

Office of the Attorney General



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**SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV**

Mr. Raymond Windmiller
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: Docket No. EEOC-2023-0005 (“Proposed Enforcement Guidance on Harassment in the Workplace”)

Dear Mr. Windmiller:

The State of Tennessee, joined by the States of Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia, welcomes the opportunity to comment on the Equal Employment Opportunity Commission’s “Proposed Enforcement Guidance on Harassment in the Workplace,” 88 Fed. Reg. 67,750 (Oct. 2, 2023) (“Proposed Guidance”). This is not the first time Tennessee and EEOC have interfaced on issues surrounding Title VII guidance and transgender status. The last go-round, Tennessee and a coalition of nineteen other States filed suit to challenge Chair Burrows’ “technical assistance document,” which advanced a vastly expanded view of Title VII liability for the nation’s employers. Chair Burrows unilaterally issued that guidance in 2021 without opportunity for comment, and the U.S. District Court for the Eastern District of Tennessee enjoined it. *See Tennessee v. U.S. Dep’t of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022). A different court later vacated Chair Burrows’ guidance altogether in a decision EEOC declined to appeal. *See Texas v. EEOC*, 633 F. Supp. 3d 824 (N.D. Tex. 2022).

By a split vote of 3-2, EEOC has again put forward sweeping new Title VII guidance that threatens Tennessee, the co-signing States, and countless other employers with widespread liability for failing to promote the gender-identity preferences of their employees. Specifically, the Proposed Guidance would broaden EEOC’s definition of “sex-based harassment” to include, among other

things, “intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering)” and “the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.” Proposed Guidance at II.A. Unlike before, EEOC has allowed a period for public comment—albeit only 30 days—regarding its expanded conception of what Title VII requires. Tennessee appreciates EEOC’s belated move toward baseline measures of procedural regularity and the chance to respond to EEOC’s proposal.

As this comment explains, EEOC’s Proposed Guidance suffers stark legal flaws.

First, EEOC’s proposal contravenes the Commission’s statutory authority. In *Bostock v. Clayton County*, the Supreme Court narrowly held that an employer violates Title VII when it fires an employee “simply for being ... transgender.” 140 S.Ct. 1731, 1737 (2020). Yet EEOC casts *Bostock* as a silver bullet for imposing breathtakingly broad transgender-based liability in contexts the Supreme Court never considered. To illustrate:

- The Proposed Guidance asserts that employers violate Title VII when they maintain the “nearly universal” practice of separating bathrooms and changing facilities based on sex, rather than gender identity. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022). But *Bostock* expressly *refrained* from deciding whether that practice violates Title VII in language that EEOC does not meaningfully address. 140 S. Ct. at 1753.
- The Proposed Guidance also requires employers to adopt—and correct colleagues and customers for not adopting—transgender employees’ preferred pronouns. But such regulation of pure speech is likewise absent from *Bostock*.

In short, *Bostock* gives no license to these and other of EEOC’s novel proposals. Nor, in all events, can EEOC permissibly require these deeply controversial gender-identity accommodations without express congressional authorization—authorization not found in Title VII.

Second, EEOC’s Title VII stance will unleash unconstitutional chaos in the Nation’s workplaces. The Proposed Guidance “seeks to force [employers and their employees] to speak in ways that align with its view but defy [their] conscience about a matter of major significance.” 303 *Creative v. Elenis*, 600 U.S. 570, 602-03 (2023). Here, the Proposed Guidance would require employers to affirm or convey to employees and customers—often against religious conviction or deeply held personal belief—messages that a person can be a gender different from his or her biological sex, that gender has no correlation to biology, or that they endorse the use of pronouns like “they/them,” “xe/xym/xys,” or “bun/bunself.”¹ This mandate flouts First Amendment freedoms of religion and speech—yet EEOC rejects any role for accommodation of contrary religious beliefs or speech. Further, EEOC’s for-cause insulation from direct presidential supervision unconstitutionally blurs the lines of accountability for this overhaul of workplaces nationwide.

Third, EEOC’s proposal is arbitrary and capricious under the Administrative Procedure Act. The proposal shortchanges the long-recognized privacy and safety justifications for sex-segregated facilities in the course of requiring a radical and expensive restructuring of all employer facilities around gender identity. The Proposed Guidance also does not account for the difficulty, if not complete inability, of employers to confirm a person’s self-professed gender identity. EEOC further

¹ See Ezra Marcus, *A Guide to Neopronouns*, NEW YORK TIMES (Sept. 18, 2022), available at <https://www.nytimes.com/2021/04/08/style/neopronouns-nonbinary-explainer.html>.

fails to meaningfully consider the ways its proposal would backfire on the employment prospects of transgender employees, as well as damage employee morale—and workplace productivity—to boot. And the proposal fails to engage in any meaningful federalism analysis or justify EEOC’s about-face from its prior recognition that States could permissibly implement policies requiring sex-segregated facilities.

