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Re: Equal Employment Opportunity Commission, Proposed Enforcement Guidance on Harassment in the Workplace

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We are pleased to submit these public comments on behalf of the American Association of Christian Schools (AACCS) regarding the Equal Employment Opportunity Commission’s (Commission) proposed guidance titled “Enforcement Guidance on Harassment in the Workplace.” The AACCS is a national organization comprised of over 700 member schools across the country, employing more than 13,000 teachers and staff who serve approximately 118,000 students nationwide. Like other faith-based and Christian institutions, our schools and ministries follow a faith-based mission that cultivates an environment supporting their employees. In addition, our schools foster a caring atmosphere free of harassment, avoiding bullying, mocking, intimidation, sexual harassment, and other selfish, sinful behaviors. We believe all such actions fail to follow the instructions in the Scriptures instructing Christians on how to treat others.

We appreciate the efforts of the Commission to provide guidance against workplace harassment. However, we are deeply concerned that the proposed guidance includes areas of so-called “harassment” that fail to recognize the reality of human sexual dimorphism, not to mention ignoring the religious liberty and exercise protections articulated in the Title VII religious exemption, the Religious Freedom Restoration Act, and the First Amendment to the U.S. Constitution.

First, we are concerned that the proposed guidance’s inclusion of abortion raises significant problems for the rights of religious employers and employees. Most Christian schools and a majority of religious organizations across the nation believe in the sacredness and value of human life before birth. This view is ingrained in their organizations and affects everything from personnel selection to policies governing employee behavioral expectations. However, pro-life institutions and individuals face a significant threat to their ability to protect life in the womb while following these sincerely held convictions when the regulation creates a new category of sex-based harassment that includes abortion.

Many Christian employers require their employees to maintain a lifestyle which follows the guidance of Scripture, including protecting life throughout a pregnancy. However, the proposed guidance could invite claims of harassment when institutions have pro-life employment policies. In addition, many of our schools teach that life begins at conception. We are concerned that this proposed guidance would stifle a school’s ability to teach these truths and squash a pro-life workplace culture for employer and employee alike.

We urge the Commission to clarify the proposed guidance to reflect the religious liberty of religious institutions, employers, and employees to make pro-life employment decisions and workplace policies without fear of retaliation from an employee or government bureaucrats. Specifically, the proposed guidance should clarify whether pro-life employees can express their views in the office and online without fear of retaliation and whether pro-life organizations can keep a pro-life culture.

Second, we are concerned that employers and employees will face significant First Amendment religious and free speech violations because the proposed guidance denies reality by including a newly created category of harassment tied to intentional and repeated so-called “misgendering.”

Biologically, ontologically, and morally, humans are and have always been sexually dimorphic. Only two sexes exist—male and female—and these remain fixed despite any desire or attempt to change otherwise. The Scriptures reflect this reality, and our schools teach and enact policies accordingly. However, in purporting to protect a person from pronoun “harassment,” this proposed guidance attempts to override reality. Consequently, teachers and schools that affirm biological reality will face claims of harassment for speaking the truth.

For example, an English teacher may affirm the correctness and proper usage of the English language, such as using pronouns that represent reality (i.e., he/him for males and she/her for females). However, this teacher may be compelled to speak otherwise for fear of harassment claims. Today, many people suffer from the delusion that pronouns can be swapped to reflect an inner sense of sex. Their insistence that others affirm this false reality is a form of intolerance and coercion that only tends to create hostility and intimidation within organizations that seek to affirm the truth about human sexual realities. Additionally, without a limiting principle related to human sex, there seems to be no end to future claims that may be made by others inventing new and unusual demands related to pronoun usage. We note with concern the continuing trend where some people have started using neopronouns such as “bug/bugself” or “vamp/vampself”¹ while demanding affirmation in these deluded identities.

For the English teacher (or any individual for that matter), any swapping or other pronoun inventions are not only confusing and capricious, but these trends also undermine the very reality teachers are conveying to their students, such as the fixed rules and standards of language. Other teachers across the disciplines will face this same dilemma, such as the math teacher who teaches that order and objective mathematical and scientific principles exist regardless of a person’s wishes. “Misgendering” is a misnomer, a euphemism for affirming lies. When people attempt to deny truth to suit desire, the realities of human existence are on the chopping block.

