalition and 29 organizational allies wrote a letter to the EEOC[10] to express concern about this very issue and met with the late Chairwoman Jacqueline Berrien to discuss ways to mitigate our concerns.

- Given the importance of this issue, we request that Example 9C be relabeled as a separate standalone example under the heading "Segregation."

- We request that the hypothetical be revised to include facts involving religious headcoverings, as this is often a basis for workplace segregation.

[9] U.S. Department of Homeland Security, Federal Protective Service, *Prohibited Items Program, Directive No. 15.9.3.1 Rev. 1* (May 16, 2013), *available at* https://www.dhs.gov/sites/default/files/publications/nppd-fps-prohibited-items-program-directive-15.9.3.1-rev-1_0.pdf.

[10] *See Group Letter to the EEOC on Workplace Segregation* (Mar. 11, 2011), *available at* http://www.sikhcoalition.org/documents/pdf/11-0325_Group%20Letter%20to%20EEOC%20on%20Workplace%20Segregation%20%20(FINAL).pdf.

- We request that the EEOC make explicitly clear that segregating employees with sincerely held religious beliefs in the name of corporate image is *ipso facto* a Title VII violation, even in the absence of economic harm to an employee, out of respect for the principle that separate but equal is inherently unequal. In our experience, corporate image policies are often based on one-size-fits-all stereotypes about what Americans should look like, and employers should not be allowed to rely on corporate image as the basis for segregating employees. To be clear, segregation is inherently discriminatory and is never a reasonable accommodation.[11]

Incorporating the feedback above, we request that Example 9C be rewritten as follows:

> Example XX
> Segregation
>
> A company's policy bars any employees from working in customer contact positions if they have a beard or headcovering, and exceptions are not made when religious accommodations are requested. As a result, individuals who maintain beards or headcoverings pursuant to a religious belief are required to work out of public view, at the same rate of pay as customer facing employees. This violates Title VII because segregation is not a reasonable accommodation. This may also constitute limiting or classifying based on religion absent undue hardship, and may have a disparate impact based on religion if it is not job-related and consistent with business necessity.

Revision 7 – Rewrite Example 47 to reflect Sikhs' ability to wear protective equipment

On page 90 of the Draft Manual, Example 47 is a hypothetical relating to facial hair and respirators.

- We request that the hypothetical be revised to reflect the fact that a large number of Sikhs work in the American healthcare industry, that there is no Sikh religious prohibition against wearing personal protective equipment (PPE), and that Sikhs are able to do so safely without shaving or trimming their beards. These revisions are critical and relevant. As of the date of this comment, and since the beginning of the COVID-19 pandemic, we have received over 20 intakes from Sikh first responders, healthcare professionals and students who have requested legal assistance concerning PPE specifically pertaining to facial hair and reasonable religious accommodations under Title VII and similar laws. In fact, the U.S.

[11] *Victory! Disney Desegregates Sikh Employee* (July 8, 2015), *available at* https://www.sikhcoalition.org/blog/2015/victory-disney-desegregates-sikh-employee/; *see [Impact AB1964 – 1-4] Meet Deputy Sheriff Khalsa* (Oct. 8, 2014), *available at* https://www.sikhcoalition.org/blog/2014/impact-of-ab1964-1-of-4-meet-deputy-sheriff-khalsa/; *see also* California Workplace Religious Freedom Act (AB1964) (Sept. 12, 2012), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1964.

Department of Health & Human Services Office of Civil Rights recently resolved a PPE case we brought to their attention.[12]

- We request deletion of any language suggesting that beards are relevant to hygiene. Not only is this assertion factually inaccurate, but cleanliness is an integral aspect of Sikh religious practice and it is offensive and demeaning to suggest that people who maintain facial hair for religious reasons are unclean.

Incorporating the feedback above, we request that Example 47 be rewritten as follows:

> Prakash, a nurse who works for a hospital, does not shave his facial hair because of his Sikh religious observance. The hospital requires staff treating COVID-19 patients to shave their facial hair, pass a fit test and wear respirator such as the N95. When Prakash is asked to assist with the treatment of COVID-19 patients in light of staffing shortages, he requests a religious accommodation to the shaving requirement. His employer offers to allow Prakash to tie his beard into a knot tucked underneath his chin with a cloth over it and wear a respirator over that instead of shaving his beard. Prakash agrees to do so. The hospital has complied with Title VII because it offered a reasonable accommodation that eliminates Prakash's religious conflict with the shaving rule.*
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> *If shaving is required for healthcare professionals to comply with OSHA regulations or medical center policies, reasonable alternatives should be allowed, such as workable solutions involving additional layers of cloth or masks, Powered Air Purifying Respirators (PAPRs), or Controlled Air Purifying Respirator (CAPRs).