Tennessee and the undersigned States are committed to ensuring that all persons are able to work in environments that appropriately balance safety, freedom of speech and religion principles, collegiality, and productivity. The undersigned States hope that EEOC will reconsider its Proposed Guidance, which would harm the States’ interests on each of these fronts.

I. EEOC’s Proposed Guidance Unlawfully Expands the Scope of Title VII.

As an administrative agency, EEOC “literally has no power to act . . . unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). Thus, EEOC can only act “within the bounds” of its statutory authority when promulgating rules. *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014); *see* 5 U.S.C. § 706(2)(C). EEOC claims the Supreme Court’s decision in *Bostock* empowers it to compel the Proposed Guidance’s new gender-identity regime. But *Bostock* is not nearly that broad, and EEOC otherwise lacks the authority to saddle the undersigned States with novel gender-identity-based liability.

A. *Bostock* does not license EEOC’s expanded application of Title VII to all transgender-related employment issues.

The Proposed Guidance, like the invalid 2021 guidance, fundamentally misconstrues and improperly extends *Bostock* to support its construction of Title VII. *See, e.g.*, Proposed Guidance at II.A n.29.

Bostock only concerned—and thus its holding only addresses—allegations of discriminatory termination. *See* 140 S. Ct. at 1753 (concluding that “employers are prohibited from firing employees on the basis of homosexuality or transgender status”). The Court *explicitly disclaimed* any intent “to address bathrooms, locker rooms, or anything else of the kind.” *Id.* Citing this clear limit, courts previously rejected EEOC’s argument that *Bostock* supported the Title VII analysis in Chair Burrows’ 2021 guidance document. *See Tennessee*, 615 F. Supp. 3d at 833 (“*Bostock* does not require Defendants’ interpretations of Title VII and IX.”); *Texas*, 633 F. Supp. 3d at 840 (“Title VII — as interpreted in *Bostock* — does not require such [dress-code, bathroom, and pronoun] accommodations.”). Yet the Proposed Guidance re-ups EEOC’s reliance on *Bostock* to include “denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity” as sex-based discrimination under Title VII. Proposed Guidance at II.A. As with the 2021 guidance, this move finds no grounding in *Bostock*’s narrow holding.

Nor does *Bostock*’s broader reasoning support EEOC’s position. *Bostock* did not change the definition of “sex,” but instead proceeded “on the assumption that ‘sex’ signified . . . biological distinctions between male and female.” *Bostock*, 140 S. Ct. at 1739. But these biological distinctions are the core basis for separate bathrooms, as opposed to employment decisions generally. *Cf. id.* at 1741 (“An individual’s . . . transgender status is not relevant to employment decisions.”). If anything, *Bostock*’s sex-means-sex logic *confirms* that separate bathrooms and changing facilities for men and women are lawful: Because all men must use male facilities, and all women must use female facilities,

differentiating facilities based on sex does not involve treating a transgender employee “worse than others who are similarly situated.” *Id.* at 1740. EEOC’s contrary reading would implausibly preference the category of “gender identity” (absent from Title VII) over sex (actually protected under Title VII).

Furthermore, the Proposed Guidance amends Title VII to create a *de facto* accommodation for gender identity—even though *Bostock* did not address the accommodations context. Under Title VII, simple recognition of sex-based differences, such as that reflected in the use of different pronouns or private spaces, does not violate Title VII. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (holding that Title VII’s prohibitions on discrimination do “not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex”). By requiring employers to create exceptions to otherwise lawful policies that segregate bathrooms by sex or permit use of gendered pronouns, the Proposed Guidance would require employers to affirmatively accommodate a person’s gender identity. Congress knew how to require accommodations for certain classes in Title VII, *see, e.g.*, 42 U.S.C. §2000e(j) (mandating religious accommodations), yet has thus far declined to do so for transgender persons. Congress’s failure to adopt this “ready alternative” of requiring transgender-based accommodations “indicates that Congress did not in fact want what [EEOC] claim[s].” *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017).

