**WRITTEN TESTIMONY OF INDIANA ATTORNEY GENERAL TODD ROKITA ON**
**"Standing up for the Rule of Law: Ending Illegal Racial Discrimination and Protecting Men and Women in U.S. Employment Practices"**
**House Committee on Oversight and Accountability**
**June 27, 2024**

Thank you, Chair Comer, Ranking Member Raskin, and members of the Committee for inviting me to speak to you today on issues related to Title VII. My name is Todd Rokita, and I serve as the Attorney General for the State of Indiana. Prior to serving as Indiana's chief legal officer, I spent several years in the private sector as General Counsel for a company with over 100 employees. I had specific duties pertaining to all aspects of employment law and other legal matters for the company and for the company's clients. I also served as a Member of Congress for 8 years, representing Indiana's 4th District, and was a member of the House Education and Workforce Committee during my tenure here. I also had the honor of serving as Indiana's Secretary of State for 8 years—a position in which I managed the day-to-day operations of a state agency and its employees. These experiences have given me unique insights on how our nation's laws, and Title VII of the Civil Rights Act in particular, regulate and restrict the use of race and sex by employers when making employment decisions.

Treating people differently based on the color of their skin is antithetical to our nation's founding principles. In 2023, the Supreme Court of the United States rooted its holding in *Students for Fair Admissions, Inc. v. Harvard* 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." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181, 208 (2023) ("*SFFA*"). This decision affirmed the principle, deeply rooted in our nation's history and Constitution, that discrimination on the basis of race is rarely if ever justified. The Supreme Court stressed that "[w]hat cannot be done directly" under the Constitution likewise "cannot be done indirectly." *Id.* at 230. Therefore, it follows that one cannot try to achieve the same end through different means or change words around to mask racial discrimination. "Eliminating racial discrimination means eliminating all of it," *id.* at 206, including in employment as well as education.

Federal law also prohibits discrimination on the basis of sex. That is also consistent with the principles embodied in our founding documents. In 2020, the United States Supreme Court extended—mistakenly, in my view—Title VII's prohibition on sex discrimination also to prohibit an employer from firing an employee "simply for being . . . transgender." *Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1737 (2020). Importantly, the Court's holding in *Bostock* was narrow and did not address many other sensitive questions concerning gender identity in the workplace or other contexts, as the Court itself acknowledged. *See id*. at 1753

Despite the limited reach of the *Bostock* decision, unelected bureaucrats and activists are attempting to use the *Bostock* decision to impose breathtakingly broad transgender-based liability in contexts the Supreme Court never considered. These aggressive attempts to use federal law to police, for example, the use of pronouns in the workplace subvert the worthy goals that Title VII was enacted to advance; stretch the statute beyond any defensible interpretation of its text; and do

so at the expense of other critically important interests, including the protection of employers' sincerely held religious convictions.

I am committed to ensuring that all persons can work in environments that appropriately balance safety, equality, freedom of speech and religious principles, collegiality, and productivity, and doing so in a way consistent with federal law and our founding principles. In my testimony, I address the state of the law on race discrimination and sex discrimination after recent, major Supreme Court decisions. But first, I intend to provide background on the law concerning Title VII and the Equal Employment Opportunity Commission ("EEOC"). Second, I examine sex discrimination after *Bostock*. And finally, I evaluate race discrimination after *SFFA*.

## I. Background on The Law

### A. *Federal Employment Discrimination Laws: Title VII*

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment. As amended, it bars employers with 15 or more employees from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1)–(2)(Title VII); *Id*. § 2000e(b) (defining employer). Specifically, Title VII states:

> 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.

42 U.S.C. § 2000e-2(a)(1)–(2). Section 2000e-2(a)(1) covers individual employment decisions and section 2000e-2(a)(2) covers policies of general applicability. *See Jefferson v. Sewon Am., Inc.,* 891 F.3d 911, 923 (11th Cir. 2018) ("[S]ection 2000e-2(a)(2) . . . applies not to discrete decisions made by an employer directed at an individual employee, but to categorical policies that have a discriminatory purpose or effect."). Additionally, Title VII prohibits discriminatory training programs and discriminatory job notices or advertisements. 42 U.S.C. § 2000e-2(d) ("It shall be an unlawful employment practice for any employee . . . to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training."); 42 U.S.C. § 2000e-3(b) ("It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . indicating any preference, limitation, specification, or discrimination, based on race . . . .").