Revision 8 – Include new Example relating to hair and drug testing

As noted in a 2016 EEOC press release, the agency mediated a Sikh Coalition case brought on behalf of Sikh truck drivers who were terminated by their employer because they refused to violate their religion by cutting their hair for pre-employment drug testing.[13] Sikhs are heavily represented in the American trucking industry,[14] which is not only subject to federally regulated

[12] *See* Press Release, U.S. Department of Health & Human Services, *OCR Resolves Complaint After Hospital Accommodates Medical Student's Religious Needs During Covid-19* (July 21, 2020), *available at* https://www.hhs.gov/about/news/2020/07/21/ocr-resolves-complaint-after-hospital-accommodates-medical-students-religious-needs-during-covid-19.html.

[13] *See* Press Release, U.S. Equal Employment Opportunity Commission, *J.B. Hunt Transport Settles EEOC Religious Discrimination Charge for $260,000* (Nov. 15, 2016), *available at* https://www.eeoc.gov/newsroom/jb-hunt-transport-settles-eeoc-religious-discrimination-charge-260000.

[14] *See, e.g.* Jaweed Kaleem, *Sikh drivers are transforming U.S. trucking. Take a ride along the Punjabi American highway,* LOS ANGELES TIMES (June 27, 2019), *available at* https://www.latimes.com/nation/la-na-col1-sikh-truckers-20190627-htmlstory.html.

urine drug testing but will soon be subject to federally regulated hair drug testing as well.[15] The federal regulations on workplace drug testing may also be adopted by other federal agencies to mandate that employees and contractors comply with drug hair testing once the Department of Health and Human Services implements its proposed rule.[16] Consistent with the increase in hair testing across industries, the Sikh Coalition has received requests for legal assistance concerning hair-related drug testing by Sikh employees in the medical, pharmaceutical, and tech sectors, among others. It would be in the public interest to educate employers and EEOC investigators about the need to provide alternative drug testing methods for observant Sikhs and others (e.g., Rastafarians, Apostolic Pentecostals, Native Americans, Nordic Hedons, Jews, and Amish) whose religious practice may require them to maintain unshorn hair. Accordingly, we request that the EEOC add the following example to the Draft Manual.

Example XX
Hair Samples for Drug Testing

Balbir applies for a job at ABC Trucking Corp. to work as a truck driver. As an observant Sikh, Balbir is religiously required to maintain kesh (uncut hair). As part of the hiring process, ABC Trucking Corp. requires job candidates to provide a one-inch strand of hair from the base of their head to a medical facility that contracts with ABC Trucking Corp., for both pre-employment and random drug testing. Balbir tells ABC Trucking Corp. that he is religiously required to maintain uncut hair and asks if he can provide urine or saliva samples for drug testing instead of removing his hair. ABC Trucking Corp. rejects his request and refuses to hire Balbir. ABC Trucking Corp. has violated Title VII because it failed to make a reasonable religious accommodation without showing undue hardship.

Revision 9 – Delete references to *Webb v. City of Phila.*, 562 F.3d 256 (3d Cir. 2009) and update footnotes 263 and 285 to reflect successful accommodation of observant Sikhs in American law enforcement agencies

On pages 82 and 92 of the Draft Manual, footnotes 263 and 285, respectively, cite to *Webb v. City of Phila.*, 562 F.3d 256 (3d Cir. 2009), for the proposition that it could be an undue hardship for law enforcement agencies to accommodate religious headcoverings. We believe the *Webb* case is outmoded given the large number of observant Sikhs and other religious minorities who

[15] Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94 § 5402, 129 Stat. 1547 (2015) (codified as 49 USC 31306); Roy Maurer, *Guidelines for Drug Hair Testing Proposed*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Oct. 1, 2020), *available at* https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/hhs-proposes-guidelines-drug-testing-hair.aspx.