EEOC subtly expands *Bostock* along another important dimension. The Proposed Guidance states that Title VII prohibits discrimination based on “sexual orientation” or “gender identity.” Proposed Guidance at II.A. But *Bostock* only addresses “homosexuality” and “transgender status,” *Bostock*, 140 S. Ct. at 1753—which are distinct concepts in important ways. In particular, transgender status, as *Bostock* understood it, is “inextricably bound up with sex” such that treating a transgender person differently “penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” *Bostock*, 140 S. Ct. at 1741. Gender identity, by contrast, is much more expansive and includes numerous identities that fall entirely outside of the biological binary of male and female. *See, e.g.*, HRC Glossary (“Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories.”).² Such nonbinary identities are not “inextricably bound up with sex” in the way *Bostock* cast transgender status—further undercutting *Bostock*’s applicability here.

B. Other precedents do not license EEOC’s expanded application of Title VII to all transgender-related employment issues.

Nor can EEOC permissibly draw support from the cases it cites beyond *Bostock*. As an initial matter, the EEOC itself has indicated that only the U.S. Supreme Court’s construction of Title VII is authoritative. *Lavern B., Complainant*, EEOC DOC 0720130029, 2015 WL 780702, at *11 (Feb. 12, 2015) (“[I]n the federal sector, federal district and circuit court decisions may be persuasive or instructive, but are not binding on the Commission.”). Similarly, to the extent that the EEOC relies on its own administrative decisions,³ such decisions “are not binding authority and cannot be considered definitive interpretations of Title VII.” *Tennessee*, 615 F. Supp. 3d at 840 n.17; *see also Wade v. Brennan*, 647 F. App’x 412, 416 n.8 (5th Cir. 2016) (“We may rely on EEOC decisions as persuasive

² Human Rights Campaign, Glossary of Terms, <https://tinyurl.com/2tbewj2v> (last visited Oct. 25, 2023)

³ *See, e.g.*, Proposed Guidance at II.A n.28 (citing *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *1 (Apr. 1, 2015)), *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 15, 2015).

authority, but they are not binding.”). That is doubly true where EEOC’s cited decisions pertain to federal employers, which are subject to a different statutory standard than private or state employers. *Compare* 42 U.S.C. §2000e-16(a) (“All personnel actions . . . shall be made free from any discrimination based on . . . sex.”) *with* 42 U.S.C. §2000e-2(a)(1) (“It shall be . . . unlawful . . . to discriminate against any individual . . . because of such individual’s . . . sex.”).

The Proposed Guidance otherwise cites to only two non-binding district court cases that arguably support⁴ its construction of Title VII. *See* Proposed Guidance at II.A n.29 (citing *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020); *Tudor v. Southeastern Oklahoma State Univ.*, Case No. CIV-15-324, 2017 WL 4849118, at *1 (W.D. Okla. Oct. 26, 2017)). These are a “wafer-thin reed on which to rest such sweeping” requirements. *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). In *Triangle Doughnuts*, the district court merely held that the plaintiff’s alleged pattern of harassment stated a claim for a hostile work environment under Title VII. 472 F. Supp. 3d at 129-30. Although misgendering and bathroom use were among the numerous allegations of harassment, it is not clear that those allegations played any role—let alone governed—the court’s determination that the Complaint stated a claim under Title VII. *See id.* Similarly, in *Tudor*, the court noted long-standing restrictions on bathroom use and extensive misgendering among multiple factors by which it determined a jury could find harassment. 2017 WL 4849118, at *1. The jury declined the invitation and rejected the plaintiff’s harassment claim. *See Tudor v. Southeastern Oklahoma State Univ.*, 13 F.4th 1019, 1027 (10th Cir. 2021) (noting that the jury had found for the defendant on Dr. Tudor’s hostile work environment claim).

Title IX caselaw also cannot sustain EEOC’s flawed reading. Although some federal circuits have interpreted Title IX to entitle students to use the restroom according to their gender identity, the federal circuit courts are divided on that issue. *See* Proposed Guidance at II.A n.34 (citing cases). Regardless, Title VII and Title IX are different statutes with different wording, so “principles announced in the Title VII context [do not] automatically apply in the Title IX context.” *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see Bostock*, 140 S. Ct. at 1753 (declining to “prejudge” questions about “other federal or state laws that prohibit sex discrimination”).

C. EEOC’s Proposed Guidance otherwise exceeds the agency’s Title VII authority.

On top of all this, EEOC’s Proposed Guidance violates limits on EEOC’s power to enshrine new substantive Title VII requirements.

