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STATE OF TENNESSEE

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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 Burrow's 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/xyrs," 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 support[4] 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. *Houlb 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. Strawser 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. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023).

3. Statutes also must, whenever possible, "be construed to avoid serious constitutional doubts." *Brawner 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 Meriwether*, 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

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[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/ysts9yw5; 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.

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[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).

***

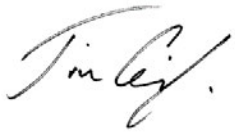
The undersigned States thank EEOC for considering these concerns. If EEOC insists on pursuing its enforcement proposal, it must "make appropriate changes" to the Proposed Guidance, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022), to avoid once more imposing unlawful gender-identity 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,

Jonathan Skrmetti
Tennessee Attorney General & Reporter

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General



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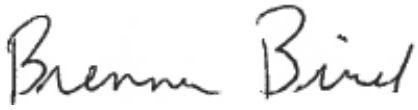

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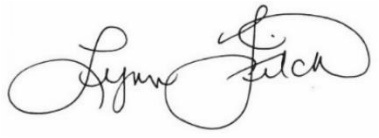

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EXHIBIT B

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TODD ROKITA
ATTORNEY GENERAL

May 1, 2024

OFFICIAL OPINION 2024-03

The Honorable Mike Speedy
Indiana House of Representatives
200 W. Washington Street, Third Floor
Indianapolis, Indiana 46204

RE: Use of preferred pronouns in the workplace

Dear Rep. Speedy:

You requested an opinion from the Indiana Office of the Attorney General ("OAG") regarding the use of preferred pronouns in the workplace.

QUESTIONS PRESENTED

1. Does state or federal law require a co-worker to refer to a coworker by their preferred pronouns and new name?

2. Is an employer liable to an employee if a co-worker or customer/client of the employer refuses to refer to the employee by their preferred pronouns and new name?

BRIEF ANSWER

Neither state law nor federal law require a coworker to use the preferred pronouns and name of a fellow employee, and therefore, an employer is likely not liable for such conduct *if* a reasonable person would not find the work environment to be objectively hostile. *Bostock*'s holding was limited solely to the question of whether an employer may fire an employee based on the employee's sexual orientation or transgender *status*; it did not address the legality of related *conduct*. EEOC Guidance issued in 2021 on the matter has been found by two federal district courts to be an improper expansion of *Bostock* that places unenforceable duties on employers. No federal court has found occasional misuse of pronouns alone, even if intentional, to be actionable discrimination or create a hostile work environment under Title VII. However, repeated, continuous, intentional misuse could create such an environment under the right circumstances, and each case is looked at on an individual basis. Therefore, although not a violation of Title VII's

prohibition on sex discrimination, one should be mindful of whether such conduct could create a hostile working environment which would also give rise to an action under Title VII.

BACKGROUND

***Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020)**

In June 2020, the Supreme Court held that firing an individual for being homosexual or being a transgender person violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020). The Court found that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of'" and "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1739, 1741. When the dissent, the employers, and others worried that the ruling would be expanded "beyond Title VII to other federal or state laws that prohibit sex discrimination," the court responded:

> The only question before us is whether 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." As used in Title VII, the term "discriminate against" refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id. at 1753. The Court specifically stated the holding was a narrow one—limited only to the instant practice of firing an individual because they are homosexual or transgender. It expressly declined to extend the holding beyond such instances as in the three cases before it.

Relevant Laws

Federal law

Title VII (42 U.S.C.A. § 2000e) of the Civil Rights Act of 1964:
Unlawful employment practices (42 U.S.C.A. § 2000e-2) reads, in relevant part:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's race, color, religion, sex, or national origin. […]

State law

Indiana Code – Civil Rights Act (Ind. Code ch. 22-9-1 *et seq*.)

Ind. Code § 22-9-1-2 reads, in relevant part:

(a) It is the public policy of the state to provide all of its citizens equal opportunity for education, employment…and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the…sex…of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to…sex…through reasonable methods is the purpose of this chapter.

(g) This chapter shall be construed broadly to effectuate its purpose.

Ind. Code § 22-9-1-3 reads, in relevant part:

(l) "Discriminatory practice" means:

(1) the exclusion of a person from equal opportunities because of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran;

(2) a system that excludes persons from equal opportunities because of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran; […]

(q) "Sex" as it applies to segregation or separation in this chapter applies to all types of employment, education, public accommodations, and housing. However:

(1) it shall not be a discriminatory practice to maintain separate restrooms; […]

ANALYSIS

Employment Discrimination Claims under Title VII of the Civil Rights Act

Scope

Title VII bars discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. Title VII prohibits an employer from refusing to hire, depriving an individual of "employment opportunities or otherwise adversely affect[ing] his status as an employee, or otherwise discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment" because of the individual's color, race, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a).

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees; however, it does not generally apply to independent contractors. *See* 42 U.S.C.A. § 2000e(b). Title VII applies to both private-sector and state and local government employers with fifteen (15) or more employees, and to the federal government as an employer. *Id.* Title VII also applies to unions and employment agencies. Employers with fewer than fifteen (15) total employees are not covered by Title VII. Because it is a federal law, Title VII applies to eligible employers and protects covered employees regardless of state law or local ordinance.

An employer may be vicariously liable for actionable discrimination caused by a supervisor, but such conduct must be extreme to amount to a change in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Additionally, an employer may have an affirmative defense looking to the reasonableness of both the employer's conduct and the plaintiff. *Id.* Damages in a discrimination case can include compensatory and punitive damages, with certain limits based on the size of the employer, although age and wage-based sex-discrimination claimed are not eligible for compensatory or punitive damages but may be entitled to liquidated damages.[1] Actions can also be taken against the employer to make it stop the discriminatory practices, such as an injunction or agreement.[2]

Types of Title VII claims

Title VII sex discrimination claims can be alleged either through alleging discrimination "because of sex" or by alleging that conditions of employment created a hostile work environment.

Discrimination

> Title VII liability for discrimination "because of" sex is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women; instead, the law makes each instance of

[1] U.S. Equal Employment Opportunity Commission ("EEOC"), *Remedies for Employment Discrimination*, https://www.eeoc.gov/remedies-employment-discrimination (last accessed Feb. 12, 2024).
[2] *Id.*

> discriminating against an individual employee because of that individual's sex an independent violation of Title VII.

Bostock, 140 S. Ct. at 1742.

A plaintiff must carry the initial burden in a discrimination case. A complainant can establish a prima facie case by demonstrating that (1) they are a member of a protected group; (2) they suffered an adverse employment action; (3) the performance of their job duties met the employer's legitimate expectations at the time of such action; and (4) the position remained open or was filled by similarly qualified applicants outside of the protected class. *Membreno v. Atlanta Restaurant Partners, LLC*, 517 F.Supp.3d 425, 436 (D. Mary., 2021). However, if the fourth prong "does not shed any light on whether the employer treated the plaintiff adversely on account of discriminatory animus, the plaintiff is relieved of such burden." *Id*.