[16] *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, Department of Health and Human Services, 85 FR 56108 (Nov. 9, 2020), *available at* https://www.federalregister.gov/documents/2020/09/10/2020-16432/mandatory-guidelines-for-federal-workplace-drug-testing-programs.

have since been granted accommodations to wear unconcealed religious headcoverings, and maintain unshorn hair/beards, while serving in uniformed law enforcement positions across the country.[17] We request replacement of this case with citations to the religious accommodation policies of the Washington, DC Metropolitan Police Department[18] and New York Police Department,[19] both of which allow officers to wear unconcealed religious headcoverings and maintain unshorn hair as part of their uniforms. Alternatively, we request insertion of the general language that these accommodation policies, and individual accommodations provided at state and federal law enforcement agencies nationwide, show that it is not an undue hardship under Title VII for law enforcement agencies to make exceptions to uniform regulations for religious headcoverings. Based on our experience, uniform regulations that categorically preclude accommodations for religious headcoverings are suspect because they are based on majoritarian stereotypes about what Americans should look like. Any safety interests alleged in this context may be pretextual and a ruse to distract from bias against religious minorities.

B. COMMENTS ON LACK OF BALANCE CONCERNING RFRA

Revision 10 – Adopt agency position that RFRA cannot be used to violate civil rights and delete Section 12-I(C)(3)

The Draft Manual lacks balance and neutrality concerning RFRA. Whereas Title VII is rooted in the American civil rights movement and is a shield to protect people against discrimination, the Draft Manual suggests that RFRA can be weaponized by private employers to justify discriminatory conduct against employees. This proposition is unsupported by case law and could also hamstring the EEOC's own congressionally-mandated enforcement efforts. We are concerned that the Draft Manuel's interpretation of RFRA will embolden employers to discriminate against minority religious groups, women, LGBTQ people, and people with disabilities. We also worry that unbridled deference to, and expansion of, RFRA to the detriment of individual employee protections under Title VII will have a chilling effect on the willingness of EEOC investigators and attorneys to investigate and remediate discrimination based on religiously-motivated conduct.

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[17] Adam Bennett, *Houston Police Changes Uniform Policies to Allow Sikh Articles of Faith* (Oct. 19, 2019), *available at* https://www.khou.com/article/news/local/houston-police-changes-uniform-policy-to-allow-sikh-articles-of-faith/285-dc29f0bb-5f98-4e5f-b550-d3fa931b0791; *see* Ashley Southall, *Religious Police Officers in New York Will Be Able to Wear Beards and Turbans* (Dec. 28, 2016*), available at* https://www.nytimes.com/2016/12/28/nyregion/new-york-police-department-sikh-beard-turban-policy.html; *see also* Chris Kaufman, *Yuba City Sheriff's (sic) Hire Sikhs* (Jul. 25, 2015), *available at* https://www.pressreader.com/usa/marysville-appeal-democrat/20150726/page/3.

[18] DC Metropolitan Police Department, *General Order: Uniform, Equipment, and Appearance Standards* (July 3, 2019), *available at* https://go.mpdconline.com/GO/GO_110_11.pdf.

[19] New York Police Department, *Patrol Guide: Procedure 203-31* (June 1, 2020), *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf.

- In light of these concerns, we request that the Draft Manual be amended to say conspicuously and repeatedly that it is the position of the EEOC that RFRA cannot be used categorically as a defense by employers who discriminate against individuals in violation of Title VII.

- On pages 31 and 32 of the Draft Manual, investigators and employers are told without support that RFRA provides a broad defense to private sector employers against Title VII discrimination claims and EEOC enforcement actions. There is no settled law providing such a broad RFRA defense. Suggesting otherwise is misleading, inaccurate, and inappropriate. Notably, the language in favor of a broad RFRA defense is negated by footnote 116, which cites to cases where RFRA was rejected as a defense to Title VII actions. To make matters more confusing to readers, after misrepresenting the viability and reach of a RFRA defense on pages 31 and 32, page 33 of the Draft Manual states that "[d]efining the exact parameters of the First Amendment or RFRA is beyond the scope of this document." On these grounds, we request deletion of Section 12-1(C)(3) of the Draft Manual.

Revision 11 – Remove citations to dicta from *Bostock* case

On pages 2, 32, and 34 of the Draft Manual, footnotes 2, 116, and 121, respectively, cite to *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Although the majority opinion in the case states that sex discrimination under Title VII includes discrimination on the basis of sexual orientation or transgender status, citations to the case in the Draft Manual emphasize dicta suggesting that the civil rights of LGBTQ people *may* be trumped in future cases by religious liberty interests. This is confusing and misleading. Accordingly, we request deletion of all *Bostock* dicta from the Draft Manual.