The three principal theories of liability for employers under Title VII that I will discuss today are: (1) disparate-treatment discrimination; (2) pattern-or-practice discrimination; and (3)

disparate-impact discrimination. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000); *see also Puffer v. Allstate Ins*. Co., 675 F.3d 709, 716-17 (7th Cir. 2012). Disparate treatment and pattern-or-practice claims require proof that the employer engaged in intentional discrimination while, in contrast, disparate-impact claims do not require discriminatory intent. *Id.* Instead, a disparate-impact claim alleges that an employer's facially neutral policy has a disproportionate adverse impact on one group compared to another. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (prohibiting an employer from using "a particular employment practice that causes a disparate impact on the basis of race" unless "the challenged practice is job related" and "consistent with business necessity"); *see Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

To prevail on a Title VII claim of disparate treatment, a plaintiff must prove that the covered employer (1) took an adverse employment action against her (2) because of a classification protected under Title VII (i.e., race, color, religion, sex, and national origin). 42 U.S.C. § 2000e-2(a)(1); *see Hamilton v. Dallas Cnty.*, 79 F.4th 494, 502 (5th Cir. 2023) (en banc). Title VII protects members of all racial groups. *See*, *e.g.*, *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2007) ("It is well-settled that the protections of Title VII are not limited to members of historically discriminated-against groups." (cleaned up)).

To satisfy what constitutes an adverse employment action, the Supreme Court in *Muldrow v. City of St. Louis Missouri*, 144 S. Ct. 967 (2024), recently held that an individual must show **some** harm respecting an identifiable term or condition of employment. *Id*. at 974. However, an individual **does not** have to show that the harm incurred was significant, serious, substantial, or any similar adjective suggesting that the disadvantage to the individual must exceed a heightened bar. *Id*. In addition to demonstrating an adverse employment action, a plaintiff who alleges disparate treatment under Title VII must also demonstrate that the action was "because of" a protected characteristic. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. 768, 772 (2015). Although a plaintiff **may** show that a discriminatory motive was the but-for cause for the challenged adverse employment action, the individual is not required to prove as much; she need only prove that it was "a motivating factor for any employment practice, even though other factors [may have] also motivated the practice." 42 U.S.C. § 2000e-2(m); *see Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020); A*bercrombie & Fitch*, 575 U.S. at 773 (Title VII "relaxes" the typical but-for causation standard). For example, a plaintiff may demonstrate that her employer impermissibly considered her race or sex in failing to promote her, even if the employer also determined that she did not have the requisite experience for the position. *See*, *e.g.*, *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 193 (4th Cir. 2003) (plaintiff was entitled to a mixed-motive jury instruction where she presented evidence that her sex was a motivating factor in declining to promote her, even though her supervisors also felt she needed to improve her "people skills" before being promoted). Discrimination claims based on these alternative causation standards are typically categorized as either mixed-motive or single-motive claims. *See Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 n.4 (11th Cir. 2016); *Spees v. James Marine, Inc.*, 617 F.3d 380, 389–90 (6th Cir. 2010).

Whereas disparate-treatment claims usually focus on the actions of an employer against one individual, a pattern-or-practice claim is a Title VII discrimination claim that necessarily relates to the employer's discrimination against a class of individuals. *See Adams v. United Ass'n*

*of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can., AFL-CIO, Loc.* 198, 469 F. Supp. 3d 615, 633 (M.D. La.), *on reconsideration in part*, 495 F. Supp. 3d 392 (M.D. La. 2020) ("A pattern or practice case is not a separate and free-standing cause of action…but is really merely another method by which disparate treatment can be shown.") (internal quotation marks and citations omitted); *cf. Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 150 (2d Cir. 2012) (pattern-or-practice method of proof is available to private plaintiffs only in a class action). In other words, rather than a distinct claim, pattern-or-practice liability is "simply one method of proving Title VII discrimination." *Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 408 (5th Cir. 2016).

In contrast to the intentional discrimination theories of disparate treatment and pattern-or-practice, a claim of disparate impact does not require proof that the employer had a discriminatory motive. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Instead, a disparate-impact claim requires a showing that the effects of a specific employment policy "fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

**B. *Indiana Discrimination Laws***

Indiana law in many ways mirrors federal law in prohibiting discriminatory practices. The Indiana Civil Rights Act declares that the public policy of the state is to have an equal opportunity without regard to race and other immutable characteristics. Ind. Code § 22-9-1-2.