1. The Proposed Guidance exceeds EEOC’s narrow rulemaking authority, which empowers EEOC to adopt only “*procedural regulations* to carry out the provisions of this subchapter.” 42 U.S.C. §2000e-12(a) (emphasis added). As this plain text indicates, EEOC “may not promulgate substantive rules.” *Texas v. EEOC*, 933 F.3d 433, 439 (5th Cir. 2019); *see also E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (recognizing that Title VII “did not confer upon the EEOC authority

⁴ The Proposed Guidance’s strained reliance on other cited cases only further indicts EEOC’s reading. *Houllb v. Saber Healthcare Grp., LLC* construed Ohio employment law, not Title VII. No. 1:16-CV-02130, 2018 WL 1151566, at *2 (N.D. Ohio Mar. 2, 2018). In *Versace v. Starwood Hotels & Resorts Worldwide, Inc.*, the court only assumed *arguendo* that alleged misgendering might violate Title VII on the way to concluding that the conduct was not sufficiently pervasive to support a violation. No. 6:14-CV-1003, 2015 WL 12820072, at *7 (M.D. Fla. Dec. 7, 2015). In *Parker v. Stranser Constr., Inc.*, the court made a single reference to misgendering in recounting the factual background and never returned to it when performing a Title VII analysis. 307 F. Supp. 3d 744, 748 (S.D. Ohio 2018).

to promulgate rules or regulations”). A substantive rule issued by EEOC is invalid regardless of whether the EEOC participates in notice-and-comment rulemaking. *Texas*, 933 F.3d at 451.

The Proposed Guidance expands Title VII beyond its text and structure and, therefore, acts as a substantive rule. In this way, EEOC’s Proposed Guidance repeats the same legal error of the vacated 2021 guidance issued by Chair Burrow. As with the 2021 guidance, the Proposed Guidance states that intentional misgendering and denial of access to a bathroom consistent with an employee’s gender identity is “sex-based harassment” that violates Title VII. As with the 2021 guidance, this interpretation by the Proposed Guidance expands rather than implements Title VII, and thus constitutes a substantive rule rather than a procedural regulation. *See Texas*, 623 F. Supp. 3d at 840 (rejecting that the 2021 guidance imposed only “‘existing requirements under the law’ and ‘established legal positions’ in light of *Bostock* and prior EEOC decisions interpreting Title VII”); *Tennessee*, 615 F. Supp. 3d at 832 (“Though the EEOC maintains that the Technical Assistance Document does not alter employers’ obligations under Title VII, it precisely does.”). As with the 2021 guidance, this dynamic would render the Proposed Guidance unlawful if finalized.

It is no response that the Proposed Guidance contains a boilerplate disclaimer that “[t]he contents of this document do not have the force and effect of law and are not meant to bind the public in any way.” Proposed Guidance at I.A. Courts assessing the 2021 guidance rejected the relevance of a similar disclaimer because the document otherwise evinced an intent to propose an expansive and authoritative construction of Title VII. *See Texas*, 633 F. Supp. 3d at 839-40; *Tennessee*, 615 F. Supp. 3d at 831. As with the 2021 guidance, EEOC clearly intends for the Proposed Guidance to be authoritative and for legal consequences to flow from it once implemented. Proposed Guidance at II (“The federal EEO laws prohibit workplace harassment if it is shown to be based on one or more of a complainant’s characteristics that are protected by these statutes.”); *id.* at II.A (“Sex-based harassment includes . . . intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering) or the denial of access to a bathroom or other sex-segregated facility consistent with the individuals gender identity.”); *see also id.* at I.A (“This guidance also consolidates, and therefore supersedes, several earlier EEOC guidance documents.”).

Moreover, Title VII standards mean employers would need to immediately implement new training and employment materials that reflect EEOC’s Proposed Guidance. *See* Proposed Guidance at IV.C.2.b.i. This is because a critical factor in assessing both hostile-work-environment claims generally and employers’ vicarious Title VII liability in particular is whether the employer has adequate training materials and procedures for reporting unlawful harassment. *E.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 808-09 (1998); *Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005); *see also* EEOC, Checklists for Employers – Checklist Two: An Anti-Harassment Policy, <https://www.eeoc.gov/checklists-employers-0> (employer policies should include “[a]n easy-to-understand description of prohibited conduct”). Practically speaking, then, EEOC’s Proposed Guidance operates as a proactive mandate to overhaul employer processes upon its publication.