The *Membreno* court found that when a plaintiff raises allegations of discrimination based on their transgender status, "the elements of the sex and gender identity discrimination claims are the same," and the plaintiff must demonstrate they were fired because of their transgender status. *Id*. If the plaintiff successfully establishes a prima facia case, the defendant must offer a legitimate, non-discriminatory reason for plaintiff's termination. If the defendant can do so, then the plaintiff must produce sufficient evidence to raise a "genuine issue of fact as to whether Defendants' rationale is pretextual." *Id*. To demonstrate pretext, a plaintiff must offer evidence both that the defendant employer's reason was false, *and* that discrimination was the real reason for the adverse employment action. *Id.*

Hostile Work Environment

Another type of Title VII Claim is that the employer's actions created an atmosphere so severe or pervasive that such conduct, based on the employee's sex (including transgender status) created a work environment that a reasonable person would consider intimidating, hostile, or offensive.

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Id.* at 436-37. To establish a hostile work environment claim, the plaintiff must demonstrate that they experienced unwelcome misconduct based on sex or gender identity that was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere and is imputable to" the employer. *Id.* at 436. For conduct to violate Title VII, such severe or pervasive conduct must "alter the conditions of [the victim's] employment and create an abusive working environment'." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Determining whether a workplace is hostile or abusive will be fact-specific and will require "looking at all the circumstances," including the frequency and severity of the alleged discriminatory conduct; whether such conduct is "physically threatening or humiliating," or a "mere offensive utterance"; and whether the conduct "unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *see also Teeter v. Loomis Armored US, LLC*, Not Reported in Fed. Supp. (E.D. N.C. 2021), 2021 WL 6200506 at *13.

In the same vein, Title VII does not establish a "general civility code." *Teeter*, 2021 WL 6200506 at *12. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Membreno*, 517 F.Supp.3d at 436-37; *see also Meritor*, 477 U.S. at 67 ("mere utterances" of an epithet is offensive but not severe enough to establish a hostile work environment claim (internal citations omitted)). In other words, a reasonable person in the plaintiff's position would have had to find the working environment "objectively hostile" in addition to the plaintiff's subjective opinion that the environment was hostile or abusive. *Teeter*, 2021 WL 6200506 at *12; *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). An offensive remark "generally will not create a hostile environment without significant repetition or an escalation in the harassment's intensity." *Id*.

Bostock's holding was narrow and specific

As noted, *supra*, *Bostock* held that an employer violates Title VII by firing an individual for being homosexual or being a transgender person, because such conduct is discriminating against an individual "because of" the individual's sex:

> …we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female. […] Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"

Bostock, 140 S. Ct. at 1739. The Court acknowledged that "homosexuality and transgender status are distinct concepts from sex," but further explained that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1746-47. While stating that "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them," the Court also was clear that *Bostock*'s holding was limited "to the question before" it: whether 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." *Id.* at 1746-47, 1753. The Court expressly declined to opine upon "sex-segregated bathrooms, locker rooms, and dress codes," astutely noting that "none of these other laws are before" it and it did not have "the benefit of adversarial testing about the meaning of their terms," before declining to "prejudge any such question" in *Bostock*'s holding. *Id.* at 1753.

> Firing employees because of a statutorily protected trait surely counts [as "'discriminating against'" an employee based on "distinctions or differences in treatment that injure protected individuals."]. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id.

Indiana's civil rights law does not include transgender as a protected class or in the definition of "sex"

As a United States Supreme Court ruling, *Bostock* is binding on all states, including Indiana. The Court held that gender identity, including one's transgender status, is a protected characteristic under Title VII to the extent that firing an individual based on such status is a violation of Title VII's prohibition on sex discrimination. However, states may have additional, more stringent laws that provide additional protection to certain individuals.

Indiana's Civil Rights Act ("ICRA") can be found at Ind. Code ch. 22-9-1. The ICRA declares that the public policy of the state is to have an equal opportunity without regard to sex and other named immutable characteristics. Ind. Code § 22-9-1-2. In its plainest sense, "[e]very employment decision involves discrimination. An employer, when deciding whom to hire, whom to promote, or whom to fire, must discriminate among employees." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 838 (Ind. 2009). There are permissible bases for discrimination, including prohibited employee conduct (e.g., time clock fraud, attendance problems, workplace violence). *Id.* Unlawful discrimination is the unfavorable treatment of an individual based on certain classifications, including sex. *Id; see also* Ind. Code § 22-9-1-3(l) (defining "discriminatory practice"). Therefore, the basis for the employer's discrimination is the critical question in an employment discrimination case. *Id.* at 838-39. In construing the ICRA our courts have often looked to federal law for guidance. *Id.* at 839.

The ICRA, as applied to sex, "applies to all types of employment, education, public accommodations, and housing." Ind. Code § 22-9-1-3(q). However, there are exclusions, including that it is not "a discriminatory practice to maintain separate restrooms." Ind. Code § 22-9-1-3(q)(1). The ICRA's definition of "sex" does not include sexual orientation, gender identity, or transgender status as protected characteristics. *See generally* Ind. Code § 22-9-1-3. Likewise, the ICRA makes no reference to any of those characteristics as a protected class under the Act.

Therefore, while *Bostock*'s limited holding applies to Indiana and its employers covered under Title VII, the ICRA does not provide any additional protection to individuals based on gender identity or transgender status.

June 15, 2021, EEOC Guidance

On June 15, 2021, the EEOC issued its *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* ("Guidance"), a fact sheet explaining the "established legal positions on LGBTQ+-related matters, as voted by the Commission."[3] The Guidance "provides examples of employer conduct that would constitute discrimination under *Bostock* through a series of questions and answers. Specifically, the Technical Assistance Document purports to explain employers' obligations with respect to dress codes, bathrooms, locker rooms, showers, and use of preferred pronouns or names." *Tennessee v. U.S. Dep't of Educ.*

[3] U.S. EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), available at: https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender (last accessed Feb. 13, 2024).

et al., 615 F.Supp.3d 807, 818 (E.D. Tenn. 2022).[4] As the EEOC is responsible for the administration and enforcement of Title VII and other federal anti-discrimination laws impacting the workplace, employers and employees may consider the Guidance to be a proper interpretation of the current laws and feel compelled to abide by the Guidance. However, such reliance on the Guidance is in error as it does not possess the force of law and is not an accurate interpretation of the law under *Bostock*. Accordingly, it would be imprudent to allow specious Guidance to further national discourse on this issue, or to utilize the document to shape employment policies and practices in organizations.