Like federal courts, Indiana recognizes both disparate treatment and disparate impact claims. *See Ali v. Greater Ft. Wayne Chamber of Commerce*, 505 N.E.2d 141 (Ind. Ct. App. 1987) disparate treatment); *see also Indiana Bell Telephone Co. Inc. v. Boyd*, 421 N.E.2d 660 (Ind. Ct. App. 1981) (disparate impact). In construing Indiana civil rights law our courts have often looked to federal law for guidance. *Filter Specialists, Inc.*, 906 N.E.2d at 839. Also, Indiana Code § 22-9-1-10 requires all state and political subdivisions to include an anti-discrimination clause in all contracts, thereby providing contracting protections like those found in the 42 USC §1981 and the general employment discrimination prohibitions found in Title VII. Pursuant to Indiana Code § 22-9-1-10, breach of this covenant may be regarded as a material breach of the contract.

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). Unlawful discrimination is unfavorable treatment based on race, religion, color, sex, disability, national origin, or ancestry. *Id.* at 838; s*ee also* Ind. Code § 22-9-1-3(l) (defining "discriminatory practice"). Therefore, the key question in an employment discrimination case is "on what basis did the employer discriminate." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d at 838-39. DEI programs that consider a job applicant or employee's race or color in hiring, retention, promotion, and other terms, conditions, or privileges of employment could be considered unlawful under Indiana's Civil Rights Act.

### C. *Equal Employment Opportunity Commission's Responsibilities and Duties*

The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, sex, national origin, age, disability, or genetic information. In particular, the EEOC was created to enforce the prohibition on employment discrimination in Title VII. Among its statutory powers, the EEOC has the power "to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder," and to "make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public." *See* 42 U.S.C. § 2000e-4(g).

The EEOC is further "empowered […] to prevent any person from engaging in any unlawful employment practice as set forth in [Title VII]." 42 U.S.C. § 2000e-5(a). As part of their power, the EEOC is charged with investigating charges "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in unlawful employment practice." *Id*. As part of its role in enforcing Title VII, the EEOC also issues guidance documents, which is:

> [A]ny statement of Commission policy or interpretation concerning a statute, regulation, or technical matter within its jurisdiction that is intended to have general applicability and future effect, but which is not intended to be binding in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents, and may include letters, memoranda, circulars, bulletins, and advisories that set forth for the first time a new regulatory policy. It may also include equivalent video, audio, and web-based formats.

29 C.F.R. § 1695.

The EEOC's authority to issue this guidance derives, at least in part, from 42 U.S.C. § 2000e-12, which states that the EEOC has authority to "issue, amend, or rescind suitable procedural regulations to carry out the provisions" of the law. The section clarifies that "no person shall be subject to any liability or punishment for or on account of the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission." Therefore, this section implies that the EEOC has the authority to issue guidance or other opinions.

The EEOC has also relied on other statutory provisions for their authority to issue guidance. For example, in the EEOC's recent guidance on gender identity and pronoun usage in the workplace, the EEOC classified the document as a "technical guidance document" provided under 42 U.S.C. § 2000e-4(g). *See also Texas v. Equal Employment Opportunity Comm'n*, 633 F. Supp. 3d 824, 843 (N.D. Tex. 2022). Guidance documents are oriented towards "outreach and education efforts," as they "inform the public of the Commission's current interpretations of the law on

specific topics and promote voluntary compliance." Though, the EEOC may issue "procedural regulations" implementing Title VII and may not promulgate substantive rules. *See* 42 U.S.C. § 2000e-12(a). These "interpretive rules" are "general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) ("[I]nterpretative rules . . . are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." (citations omitted)). Further, while the EEOC may bring *civil enforcement* proceedings against private employers for violating Title VII, it may only *investigate* state employers. 42 U.S.C. §§ 2000e-5(f). The U.S. Attorney General is the only entity who may directly sue state employers to enforce Title VII. 42 U.S.C. §§ 2000e-6. Both the EEOC and the Attorney General, however, may issue aggrieved individuals a "right-to-sue" letter, which allows them to sue a state employer for violating Title VII. 42 U.S.C. §§ 2000e-5(f).

The EEOC's guidance does not bind a court like "an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). Nonetheless, courts recognize an agency's "specialized experience" and acknowledge that the agency's guidance may provide "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 Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)* 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.

The Seventh Circuit has held that, in general, EEOC guidance is helpful and should be afforded some degree of deference by the courts because of the agency's experience and expertise. But as previously noted, the guidance is not binding on courts. And as SCOTUS demonstrated in *Young* and *University of Texas*, there are reasons for courts to disregard EEOC guidance in particular cases where the guidance lacks "the persuasive force that is a necessary precondition for deference under *Skidmore*," suggesting it's a case-by-case determination whether and how much weight to afford to EEOC guidance. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013); *see also Young v. United States Parcel Services, Inc.*, 575 U.S. 206 (2015).

