ETHICS AND PUBLIC POLICY CENTER

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EO 12866 Meeting
EEOC "Enforcement Guidance on Harassment in the Workplace"
RIN 3046–ZA02

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Thank you for the opportunity[1] to provide comments on OIRA's review of the Equal Employment Opportunity Commission's proposed "Enforcement Guidance on Harassment in the Workplace" ("guidance" or "harassment guidance").[2]

My name is Rachel Morrison, and I'm an attorney and fellow at the Ethics and Public Policy Center, where I direct the HHS Accountability Project. I am also a former attorney at the EEOC.

As I explained in my public comment on the guidance: "I support the EEOC's efforts to prevent and remedy *unlawful* harassment in the workplace. EEOC's proposed harassment guidance, however, exceeds the Commission's authority by covering actions and speech not prohibited by law, raising serious religious freedom and free speech concerns."[3] EEOC intends its guidance to "provide clarity to the public," and "serve[] as a resource."[4] Yet its proposed guidance does the opposite of "provide clarity" by overstating the law and ignoring constitutional and statutory free speech and religious exercise protections for employees and employers.

Today, I'd like to discuss eight concerns of particular interest for OIRA. Most of my concerns are focused on the expansive definition of sex-based harassment, instances where the guidance is contrary to law, and ways the Commission can provide more clarity. I urge OIRA to ensure that the Commission does not overstate or misstate the law, acknowledges areas where

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, I are glad you are willing to hear an EPPC scholar's input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] *Available at* https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace [hereinafter "EEOC Proposed Harassment Guidance"].
[3] EPPC, EPPC Scholar Comment on EEOC PROPOSED Enforcement Guidance on Harassment in the Workplace, Docket ID EEOC–2023–0005, RIN 3046–ZA02, at 1 (Nov. 1, 2023), https://eppc.org/wp-content/uploads/2023/11/EPPC-Scholar-Comment-on-EEOC-Proposed-Harassment-Guidance.pdf [hereinafter: "EPPC Comment on EEOC Proposed Harassment Guidance"].
[4] EEOC Proposed Harassment Guidance at 4-5.

courts have disagreed with the Commission's position, provides clarity, and explicitly acknowledges legal protections for free speech and religious exercise in the workplace.

I. Claims that EEOC's harassment guidance does "not have the force and effect of law," do not eliminate the obligation to comply with the Administrative Procedure Act.

- While EEOC is clear that its guidance does "not have the force and effect of law" and is "not meant to bind the public in any way,"[5] it is important that EEOC guidance accurately reflects the law. As EEOC well knows, considerable weight is placed on EEOC guidance. Indeed, EEOC intends its guidance to "provide clarity to the public," and "serve[] as a resource" for EEOC staff, other federal agencies, employers, employees, practitioners, and courts considering harassment issues.[6] EEOC staff in particular have a duty to follow the law as written and EEOC guidance should not lead them astray.[7]
- The claim that EEOC's harassment guidance does "not have the force and effect of law," does not eliminate the obligation for the guidance to comply with the Administrative Procedure Act (APA). For example:
    - A federal court found that EEOC's *Bostock* guidance, which covered many of the same topics as the harassment guidance, was subject to APA requirements.[8]
    - A federal court found that the Department of Health and Human Services' post-*Dobbs* pharmacy guidance that stated it does "not have the force and effect of law" was subject to the APA.[9] Denying the government's motion to dismiss APA claims, the court explained that HHS is "smurfing[] an executive policy goal into 'unreviewable' and 'unchallengeable' pieces while reinforcing the whole with an implicit enforcement threat … in an effort to avoid legal consequence."[10] The court explained, the Biden administration "has, before and since *Dobbs,* openly stated its intention to operate by fiat to find non-legislative workarounds to Supreme Court dictates."[11]
- EEOC's harassment guidance here appears to be "smurfing" the Biden administration's pro-abortion and pro-LGBTQI+ policy goals into "unreviewable" and "unchallengeable"

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[5] *Id.* at 5.
[6] *Id.* at 4-5.
[7] *See generally* Sharon Fast Gustafson & Rachel N. Morrison, *EEOC's 'Gender Discrimination' Campaign and Crusade against Religious Employers*, Nat'l Rev. (Sept. 27, 2023, 1:00 PM), https://www.nationalreview.com/bench-memos/eeocs-gender-discrimination-campaign-and-crusade-against-religious-employers/ ("The EEOC would do well to remember that it is an arm of the federal government, responsible for serving all the people, not a partisan or public-interest advocacy organization like the ACLU. The EEOC has a duty of good government and not just aggressive litigation. And it has a duty to uphold the Constitution, including [protections for religious exercise], and to enforce the law as written by Congress in an evenhanded way.").
[8] *Texas v. Equal Emp't Opportunity Comm'n*, 2:21-CV-194-Z (N.D. Tex. Oct. 1, 2022) (holding EEOC's *Bostock* guidance "constitutes a substantive rule" and is thus subject to APA requirements).
[9] *Texas v. U.S. Dep't of Health & Human Servs*., No. 23-CV-00022-DC, 2023 WL 4629168, at *2 (W.D. Tex. July 12, 2023).
[10] *Id.* at *12.
[11] *Id.*

guidance "while reinforcing the whole with an implicit enforcement threat … in an effort to avoid legal consequence." The APA requires that substantive rules, like the harassment guidance, not be contrary to law or arbitrary and capricious.