Agency guidance is not legally binding on individuals to whom it applies or the courts

Although the EEOC states that the Guidance "explains the EEOC's established legal positions," guidance issued by a federal agency does not have the force of law. It does not bind a court "as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). However, courts do recognize the agency's "specialized experience" and acknowledge that such guidance provides the "policy which will guide applications for enforcement by injunction on behalf of the Government." *Id.* at 139-40. While "not controlling," courts generally recognize that agency guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (discussing EEOC Guidelines on sexual harassment as a form of sex discrimination under Title VII); *see also Skidmore*, 323 U.S. at 139-40. As discussed in more detail *infra*, however, the Guidance itself is questionable and is legally tenuous by advancing unsupportable—and unlawful—theories and conclusions.

Validity of June 15, 2021, Guidance is questionable

Even though the Guidance purports to explain "what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country," the EEOC even acknowledges, this "publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law."[5] This statement certainly can be confusing to an employee or employer who also sees that the same Guidance states it is the established legal position of the agency.

Concern over the effect of the Guidance on affected employers and the States caused several states to bring legal challenges to the Guidance after it was issued, a fact acknowledged within the Guidance itself.[6] In July 2022, a federal district court preliminarily enjoined the EEOC from implementing the Guidance as to the plaintiffs—including Indiana—in the *Tennessee case*, and in October 2022, a federal district court vacated it in *Texas v. EEOC et al.*[7] *The Tennessee district court noted that* the Guidance "purports to define the legal obligations of those subject to Titles VII and IX" and that "private litigants are relying on Defendants' guidance to challenge Plaintiffs' state laws." *Tennessee*, 615 F.Supp.3d at 828-29. This left the Plaintiff States in an

[4] Indiana was a plaintiff State in this action.
[5] *Supra*, note 3.
[6] *Id.*
[7] The other Defendants in this case were the Health and Human Services' ("HHS") Office of Civil Rights.

untenable position, to "either forgo the enforcement of their conflicting state laws to comply with the allegedly unlawful guidance or violate the guidance and risk significant legal consequences—an enforcement action, civil penalties, and the loss of federal funding." *Id.*

The *Tennessee* court found that "Defendants' guidance documents advance *new* interpretations of Titles VII and IX and impose *new* legal obligations on regulated entities." *Tennessee*, 615 F.Supp.3d at 833. Similarly, the *Texas* court found that "[t]he Guidances and Defendants misread *Bostock* by melding 'status' and 'conduct' into one catchall protected class covering all conduct correlating to 'sexual orientation' and 'gender identity.' Justice Gorsuch expressly did not do that." *Texas v. EEOC et al.*, 633 F.Supp.3d 824, 831 (N.D. Texas, 2022). The court further pointed out that the central question to the case was whether *Bostock*'s holding was limited to "homosexuality and transgender *status*" or extended to "correlated *conduct* — specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices." *Id.* at 829-30. The court found that the Guidance overreached by improperly expanding *Bostock*'s holding to conduct rather than just status and invalidated them. *Id.* at 847.

Based on these two cases, especially the *Tennessee* case where Indiana was a plaintiff State, it is clear the Guidance does not have the force of law and was an impermissible overstep of agency authority for the EEOC to issue it. Therefore, although it is generally wise to follow agency guidance, in this case, at least two courts have found that the Guidance is unlawful and is thereby useless. Because it is not in compliance with the current state of the law, the Guidance is not an authoritative document that an employer or employee should look to for compliance with Title VII under *Bostock*.

Referring to someone by a non-preferred pronoun is not expressly prohibited by the ICRA or Bostock's holding

As established *supra*, *Bostock*'s holding was limited to the narrow question of whether an employer can fire an employee for being homosexual or transgender; the answer is no, as that is a violation of Title VII's prohibition on "discrimination on the basis of sex." Moreover, the EEOC's Guidance has been held to be an improper interpretation of *Bostock* and, therefore, not authoritative guidance. Additionally, the ICRA does not cover gender nonconforming individuals as a protected class. Therefore, it is unlikely that mere use of a non-preferred pronoun will rise to the level of actionable discrimination under Title VII.

Even though referring to someone by non-preferred pronouns or a non-preferred name is not a form of discrimination under Title VII or the ICRA, an employer should still be aware of whether such references could give rise to a hostile work environment claim as set forth, *supra*. There are no examples in case law where the (mis)use of an employee's pronouns alone has been held to have created a hostile work environment pursuant to Title VII. However, many of these cases at least imply that repeated use of non-preferred pronouns and names could result in such an outcome, if the conduct is "severe or pervasive enough." Although not binding on courts, the EEOC acknowledges in guidance (separate from the invalidated June 2021 Guidance) that, "Although accidental misuse of a transgender employee's preferred name and pronouns does not

violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment."[8]

As noted *supra*, to establish a hostile environment claim, the conduct must be "severe or pervasive enough" such that "a reasonable person would find hostile or abusive"; conduct that does not create "an objectively hostile or abusive work environment…is beyond Title VII's purview." *Harris*, 510 U.S. at 21-22 (1993) (quoting *Meritor*). "Rude treatment" by fellow employees is not sufficient to be an actionable Title VII claim. *Faulkenberry v. U.S. Dept. of Defense*, --- F.Supp.3d ---- (D. Mary. 2023), 2023 WL 3074639 at *10. However, being "regularly misgendered" combined with other conduct *may* give rise to a hostile environment claim. *See Doe v. Triangle Doughnuts, LLC*, 472 F.Supp.3d 115 (E.D. Penn. 2020) (Plaintiff's colleagues, supervisors, and customers "regularly misgendered" her with a male name and pronouns despite her requests; she was prohibited from using the women's restroom; her job duties were changed so she was not in view of customers; she was subject to a stricter dress code than other employees; and she was terminated.).

Contrast *Doe* to *Faulkenberry*, where "offhand comments[ ] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment…Rather, a hostile work environment is one that is permeated with discriminatory intimidation, ridicule, and insult." *Faulkenberry*, 2023 WL 3074639 at *10. The Faulkenberry court pointed out that "a mere handful of incidents, none [of which] are physically threatening although she was offended by her co-worker's references to 'him' or 'he' rather than 'her' or 'she,'" do not give rise to conduct that is "severe or pervasive enough to plausibly describe a hostile work environment." *Id.* at *11 (internal citations omitted). Sporadic misgendering does not "meet the "extremely serious" standard described" to establish a hostile work environment claim. *Id.*

"Title VII provides redress only to those whose working conditions are 'so out of the ordinary as to meet the severe or pervasive criterion,'" and a handful of "uses of feminine pronouns and single profane insult" do not "approach the severity or frequency of harassment" required to be actionable under Title VII, nor does "approximately ten such comments spread over three-to-four months…alter the conditions of employment and create an abusive working environment." *Teeter*, 2021 WL 6200506 at *13, 14. Therefore, a court will look at the frequency and severity of the misuse of pronouns and preferred name, as well as other surrounding circumstances related to the employee's job duties and performance, to analyze whether the employee has established a Title VII claim. So, while the use of non-preferred pronouns and names are not discriminatory per se, repeated and continued use may be a basis on which to establish a hostile work environment claim under Title VII.