2. Congress has not clearly authorized EEOC to broaden the reach of Title VII to include the Proposed Guidance’s nationwide gender-identity-accommodation regime. There is no doubt that EEOC’s policy purports to resolve questions “of vast economic and political significance.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022); *see Bostock*, 140 S. Ct. at 1753 (2020) (“We can’t deny that today’s holding . . . is an elephant.”). It is thus up to clearly expressed “legislative action,” not an unelected and unaccountable EEOC, to resolve the “fraught line-drawing dilemmas” associated with

balancing gender-identity accommodations, employee health, welfare, and safety, and freedom of speech, conscience, and religion. *L.W. ex rel Williams v. Skremetti*, 83 F.4th 460, 486 (6th Cir. 2023).

3. Statutes also must, whenever possible, “be construed to avoid serious constitutional doubts.” *Brunner v. Scott Cnty.*, 14 F.4th 585, 592 n.2 (6th Cir. 2021) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)). Yet EEOC’s Proposed Guidance would open a Pandora’s Box of constitutional problems with Title VII. See *infra* p. 7-9, 12. The constitutional-avoidance canon “take[s] precedence” over any interpretive deference EEOC might claim and cuts further against EEOC’s novel interpretation of Title VII. *Arangure v. Whitaker*, 911 F.3d 333, 339-40 (6th Cir. 2018).

II. EEOC’s Proposed Guidance Violates the Constitution.

Agency action cannot be “contrary to constitutional right [or] power.” 5 U.S.C. § 706(2)(B). Here, multiple constitutional violations pervade EEOC’s proposal. *First*, the Proposed Guidance improperly compels employers and their employees to convey EEOC’s preferred message regarding gender ideology, vitiating core First Amendment freedoms. And *second*, the EEOC’s putatively independent structure—in which Commissioners are insulated from at-will presidential removal—violates the separation of powers.

A. EEOC’s proposal contravenes First Amendment protections of employers and employees.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” *303 Creative*, 600 U.S. at 584-85 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). That core First Amendment principle reflects that “the freedom of thought and speech is ‘indispensable to the discovery and spread of political truth.’” *Id.* at 584 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). The Proposed Guidance flouts these principles by prolifically dictating how employers and their employees must view and speak about controversial gender-identity preferences.

EEOC’s Proposed Guidance would unlawfully compel employers to convey government-preferred messages they “do[] not endorse” on pain of significant liability. *Id.* at 581. To avoid potential liability for creating a “hostile work environment,” EEOC would require employers to affirmatively correct employees and customers who use biologically correct pronouns that conflict with a person’s gender identity—thus conveying agreement with the controversial message that sex stems from something other than biology. So too, to comply with Title VII as EEOC reads it, an employer must promulgate written policies, training materials, a complaint procedure, and a monitoring program affirming gender ideology. See Proposed Guidance at IV.C.2.b.i. And under the EEOC’s Proposed Guidance, even persons who seek employment with a covered employer can be compelled to affirm the government’s gender-ideology viewpoint.

Free-speech limits do not allow EEOC to compel employers to “speak its preferred message” against their will. *303 Creative*, 600 U.S. at 597. The Supreme Court’s *303 Creative* decision is squarely on point. There, Colorado sought “to compel speech” by a website designer that she did “not wish to provide.” *Id.* at 588. The Court concluded that Colorado’s efforts violated the First Amendment. Simply put, the government generally cannot “force someone who provides her own expressive

services to abandon her conscience and speak its preferred message instead”—even when “others may find” the speaker’s preferred message “misinformed or offensive.” *Id.* at 595, 597.

303 Creative’s rule likewise governs here. EEOC’s Proposed Guidance means that if an employer “wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs.” *Id.* at 589. The First Amendment does not let EEOC put employers to that choice. Indeed, applying a similar rule, the Sixth Circuit has already concluded that requiring the unwanted use of preferred pronouns violates free-speech rights. *See Merivether*, 992 F.3d at 511-12 (holding university’s policy requiring faculty to use students’ preferred pronouns violated professor’s free-speech rights). Yet EEOC mentions neither of these cases.

Compounding its problems, EEOC’s requirement further limits speech based on viewpoint—a particularly “egregious form of content discrimination.” *Rosenberger v. Rectors & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995)). Employers and their employees may speak without restriction when they embrace an ideology of mutable gender divorced from sex, but face liability if they do otherwise. *See Otto v. Boca Raton, Florida*, 981 F.3d 854, 863 (11th Cir. 2020) (holding unconstitutional ordinances that “codif[ied] a particular viewpoint—sexual orientation is immutable, but gender is not—and prohibit the therapists from advancing any other perspective when counseling clients”); *see also Business Leaders in Christ v. University of Iowa*, 991 F.3d 969, 978 (8th Cir. 2021) (affirming that university policy was unlawful where student group “was prevented from expressing its viewpoints on protected characteristics while other student groups ‘espousing another viewpoint [were] permitted to do so”).