II. EEOC harassment guidance should clarify whether it applies to the PWFA.

- While the guidance references pregnancy, it did not mention the Pregnant Workers Fairness Act (PWFA), the most recent law EEOC is tasked with enforcing. In EEOC's regulations implementing the PWFA, revealed this week, the Commission added "harass" to the statutory list of prohibited activities in the Act's coercion provision, which prohibits retaliation and also makes it unlawful to "coerce, intimidate, threaten, or interfere" with "the exercise or enjoyment of[] any right granted or protected by [the PWFA]."[12]
- While I disagreed that it was appropriate for EEOC to add "harass" to the list of prohibited activities that Congress provided in the text of the statute, I agree that harassment could be a form of coercion, intimidation, threats, or interferences with a worker's PWFA rights (though not all harassment will "coerce, intimidate, threaten, or interfere").
- As such, I ask that EEOC clarify whether its harassment guidance applies to the PWFA. If it does, I ask the EEOC reopen its proposed harassment guidance for public comment so that the public can provide input on the guidance's application to the PWFA.

III. Harassment based on broader "reproductive decisions" is contrary to law.

- The harassment guidance states sex-based harassment also includes harassment based on "pregnancy, childbirth, or related medical conditions, including lactation," and can include "harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion."
- I agree that sex-based harassment extends to pregnancy, childbirth, and related medical conditions through the Pregnancy Discrimination Act, but the EEOC's articulation of sex harassment related to "lactation" and "reproductive decisions" overstates and misstates the law. The question is not what harassment the Commission (or you or I) would like to see prohibited, but what harassment is prohibited by law.
- Below, I flag where the Commission's position, which is stated without qualification in the guidance, is not supported by caselaw and where courts are not in agreement.
    - *Lactation.* The EEOC asserts that harassment based on lactation is unlawful under the PDA,[13] citing to decisions from the Fifth and Eleventh Circuits that have found that lactation is a related medical condition of pregnancy or childbirth, or

[12] 29 C.F.R. § 1636.5(f)(2)(ii), *available at* EEOC, Implementation of the Pregnant Workers Fairness Act, https://www.federalregister.gov/public-inspection/2024-07527/implementation-of-the-pregnant-workers-fairness-act (unpublished PDF version available until scheduled publication Apr. 19, 2024) [hereinafter "EEOC PWFA Regulations"].
[13] EEOC Proposed Harassment Guidance at 10 n.25.

both.[14] However, the EEOC takes no note of other jurisdictions, including the Fourth and Sixth Circuits, that have found that breastfeeding does not fall within the scope of the PDA.[15] At minimum, EEOC harassment guidance should recognize that not all courts agree with the EEOC's position.

- *Reproductive Decisions.* The term "reproductive decisions" is found nowhere in Title VII and is, by definition, broader than the statutory language of "pregnancy, childbirth, or related medical conditions." The extra textual language of "reproductive decisions" should be dropped.
- *Contraception.* Regarding contraception, the EEOC cites to its pregnancy guidance for the proposition that "Title VII prohibits discrimination against a woman because she uses contraceptives and citing cases."[16] But EEOC's pregnancy guidance merely cites two district court cases and dismisses a contrary circuit court case.[17] In the one circuit court case on point, *In re Union Pacific Railroad*, the Eighth Circuit held that "contraception is not 'related to' pregnancy for PDA purposes because, like infertility treatments, contraception is a treatment that is only indicated prior to pregnancy. Contraception is not a medical treatment that occurs when or if a woman becomes pregnant; instead, contraception prevents pregnancy from even occurring."[18] The EEOC's pregnancy guidance claims that the Eighth Circuit's conclusion—that "contraception is not 'related to pregnancy' because 'contraception is a treatment that is only indicated prior to pregnancy'"—is "not persuasive because it is contrary to the *Johnson Controls* holding that the PDA applies to potential pregnancy."[19] But it is the EEOC's argument that is not persuasive. The entire purpose of contraception is to *prevent* pregnancy. By design there is no "potential pregnancy." In addition to the Eighth Circuit, two other district courts have likewise questioned extending the PDA to contraceptives.[20] It is inappropriate for the EEOC to blanketly claim that decisions

[14] *See Hicks v. City of Tuscaloosa, Ala.*, 870 F.3d 1253, 1259 (11th Cir. 2017) ("lactation is a related medical condition and therefore covered under the PDA"); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding "lactation is a related medical condition of pregnancy for purposes of the PDA"); *Allen-Brown v. D.C.*, 174 F. Supp. 3d 463, 478 (D.D.C. 2016) (holding lactation is a medical condition related to childbirth, such that the PDA applies to lactation).