[8] EEOC, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, available at: https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination (last accessed Feb. 13, 2024). The EEOC issued additional guidance on Apr. 29, 2024, with additional comments and examples on discrimination based on sexual orientation and gender identity (EEOC, *Enforcement Guidance on Harassment in the Workplace*, available at: https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftn42; last accessed Apr. 29, 2024); however, this guidance and the examples therein do not substantively alter the analysis in this Opinion that thus far, case law has not found that misgendering, standing alone, establishes a hostile work environment, but implies that if the conduct is severe or pervasive enough, a complainant potentially could establish such claim.

CONCLUSION

Neither state law nor federal law require a coworker to use the preferred pronouns and name of a fellow employee, so it is unlikely an employer would be liable for such conduct, provided a reasonable person would not find the work environment to be objectively hostile. *Bostock*'s holding was limited to whether an employer may fire an employee based on the employee's sexual orientation or transgender status and did not address conduct or behavior apart from termination. Currently, two federal district courts have invalidated or enjoined the EEOC's guidance on the matter because they found the EEOC improperly issued the Guidance and it was an unlawful expansion of *Bostock*'s holding, thereby overstepping the regulatory authority of the agency. Courts have not found the occasional misuse of pronouns alone, even if intentional, to be actionable discrimination or to create a hostile work environment under Title VII. However, each case is looked at on an individual basis, so it is possible that there may be a situation where such misgendering could create a hostile work environment. Thus, although refusing to use preferred pronouns and name is not a violation of Title VII's prohibition on sex discrimination, one should be mindful of whether such conduct could create a hostile working environment which could be actionable.

Sincerely,

Todd Rokita
Attorney General of Indiana

William H. Anthony, Chief Counsel, Advisory
Christopher M. Anderson, Asst. Chief Counsel
Hilari A. Sautbine, Supervising Dep. Attorney General

EXHIBIT C

July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In that case, the Supreme Court struck down Harvard's and the University of North Carolina's race-based admissions policies and reaffirmed "the absolute equality of all citizens of the United States politically and civilly before their own laws." *SFFA*, slip op., at 10. Notably, the Court also recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *See SFFA*, slip op. at 6 n.2. And the Court reiterated that this commitment to racial equality extends to "other areas of life," such as employment and contracting. *Id.* at 13. In sum, the Court powerfully reinforced the principle that *all* racial discrimination, no matter the motivation, is invidious and unlawful: "***Eliminating racial discrimination means eliminating all of it.***" *Id.* at 15 (emphasis added).

We ask that you comply with these race-neutral- principles in your employment and contracting practices.

A. Racial Discrimination Is Commonplace Among Fortune 100 Companies and Others.

Sadly, racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses. In an inversion of the odious discriminatory practices of the distant past, today's major companies adopt explicitly race-based initiatives which are similarly illegal. These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences.

A few cases illustrate the pervasiveness and explicit nature of these racial preferences. In 2020, a group of executives from 27 banks, tech companies, and consulting firms set an explicit racial hiring quota. Matthew Lavietes, *'Watershed Moment': Corporate America Looks to Hire More Black People*, Reuters (Aug. 19, 2020), *available at* https://www.reuters.com/article/us-usa-race-hiring-idUSKCN25F2SY/. Similarly, in 2019, Goldman Sachs set racial quotas for the hiring of new analysts and entry-level associates. Hugh Son, *How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds*, CNBC, Apr. 9, 2021, *available at* https://www.cnbc.com/2021/04/09/jpmorgan-increased-the-number-of-black-interns-in-its-wall-street-program-by-nearly-two-thirds.html. Racial quotas and other explicitly race-based practices in recruitment, hiring, promotion, and/or contracting have also been adopted by other major companies, such as Airbnb, Apple, Cisco, Facebook, Google, Intel, Lyft, Microsoft, Netflix, Paypal, Snapchat, TikTok, Uber, and others. Lauren Feiner, *Tech Companies Made Big Pledges to Fight Racism Last Year—Here's How They're Doing So Far*, CNBC (June 6, 2021), *available at* https://www.cnbc.com/2021/06/06/tech-industry-2020-anti-racism-commitments-progress-check.html.

Microsoft announced that it would set a quota for the number of Black-owned approved suppliers over three years and demand annual diversity disclosures from its top 100 suppliers, implying that suppliers that did not adopt their own racially discriminatory policies would suffer consequences. *Id.* Microsoft also announced that over a three-year period, it would set quotas for transaction volumes through Black-owned banks and external managers as well as for the number of Black-owned U.S. partners. *Id.*

B. Race Discrimination Is Illegal Under Federal and State Law.

Such overt and pervasive racial discrimination in the employment and contracting practices of Fortune 100 companies compels us to remind you of the obvious: Racial discrimination is both immoral and illegal. Such race-based employment and contracting violates both state and federal law, and as the chief law enforcement officers of our respective states we intend to enforce the law vigorously.

"It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017). As the multitude of state and federal statutes prohibiting race discrimination by private parties attests, this "commitment to the equal dignity of persons" extends to the private sector as well as the government.

Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in employment. It provides that "[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;" or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

Furthermore, 42 U.S.C. § 1981 prohibits race discrimination in contracting. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). This extends to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Further, "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c).

The Supreme Court has repeatedly and emphatically condemned racial quotas and preferences. As the Court held in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007):

> [Racial] classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation

> divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."

Id. at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Shaw*, 509 U.S. at 657; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O'Connor, J., dissenting)). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Well-intentioned racial discrimination is just as illegal as invidious discrimination. The "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." *Parents Involved*, 551 U.S. at 742.

Last month, the Supreme Court stated definitively that racial discrimination under the guise of affirmative action must end: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA*, slip op. at 16 (internal quotes omitted). "[R]acial discrimination is invidious in all contexts." *Id.* at 22 (internal quotes omitted). Racial preferences are a "perilous remedy." *Id.* at 23. The Court previously allowed a narrow exception for race-conscious college admissions to further student body diversity, but we have known for decades that that exception would be expiring soon—as indeed it did on June 29. *See generally Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . .").

