

October 28, 2024

Via Email Attachment to OCRharassment@usaid.gov

Re: EPPC Scholars Comment on USAID’s Notice “Proposed Revision of AID 114–2 Anti-Harassment Intake Summary Sheet”

Dear Mr. Shih:

We write in response to the U.S. Agency for International Development’s (USAID) notice “Proposed Revision of AID 114–2 Anti-Harassment Intake Summary Sheet.”¹ This notice seeks to evaluate the “quality, utility, and clarity” of the information collected by the Anti-Harassment Intake Summary Sheet, as well as the necessity of the collection. Our comments focus on the proposed protected EEO categories “gender identity, sexual orientation, [and] transgender status.”²

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We support USAID’s efforts to prevent and remedy unlawful harassment of its employees, volunteers, and contractors. USAID, however, improperly implies that gender identity, sexual orientation, and transgender status are protected EEO categories without direction by Congress or the Supreme Court. To the extent USAID is relying on the Supreme Court’s decision in *Bostock*, that decision was limited to hiring and firing (not harassment) under Title VII.³

We urge the Agency to not overstate or misstate anti-harassment obligations by going beyond Congress’ direction and the Supreme Court’s limited holding in *Bostock*.

1. Congress has not made gender identity, sexual orientation, or transgender status protected EEO categories.

Congress has never made gender identity, sexual orientation, or transgender status protected EEO categories. There have been multiple attempts to include gender identity, sexual orientation, or transgender status as a protected basis in civil rights laws, but all these efforts have failed.⁴

¹ 89 Fed. Reg. 68,849 (Aug. 28, 2024), <https://www.federalregister.gov/documents/2024/08/28/2024-19314/proposed-revision-of-aid-114-2-anti-harassment-intake-summary-sheet>.

² *Id.* at 68,849.

³ See *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

⁴ See, e.g., S.788 - 116th Congress (2019-2020): Equality Act, S.788, 116th Cong. (2019),

Title VII prohibits discrimination in employment on the basis of *sex*. As discussed below, *Bostock* did not change that. Congress also refused to give the Equal Employment Opportunity Commission (EEOC) substantive rulemaking authority under Title VII, meaning that none of its guidances, especially those that go beyond Title VII’s text and the Supreme Court’s direction in *Bostock*, have the force and effect of law. Indeed, as discussed below, these guidances have been enjoined by federal courts for going beyond Title VII, *Bostock*, and the EEOC’s authority.

Further, President Biden’s pro-LGBT executive orders and policy priorities cannot make gender identity, sexual orientation, or transgender status a protected EEO category. The branch tasked with making laws is the legislature, not the executive.

2. *Bostock* was a limited holding.

The Supreme Court’s decision in *Bostock* was limited. The Court did not hold that Title VII (or any other law) bars discrimination (or harassment) on the basis of gender identity. To the extent that the Court addressed sexual orientation and transgender status, its decision was limited to hiring and firing (not harassment) and was based on consideration of the employee’s sex.

In *Bostock*, the 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.’”⁵ While the Court used the terms “sexual orientation” and “transgender status” (not “gender identity”) throughout its opinion,⁶ it made clear that it was the employees’ sex, not their sexual orientation or transgender status, that must be the “but-for cause” of an employer’s adverse action.⁷

Bostock was premised on the assumption that “sex” refers “only to biological distinctions between male and female.”⁸ The Court held Title VII is violated: “[i]f the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put

<https://www.congress.gov/bill/116th-congress/senate-bill/788>; S.393 - 117th Congress (2021-2022): Equality Act, S.393, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/393>; Text - H.R.15 - 118th Congress (2023-2024): Equality Act, H.R.15, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/15/text>.

⁵ 590 U.S. at 681.

⁶ Indeed, USAID appears to acknowledge that transgender status and gender identity are not identical by providing both in its list of protected categories. The *Bostock* majority uses the term “gender identity” only once, as then only as a descriptor of what the employees in the case argued and an argument that was not relevant for the Court’s decision:

The employees . . . submit[] that, even in 1964, the term [sex] . . . captur[ed] more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties’ debate, and because the employees concede the point for argument’s sake, we proceed on the assumption that “sex” signified what the employers suggest, referring only to biological distinctions between male and female.

Id. at 656.

⁷ *Id.* at 660.

⁸ *Id.* at 656.

differently if changing the employee’s sex would have yielded a different choice by the employer.”⁹ For example:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.¹⁰

Reading “gender identity” into *Bostock* is fundamentally incompatible with the decision. *Bostock* assumed sex is biological and binary and premised its holding on the assumption that “sex” refers only to the “biological distinctions between male and female.”¹¹ Sex as a biological binary is incompatible with the notion that each person can self-proclaim a “gender identity” that is fluid or along a spectrum.