[15] *See Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (acknowledging that breast-feeding is not covered by the PDA); *Notter v. North Hand Protection*, 89 F.3d 829, at *5 (4th Cir. 1996) (per curiam) (table) (acknowledging *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (per curiam), "stands for the narrow proposition that breastfeeding is not a *medical* condition related to pregnancy or to childbirth"); *Stanley v. Abacus Tech. Corp.*, No. 07-CV-1013 BB/LFG, 2008 WL 11359117, at *6 (D.N.M. Nov. 17, 2008) ("breast-feeding does not fall within the scope of the PDA"), *aff'd on other grounds without reaching issue*, 359 F. App'x 926 (10th Cir. 2010).

[16] EEOC Proposed Harassment Guidance at 10 n.26.

[17] EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues § I.A.3.d (2015) [hereinafter "EEOC Pregnancy Guidance"], *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.

[18] *In re Union Pacific Railroad*, 479 F.3d 936, 942 (8th Cir. 2007).

[19] EEOC Pregnancy Guidance at § I.A.3.d n.38.

[20] *See*, *EEOC v. United Parcel Service, Inc*., 141 F. Supp. 2d 1216, 1218 n.1, 1219–20. (D. Minn. 2001) (explaining that it had "serious doubts about the merits of a PDA claim in this context" (citing *Krauel v. Iowa Methodist Med. Ctr*., 95 F.3d 674 (8th Cir. 1996), for the proposition that "[t]he Eighth Circuit has made clear that prevention of conception is outside the scope of the PDA"); *Alexander v. Am. Airlines, Inc*., No. 02-252, 2002 WL 731815, at *2,

about contraception are covered when most courts disagree. At minimum, EEOC should recognize in its guidance that courts disagree with its position, including the only circuit court that has yet addressed this issue.

- *Abortion.* In support of extending harassment protections to abortion, EEOC cites its (non-legally binding) pregnancy guidance, two circuit court cases, and a district court case.[21] But three pre-*Dobbs* court decisions involving employee terminations, including one by a district court, hardly create an established interpretation of harassment under Title VII nationwide. Significantly, the U.S. Supreme Court has never addressed the issue of whether Title VII protects employees from abortion discrimination and has never held that Title VII's prohibition against discrimination "on the basis of pregnancy, childbirth, or related medical conditions" covers abortion. Further, these three decisions were issued with the backdrop of *Roe v. Wade* providing constitutional protection for abortion. The Supreme Court's decision in *Dobbs* overturning *Roe* calls into question continued reliance on these opinions. Under the Constitution, there is no federal governmental interest in abortion and Title VII (and the PWFA) do not change that.
    - Indeed, abortion is not pregnancy, childbirth, or a related medical condition of either; it is a medical intervention, not a medical *condition.* Abortion is the act of forcibly ending a pregnancy and preventing childbirth by killing a child in the womb. It is anti-pregnancy and anti-childbirth. Since abortion is not a pregnancy or childbirth-related medical *condition*, it cannot be subject to PDA harassment protections per se. At minimum, EEOC should make clear in its final guidance that harassment protections for abortion are merely the Commission's position, and not settled under law.
- *Other "reproductive decisions."* In EEOC's recently revealed PWFA regulations, the Commission provides a "non-exhaustive" list of conditions it believes is covered by the phrase "pregnancy, childbirth, and related medical conditions."[22] This list includes "current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery)," as well as "termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or

*4 (N.D. Tex. Apr.22, 2002) (dismissing case for lack of standing but explaining that "[b]y no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition[s]' require the provision of contraceptives as part of the treatment for infertility").

[21] EEOC Proposed Harassment Guidance at 10 n.27.

[22] 29 C.F.R. § 1636.3(b), *available at* EEOC PWFA Regulations, *supra* note 12.

psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections."[23]

- EEOC should clarify whether all the conditions identified in the PWFA regulations are "reproductive decisions" that would be grounds for a harassment claim? If the answer is yes and because the list of conditions identified in the PWFA regulations is "non-exhaustive," the Commission should also clarify whether the following "reproductive decisions" would likewise be grounds for a harassment claim: abortion unlawful under state law, fertility treatments for men or gay couples,[24] male employees "chestfeeding" infants, surrogacy, adoption, uterus transplants, and hormones for gender transitions.