## II. Sex Discrimination: *Bostock v. Clayton County*

In June 2020, the United States Supreme Court issued its ruling in *Bostock*, which consolidated three similar cases of Title VII discrimination claims. Mr. Bostock was a homosexual man who had worked for Clayton County, Georgia, as a child services coordinator for ten years. *See Bostock*, 590 U.S. at 653. Mr. Zarda was a skydiving instructor who worked for several seasons at Altitude Express in New York, and after mentioning he was homosexual, he was fired. *Id*. Aimee Stephens was a male when hired at a funeral home. *Id*. at 653-54. During her six years of working there, she was diagnosed with gender dysphoria and notified her employer of her decision to live as a woman, prompting the funeral home to fire Aimee. *Id.* All three individuals brought a claim under Title VII for unlawful discrimination because of sex.

Title VII prohibits employers from unlawfully discriminating against an individual "because of" the individual's race, color, religion, sex, or national origin. *Id*. at 656; *see also* 42 U.S.C.A. § 2000e-2. The Court concluded that these terminations occurred because the individual was of the specific sex they claimed to be. *Id*. at 659-60. For instance, if Mr. Bostock was a female attracted to men, the Court reasoned that Clayton County would not have fired her; however, because he was a male attracted to men, the employer's adverse action was linked to the employee's sex, in violation of Title VII. *Id*. The Court observed that Title VII prohibits employers from taking certain actions "because of" sex, and "[s]o long as the plaintiff's sex was one but-for cause of the employer's decision, that is enough to trigger the law." *Id*. at 655. So ultimately, the Court narrowly held that an employer who fires an individual solely because of their status of being a homosexual or transgender violates Title VII. *Id.* at 651-53. The Court expressly refused to address "bathrooms, locker rooms, or anything else of the kind" and made no mention of the use of pronouns in the workplace. *Id*. at 681. Several courts have "acknowledged the limited nature of Bostock's holding." *State of Tennessee et al. v. Cardona et al.*, (E.D. Ky. 2024), (citing *L.W. by and through Williams v. Skermetti*, 83 F.4th 460 (6th Cir. 2023)).

**A. EEOC guidance incorporating Bostock**

According to EEOC, *Bostock* made clear that Title VII's prohibition of discrimination based on sex includes sexual orientation and transgender status.[1] However, the Bostock Court pointedly stated that the holding was a narrow one, limited only to the instant practice of firing an individual because they are homosexual or transgender. *Bostock*, 590 U.S. at 681. In response, on June 15, 2021, the EEOC issued its *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* ("Guidance"), and a fact sheet explaining the "established legal positions on LGBTQ+-related matters, as voted by the Commission."[2] The Guidance "provides examples of employer conduct that would constitute discrimination under *Bostock* through a series of questions and answers." This 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. et al.*, 615 F.Supp.3d 807, 818 (E.D. Tenn. 2022)), *aff'd sub nom*. *State of Tennessee v. Dep't of Educ*., No. 22-5807, 2024 WL 2984295 (6th Cir. June 14, 2024). Even though the Guidance intends to illustrate "what the Bostock decision means for LGBTQ+ workers (and all covered workers) and for employers across the country," the EEOC fully acknowledged that the "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."[3] This statement certainly can be confusing to any employee or employer who believes that the same Guidance states it is the established legal position of the agency.

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[1] *Sexual Orientation and Gender Identity (SOGI) Discrimination,* U.S. Equal Employment Opportunity, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination.
[2] 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.
[3] *Id.*

### B. States response to EEOC Guidance

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.[4] In July 2022, a federal district court preliminarily enjoined the EEOC from implementing the Guidance as to the plaintiffs—including Indiana—in a case led by Tennessee, and in October 2022, a federal district court vacated it in *Texas v. EEOC et al*. *See Tennessee,* 615 F. Supp. 3d 807; *see also Texas*, 633 F. Supp. 3d 824. The Tennessee district court noted that the Guidance "purports to define the legal obligations of those subject to Titles VII and IX"—and thus, unlawfully binding guidance—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 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 "[d]efendants' 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 Guidance and Defendants misread Bostock by melding 'status' and 'conduct' into one catchall protected class covering all conduct correlating to 'sexual orientation' and 'gender identity.'" *Texas*, 633 F.Supp.3d at 831. On the contrary, Justice Gorsuch expressly did not do that [in *Bostock*]." *Id.* 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 that the Guidance does not have the force of law, and it was an impermissible overstep of agency authority by the EEOC to issue it.