And the Court took pains to emphasize that the supposedly benign nature of racial preferences cannot save them. Despite the universities' claims in *SFFA* that they were actually helping people, not hurting them, the Court rightly noted that that argument itself "rest[ed] on [a] pernicious stereotype." Slip op. at 29. Likewise, when an employer makes employment or contracting decisions "on the basis of race, it engages in the offensive and demeaning assumption that [applicants] of a particular race, because of their race, think alike." *Id.* (internal quotes omitted). Further, racial preferences "stamp" the preferred races "with a badge of inferiority" and "taint the accomplishments of all those who are admitted as a result of racial discrimination." *SFFA*, slip op. at 41 (Thomas, J., concurring); *see also id.* ("The question itself is the stigma.").

And, of course, every racial preference necessarily imposes an equivalent harm on individuals outside of the preferred racial groups, solely on the basis of their skin color. "[I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups. It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Id.* at 42 (quotation omitted). Thus, "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Id.*

Racial discrimination inevitably "provokes resentment among those who believe they have been wronged by the . . . use of race." *Id.* at 46.

Attempting to defend such racial hiring in the name of seeking racial diversity is unavailing. Regarding Harvard's unlawful admissions program, the Supreme Court noted that it was a quota system in all but name—as all race-conscious practices inevitably are. "For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork." *Id.* at 32 n.7. Playing this "numbers game" is flagrantly illegal: "[O]utright racial balancing" is "patently unconstitutional." *Id*. at 32.

Let there be no confusion: These principles apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting. Courts routinely interpret Title VI and Title VII in conjunction with each other, adopting the same principles and interpretation for both statutes. *See, e.g., SFFA* slip op. at 4 (J. Gorsuch concurring), *Maisha v. Univ. of N. Carolina*, 641 F. App'x 246, 250 (4th Cir. 2016) (applying "familiar" Title VII standards to "claims of discrimination under Title VI"); *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) ("We now join the other circuits in concluding that [the Title VII standard] also applies to Title VI disparate treatment claims.").

Race discrimination in employment and contracting, of course, also violates state law. And State courts frequently look to Title VII to interpret their own prohibitions against race discrimination in employment practices. *See, e.g., Montana State University-Northern v. Bachmeier*, 480 P.3d 233, 246 (Mont. 2021) ("Reference to federal case law is appropriate in employment discrimination cases filed under the [Montana Human Right Act]' because of the MHRA's similarity to Title VII of the Civil Rights Act of 1964."); *Texas Dep't of State Health Servs. v. Kerr*, 643 S.W.3d 719, 729 (Tex. Ct. App. 2022) ("The Texas Legislature modeled the TCHRA after federal law 'for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.'"); *see also McCabe v. Johnson Cty. Bd. of Cty. Comm'rs*, 615 P.2d 780, 783 (Kan. 1980) ("Federal court decisions under [Title VII], although not controlling, are of persuasive precedential value [in construing the Kansas Act Against Discrimination]."). Likewise, refusing to deal with a customer or supplier or otherwise penalizing them on the basis of race is illegal under the laws of many states. *See, e.g., J.T.'s Tire Service, Inc. v. United Rentals of North America, Inc*., 985 A.2d 211, 240 (N.J. App. 2010) (holding that New Jersey law "prohibits discriminatory refusals to do business" with any person on the basis of race); *Reese v. Wal-Mart Stores, Inc*., 73 Cal. App. 4th 1225, 1231 (Cal. Ct. App. 1999) (noting that California law prohibits any "business establishment" from "discriminat[ing] against" or "refus[ing] to buy from, sell to, or trade with any person" because of race); *Mehtani v. New York Life Ins. Co.*, 145 A.D.2d 90, 94 (N.Y. 1989) (noting that New York law defines "unlawful discriminatory practice(s)" to include "discriminat[ing] against," "refus[ing] to buy from, sell to or trade with, any person" because of race).

Accordingly, the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. As Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws. If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants, and *all* contractors equally, without regard for race.

***

Social mobility is essential for the long-term viability of a democracy, and our leading institutions should continue to provide opportunities to underprivileged Americans. Race, though, is a poor proxy for what is fundamentally a class distinction. Responsible corporations interested in supporting underprivileged individuals and communities can find many lawful outlets to do so. But drawing crude lines based on skin color is not a lawful outlet, and it hurts more than it helps.

We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin.

Sincerely,

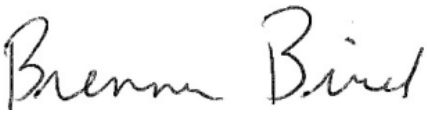
Kris W. Kobach
Kansas Attorney General

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General

Todd Rokita
Indiana Attorney General



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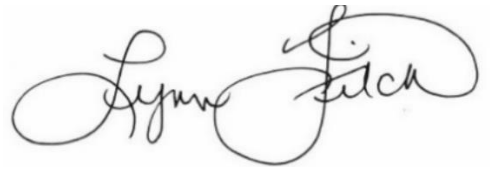

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EXHIBIT D

January 5, 2024

SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV

Ms. Brandee Anderson
Senior Advisor to the Deputy Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

RE: U.S. Department of Commerce Notice Entitled *Business Diversity Principles*, 88 Fed. Reg. 83,380 (Nov. 29, 2023), DOC-2023-0003

Dear Ms. Anderson:

The Attorneys General of Kansas, Montana, and Tennessee, joined by 16 co-signing States, welcome the chance to comment on the U.S. Department of Commerce's draft "Business Diversity Principles," through which the Department ostensibly seeks to advance "best practices related to diversity, equity, inclusion, and accessibility (DEIA) in the private sector."[1] The proposed Business Diversity Principles would incorporate a host of race-based DEIA measures and goals, including by pushing businesses to:

- implement "clear strategies to increase diversity among the organization[s'] executive ranks" and "strive to meet diversity targets in their long-term workforce plans";
- ensure that leaders "model equitable and inclusive behavior" and heed "DEIA professionals";
- hold executives accountable for failing to meet DEIA goals through "performance evaluations and compensation"; and
- assess DEIA performance using "demographic data across all levels and departments."[2]

This proposal, the Department asserts, helps carry out early-2021 Executive Orders outlining the Biden-Harris Administration's "ambitious, whole-of-government approach to racial equity" and directive to "continuously embed[] equity into all aspects of Federal decision-making."[3]

We endorse the value of promoting meaningful diversity of experience, thought, and background among the public- and private-sector workforce. But race is both a poor and unlawful proxy for achieving that end. As we previously warned employers in prior letters, attached as Exhibit A and incorporated by reference, "discriminating on the basis of race" is illegal and wrong, "whether

[1] *See* 88 Fed. Reg. 83,380, 83,380 (Nov. 29, 2023).
[2] *Id.* at 83,381; McKinsey & Company, *Diversity Wins: How Inclusion Matters* (2020) (cited at 88 Fed. Reg. 83,380 n.1).
[3] 88 Fed. Reg. at 83,380 (quoting Executive Orders 13985 & 14091).