Requiring that employers and employees adhere to EEOC’s chosen gender-ideology orthodoxy likewise trenches on religious freedoms. Whether under the First Amendment or the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., EEOC’s gender-ideology accommodation mandate would impermissibly violate employers’ and employees’ free-exercise rights. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720-21 (2014). The First Amendment’s limits on impinging free exercise also prohibit EEOC’s interpretation of Title VII. Because the law provides exemptions for small employers, it is not “generally applicable” and therefore triggers strict scrutiny under free-exercise caselaw. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881-82 (2021).

Nor could EEOC satisfy the strict First Amendment scrutiny its problematic approach triggers. That employees may take offense at the refusal of others to address them according to their gender identity is not a sufficient ground to compel the use of their preferred pronouns. *303 Creative*, 600 U.S. at 595 (“Nor, in any event, do the First Amendment’s protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.”); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (“[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.”). And EEOC’s sweeping approach—including its rejection of any room for protecting “religious expression that creates, or reasonably threaten to creates, a hostile work environment,” Proposed Guidance at IV.C.3.b.ii.b—is far from narrowly tailored.

B. EEOC’s proposal is invalid because EEOC is unconstitutionally structured.

Article II of the Constitution vests “the executive Power”—all of it—in the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1). Tennessee and other

co-signing States have recently written to point out how EEOC’s putative “independent” status violates this Article II command.⁵ Tennessee incorporates and renews that objection here and writes only to reemphasize that EEOC’s separation-of-powers foul is no mere technicality. Our constitutional system ensures “the ultimate authority resides in the people alone,” Jonathan Skrmetti, *Why We Must Fight to Preserve the Constitution*, THE TENNESSEAN (Sept. 15, 2023), <https://tinyurl.com/ycjx7wwu>; see also *The Federalist* No. 46, including by requiring that the executive officials who “wield significant authority ... remain[] subject to the ongoing supervision and control of the elected President,” *Seila Law*, 140 S. Ct. at 2203. EEOC’s current scheme impermissibly thwarts public accountability for radical agency policies by blurring who is to blame among the President and EEOC heads.

III. EEOC’s Proposed Guidance Is Arbitrary and Capricious.

The APA requires agency decision-making to be “reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Agency actions are arbitrary and capricious when they “entirely fail[] to consider an important aspect of the problem or offer[] an explanation for its decision that runs counter to the evidence before it.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383-84 (2020) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). EEOC’s proposal violates these baseline APA rules in multiple respects.

A. **EEOC has not considered or addressed the long-recognized privacy and safety justifications for sex-segregated spaces.**

EEOC’s Proposed Guidance would subject employers to liability for requiring transgender employees to use bathrooms associated with their sex. But Courts have repeatedly recognized the value in, and sometimes the necessity of, private, sex-segregated spaces. A sampling:

- “Admitting women to [Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.” *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).
- “[S]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy.” *Adams*, 57 F.4th at 804 (quoting Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21 (emphasis original)).
- “[S]ociety [has expressed] undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.” *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

The federal government, for its part, has specifically created exceptions for single-sex living facilities in education—thus endorsing the longstanding and common-sense practice of segregating the sexes to promote privacy and safety. See 20 U.S.C. §1686.

⁵ See Comment Ltr. of Tennessee *et al.* on EEOC RIN 3046-AB30, *Regulations to Implement the Pregnant Workers Fairness Act* (Oct. 10, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-44-comment.pdf>

What makes places like restrooms and changing facilities private, however, also makes them susceptible to abuse by bad actors. Public restrooms, in particular, have long been designed to feature deliberately obstructed sightlines, limited points of ingress or egress, and a categorical exemption from most forms of surveillance. Add the fact that many people using these facilities are partially or completely undressed, and the potential for harassment, voyeurism, or even violent crime is obvious. Women, moreover, are particularly vulnerable in light of the “[e]nduring” “physical differences between men and women.” *Virginia*, 518 U.S. at 533; see Brief for the Women’s Liberation Front as *Amicus Curiae* 9, *Adams*, 57 F.4th 791 (arguing that allowing men in women’s private spaces “inherently threatens women’s physical safety in the places previously preserved exclusively for women and girls”).