### C. EEOC Guidance on Sexual Harassment

On April 29, 2024, the EEOC released an updated enforcement guidance on harassment in the workplace, which included updates in light of the *Bostock* decision. This Guidance reflects the Court's interpretation of Title VII and its prohibition on discrimination "because of sex" to include discrimination of an individual's sexual orientation and gender identity. The EEOC outlines the three components of a harassment claim: (1) covered bases and causation; (2) discrimination with respect to a term, condition, or privilege of employment; and (3) liability.[5] This Guidance also acknowledges the longstanding legal precedent of requiring both objective and subjective hostility for an individual to bring a hostile work environment claim. It also clarifies the "quid pro quo" liability of employers when a change to a term, condition, or privilege of employment is likened

[4] *Id.*
[5] *Enforcement Guidance on Harassment in the Workplace*, EEOC Notice No. 915.064 (April 29, 2024).

to harassment because of a protected characteristic.[6] The EEOC also enumerates 77 examples to provide practical advice to employers on most of the topics covered in the Guidance and provides suggestions to consider when responding to alleged complaints of harassment in the workplace.[7]

This Guidance, like the EEOC's previous Guidance, artificially and impermissibly expands the scope of the Court's holding in *Bostock*, which refused to address "bathrooms, locker rooms, or anything else of the kind" and made no mention of pronouns in the workplace. *Bostock* at 681. The new guidance explicitly defined sex-based harassment to include "harassment based on sexual orientation or gender identity, including how that identity is expressed."[8] For instance, now it is considered harassment to:

> "create epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."[9]

Not only does this Guidance ignore the Court's clear statement in *Bostock* that its holding is limited to a specific set of facts regarding hiring and firing decisions, but it also runs afoul of the First Amendment, and even admits to it.[10]

### D. States comment letter response to sexual harassment

After the EEOC issued the proposed Guidance, my office, and 20 other states, filed a comment with the EEOC in response to the notice and request for comment in November of 2023.[11] First, the States argued that the EEOC's proposal contravenes the Commission's statutory authority and expands Title VII beyond Congress's original intent.[12] *Bostock* did not grant any authority to the EEOC to create federal workplace policy related to bathrooms, changing facilities, or the misuse of a person's preferred pronouns. *See Bostock,* 590 U.S. 644 (2020). As previously stated, *Bostock* expressly refused to address them. *Id.* at 681. Second, the States argued that this new Guidance would lead to "unconstitutional chaos" in workplaces across America.[13] The rule blatantly requires individuals and employers to "speak" and use an individual's correct pronouns.[14] For the EEOC to promulgate such a rule violates the constitutional protections of the First

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[6] *Id*.
[7] *Id*.
[8] *Enforcement Guidance on Harassment in the Workplace*, EEOC Notice No. 915.064 (April 29, 2024) at 7.
[9] *Id*.
[10] *Id*.
[11] State Attorneys General of Tennessee and 20 Other States, Comment Letter on Proposed Enforcement Guidance on Harassment in the Workplace (November 1, 2023) (attached as Exhibit A).
[12] *Id.* at 2-3.
[13] *Id.* at 2.
[14] *Id.*

Amendment—not only its free speech mandate but also an individual's freedom of religion. And if an employer refuses to enforce a pronoun policy or correct customers, they can be subject to liability under Title VII through the EEOC.[15] Lastly, the states argued that the EEOC proposal was arbitrary and capricious because the guidance ended "long-recognized privacy and safety justifications for sex-segregated facilities" and failed to account for the "difficulty, if not complete inability, of employers to confirm a person's self-professed gender identity."[16] The states ultimately concluded that the new Guidance was inappropriate, and that the EEOC should instead balance "safety, freedom of speech and religion principles, collegiality, and productivity" to create a positive workplace environment for employees across the nation.[17]

### E. Indiana State Attorney General Advisory Opinion concerning Use of Preferred Pronouns in the Workplace

On May 1, 2024, my office issued an advisory opinion concerning the use of preferred pronouns in the workplace.[18] Advisory opinions serve an essential function and provide public officials with a correct, legal interpretation of the law. Moreover, a question may be presented to assist a state official in determining a policy choice or future course of action. This particular request came from a state legislator who had been approached by his constituents regarding the topic. *See* Ind. Code § 4-6-2-5. Specifically, the legislator asked, "Does state or federal law require a co-worker to refer to a coworker by their preferred pronouns and new name?" and "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?"

In the official opinion, my office found that 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*. As previously mentioned, two federal district courts found that EEOC Guidance issued in 2021 to be an improper expansion of *Bostock* that places unenforceable duties on employers. No federal court has found the occasional misuse of pronouns alone to be actionable discrimination or pervasive enough to create a hostile work environment under Title VII. However, repeated, continuous, intentional misuse could create such an environment under the right circumstances, as each case is looked at on an individual basis. Therefore, although it 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 would also give rise to an action under Title VII.