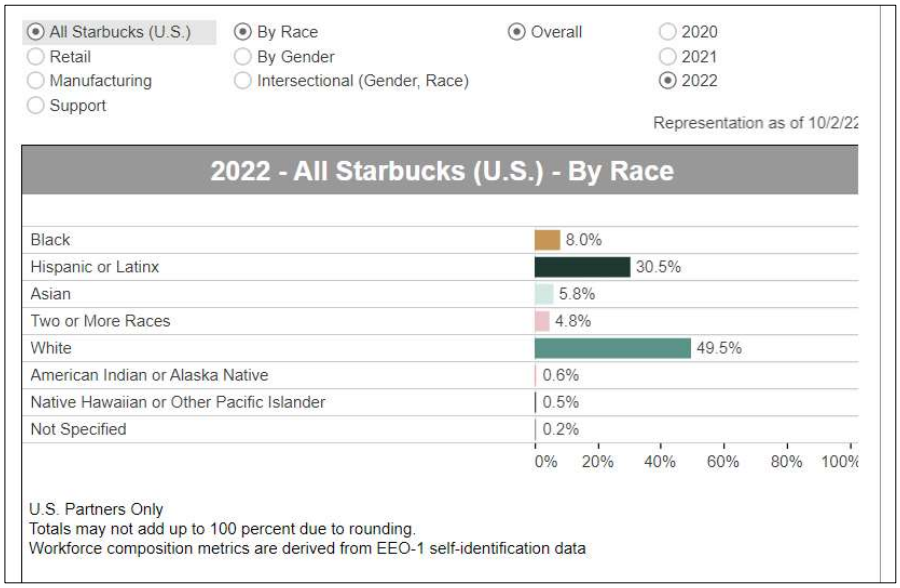
under the label of 'diversity, equity, and inclusion' or otherwise." That same critique applies to the Department's proposed Business Diversity Principles, which appear to advocate for explicitly race-based employment quotas and decision-making. We write to briefly reiterate the significant legal defects with the Department's proposal to push race-based discrimination to advance the Department's DEIA agenda.

***First*, the Department's proposed race-based employment policies violate the U.S. Constitution's Equal Protection Clause.** In exclusively citing early-2021 Executive Orders regarding racial equity, the Department omits a landmark constitutional development: The Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (*SFFA)*, which invalidated the use of race in educational affirmative-action programs. *SFFA* noted that the "daunting" strict-scrutiny standard applies to *all* racial classifications—whether benign or malevolent in motive—because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[4] And the Court emphasized that this commitment to racial equality extends "to other areas of life" such as employment.[5]

In its rush to advance race-based decision-making, the Department's notice fails to acknowledge these core constitutional limits on the government's use of race. The result is a stark disconnect between the Department's proposed Business Diversity Principles and governing equal-protection law as set out by *SFFA*. To ensure *SFFA*'s constitutional limits on the use of race have not slipped under the Department's radar, we have enclosed the opinion as Exhibit B for review.

***Second*, race-based employment decision-making violates Title VII and related civil-rights laws.** *SFFA* makes clear that Title VII of the Civil Rights Act of 1964 and other federal civil-rights statutes bar private-sector race discrimination to at least the same extent as the Equal Protection Clause.[6] Yet under the rubric of DEIA, racial discrimination in employment is all too common among Fortune 100 companies and other large businesses. Employers from Airbnb, to Google, to Netflix, to Uber have championed fine-tuned racial tracking in recruitment, hiring, and promotion, among other areas. Some, like Starbucks, even report their fulfilment of racial and other "[i]ntersectional" quotas using interactive tools and charts[7]:

[4] *Id.* at 2160, 2162 (quotation omitted).
[5] *Id.* at 2160.
[6] *See SFFA*, 143 S. Ct. at 2156 n.2.
[7] *See* Starbucks, *Workforce Diversity at Starbucks* (Apr. 2, 2023), https://stories.starbucks.com/stories/2023/workforce-diversity-at-starbucks/.



Make no mistake: Express racial quotas have *never* been lawful, even in the legal landscape prior to *SFFA*.[8] Nor is there any affirmative "DEIA defense" under Title VII or 42 U.S.C. § 1981 for race-based decision-making or contracting. The U.S. Solicitor General's Office recently reiterated as much, noting that Title VII's "bona fide occupational qualification" defense excludes race-based employment decisions.[9] As such, any race-based decision—even with the aim of "diversifying the workforce" consistent with DEIA dictates—would violate the "clear text" of Title VII.[10] It is no surprise, then, that in a series of recent lawsuits, law firms and other employers have quickly folded or altered race-based employment programs rather than defend their legality.[11] That not even some of the nation's leading law firms can craft a colorable defense to race-based DEIA efforts speaks volumes about their lack of legal footing.

In short, federal law makes clear that well-intentioned racial discrimination is just as illegal as invidious discrimination.[12] One thus might have hoped the Department would pivot away from illegal racial measures and towards diversity efforts that are consistent with current equal-protection and statutory limits on private-sector employers' use of race. But the proposed Business Diversity Principles instead double down on discrimination. The Department for instance encourages the setting of "diversity targets"—*i.e.*, racial quotas—for all manner of employment positions, as well as tracking such targets using "demographic data across all levels and departments" and DEIA

[8] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (plurality op.) ("This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past and has been repeatedly rejected." (citation omitted)).

[9] Transcript of Oral Argument at 44, *Muldrow v. St. Louis*, No. 22-193 (U.S. Dec. 6, 2023) (discussing 42 U.S.C. § 2000e-2(e)).

[10] *Id.* at 44-45.

[11] *See, e.g.*, Tatyana Monnay, *Blum's Group Drops DEI Lawsuit Against Morrison Foerster* (Oct. 6, 2023), http://tinyurl.com/bce7prmk (lawsuit dropped after Morrison Foerster "changed the eligibility criteria for its diversity, equity and inclusion fellowship" to be "race and gender neutral"); Tatyana Monnay, *Blum Says He's Done Suing Law Firms as Winston Yields on DEI* (Dec. 6, 2023), http://tinyurl.com/yduabk3u (same, for Perkins Coie and Winston & Strawn).

[12] *See Parents Involved in Cmty. Sch.*, 551 U.S. at 742; *see also SFFA*, 143 S. Ct. at 2166.

"toolkits."[13] If, as it appears, the Department's proposed Business Diversity Principles advocate express race-based measures in the employment or contracting space, those principles would plainly violate federal law. The Department's final Business Diversity Principles should therefore clarify that employers must at a minimum use non-race-based measures of diversity like socioeconomic status, educational background, and geography. To do otherwise propagates harmful racial stereotypes and detrimentally directs businesses into a cycle of unlawful behavior and unnecessary litigation.