- In short, harassment protections should be limited to the grounds protected by statute—pregnancy, childbirth, and related medical *conditions*. At a minimum, EEOC should flag that its position is merely the Commission's and not give the false impression that harassment based on broader "reproductive decisions" it is required under law.

IV. Harassment based on gender identity and gender expression is contrary to law and the limits of *Bostock*.

- The EEOC explains the updated guidance "reflects notable changes in law, including the Supreme Court's decision in *Bostock v. Clayton County.*"[25] Yet the Commission's proposed guidance goes far beyond *Bostock*'s holding.

- Citing to *Bostock*, the guidance states, "sex-based harassment includes harassment on the basis of sexual orientation and gender identity, *including how that identity is expressed*."[26]

  - The guidance provides examples of what such harassment could include: "epithets regarding sexual orientation or gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; 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 individual's gender identity."[27]

  - Example 4 provides a hypothetical scenario elaborating on the Commission's position on harassment based on gender identity. "Jennifer, a cashier at a fast food restaurant who identifies as female, alleges that supervisors, coworkers, and customers regularly and intentionally misgender her. One of her supervisors, Allison, frequently

[23] *Id.*
[24] For example, California lawmakers redefined "infertility" to include same-sex couples who would like to have children but obviously cannot without involving a third party. *See* Cal. S.B. 729 (2023).
[25] Press Release, EEOC, EEOC Proposes Updated Workplace Harassment Guidance to Protect Workers (Sept. 29, 2023), https://www.eeoc.gov/newsroom/eeoc-proposes-updated-workplace-harassment-guidance-protect-workers.
[26] EEOC Proposed Harassment Guidance at 10-11 (emphasis added).
[27] *Id.* at 11-12.

uses Jennifer's prior male name, male pronouns, and "dude" when referring to Jennifer, despite Jennifer's request for Allison to use her correct name and pronouns; other managers also intentionally refer to Jennifer as "he." Coworkers have asked Jennifer questions about her sexual orientation and anatomy and asserted that she was not female. Customers also have intentionally misgendered Jennifer and made threatening statements to her, but her supervisors did not address the harassment and instead reassigned her to duties outside of the view of customers. Based on these facts, Jennifer has alleged harassment based on her gender identity."[28]

a. *Bostock* was a limited holding.

- As explained below, *Bostock* was a limited holding and does not support this proposed broad application of gender identity harassment.

i. *Bostock* addressed "transgender *status*" and did not adopt "gender identity" as a protected class.

- In *Bostock*, the Supreme Court held that under Title VII "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"[29]
- Notably, the majority in *Bostock* used the term "transgender" or "transgender status," not "gender identity," throughout its opinion. Significantly, *Bostock* did not adopt "gender identity" as a protected class. As such, EEOC cannot rely on *Bostock* to support application of sex discrimination to "gender identity." Indeed, it is telling that the harassment guidance cites to circuit court decisions describing *Bostock*'s holding in terms of "gender identity" and not the language in *Bostock* itself.[30]
- To the extent that the Commission believes that there is no distinction between "gender identity" and "transgender status," there is no need to use a different term than the Supreme Court used. The Commission should be faithful to the text of Title VII and Supreme Court's articulation in *Bostock*. If, however, there is a distinction between the two terms, then it is inappropriate for the Commission to go beyond the Supreme Court's articulation. Indeed, it appears that by using the arguably broader term "gender identity" the Commission is seeking to extend protections beyond "status" to related behavior or "how that identity is expressed." But, as explained more below, that is more than *Bostock* held.

ii. *Bostock* was limited to status; the Court explicitly did address related conduct or expression.

- The EEOC explains, "*Bostock* itself concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision logically extends to claims of harassment. Indeed, courts have readily found post-*Bostock* that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII."[31]

[28] *Id.* at 12.
[29] 140 S. Ct. 1731, 1737 (2020).
[30] EEOC Proposed Harassment Guidance at 10 n.28.
[31] *Id.* at 11 n.29.

However, the Supreme Court in *Bostock* specifically cabined its decision to status, or "being transgender."[32] As a federal district court explained, *Bostock*'s holding was cabined to "homosexuality and transgender *status"* and does not extend to "correlated *conduct*—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices."[33] The EEOC ignores the text of *Bostock*; it "misread[s] *Bostock* by melding 'status' and 'conduct' into one catchall protected class covering all conduct correlated to 'sexual orientation' and 'gender identity. Justice Gorsuch expressly did not do that."[34]