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[15] *Id.*
[16] *Id.*
[17] *Id*. at 13.
[18] 2024 Op. Ind. Att'y Gen. No. 2024-03 (attached as Exhibit B).

## III. Racial Discrimination in the Admissions Process: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* Decision

While *Bostock* was decided in June 2020 regarding discrimination in hiring and firing because of sex, in June 2023, the United States Supreme Court decided *SFFA*, a case regarding race-based classification. The Court held that admissions programs used by Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment. *SFFA, Inc.,* 143 S. Ct. 2141 (2023) at 2154. The Court overturned the use of race-based affirmative action admissions practices, finding such practices violate the Equal Protection Clause. and Title VI. Colleges can no longer meet the requirements of strict scrutiny by showing a compelling governmental interest in making race-based admissions determinations. Under *SFFA*, the colleges could not articulate a "meaningful connection" between the practices they employed and the goals they pursued.

Respondents fell short of satisfying their burden of showing a compelling interest as a means to justify the programs and policies they had in place. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." *Id.* Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. *Id.* at 2166.

The Court found the college's use of affirmative action was not necessary to achieve the compelling government interest in promoting diversity because the goals used by the colleges were not measurable, used race as a negative towards some applicants, and lacked a logical end point; and the practice of affirmative action was not narrowly tailored enough to achieve any diversity goal of these colleges. *Id*. at 2168-74. First, the Court reiterated that an "individual's race may never be used against him in the admissions process." *Id.* at 2168. For example, selecting Person 1 of Race A over Person 2 of Race B because Race A was preferred is using race as a negative against Person 2 because they were of Race B. In this analysis, you are inherently favoring one race over another. The universities who claimed that they never used race as a negative in their admissions process could not withstand scrutiny. *Id*. at 2169.

Second, the programs that the universities used for affirmative action "lacked a logical endpoint." *Id*. at 2172. In fact, the Court's previous statement in *Grutter* that it "'expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary'" was "oversold." *Id*. (quoting *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003)). The universities did not believe that, in 2028, affirmative action and race-based admissions would be unnecessary. *Id*. The Court did not know when race-based admissions or affirmative action would end, thereby lacking a logical endpoint. The universities also could not articulate measurable and objective outcomes, or "meaningful connections" between their policies and practices and the stated diversity goals and objectives. *Id*. at 2167. The Supreme Court delineated in numerous other rulings that "an effort to

alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 2173. However, the Court was narrow in its holding and made clear that their ruling should not "be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *Id*.

**A. Application of SFFA decision to the Title VII context**

Although *SFFA* was a Title VI case, it is highly likely that many of the same reasonings apply to Title VII and other employment law cases. As the Court equivocally stated, "Eliminating racial discrimination means eliminating all of it." *Id.* at 2161. This does not just mean in the academic world. Discrimination is wrong (and illegal) no matter where it occurs, including the workforce. As the Court has noted multiple times, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 2168 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). The Fourteenth Amendment declares that no person shall be denied "equal protection of the laws." U.S. Const., Amend. 14, § 1. The Court pointed out that the Fourteenth Amendment was to protect every citizen "without regard to color." *SFFA, Inc*., 143 S.Ct. at 2159. Consequently, multiple cases have held that the Equal Protection Clause of the Fourteenth Amendment applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color," because "[i]f both are not accorded the same protection, then it is not equal." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290 (1978).

"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 ["][…]But when a university admits students 'on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike'" *SFFA, Inc.*, 143 S.Ct. at 2170. Stereotyping, using quotas, grouping individuals into training based on race alone are prohibited because employers may not "limit, segregate, or classify [] employees . . . 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, . . . or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1)(2); *see also* Ind. Code § 22-9-1-3(l).

*SFFA* notes that race cannot be used as a negative in education admissions. This can easily transfer to employment actions based on Title VII and the Indiana Civil Rights Act's prohibition on adverse employment actions because of race. Using race as a "negative" means discriminating "*against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that 'unduly harm[ed] nonminority applicants.'" *SFFA, Inc.* 143 S.Ct. at 2164-65 (emphasis in original). The same can be said when quotas or other forms of race-based decisions on hiring, promotion, or other employment actions are made in the workforce. "[O]utright racial balancing" is "patently unconstitutional" . . . because "[a]t the heart of the Constitution's guarantee of equal protection

lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Id.* at 2172.