In short, *Bostock* did not adopt “gender identity” as a protected class or category and does not support broad claims of “sexual orientation” and “transgender status” discrimination without regard for the employee’s sex.¹²

Further, the Court explained that it was only addressing hiring and firing under Title VII and was not addressing a “broader scope” of conduct, such as “bathrooms, locker rooms, or anything else of the kind.”¹³ Addressing concerns that its decision would “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,” the Court explained that it would “not prejudge” any such concerns because “none of th[o]se other laws [we]re before [them].”¹⁴ As one federal district court explained, *Bostock*’s holding was cabined to “homosexuality and transgender *status*”; it does not extend to “correlated *conduct*—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices.”¹⁵ Likewise, *Bostock* did not address harassment.

In sum, USAID cannot rely on *Bostock* to extend sex-based harassment to include gender identity, sexual orientation, or transgender status.

3. Numerous courts have enjoined the Biden-Harris Administration’s unlawful attempts to make gender identity, sexual orientation, and transgender status protected categories.

The Biden-Harris administration’s expansive interpretation and application of *Bostock* has been enjoined or vacated by numerous federal courts in different contexts.

⁹ *Id.* at 659-60.

¹⁰ *Id.* at 660.

¹¹ *Id.* at 656.

¹² *Id.* at 661 (“to discriminate on [homosexuality or transgender status] grounds requires an employer to intentionally treat individual employees differently because of their sex”).

¹³ *Id.* at 655, 681.

¹⁴ *Id.* at 681.

¹⁵ *Texas v. EEOC*, No. 21-194, at *4 (N.D. Tex. Oct. 1, 2022).

EEOC Bostock Guidance. On the one-year anniversary of *Bostock*, the EEOC Chair unilaterally issued guidance purportedly on what *Bostock* means for gender identity and sexual orientation discrimination in employment, including applications to employee conduct like dress, sex-specific bathrooms, and self-selected pronouns.¹⁶ Although the EEOC claimed its guidance was “intended only to provide clarity to the public regarding existing requirement under law,”¹⁷ federal courts have disagreed. Within months of the guidance being released, two federal courts held the guidance was unlawful.¹⁸

EEOC Harassment Guidance. EEOC issued harassment guidance that does “not have the force and effect of law and are not meant to bind the public in any way” but is meant to “provide clarity to the public regarding existing requirements under the law or agency policies.”¹⁹ Going far beyond *Bostock*, the guidance states that “[s]ex-based discrimination under Title VII includes employment discrimination based on ... gender identity[,] ... including how that identity is expressed.”²⁰ Examples of harassment include: “outing (disclosure of an individual’s sexual orientation or gender identity without permission),” “repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering),” and “the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.”²¹ This guidance has been enjoined by a federal court.²²

Title IX Rule. Title IX prohibits discrimination on the basis of sex in federally funded educational programs and activities.²³ The Biden-Harris Department of Education claimed in a final rule that Title IX’s prohibition against sex discrimination extends to gender identity and sexual orientation discrimination.²⁴ This rule is enjoined by many federal courts.²⁵

¹⁶ EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 14, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.

¹⁷ *Id.*

¹⁸ See *Texas v. EEOC*, 633 F. Supp. 3d 824, 831 (N.D. Tex. 2022) (The EEOC “misread[] *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.”); *Tennessee v. U.S. Dep’t of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022).

¹⁹ EEOC, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

²⁰ *Id.*

²¹ *Id.*

²² See *Cath. Benefits Assoc. v. Burrows*, No. 24-142 (D. N.D. Sept. 23, 2024).

²³ 20 U.S.C. §§ 1681 *et seq.*

²⁴ Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf>.

²⁵ See *Alabama v. Cardona*, No. 24-12444 (11th Cir. Aug. 22, 2024); *Texas v. United States*, No. 24-86 (N.D. Tex. July 11, 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, No. 24-461 (N.D. Tex. July 11, 2024); *Tennessee v. Cardona*, No. 24-72 (E.D. Ky. June 7, 2024), *app. for partial stay denied*, No. 24A78, 603 U.S. ____ (2024); *Louisiana v. U.S. Dep’t of Educ.*, No. 24-563 (W.D. La. June 13, 2024), *app. for partial stay denied*, No. 24A79, 603 U.S. ____ (2024); *Oklahoma v. Cardona*, No. 24-461 (W.D. Okla. July 31, 2024); *Arkansas v. U.S. Dep’t of Educ.*, No. 24-636 (E.D. Mo. July 24, 2024); *Kansas v. U.S. Dep’t of Educ.*, No. 24-4041 (D. Kan. July 2, 2024); *Texas v. Cardona*, No. 23-604 (N.D. Tex. Aug. 5, 2024) (amended order granting motion for summary judgment).