- The majority in *Bostock* explained it was not addressing a "broader scope" of conduct[35] and other Title VII issues, such as sex-specific bathrooms, locker rooms, and dress codes.[36] While the Court acknowledged concerns by some that its decision could make sex-specific bathrooms, locker rooms, and dress codes "unsustainable" and "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," the Court did not address those concerns.[37] The Court explained that such questions were for "future cases" and the Court would not prejudge any such questions because "none of th[o]se other laws [we]re before [them]."[38]
- While the EEOC relies on other Title VII cases and federal sector EEOC decisions, it "cannot rely on the words and reasoning of *Bostock* itself to explain why the Court prejudged what the Court expressly refused to prejudge."[39] The EEOC should heed the Supreme Court's direction and likewise not prejudge those questions the Court left unanswered, especially as it relates to pronouns and sex-specific spaces. The Supreme Court was clear that *Bostock* did not decide any issue beyond hiring and firing based on "homosexuality and transgender *status"* under Title VII. It is inappropriate for EEOC guidance to ignore *Bostock*'s limitations and claim *Bostock* supports its extension of harassment claims to how a person's gender identity is expressed.

iii. *Bostock* assumed sex is biological and binary.

- *Bostock* premised its decision on the assumption that "sex" refers only to the "biological distinctions between male and female."[40] A biological view of sex is incompatible with a gender spectrum or fluidity, which is promoted through use of the phrases "gender identity" and "how that identity is expressed." To be consistent with *Bostock*, which the guidance claims to follow, EEOC must also assume "sex" refers to "biological distinctions between male and female."

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[32] *Texas v. Equal Emp't Opportunity Comm'n*, 2:21-CV-194-Z, at *5 (N.D. Tex. Oct. 1, 2022) ("Though human sexuality correlates to myriad attractions, identifications, actions, and relationships, the Court cabined its definitions and descriptions of 'being homosexual' and 'being transgender' to *status*.").
[33] *Id.* at *4.
[34] *Id*. at *6 (citations omitted).
[35] 140 S. Ct. at 1739.
[36] *Id.* at 1753.
[37] *Id.*
[38] *Id.*
[39] *Texas*, 2:21-CV-194-Z, at *8.
[40] 140 S. Ct. at 1739.

b. EEOC's gender identity pronoun mandate is contrary to law and raises a host of practical problems, requiring more clarity.

- Example 4 calls a person's name and pronouns that correspond to the person's gender identity "correct," implying that use of pronouns that correspond to a person's biological sex are "incorrect." Citing several unreported district court cases, the EEOC notes, "Courts—even prior to the Supreme Court's *Bostock* decision—have viewed evidence of intentional misgendering as supportive of a hostile work environment claim."[41]
- The guidance, however, fails to mention the First Amendment's protections for free speech or religious exercise. It thus fails provide any guidance as to how these fundamental rights might constrain its pronoun mandate.
    - In October 2023, a group of Senators sent a letter to the State Department raising compelled speech and religious liberty concerns with the state department's gender identity pronoun policy, citing the First Amendment, Title VII, and the Religious Freedom Restoration Act (RFRA).[42]
    - A 2021 Sixth Circuit decision in *Meriwether v. Hartop* allowed a professor's First Amendment challenge to a university pronoun policy to proceed on free-speech and free-exercise grounds.[43] The case ultimately settled, with the university agreeing to pay $400,000 in damages and attorney's fees.[44]
- At the very least, EEOC should acknowledge the free speech and free exercise concerns raised by the Senators and the Sixth Circuit and take a position on whether the First Amendment, Title VII, and RFRA provide protections for employees or employers who object to using pronouns that do not correspond to a person's biological sex.
- The EEOC's gender identity pronoun mandate leaves many open questions. If the final guidance includes the proposed pronoun mandate, which it shouldn't, the EEOC should clarify the following questions about its application. Under the guidance, will employers be required to police pronoun usage by employees and customers? Does the guidance apply to *any* pronouns a person claims reflect the person's gender identity? Does it apply to "neopronouns"? Does it apply to pronouns that would otherwise be inappropriate, impolite, or offensive words? Is there any limit on what pronouns employers and employees would be required to use if a person claims those pronouns reflect the person's gender identity?
- For example, would it be considered harassment to not use the following pronouns consistent with an individual's gender identity:
    - He/him to refer to a biological female;
    - She/her to refer to a biological male;

[41] EEOC Proposed Harassment Guidance at 11 n.33.
[42] Letter from Ted Budd, U.S. Senator, and 10 Other Senators, to Antony Blinken, Secretary, U.S. Dep't of State, Oct. 20, 2023, https://www.budd.senate.gov/wp-content/uploads/2023/10/10.20.23-Budd-Letter-to-Blinken-on-Updated-Guidance1.pdf.
[43] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).
[44] *Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), press release available at https://adfmedia.org/case/meriwether-v-trustees-shawnee-state-university.

- They/them to refer to a singular individual[45];
- It/its to refer to a human being[46];
- Ze/zir (or hir), xe/xyr, fae/faer, ae/aer[47];
- Leaf/leafself[48];
- Love/loves[49];
- Pumpkin/spice[50];
- Pup/pupself[51];
- Fish/fishself[52];
- Toy/toyself[53];
- Nor/mal[54];
- Beep/boop[55];
- Hee/haw[56];
- Rawr/rawrs[57];
- Clown/clownself[58]; etc.