Revision 12 – Clarify that neutral investigation of discrimination is always permissible, even if the investigated party invokes religion to justify discrimination

On page 3 of the Draft Manual, footnote 11 references *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)* for the proposition that government agencies must investigate cases neutrally and without hostility toward religion. We request revision of this footnote to clarify and reiterate that where a government agency is investigating a party for alleged discrimination, and that investigated party attempts to justify their alleged discrimination based on religion, the investigation itself does not constitute bias or hostility toward religion. For example, if an organization discriminates against a same-sex couple on religious grounds, the Draft Manual should clarify that a neutral fact-based investigation is always permissible in such a circumstance, consistent with the agency's congressionally-mandated authority to investigate and remediate workplace discrimination.

C. COMMENTS ON THE NEED FOR CLARIFYING CONTENT

Revision 13 – Amend Sections 12-I(C)(1) and 12-I(C)(2) to clarify that religious organization and ministerial exceptions are narrow

Pages 19 to 32 of the Draft Manual include lengthy discussions of the narrow ministerial and religious organization exceptions. We are concerned that the detailed legal discussions of the exceptions tend to swallow the general rule about Title VII's applicability and cause significant confusion. In either the ministerial or the religious organization exceptions, it should be made clear that the evaluations are very fact specific and protections are only applicable for the hiring or firing of employees who hold or held positions including a religious function, and cannot be used as a defense to harassment or other forms of discrimination.[20] Furthermore, while these exceptions do allow for faith-based organizations to give preferential treatment to members of their own faith in hiring, neither of these exceptions allow for any group to discriminate against members of other faiths in perpetrating workplace discrimination.

In the rare circumstances when the ministerial exception has been successfully used as a defense against Title VII discrimination claims, defendants have used religion as a weapon to excuse termination of employees who were gay, pregnant, and stricken with cancer.[21] We are concerned that private employers may attempt to use the language of the manual to broaden the scope of these two exceptions in ways that would allow them to engage in invidious discrimination against employees, and undermine the EEOC's own enforcement efforts. Accordingly, we request that Sections 12-I(C)(1) and Sections 12-II(C)(2) be simplified and amended to clarify explicitly that the ministerial and religious organization exceptions are rarely invoked and narrow in scope.

Revision 14 – Include citation to the California Workplace Religious Freedom Act

On page 2 of the Draft Manual, footnote 6 notes that some state and local laws provide more protections than Title VII. To make this point more concrete, we request inclusion of a link to the California Workplace Religious Freedom Act, which was signed into law in 2012. The legislation, popularly known as AB1964, amended California's Fair Employment and Housing Act to define undue hardship as a "significant difficulty or expense," clarified that segregating a religiously observant employee cannot be considered a reasonable accommodation, and affirmed that religious accommodations are not required if they violate other laws protecting civil rights.[22]

Revision 15 – Emphasize intersectionality of employment discrimination claims

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[20] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-2.
[21] *See* Brief of the American Civil Liberties Union as Amicus Curiae, et. al., p. 7-8, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), *available at* https://www.aclu.org/legal-document/biel-and-morrissey-berru-cases-amicus-brief.
[22] *See* California Workplace Religious Freedom Act (AB1964) (Sept. 12, 2012), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1964.

Based on our experience, Sikhs can be subjected to employment discrimination in a single case based on multiple protected classes, including actual or perceived religion, race, color, national origin, and gender. For example, Sikhs are often conflated with Arabs and other people of Middle Eastern origin (perceived national origin), confused for Muslims (perceived religion), and demeaned because of their complexion (race and color). In addition, turban-wearing Sikh women are uniquely vulnerable to discrimination based on sex, race, color, national origin and religion.[23] The Draft Manual should emphasize this intersectionality of classes so that EEOC investigators thoroughly analyze all possible bases of discrimination. To implement this recommendation, we request that Example 14 on page 41 of the Draft Manual be revised as follows:

> Harinder, a dark-skinned South Asian female who wears a turban as part of her Sikh religious faith, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is an Arab and a Muslim, makes them uncomfortable in light of recent terrorist attacks and her "Iranian complexion." The manager tells Harinder that he has to let her go because the customers' discomfort is understandable and "the company policy is that customers are always right." The manager has subjected Harinder to unlawful discrimination based on race, color, religion, and national origin by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived race, color, religion, and national origin. Harinder's termination based on customer preference would violate Title VII regardless of whether she was Muslim, Sikh, or any other religion, and regardless of whether she was of any race, color, or national origin.