Section 1557 Guidance and Rule. Section 1557 of the Affordable Care Act prohibits discrimination in federally funded healthcare programs and activities on the grounds prohibited under Title IX (i.e., sex).²⁶ Relying on *Bostock*, the Biden-Harris Department of Health and Human Services (HHS) has issued guidance and a final rule claiming that Section 1557 prohibits discrimination based on gender identity and sexual orientation.²⁷ This guidance and rule have been enjoined by federal courts.²⁸

4. Maintaining gender identity, sexual orientation, and transgender status as protected EEO categories raises free speech, religious freedom, and other concerns.

If USAID chooses to maintain gender identity, sexual orientation, and transgender status as a protected EEO category on its harassment intake form (it should not), it is far from clear what harassment based on these categories would entail.

For instance, in its harassment guidance, the EEOC claimed that gender identity-based harassment includes so-called “misgendering” or the use of biologically accurate sex-based pronouns instead of a person’s self-selected pronouns.²⁹ The Commission has also implied that harassment includes comments that reference a person’s birth or legal name (so-called “deadnaming”) or even a person’s biological sex without consent.³⁰ Further, HHS has issued a final rule claiming that not affirming a foster child’s “LGBTQI+ status or identity” is harassment, mistreatment, and abuse.³¹ It would be harassment to not allow a person to present in a way that is consistent with their self-proclaimed gender identity under a sex-specific dress and grooming code.³² Further, according to both EEOC and HHS, denial of access to a sex-specific space or activity based on a person’s self-declared identity would also be considered harassment.³³

²⁶ 42 U.S.C. § 18116 (citing title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.).

²⁷ Office for Civil Rights, HHS, HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (Mar. 2, 2022), <https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf>; HHS, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522 (May 6, 2024), <https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities>.

²⁸ See *Texas v. Becerra*, No. 24-211 (E.D. Tex. July 3, 2024); *Tennessee v. Becerra*, No. 24-161 (S.D. Miss. July 3, 2024); *Florida v. HHS*, No. 24-1080 (M.D. Fla. July 3, 2024); *Christian Emps. All. v. EEOC*, No. 21-195 (D. N.D. Mar. 4, 2024).

²⁹ See EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

³⁰ See *id.*; EEOC, *EEOC Sues Culver’s for Discriminating Against Transgender Employee and Retaliating Against Him and His Co-Workers* (Oct. 25, 2024), <https://www.eeoc.gov/newsroom/eeoc-sues-culvers-discriminating-against-transgender-employee-and-retaliating-against-him>.

³¹ See HHS, Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children, 89 Fed. Reg. 34818 (Apr. 30, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-04-30/pdf/2024-08982.pdf>.

³² See EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

³³ See EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>; HHS, Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children, 89 Fed. Reg. 34818 (Apr. 30, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-04-30/pdf/2024-08982.pdf>.

These harassment claims may implicate constitutional and statutory protections for free speech and religious freedom. By implying that harassment is prohibited based on gender identity, sexual orientation, and transgender status but not clarifying what constitutes harassment, USAID could unlawfully infringe on or “chill” the free speech and religious freedom rights of employers, employees, volunteers, and contractors.

USAID is bound by the First Amendment’s Free Speech and Free Exercise Clauses, as well as the Religious Freedom Restoration Act.³⁴ Further, Title VII prohibits religious discrimination and has religious accommodation protections for employees that require employers to provide reasonable accommodations for the employee’s religious beliefs, observances, and practices, as well as a religious organization exemption that permits religious employers to make employment decisions based on religion.³⁵

Further, allowing someone of the other sex (regardless of how that person identifies) into a sex-specific space or activity raises privacy and safety concerns. It could also raise conflicting claims of sex-based harassment.

Conclusion

The Department should remove gender identity, sexual orientation, and transgender status from the list of protected EEO categories on its AID 114-2 Anti-Harassment Program Intake Summary Sheet.

Sincerely,

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³⁴ 42 U.S.C. § 2000bb *et seq.*

³⁵ 42 U.S.C. §§ 2000e(j), 2000e-1(a).