- Does the pronoun mandate extent to:
  - Titles and honorifics?
  - The use emojis as pronouns?[59]
  - Individuals who use mixed or multiple sets of pronouns?[60]
  - Individuals who continually change their pronouns?[61]
  - Individuals that request that different types of people use different pronouns when referring to them?

- Does the pronoun mandate apply to pronouns employees say corresponds with their gender identity, but appear to mock or troll others' pronouns?[62] If no, how can an

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[45] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns.
[46] *See* Beth Greenfield, *Here's why some LGBTQ Youth Are now Embracing the Nonbinary Pronoun 'it/its'*, Yahoo (Aug. 17, 2021), https://www.yahoo.com/lifestyle/heres-why-some-lgbtq-youth-are-embracing-non-binary-pronoun-it-its-223331366.html.
[47] *See* Scottie Andrew, *A Guide to Neopronouns, from ae to ze*, CNN (Aug. 12, 2023, 5:00 AM), https://www.cnn.com/us/neopronouns-explained-xe-xyr-wellness-cec/index.html.
[48] *See id.*
[49] *See* https://www.tiktok.com/@lesbiansnowwhite/video/7197266276870409515.
[50] *See* https://www.tiktok.com/@lesbiansnowwhite/video/7281473755426131242.
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[58] *See* https://www.tiktok.com/@tom_f420/video/7201353809078045957.
[59] *See, e.g.*, https://www.tiktok.com/@lesbiansnowwhite/video/7292246787513945386; https://www.tiktok.com/@lesbiansnowwhite/video/7269234553724734763.
[60] *See* Gabrielle Kassel, *How to Respect and Affirm Folks Who Use Multiple Sets of Pronouns*, Well+Good (July 12, 2021), https://www.wellandgood.com/multiple-sets-pronouns/.
[61] *See, e.g.*, https://twitter.com/libsoftiktok/status/1664097577401298945.
[62] *See, e.g.*, Louis Chilton, *Star Wars: Mandalorian Star Gina Carano Accused of 'Mocking Trans People' with 'Boop/Bop/Bbeep' Pronouns Joke*, Independent (Sept. 14 2020, 2:28 PM), https://www.independent.co.uk/arts-entertainment/tv/news/star-wars-mandalorian-gina-carano-trans-pronouns-bio-twitter-disney-b436015.html.

employer determine a "proper" use of pronouns? If a person's gender identity is subjective and self-defined, on what basis does the EEOC recommend that an employer determine whether a person's self-proclaimed pronouns do not actually reflect that person's self-proclaimed gender identity?

- In short, EEOC's gender identity pronoun mandate is impractical, unsustainable, and raises serious free speech and religious exercise concerns. EEOC should not include the proposed pronoun mandate in its final guidance.

c. EEOC's gender identity bathroom mandate is contrary to law and raises a host of practical problems, requiring more clarity.

- To support its position that employers must permit employees to access bathrooms that correspond to their gender identity, the EEOC cites to Title IX bathroom cases. But Title IX cases, while often persuasive in the Title VII context, do not create a legal basis for EEOC's bathroom mandate under Title VII. As EEOC acknowledges in footnotes, courts disagree as to whether Title IX requires access to bathrooms based on gender identity in schools, much less whether a Title IX bathroom mandate extends to Title VII and the workplace.
- EEOC's gender identity bathroom mandate is unsustainable. Consider a case where a male employee accessed a female bathroom and undressed in front of female employees. Whether such behavior is unlawful harassment or mandated by the guidance would depend entirely on the subjective self-identification of the male employee. In one scenario where the male identifies as a man, allowing such behavior would constitute unlawful sex harassment. In the other scenario where the male identifies as a woman, allowing such behavior would be *required* by the guidance. This is arbitrary and capricious.
- Further, like with the pronoun mandate, EEOC's position that access to bathrooms, locker rooms, and other intimate sex-specific facilities should be based on gender identity is unsustainable. Under the guidance, it would be harassment to block a biological male who identifies as a woman from accessing a women's locker room while women are changing or showering. But would it likewise be harassment to block a biological male who identifies as a man from accessing a women's locker room while women are changing or showering? If not, why not? On what basis can an employer make distinctions based on gender identity but not biological sex?
- Allowing access to private spaces based on gender identity will create a host of practical problems in the workplace. Would an employer be subject to a harassment claim if it knowingly allowed a male into private spaces reserved for females? If an employer were subject to such a claim, would it have a defense if the employer believed that the male identified as a woman? If anyone can use sex-specific facilities based on self-declared identity, how can employers ensure that their employees, especially female employees, are free from a hostile work environment? There will be no limiting principle as gender identity is subjective and self-declared. A person's identity could also change day-to-

day,[63] opening the door (literally) for individuals to take advantage of the policy to invade the private spaces of females. Women, especially survivors of sexual assault, deserve to use the bathroom, change, or shower without the presence of biological men (however they identify). Such intimate facilities should remain sex-specific (regardless of gender identity) to promote privacy and safety. Title VII does not mandate otherwise.