A Fifth Circuit case recently reiterated that the purpose of the 1964 Civil Rights Act was "to protect every American against every form of prohibited discrimination—not just certain favored classes against certain disfavored forms of discrimination." *Hamilton v. Dallas Cnty., 79 F.4th 494 (5th Cir. 2023)* (J. Ho, concurring). It unequivocally stated that, "For almost 60 years, Title VII has made it unlawful for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Id.* at 1-2 (citing 42 U.S.C. § 2000e-2(a)(1)). Judge Ho astutely noted the Justice Department's observations that work assignments based on race are unlawful under Title VII, as well as citing other unlawful employment practices including "race-restricted access to mentoring, sponsorship, or training programs," hiring and compensation policies based on race and diversity targets, and race-restricted internship programs and interview processes. *Id.* at 25.

From this, it follows that "Diversity, Equity, and Inclusion" initiatives and programs that target race-based hiring could be considered a violation of Title VII. The entire purpose of DEI is to affirm or prefer certain races or sexual preferences of certain individuals over others. The Court noted in *SFFA* that affirmative action type practices create a negative effect and operate to stereotype. *SFFA, Inc.*, 143 S. Ct. at 2168-69. There, the practice assumed that black students could offer something that white students cannot and draws assumptions about ability based on the sole characteristic of race and that students of that race think alike. *Id.* at 2169-70. This type of thinking has implications for the employment sector just as our colleges and universities. There should be no difference in how race is treated in schools versus in the workplace.

Unconstitutional means just that—unconstitutional—not just in the educational arena, but also throughout all areas of the law, including employment. As the Court observed,

> The time for making distinctions based on race had passed. [. . .] the Court [. . .] "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." [. . .] So too in other areas of life. [. . .] all manner of race-based state action. [. . .] These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race.

*Id.* at 2160 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). The State of Indiana also demands that its citizens be treated equally. *See* Ind. Const. Art. I, § 23 (The Privileges and Immunities Clause); *see also* Ind. Code § 22-9-1-2. DEI initiatives that show preference for, or discriminate against, one class of individuals over another based on race, ethnicity, ancestry, or another protected class is prohibited, not only by federal law but also by Indiana law as well.

### B. Recent State Efforts in Combatting DEI efforts and discrimination

In the wake of the *SFFA* decision, on July 13, 2023, Indiana, along with twelve (12) other State Attorneys General, wrote to Fortune 100 company CEOs reminding those officers of their obligations as employers under federal and state laws and to refrain from discriminating based on race, specifically any discriminatory activity labeled "diversity, equity, or inclusion."[19] We reminded the CEOs that federal-civil rights statutes prohibit "private entities from engaging in race discrimination" and are as broad as the "prohibition against race discrimination found in the Equal Protection Clause."[20] The Court in the *SFFA* decision reiterated that the "commitment to racial equality extends to 'other areas of life,' such as employment and contracting."[21] Through this letter, we requested the companies to comply with these race-neutral-principles in their employment and contracting practices.[22]

Discriminatory practices like "racial quotas and preference in hiring, recruiting, retention, promotion and advancement" or "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 . . . racially discriminatory quotas and preferences" are incompatible with the Court's decision in *SFFA*.[23] We also noted that discrimination based on race is illegal under both federal and state law.[24] Accordingly, the Attorneys General put Fortune 100 companies on notice of the illegality of some of their race-based practices, and that they risk being held legally accountable if such illegal practices continue.[25]

In response, by July 19, 2023, certain Democrat Attorneys General sent a letter to Fortune 100 companies claiming that DEI programs are not prohibited by federal law, contradicting the Court and its decision in *SFFA*. These states would rather see individual companies violate the law to promote their racist policies, programs, and hiring practices, instead of complying with the law. Hiring individuals based on merit is always a good business practice, rather than arbitrary categories which have little to no bearing on an individual's ability to complete a job or task.

On November 29, 2023, the U.S. Department of Commerce issued a rule for comment titled *Business Diversity Principles*. *See* 88 Fed. Reg. 83,380. This Proposed Rule sought to "advance 'best practices related to diversity, equity, inclusion, and accessibility (DEIA) in the private sector.'" *Id*. The proposed regulations would have pushed businesses to: "implement 'clear strategies to increase diversity among the organization[s'] executive ranks,' '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.'" *Id*. These regulations were a part of

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[19] Letter from State Attorneys General from Kansas, Tennessee, and 11 Other States to Fortune 100 CEOs (July 13, 2023) (attached as exhibit C).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 2.
[24] *Id*. at 3-5.
[25] *Id*. at 6.

the Biden Administration's "ambitious, whole-of-government approach to racial equity" and "directive to 'continuously embed[] equity into all aspects of Federal decision-making." *Id*.