***Third*, the discrimination that "cannot be done directly" under governing law also "cannot be done indirectly" through end-run means consciously aimed at satisfying racial targets.**[14] Strict scrutiny generally applies "to a classification that is ostensibly neutral but is a[] . . . pretext for racial discrimination."[15] Thus, the Department also should not endorse superficially race-neutral measures that have the purpose of influencing the racial makeup of employers' workforces or supplier bases.

To sum up in the Supreme Court's words, "[e]liminating racial discrimination means eliminating all of it."[16] That should—and legally, must—be square one for any employment "best practices" the Department promulgates. We hope to work with the Department to promote meaningful diversity efforts that abide governing federal- and state-law limits. In the meantime, we will continue to oppose measures—like the Department's proposed Business Diversity Principles—that perpetuate unlawful treatment of individuals on the basis of race.

Sincerely,

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[13] 88 Fed. Reg. at 83,380 n.1 (citing McKinsey & Company, *supra*); *id.* at 83,381.
[14] *SFFA*, 143 S. Ct. at 2176 (quotations omitted).
[15] *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[16] *SFFA*, 143 S. Ct. at 2161.

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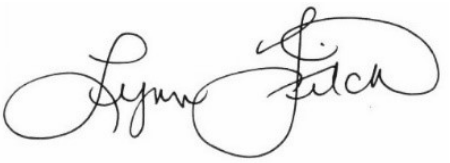

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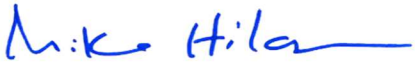

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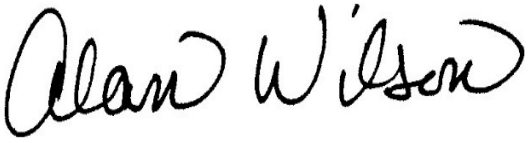

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June 3, 2024

Council of the American Bar Association
Section of Legal Education and Admissions to the Bar
321 North Clark Street
Chicago, IL 60654

Dear Council Members:

The Supreme Court's decision last term in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023), changed the constitutional landscape when it comes to the consideration of race in higher education. We the Attorneys General of Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia write because that decision requires significant adjustments to your current Standards and Rules of Procedure for Approval of Law Schools. *See* ABA, *Standards and Rules of Procedure for Approval of Law Schools 2023–2024* (2023), https://perma.cc/6XF5-SN8L [hereinafter *ABA Standards*]. One standard in particular—Standard 206, Diversity and Inclusion—fails to account for *SFFA* and, by all appearances, directs law-school administrators to violate both the Constitution and Title VII. We understand that the Council is considering revisions to that Standard in light of *SFFA*. While we support the Council's willingness to modify Standard 206, the proposed revisions reemphasize Standard 206's problematic requirement that law schools engage in race-based admissions and hiring. We urge the Council to modify its standards in a way that comports with federal law and with the ABA's purported commitment to set the legal and ethical foundation for the nation.

1. The Supreme Court's Decision in *SFFA*

In *SFFA*, the Supreme Court held that Harvard's and the University of North Carolina's use of race in the admissions process violated the Fourteenth Amendment's Equal Protection Clause. The Court rooted its holding in a fundamental principle: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *SFFA*, 600 U.S. at 208 (quotations omitted). That being so, *all* racial classifications—benign or malevolent—face the "daunting" strict-scrutiny standard. *Id.* at 206. And race-based affirmative-action programs in higher education, the Court explained, simply cannot satisfy that standard. Programs of that sort "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, [and] involve racial stereotyping." *Id.* at 230. It follows that educational institutions cannot "use race as a factor in affording educational opportunities." *Id.* at 204 (quotations omitted).

But the Court didn't stop there. Anticipating attempts to evade its holding, the Court stressed that "[w]hat cannot be done directly" under the Constitution likewise "cannot be done indirectly." *Id.* at 230 (quotations omitted). Strict scrutiny, the Court has long held, also governs "a classification that is ostensibly neutral but is a[] . . . pretext for racial discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). As elsewhere, then, "facially neutral" admissions and hiring policies "warrant[] strict scrutiny" if undertaken with the aim to achieve particular racial outcomes. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (quotations omitted). Schools of course remain free to implement race-neutral policies that further other kinds of diversity (geographic, socioeconomic, etc.). But they cannot "simply establish through . . . other means"—even facially neutral ones—the sort of race-focused "regime" the Court held unlawful in *SFFA*. 600 U.S. at 230. In short, "[e]liminating racial discrimination means eliminating all of it." *Id.* at 206.

2. The Current ABA Standards

Standard 206 seemingly asks law schools to defy the Court's clear directive. In its current form, the Standard all but *compels* law schools to consider race in both the admissions and employment contexts. The Standard reads, in full:

> (a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

> (b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.

ABA Standards at 15. Diversity is not without benefit, but the Constitution squarely rejects racial diversity as a legally sufficient justification for treating people differently because of the color of their skin. *SFFA*, 600 U.S. at 224. Standard 206's express calls to calibrate classes and faculty based on race fly in the face of the Constitution.

Take section (a)'s requirement of "concrete action" showing "a commitment to diversity and inclusion." That requirement seems reasonable standing alone, but the section then directs law schools to focus "particularly" on "racial and ethnic minorities" and show "a commitment to having a student body that is diverse with respect to . . . race[] and ethnicity." *ABA Standards* at 15. What sort of "concrete action" does the ABA have in mind? Standard 206 and its accompanying "[i]nterpretation[s]" provide some clues. Law schools should give "special concern [to] determining the potential of [underrepresented] applicants through the admission process"; undertake "special recruitment efforts"; and develop "programs that assist in meeting the . . . financial needs" of students from underrepresented groups. *Id.* But the Standard and its interpretations say nothing about how schools can lawfully implement "concrete action[s]" to achieve racial ends without unlawfully using race-based means. Nor could the ABA walk that line: If race-based admissions cannot satisfy strict scrutiny, *see SFFA*, 600 U.S. at 230, then neither can racially motivated recruitment or financial aid. Changing where or when racial discrimination happens does not shield it from constitutional review.