While the proposed guidance states it is not imposing a general civility guide, it does just that by coercing employers to compel employees to use inaccurate pronouns. This type of positive liberty advocated by Rousseau stands in stark contrast to the negative liberty championed by America’s Founders. In other words, the government can either force people to be “free” by requiring them to support a certain viewpoint, or the government can stop coercing belief and simply let people operate in truth and freedom without interference. Court precedent indicates this de facto civility code is unacceptable and unlawful practice. In the case *Meriwether v. Hartop*, which involved a professor who declined to use a person’s claimed pronouns, the Sixth Circuit Court found that “if professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to

¹ Marcus, Ezra. (2022, September 18). “A Guide to Neopronouns,” *New York Times*.
<https://www.nytimes.com/2021/04/08/style/neopronouns-nonbinary-explainer.html>.

condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as ‘comrades.’ That cannot be.”²

The proposed guidance purports to reflect the Supreme Court’s decision in *Bostock v. Clayton County*.³ Yet, the Commission fails to use the language of *Bostock*, i.e., “transgender status,” and instead uses “gender identity,” which *Bostock* did not use. Thus, if the Commission wishes to reflect the Supreme Court’s decision, it should follow the Court’s opinion instead of the Commission’s interpretation.

In addition to denying reality and compelling speech, the proposed guidance tramples on religious liberty, a constitutionally ensured right. Despite those who believe objective truth to be hurtful, the government cannot veto religious liberty and compel certain speech even from those who believe differently. The Supreme Court recently agreed with this religious liberty in the decision *303 Creative LLC. v. Elenis*:

In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment’s boundaries by seeking to compel speech they thought vital at the time. But abiding the Constitution’s commitment to the freedom of speech means all will encounter ideas that are “misguided, or even hurtful.” *Hurley*, 515 U. S., at 574. Consistent with the First Amendment, the Nation’s answer is tolerance, not coercion. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.⁴

If this proposed guidance is not changed to reflect reality and religious liberty, teachers and students, employers and employees will suffer. For example, a Christian teacher may be caught in the crosshairs if he is forced to call a student or coworker by inaccurate pronouns. This teacher who affirms the distinctiveness of the sexes will be forced to abandon his religious beliefs, religious beliefs grounded in physical and spiritual reality, to comply with this policy—an untenable dilemma.

When updating this proposed guidance, the Commission should address how the inclusion of “misgendering” will affect teachers of subjects such as language or English, how the inclusion of “misgendering” will affect teachers who may have religious beliefs about correct pronoun usage, and whether the inclusion of “misgendering” will force teachers to use neopronouns.

Third, we are concerned about the Commission’s assertion that the denial of access to a bathroom or sex-segregated facility based on a person’s claimed gender identity could constitute harassment. As previously stated, our school policies operate according to the reality of the distinctives of maleness and femaleness. As a result, they have policies that protect the sexes through separate facilities such as bathrooms or locker rooms. We are concerned that the inclusion of this language in the proposed guidance opens the door for men to trespass in spaces designed for women. For instance, a situation already exists where a male coach has identified as a woman and forced his employer to allow him

² *Meriwether v. Hartop*, <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0071p-06.pdf>.

³ U.S. Equal Employment Opportunity Commission. (2023, September 29). “EEOC Proposes Updated Workplace Harassment Guidance to Protect Workers.” <https://www.eeoc.gov/newsroom/eeoc-proposes-updated-workplace-harassment-guidance-protect-workers>.

⁴ *303 Creative LLC. v. Elenis*, ___ U.S. ___ (2023), https://www.supremecourt.gov/opinions/22pdf/21-476_c185.pdf.

access to the girls' locker room with the female students.⁵ This guidance would practically ensure this result as matter of policy. In attempting to protect against this "harassment" for "denial of access," the proposed guidance exposes women and children to the credible threat of real harassment. The inclusion of bathroom access as a harassment claim will inevitably lead to conflicting claims of harassment. How will the Commission prioritize alternate claims of sex-based harassment between an individual who wants to use the opposite sex's facility and an individual who is harassed by someone of the opposite sex being in the same facility?

Furthermore, most religious institutions, including our schools, have religious convictions regarding how to best help those suffering from gender dysphoria. Without clarifying an employer's or employee's lawful and constitutional religious liberty provided through Title VII and the Constitution, the Commission is forcing religious organizations and employers to choose between protecting women and children but violating the Commission's proposed guidance or following the Commission's proposed guidance but endangering women and children. Specifically, the Commission should clarify whether Christian organizations will be forced to allow unrestricted access to restrooms or other sex-segregated spaces based on a person's claimed gender identity.