Revision 16 –Include language and case law clarifying that proselytizing should not be accommodated when it violates the rights of other employees

Pages 95 to 108 the Draft Manual specifically address proselytizing. Observant Sikhs are disproportionately subject to proselytizing and harassment in the workplace due to their visible religious identity. The EEOC should make clear the legal rights employees have to be free from religious discrimination, including the right to be agnostic or atheist,, and the right to not be harassed because one's religious beliefs differ from another's. [24] While the Draft Manual does explain that employers who are made aware of harassment should not wait until the "unwelcome

[23] *See* Press Release, U.S. Equal Employment Opportunity Commission*, National Wholesale Liquidators to pay $255,000 to Settle EEOC National Origin, Religious Bias and Sexual Harassment Lawsui*t (Oct. 20, 2008), *available at* https://www.sikhcoalition.org/wp-content/uploads/2016/12/2008-EEOC-v-NWL-Settlement-Pressrelease.pdf.

[24] *Noyes v. Kelly Services*, 488 F.3d 1163 (9th Cir. 2007).

behavior becomes severe or pervasive"[25] to address it, it should provide more clarity to employers about how to resolve the competing interests at stake in proselytization cases. For example, the manual falls short of clearly stating that an employer need not accommodate an employee's religiously-motivated conduct when it disrespects another employee based upon their protected status or diminishes their statutory civil rights, or undermines the employer's efforts to promote diversity and inclusion in the workplace.[26] To make this point more concrete, we request inclusion of language and case law to this effect - underscoring that Title VII does not require an employer to accommodate "an employee's desire to impose his religious beliefs upon his co-workers".[27] In addition, we ask that the manual specifically clarify that proselytizing may come from employees, supervisors and employers, and expand cited caselaw reflective of this.

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The Sikh Coalition appreciates the opportunity to provide comment on this matter. We reiterate our position that, given the complexity of the subject matter and little time to adequately address all stakeholder concerns, the Draft Manual should be suspended entirely. In the alternative, we ask that the submission of comments deadline be extended by 180 days to account for a more inclusive perspective. Finally, in the event the Draft Manual moves forward, we request adoption of all of our recommendations. In all cases, we also request the opportunity to meet with EEOC Commissioners and key EEOC staff to discuss implementation of our recommendations prior to the publication of any proposed guidance. Though we appreciate the EEOC's efforts in acknowledging that the 2008 manual requires updating, we believe this Draft Manual lacks the neutrality, balance and cultural competence required to be a useful tool for EEOC investigators, employees, employers, and others seeking guidance on workplace discrimination law and best practices. As an ongoing thought partner on this guidance, the Sikh Coalition is available to share resources and provide additional information to the EEOC to ensure that workplace discrimination suffered by Sikhs and other religious minorities is adequately understood and addressed.

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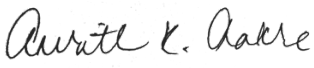
[25] *See e.g.* U.S. Equal Employment Opportunity Commission, *Proposed Updated Compliance Manual on Religious Discrimination,* at page 95 (Nov. 17, 2020), https://beta.regulations.gov/document/EEOC-2020-0007-0001.
[26] *Peterson v. Hewlett-Packard Co*., 358 F.3d 599, 605-07 (9th Cir. 2004) (employer properly directed employee to remove posters quoting "anti-gay scriptural passages" that violated the company's harassment policy).
[27] *See e.g. Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341-42 (8th Cir. 1995); *see* also *EEOC v. United Health Programs of Am., Inc*., No. 14-CV-3673 (KAM)(JO), 2020 U.S. Dist. LEXIS 39587, at *16-17 (E.D.N.Y. Mar. 6, 2020).

Very Respectfully,



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cc: Chair Lamar Alexander, Senate Committee on Health, Education, Labor and Pension;
Ranking Member Patty Murray, Senate Committee on Health, Education, Labor and Pension;
Chair Bobby Scott, House Committee on Education on Labor;
Ranking Member Virginia Foxx, House Committee on Education on Labor;
Chair, Ron Johnson, Senate Committee on Homeland Security and Governmental Affairs;
Ranking Member Gary Peters, Senate Committee on Homeland Security and Governmental Affairs;
Chair Carolyn Maloney, House Committee on Oversight and Reform;
Ranking Member James Corner, House Committee on Oversight and Reform;
Chair Jerry Nadler, House Committee on Judiciary;
Ranking Member Jim Jordan, House Committee on Judiciary;
Chair Lindsey Graham, Senate Committee on the Judiciary;
Ranking Member Dianne Feinstein, Senate Committee on the Judiciary