It is thus an unfortunate reality that the news is replete with reported instances of assaults occurring in public restrooms.⁶ EEOC nonetheless fails to recognize that its Proposed Guidance will enable this nefarious conduct. At present, a woman encountering a male in a “sex-segregated space . . . do[es] not have to wait until the man has already assaulted her before she can fetch security.”⁷ But if a person’s self-reported (and potentially multi-faceted or shifting) gender identity can determine the bathrooms he may use, that safety valve will be bolted shut. See *id.* Some women may not even have recourse following abuse if their male perpetrators had every right to be present, expose themselves, or witness others changing in a restroom or changing room.⁸ In fact, the victims of voyeurism might not even realize when it has occurred or have any hope of identifying a suspect afterward.⁹ Nor can EEOC sidestep these incidents by noting they can occur with or without sex-segregated spaces. The “important aspect of the problem” with the Proposed Guidance is not that it fails to prevent these crimes from occurring, but that it risks *facilitating* some number of such crimes by stripping away crucial safeguards. *State Farm*, 463 U.S. at 43.

B. EEOC has not considered or addressed the difficulties of discerning and authenticating gender identity.

The Proposed Guidance also fails to address the difficulty in ascertaining gender identity. Sex is an “immutable characteristic determined solely by accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In contrast, “the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her

⁶ See, e.g., Emma James, *Oklahoma mother files lawsuit against school district after her teenage daughter, 15, was ‘severely beaten’ by a transgender student, 17, in the girls’ bathroom*, DAILY MAIL (June 1, 2023), <https://tinyurl.com/2p8d9srz>; Audrey Washington, *‘A heinous crime:’ 15-year-old girl says student sexually assaulted her in Cobb high school bathroom*, WSB-TV NEWS (May 16, 2023), <https://tinyurl.com/3nrk6rut>; Henri Hollis, *Man arrested in ‘egregious’ rape of girl in bathroom at Kennesaw park, cops say*, ATLANTA JOURNAL-CONSTITUTION (May 13, 2022), <https://tinyurl.com/3m85kr5c>; Virginia Abraham, *Teenager found guilty in Loudoun County bathroom assault*, WASHINGTON EXAMINER (Oct. 25, 2021), <https://tinyurl.com/4vmxzkkh>; *Pittsburgh McDonald’s sued after manager charged with raping worker*, PITTSBURGH POST-GAZETTE (Sept. 22, 2021), <https://tinyurl.com/2u4v9wx7>; Spencer Neale, *Gender-neutral bathroom closed after high school student arrested for sexual assault*, WASHINGTON EXAMINER (March 4, 2020), <https://tinyurl.com/ymevmdaa>; City News Service, *Man Accused of Secretly Recording Women in Denny’s Restaurant Restroom*, NBC4 NEWS (Nov. 17, 2016), <https://tinyurl.com/bde38ffk>; *Employee attacked in Duke hospital bathroom*, WRAL NEWS (Sept. 23, 2015), <https://tinyurl.com/nhf88zxn>; Emily L. Mahoney, *Man held in Cortez Park rape*, THE REPUBLIC (July 9, 2015), <https://tinyurl.com/yysts9yw5>; Juan Flores, *Man Sought in Sexual Assault of Girl, 10, in Denny’s Restroom*, KTLA NEWS (Jan. 7, 2014), <https://tinyurl.com/yntfn4ap>.

⁷ Cambridge Radical Feminist Network, *There is Nothing Progressive About Removing Women-Only Bathrooms*, Medium (Jan. 13, 2019), <https://tinyurl.com/3ncw6ss5>.

⁸ See, e.g., *Man in Women’s Locker Room Cites Gender Rule*, King 5 Seattle (Feb. 16, 2016), <https://tinyurl.com/ye299ndz>.

⁹ See, e.g., *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, 4 Washington (last updated Nov. 18, 2015), <https://tinyurl.com/mr2dz9yk>.

biological sex).” *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Wilkins, J., concurring). As one prominent advocacy group has advised, “[t]here is no way to determine if someone is transgender or non-binary unless they share their personal gender identity.”¹⁰ Although some transgender individuals may change their name or preferred pronouns or medically transition through hormone therapy or surgery, a transgender person “may choose to undergo some, all, or none of these processes.”¹¹ Accordingly, the only evidence that an employer can have as to a person’s current gender identity is concurrent representations by that person.