In response, Indiana, along with 18 other State Attorneys General, submitted a comment letter to the U.S. Department of Commerce on January 5, 2024.[26] In that letter, we argued that the "Department's proposed race-based employment policies violate the U.S. Constitution's Equal Protection Clause" and were issued in complete contradiction to the Supreme Court's ruling in *SFFA*.[27] Further, our letter contended that "race-based employment decision-making violates Title VII and related civil-rights laws."[28] Lastly, we emphasized "discrimination that 'cannot be done directly' under governing law also 'cannot be done indirectly' through end-run means consciously aimed at satisfying racial targets."[29] Ultimately, we agree with the goal to eliminate "all" racial discrimination, and will work with the Department to "promote meaningful diversity efforts that abide [within] governing federal[] and state[] law."[30]

Most recently, Indiana, along with 20 other State Attorneys General, wrote a letter to the American Bar Association ("ABA") on June 3, 2024, to discuss the ABA's standards and rules of procedure for approval of law schools.[31] Specifically, Standard 206, as it is currently written, runs afoul of the law because the current rule requires affirmative action to "provide 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."[32] It also compels the same for faculty and staff.[33] Standard 206 directs law-school administrators to "engage in race-based admissions and hiring" in violation of *SFFA*, Title VII, and the Constitution.[34] Diversity has its benefits, but the "constitution squarely rejects racial diversity as a legally sufficient justification for treating people differently because of the color of their skin."[35]

In this letter, we contended that the proposed changes to Standard 206 did not remedy any concerns brought to light due to *SFFA*.[36] In fact, the proposed changes to Standard 206, which instead require law schools to demonstrate "concrete actions" for students who have been "disadvantaged" or "excluded" from the legal profession, does not make the section comply with *SFFA* or the constitution because the ABA is still coercing law schools to perform some unconstitutional action in order to be accredited.[37] The ABA should recognize that changing some words around does not fix the problem, but actually just masks its unconstitutional behavior.

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[26] State Attorneys General of Kansas, Montana, Tennessee, and 16 Other States, Comment on U.S. Dep't of Commerce Notice Entitled Business Diversity Principles (January 5, 2024) (attached as Exhibit D).
[27] *Id*. at 2.
[28] *Id*.
[29] *Id.* at 4.
[30] *Id*.
[31] Letter from State Attorneys General of Tennessee, and 20 Other States to the Council of the American Bar Association (June 3, 2024) (attached as Exhibit E).
[32] *Id*. at 2.
[33] *Id*. at 3.
[34] *Id.* at 1.
[35] *Id*. at 3.
[36] *Id*. at 4-5.
[37] *Id*. at 4.

Ultimately, instead of fixing the constitutional issues with the prior standard, the ABA would rather threaten a law school's accreditation and force them to "work around 'legal constraints' by finding 'means other than those prohibited by law' to achieve the goal" of implementing the revised Standard 206.[38] The ABA should instead make clear that "the consideration of race in hiring or admissions violates the Constitution and federal law."[39] Through our letter, we asked the ABA to update Standard 206 to comply with the law because the "Supreme Court has made clear that [even] well-intentioned racial discrimination is just as illegal as invidious discrimination."[40]

## IV. Conclusion

In summation, DEI policies based on an individual's sex or race are discriminatory because they treat classes of people differently based on a protected characteristic. This is the very practice that Title VII and other civil rights laws, including those at the state level, were enacted to prevent and prohibit. The *SFFA* Court pointed out that "acceptance of race-based state action has been rare for a reason" and such a "principle cannot be overridden except in the most extraordinary case." *SFFA, Inc.,* 143 S.Ct. at 2162-63. Courts find distinctions based on race and ethnicity "inherently suspect." *Bakke,* 438 U.S. at 272–276, 291. Racial classifications are "dangerous" because even though they may have "compelling goals," using these categories undermines rather than promotes such goals. *SFFA, Inc.*, 143 S.Ct. at 2167-68 (citing *Grutter*, 539 U.S. at 342). The *Bostock* holding has been improperly expanded to include conduct that was not at issue in the case, to the point it creates unnecessary hurdles with which employers are expected to comply due to EEOC Guidance, even if such Guidance improperly oversteps. As the Indiana Attorney General, I and other State Attorneys General, are prepared to fight this dramatic federal overreach and ensure racism and discrimination of any kind are entirely eliminated to ensure individuals are treated fairly and without regard to any other classification.

[38] *Id*. at 5.
[39] *Id*.
[40] *Id*. at 6.