V. EEOC harassment guidance should acknowledge and clarify protections for religious organizations.

- The guidance not only overstates what counts as "harassment" under federal law and cases interpreting the same; it neglects entirely to mention that the First Amendment and Congress protect the right of religious employers to make employment decisions according to their religious beliefs. Many commenters raised concerns that the guidance will create conflicts with the religious beliefs of certain religious organizations.[64]

- At a minimum, EEOC's final guidance should acknowledge the legal protections for religion identified by the court in *Bostock*: the First Amendment ministerial exception, Title VII's religious organization exemption, and RFRA.[65] I detail these protections more fully in my public comment.[66] The final guidance should explicitly affirm that additional consideration could apply to harassment claims for employees at religious organizations. This acknowledgment is important because EEOC intends for its guidance to be a resource for employees and practitioners. Recognition of these considerations is especially important for EEOC staff because it involves constitutional and statutory limits of EEOC's authority.

    - For example, the vast majority of courts of appeals have held that the First Amendment ministerial exception protects religious groups from the burdens of litigation, not merely the imposition of liability, regarding their ministerial employment decisions.[67] Indeed, EEOC religion guidance directs its staff to "resolve[]" the ministerial exception "at the earliest possible stage before reaching [an] underlying discrimination claim."[68] The guidance explains the exception is "not just a legal defense . . . , but a constitutionally-based guarantee that obligates

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[63] WebMD, *What is Fluid?*, https://www.webmd.com/sex/what-is-fluid ("Someone who is fluid—also called gender fluid—is a person whose gender identity (the gender they identify with most) is not fixed. It can change over time or from day-to-day.... A person who is gender fluid may identify as male one day, female the next, both male and female, or neither.").

[64] *See* EPPC, *EPPC Scholar and Others Submit Comments on EEOC Proposed Guidance on Workplace Harassment* (Nov. 1, 2023), https://eppc.org/news/eppc-scholars-and-others-submit-comments-on-eeoc-proposed-guidance-on-workplace-harassment/ (linking to public comments submitted by "[r]eligious, pro-life, educational, legal, and policy organizations and experts").

[65] *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

[66] *See* EPPC Comment on EEOC Proposed Harassment Guidance, *supra* note 3, at 10-13.

[67] *See Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577-78 (1st Cir. 1989); *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980–982 (7th Cir. 2021) (en banc); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *EEOC v. Cath. U. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996).

[68] EEOC Religion Guidance § 12-I.C.2.

the government and the courts to refrain from interfering or entangling themselves with religion."[69] The harassment guidance should provide the same direction or, at a minimum, direct to the relevant discussion in EEOC's religion guidance. To do otherwise would risk unconstitutional entanglement by EEOC staff with a religious organization's religious exercise.

VI. EEOC harassment guidance should clarify religious protections for employees.

- Regarding religious expression, the guidance states: "If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile. If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile."[70] The guidance further states that attempts to convince coworkers about the correctness of a religious belief is "not *necessarily* objectively hostile."[71]
- These statements beg the question: is there ever an instance where an employee sharing his or her faith (without known objection) would be objectively hostile? Could an employee's conversation about religion with another consenting coworker constitute a hostile work environment for a third coworker who overhears the conversation? The EEOC should clarify these important points in its final guidance.
- Such a statement without additional clarification could lead to unconstitutional chilling of free speech and religious exercise. EEOC should provide more clarity.
- The EEOC also provides a note on "special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression."[72] The guidance acknowledges while "Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship," employers "also have a duty to protect workers against religiously motivated harassment."[73] Specifically, "[e]mployers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment. As with other forms of harassment, an employer should take corrective