Moreover, gender identity is not fixed. A person can “embrace a fluidity of gender identity” or have “a fluid or unfixed gender identity.”¹² And the possibilities for potential protected identities continue to grow: Recent estimates cite some 80 types of genders and gender identities, ranging from “aliagender” to “bigender” to “demiboy” to “genderqueer” to “transfeminine” and many more.¹³ EEOC does not explain how employers are to continually monitor and update their employment policies to reflect the latest developments in gender ideology, let alone adequately account for the costs of complying with this demanding requirement. Holding employers liable for unknowable, unverifiable, and in some cases oft-changing traits is unsustainable, especially in conjunction with society’s legitimate interest in sex-restricted private spaces.

C. EEOC has not considered or addressed how the Proposed Guidance may harm the employment prospects of transgender persons as well as workplace morale and productivity.

Under the APA, agencies must consider the countervailing consequences of a proposed regulatory approach. *See, e.g., Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19-20 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133, 140 (D.C. Cir. 2005). Here, EEOC’s proposal risks grave harm to the ability of transgender employees to obtain employment. The Proposed Guidance requires employers to police interactions between transgender employees and customers so that they can intervene should customers engage in “misgendering.” Proposed Guidance at II.A, Example 4. It should be obvious that injecting employers into such sensitive interactions threatens the customer-business relationship by deterring future patronage. Likewise, requiring employers to open up bathrooms and changing facilities to employees based on their preferred gender identity could lead to conflicts with other employees and customers who feel their privacy or safety has been compromised. Not to mention, requiring employers to enforce policies that violate the deeply held beliefs of many workers risks creating the type of strife, confusion, and resentment that in turn drains productivity. Given all this, EEOC’s Proposed Guidance may well make it more difficult for transgender employees to obtain employment—thus harming rather than helping this population. Yet EEOC has not mentioned—let alone addressed—this patent downside of its proposal, as the APA requires.

¹⁰ Human Rights Campaign, *Transgender and Non-Binary People FAQ*, <https://tinyurl.com/5f9jvs4c> (last visited Oct. 25, 2023).

¹¹ HRC Glossary, <https://tinyurl.com/2tbewj2v>.

¹² *Id.*

¹³ Chris Drew, *81 Types of Genders & Gender Identities (A to Z List)*, HELPFULPROFESSOR.COM (Mar. 26, 2022), <https://tinyurl.com/yc3xajrj>.

D. EEOC has failed to undertake the required federalism analysis and performs an impermissible about-face on contrary state policies.

Executive Order 13,132 requires agencies to consult with state and local officials to minimize the intrusive effects of ‘policies’ that have federalism implications.” E.O. 13,132 §3(c). Here, the Proposed Guidance contains no such analysis despite its clear implications for federalism. Numerous state and local government agencies and departments have 15 or more employees, and therefore are directly affected by Title VII. Additionally, a number of States have laws that would be directly impacted by the Proposed Guidance.

For example, Tennessee and other States have laws protecting privacy in sex-segregated bathrooms. *See, e.g., Tennessee*, 615 F. Supp. 3d at 823 n.9 (noting laws in Nebraska, Oklahoma, Tennessee, and West Virginia); Ark. Code Ann. § 6-21-120; Idaho Code Ann. § [33-6701]33-6601, *et seq.* Notably, EEOC’s own current regulations recognize and support such laws. *See* 29 C.F.R. §1604.2(b)(5) (“Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.”). Yet EEOC’s Proposed Guidance would override them with a novel take on Title VII preemption.

Tennessee and other States also have laws prohibiting educators from being compelled to use a student’s preferred pronoun inconsistent with the student’s biological sex. *E.g.,* Tenn. Code Ann. § 49-6-5102; Ky. Rev. Stat. Ann. § 158.191(5); Ark. Code Ann. § 6-1-108. Compliance with those State laws would be considered sexual harassment under the Proposed Guidance.

The APA required EEOC to consider Tennessee and other States’ “legitimate reliance” on their laws protecting sex-segregated-facilities and free speech and their implementation before “chang[ing] course[]” from its prior position. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020).

The undersigned States thank EEOC for considering these concerns. If EEOC insists on pursuing its enforcement proposal, it must “make appropriate changes” to the Proposed Guidance, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022), to avoid once more imposing unlawful gender-identity rules on the nation’s employers. *See generally Tennessee*, 615 F. Supp. 3d 807. Should EEOC decline, Tennessee and the other co-signing States are prepared to pursue appropriate legal action to protect their interests, affected employers, and the democratic process.

Sincerely,



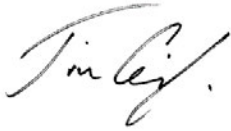
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