Fourth, we are concerned about the balance between anti-harassment accommodations and the freedom of religious exercise. The proposed guidance states that the employer is "not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment" (p. 59). However, the proposed guidance fails to explain how the protections for religious belief and practice should be accommodated. As illustrated in previous points, the proposed guidance sets up scenarios which inevitably will lead to dueling claims between the Commission's definition of sex-based harassment and religious harassment. For every employee who feels harassed by a coworker speaking the truth, another employee's religious rights will be violated when he is compelled to deny reality and his religious convictions. Although the Commission fails to explicitly address how it will handle these opposite accusations, it has shown its hand by revealing which side it prefers. If the Commission calls a person's preferred pronouns "correct" (p. 9, Example 4) or feels compelled to use "they/them" pronouns in an imaginary illustration (p. 41, Example 28), how can the Commission be a neutral arbiter of harassment claims in real life? By failing to protect reality, this proposed guidance opens the door to the trampling of First Amendment religious liberty rights and free speech rights, not to mention the myriad of legal issues that will surely arise.

In conclusion, most (if not all) of our concerns stem from the proposed guidance omitting any explanation and clarity regarding the reality of human sexual dimorphism, religious liberty, and religious expression. The proposed guidance provides allowances and protections for abortion, inaccurate pronouns, and the effective dissolution of sex-segregated spaces without recognizing these issues run counter to the truth and the deeply held convictions of many religious institutions and individuals.

We urge the Commission to clearly state in the proposed guidance that it follows the religious organization exemption in Title VII and is also under the authority of the Religious Freedom Restoration Act, and the First Amendment.

⁵ Hall, Alexander. (2023, September 14). School Board Reportedly Votes to Retain Trans Tennis Coach After Girls' Locker Room Controversy. <https://www.foxnews.com/media/school-board-reportedly-votes-retain-trans-tennis-coach-girls-locker-room-controversy>

- The religious organization exemption (Section 702(a)) in Title VII protects the employment practices of a “religious corporation, association, educational institution or society,” and the language indicates that the exemption covers all of Title VII.⁶ According to the definition given for religion in Section 701(j) of Title VII, the scope of the protected religion “includes all aspects of religious observance and practice, as well as belief.”⁷ In passing Title VII, Congress recognized the importance of protecting the freedom of religious institutions to make decisions regarding employment and practice based on their religious beliefs and convictions. The proposed guidance should explicitly recognize this important religious organization exemption to clarify the areas of abortion, policies regarding transgender-identifying individuals, and sex-separate facilities in the proposed guidance, ensuring that religious organizations can continue following their faith-based missions.
- The First Amendment clearly protects against the government prohibiting religious exercise or practice. Additionally, it also protects the freedom of speech. To provide clarity, the proposed guidance should explicitly recognize the protections for religious expression and practice as provided for by the First Amendment, ensuring religious employers will not be accused of harassment when adhering to reality and religious convictions in the areas of abortion, policies regarding transgender-identifying individuals, or sex-separate facilities.
- The Religious Freedom Restoration Act protects the religious freedom of individuals and organizations against a government action which would substantially hinder their religious expression.⁸ Court precedent confirms the protections provided through RFRA in the case *Braidwood Management Inc. v. Becerra*. In that case, the Fifth Circuit found the Commission’s guidance “burdens the exercise of Braidwood’s religious practice” because the guidance forced the company to either violate its religious convictions or violate the Commission’s policy.⁹ The Fifth Circuit found that the Commission cannot determine its LGBT guidance against religious employers under RFRA. If the Commission issues a final version of this proposed guidance that adopts the same standards found unlawful in *Braidwood*, the same rationale should apply. As the Fifth Circuit put it, “The EEOC’s opposing arguments are unconvincing.”¹⁰ The inclusion of abortion, “misgendering,” and separate bathroom use as areas of harassment will all violate RFRA without the proposed guidance clarifying and recognizing the importance of religious exercise as protected under this statute.

To avoid inevitable legal conflicts, this proposed guidance must recognize the constitutional rights of religious employers and employees to follow and exercise these reality-based beliefs without being accused of harassment. Without recognizing the importance of truth and religious freedom, this proposed guidance pits a government-supported ideology against Constitutionally backed religious liberty.

⁶ Pub. L. No. 88-352 (Title VII) <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>

⁷ *Id.*

⁸ Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4

⁹ *Braidwood Management Inc. v. Becerra*, <https://www.ca5.uscourts.gov/opinions/pub/22/22-10145-CV0.pdf>.

¹⁰ *Id.*

We respectfully urge the Commission to reevaluate and revise the proposed guidance, given the preeminence of the Constitution and the other federal laws that recognize and protect religious liberty.

Thank you for your consideration of our concerns.

Sincerely,



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