[69] *Id*. Concerningly, and in contrast to the religion guidance, EEOC filed an amicus brief last year in *Garrick v. Moody Bible Institute* urging the Seventh Circuit to dismiss Moody's appeal of the denial of its religious defenses to a Title VII sex discrimination claim, arguing that Moody's religious defenses should not get appellate review until *after* all the other underlying claims are litigated in the district court. *See* Sharon Fast Gustafson & Rachel N. Morrison, *EEOC's 'Gender Discrimination' Campaign and Crusade against Religious Employers*, Nat'l Rev. (Sept. 27, 2023, 1:00 PM), https://www.nationalreview.com/bench-memos/eeocs-gender-discrimination-campaign-and-crusade-against-religious-employers/ (discussing concerns of EEOC's *Garrick* amicus brief). "As a taxpayer-funded government agency, the EEOC should be neutral, objective, and fair. It should favor, or at least it should not deliberately frustrate, litigation economy." *Id.* As explained more fully in an amicus brief filed on behalf of former EEOC General Counsel Sharon Fast Gustafson and myself, "If not required to resolve the ministerial exception at the outset, EEOC staff will have free rein to launch long and onerous investigations into religious organizations, with all of their attendant costs." Brief for Former EEOC General Counsel and Religious Nondiscrimination Expert as Amicus Curiae in Support of Petitioner, *Faith Bible Chapel v. Gregory Tucker*, No. 22-741 (U.S. Mar. 10, 2023), *available at* https://eppc.org/wp-content/uploads/2023/03/FINAL-Faith-Bible-Former-EEOC-Amici-Brief-c.pdf.

[70] EEOC Proposed Harassment Guidance at 46-47.

[71] *Id.* at 46 (emphasis added).

[72] *Id.* at 93.

[73] *Id.*

action before the conduct becomes sufficiently severe or pervasive to create a hostile work environment."[74]

- Yet the guidance once again fails to acknowledge additional laws protecting religious expression and exercise for employees, such as the First Amendment and RFRA. The EEOC should reference those additional considerations, which are particularly relevant for federal government employers, in its final guidance.

VII. EEOC harassment guidance should avoid race and color discrimination.

- Title VII prohibits discrimination on the basis of race, color, and national origin. Concerningly, language in EEOC's harassment guidance treats different races and colors differently. The guidance states, "Race-based harassment includes harassment based on a complainant's race, e.g., harassment because the complainant is Black, Asian American, white, or multiracial."[75] Without explanation, the EEOC repeatedly capitalizes "Black" while lowercasing "white" when referring to a person's race or color.
- The EEOC provides no explanation for its capitalization decisions. In 2020, several prominent media organizations announced they would "capitalize Black in a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community among people who identify as Black, including those in the African diaspora and within Africa."[76] At the same time, many media organizations explicitly refused to likewise capitalize white (and sometimes brown). Perhaps this sentiment was the impetus for the Commission's capitalization decisions. It should, however, go without saying that it is inappropriate, especially for a government agency, to assume that all people who identify as black share a sense of history, identity, and community, just as not all people who identify as white (or brown) share a sense of history, identity, and community.
- In contrast, just this year in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* when discussing students of different races/colors, the Supreme Court lowercased both black and white.[77]
- Capitalizing one race or color while choosing not to capitalize another race or color is discriminatory. Black and white should either be both capitalized or both lowercase.
- The unequal capitalization based on race/color is discriminatory and should not be perpetuated by the federal agency tasked with preventing and remedying unlawful employment discrimination based on race and color. The EEOC should treat all races and colors equally in its capitalization decisions, whether that is choosing to capitalize or lowercase both black and white.
- If, however, the Commission continues to capitalize black but lowercase white throughout its guidance, the EEOC should explain on what basis such unequal treatment

[74] *Id.*
[75] *Id.* at 5-6.
[76] John Daniszewski, *The Decision to Capitlize Black*, AP, June 19, 2020, https://blog.ap.org/announcements/the-decision-to-capitalize-black; *see also* Nancy Coleman, *Why We're Capitalizing Black*, New York Times, July 5, 2020, https://www.nytimes.com/2020/07/05/insider/capitalized-black.html.
[77] No. 20-1199 (U.S. Jun. 29, 2023).

is justified under the law.

VIII. EEOC harassment guidance should clarify application to private social media posts.

- The guidance states harassment could occur in non-work-related contexts but impact the workplace, such as social media posts. The EEOC explains, "Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace."[78] According to the guidance, social media posts on a personal social media page could contribute to a hostile work environment if an "employee learns about the post directly or other coworkers see the comment and discuss it at work."[79]
- These statements raise many unanswered questions and free speech concerns. To what extent will an employer have to police its employees' use of social media? Can a hostile work environment be created by "likes" or "reposts"? Does mere offense or disagreement with a coworkers' social media posts constitute an impact on the workplace? Could a person's posts about abortion, marriage, gender, or sexuality contribute to a hostile work environment? Does this extend to support or opposition to political candidates or policies? Could a person's private social media post quoting a Bible verse contribute to a hostile work environment? The guidance appears to impose an unconstitutional chilling of free speech, especially on matters of great public importance. The EEOC should provide more clarity and guidance in its final guidance around this emerging area of law and potential First Amendment free speech ramifications.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld and that the Commission does not overstate or misstate the law, provides requested clarity, and complies with its obligations under the Constitution, the Administrative Procedure Act, federal laws protecting religious liberty, and all other relevant legal authority.

[78] EEOC Proposed Harassment Guidance at 55.
[79] *Id.* at 54-55.