Section (b), Standard 206's employment provision, goes further still. While section (a) hints at a requirement of "achiev[ing]" diversity in some abstract sense, section (b) minces no words: It demands that law schools show their "commitment to diversity and inclusion" not simply by welcoming diversity, but by actually "*having* a faculty and staff that are diverse with respect to . . . race[] and ethnicity." *ABA Standards* at 15 (emphasis added). That explicit demand to make hiring decisions based on race is irreconcilable with the Fourteenth Amendment's command to "eliminate racial discrimination." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Section (b)'s race-based regime also runs headlong into Title VII of the Civil Rights Act of 1964, which outlaws race-based decisionmaking in employment. *See* 42 U.S.C. § 2000e-2(a). That sort of decisionmaking is just as illegal today as it was when Title VII was enacted. *See, e.g.*, Kan. & Tenn. Att'y Gen. Ltr. to Fortune 100 CEOs (July 13, 2023), https://perma.cc/88AY-QVDQ. As the U.S. Solicitor General's Office recently reaffirmed to the Supreme Court, "when an employment decision is made on the basis of race, that is [a] denial of equal treatment" and a violation of Title VII. Tr. of Oral Arg. at 46, *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024) (No. 22-193).

The interpretations accompanying Standard 206's provisions only make matters worse. They double down on the Standard's obvious incompatibility with *SFFA* and Title VII, proclaiming that "[t]he requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is *not* a justification for a school's non-compliance with Standard 206." *ABA Standards* at 15 (emphasis added). The ABA—the accreditor of legal-education programs—thus directs law schools to consider race in a manner prohibited by the United States Constitution and federal and state law. The *American Bar Association*—an institution that publicly touts its commitment to setting the legal and ethical foundation for the American nation and celebrates its work advancing respect for the rule of law—tells law schools that if they follow the controlling law, they are not worthy of educating future lawyers. I cannot fathom how this anarchic language made its way into the standards for law-school accreditation. Its inclusion betrays a serious failure within the ABA. ABA standards do not carry get-out-of-federal-law-free status, nor does the ABA enjoy immunity from following the laws binding it as an accreditor. By requiring explicitly illegal consideration of race, the ABA is working hard to burden every law school in America with punitive civil-rights litigation. Further, if American legal culture internalizes the ABA's determination to ignore unwanted legal obligations, our profession, and our country, may never recover.

3. The Proposed Revisions

The proposed revisions to Standard 206 do little to solve these problems. As revised, the Standard would read:

> (a) A law school shall demonstrate by concrete actions a commitment to access to the study of law and entry into the profession to all persons, including those with identity characteristics that have led to disadvantages in or exclusion from the legal profession on the basis of race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, or socioeconomic background.
>
> (b) A law school shall demonstrate by concrete actions a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to race, color, ethnicity, religion, national origin, gender, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship, and socioeconomic background.

ABA, *Proposed Revisions to Standard 206 – Discussion Draft for February 2024 Meeting* at 1–2 (Feb. 21, 2024), https://perma.cc/FA64-4H2K (cleaned up) [hereinafter *Proposed Revisions*]. Just like the current Standard, the proposed revisions require

law schools to take "concrete actions" based on race—among other preferred "identity characteristics"—in both the admissions and employment contexts. But bundling race with other permissibly considered characteristics does not somehow make Standard 206's requirements any more constitutionally sound.

A narrow reading of the proposed revisions to 206(a) might suggest that the Standard simply prohibits discrimination against underrepresented groups, but revised Interpretation 206-1 makes clear that the Standard should be read broadly. The interpretation asserts that "[a]ny law that purports to prohibit consideration of any of the identity characteristics listed in Standard 206(a) and (b) in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206." *Proposed Revisions* at 2. It appears that the ABA is once again telling law schools that if they comply with binding nondiscrimination law, their accreditation is in jeopardy. Law schools are required to work around "legal constraints" by finding "means other than those prohibited by law" to achieve the goal, *id.*, but this seems like an impossible order when race is both the first identity characteristic listed for consideration by the Standard and flatly prohibited from consideration by the law.

The revised interpretations, presumably anticipating pushback, also provide that "[c]ompliance with Standard 206(b)"—the employment provision—"does not require a law school to have faculty and staff members from every identity category listed in the Standard." *Id.* But that language simply says that law schools need not meet certain quotas; it does nothing to relieve law schools from Standard 206's requirement to consider race in the hiring process. And neither the Standard nor the interpretations suggest how many "identity" boxes a law school must check to comply with the Standard. The Council needs to make clear that the consideration of race in hiring or admissions violates the Constitution and federal law, and that a law school's compliance with the Constitution and federal law will not adversely impact its accreditation.

4. The Need for Clarity

Standard 206, in both current and revised forms, forces law schools to play a high-stakes guessing game about how to pass ABA muster without violating the law. Even before *SFFA*, Standard 206's inscrutable requirements—which expressly do not "specif[y]" how schools are to comply, *ABA Standards* at 15; *Proposed Revisions* at 2—prompted questions from administrators. *See* ABA J., *How can law schools comply with faculty diversity accreditation standards? Some deans have questions* (Apr. 10, 2023), https://perma.cc/7Y48-M8V6. In the wake of that decision, many more questions are sure to come. Answering them wrong could mean losing the Council's approval—the sole route to accreditation for our nation's law schools. That outcome, in turn, has steep costs for the schools and their students. And of course, those costs are nothing compared to the harms suffered by those deprived of

educational and employment opportunities solely because their skin is the wrong color.

Anyone with an interest in the legal profession and students' well-being should be concerned that accreditation rests—and seemingly will continue to rest—on a tightrope walk between federal law, on one hand, and Section 206's contrary demands on the other. These concerns are all the more justified because schools' balancing acts will be judged behind closed doors, according to uncertain criteria, *see ABA Standards* at 15 (alluding to a handful of actions that will "typically" show a "commitment" to diversity); *Proposed Revisions* at 2 (same), by a Council that has not been shy about enforcing Standard 206 in the past, *see, e.g.*, ABA, *Notice of Finding of Significant Noncompliance with Standard 206* (Dec. 14, 2022), https://perma.cc/U9M2-4RJY (Hofstra University); ABA, *Notice of Finding of Significant Noncompliance with Standard 206* (Dec. 14, 2022), https://perma.cc/G92D-B7SB (University of Oregon).

* * *

The bottom line: Whatever the intent behind Standard 206 might be, it cannot lawfully be implemented in its current or revised forms. The Supreme Court has made clear that well-intentioned racial discrimination is just as illegal as invidious discrimination. The "argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (citations omitted); *see also SFFA*, 600 U.S. at 213–14. We thus urge the Council to bring Standard 206 in line with federal law's prohibition of race-based admissions and hiring. Doing so will provide much-needed clarity for the law-school administrators who work hard to train future members of our profession.

Sincerely,

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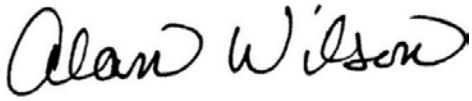

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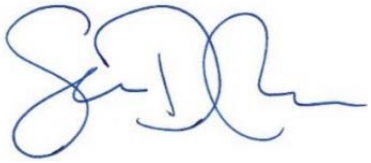

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