UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

State of Tennessee, et al., *Plaintiffs*, v. Equal Employment Opportunity Commission, et al., *Defendants*.	No. 3:24-cv-00224-CEA

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

America First Legal Foundation is a nonprofit corporation that does not have a parent corporation and is not publicly held.

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America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.[1]

America First Legal has a substantial interest in this case. First, it represents citizens nationwide who are fighting, *inter alia*, to protect women's physical safety, personal privacy, and access to sports and other educational opportunities. Second, as a participant in notice-and-comment rulemaking and an organization often engaged in litigation to protect the rule of law, it has an interest in ensuring that the Executive Branch does not abuse the Constitution, the Administrative Procedure Act, and controlling Supreme Court authorities, as it has done here. Third, it filed an *amicus* brief in the prior case involving the 2021 guidance enjoined by this Court. *See Amicus* Brief for America First Legal Foundation, *Tennessee v. Dep't of Educ.*, No. 22-5807, Doc. 47 (6th Cir. Jan. 31, 2023). And fourth, it has previously sought to vindicate the rights of employers against EEOC's overbroad assertions of Title VII liability based on sexual orientation or gender identity. *See Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023).

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Title VII generally makes it "an unlawful employment practice for an employer" "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Sex is an immutable characteristic acquired by birth. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). As the Supreme Court held in *Bostock v. Clayton County*, "transgender status" is a "distinct concept[] from sex," as understood at the time of Title VII's enactment. 590 U.S. 644, 669 (2020); *see id.* at 655 ("[W]e proceed on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female.").

EEOC's latest effort at transmogrifying "sex" in Title VII into "gender identity" contradicts *Bostock* and would turn Title VII inside out. A central question posed by EEOC's guidance is whether sex-separated facilities and policies that are appropriate under Title VII become impermissible when gender identity is invoked. The answer is no. What matters under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Because sex-separated facilities tied to biological realities generally do not impose disadvantageous terms of employment based on sex, they have long been permissible.

Replacing "sex" with "gender identity"—in contravention of the statute's original public meaning—EEOC's guidance declares that "the denial of access to a bathroom or other sex-separated facility consistent with the individual's gender identity" is prohibited by Title VII. There are at least two straightforward reasons that cannot be right, and they underscore why the rest of EEOC's guidance departs from the statutory text too.

First, even accepting EEOC's substitution of "gender identity" for the statutory term "sex," EEOC's declaration flunks *Bostock*'s "straightforward rule": "chang[e] the employee's [gender identity]" and see if it "yield[s] a different choice by the employer." *Bostock*, 590 U.S. at 659–60. When it comes to sex-separated facilities, the choice would remain the same: no matter a male's gender identity, they cannot use the female facility. Even if "discrimination based on . . . transgender status necessarily entails discrimination based on sex," *id.* at 669, discrimination based on sex does not necessarily entail discrimination based on gender identity. Sex-separated facilities obviously discriminate based on sex, and that discrimination is permissible when it does not impose an employment disadvantage. Gender identity is irrelevant.

Second, if the result were otherwise, EEOC's logic would collapse the statute by elevating "gender identity" over the term that is in the statute, "sex." An employer cannot maintain two facilities that are sex- *and* gender identity-segregated. If an employer must permit males who identify as other gender identities to use the female facility, then the facilities are no longer sex-separated—and preventing males who identify as males from using the female facility would also discriminate based on gender identity. And what about the other "more than 100 gender identities"?[2] If an employer lets males who identify as males and females who identify as females have facilities, it would seemingly discriminate based on gender identity not to have separate facilities for those who identify as each of those 100+ identities. In all events, if maintaining sex-separated restrooms generally does not impose disadvantageous terms of employment, how does invoking gender identity change that conclusion?

[2] The Trevor Project, *National Survey on LGBT Youth Mental Health 2019*, at 7, https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf.

EEOC has no answers. It cannot explain how its interpretation squares with the statutory text, history, *Bostock*'s logic, or the long acceptance of sex-separated facilities. It does not dispute that its interpretation would *prohibit* those facilities, prioritizing a characteristic not covered by the statute at all. Perhaps worst of all, EEOC backhands society's compelling interest in protecting women's private facilities, delivering this astounding rejoinder in its lead decision: "[I]f a transgender woman [biological male] using a common female restroom were to assault a co-worker using the same restroom, then the matter could and should be dealt with like any other workplace conduct violation—just as it would be if any other woman using a common female restroom assaulted a co-worker." *Lusardi*, EEOC DOC 0120133395, 2015 WL 1607756, at *17 n.5 (Apr. 1, 2015).

This is gender ideology run amok. Title VII is about sex, not the 100+ gender identities. Title VII lets employers protect women's spaces. And Title VII doesn't require employers to pretend that there is no difference between a male and "other wom[e]n." EEOC's guidance is unlawful and should be enjoined.

ARGUMENT

I. The guidance unlawfully conflates biological sex with gender identity.

When Title VII permits sex-based treatment, it cannot violate Title VII for employers to act accordingly. In other words, when Title VII allows employers to separate facilities based on biological sex, then Title VII could not simultaneously make it unlawful to exclude opposite-sex individuals, no matter how they identify. Concluding otherwise, as the EEOC did, unlawfully conflates sex and gender identity.

Only recently has anyone struggled with the meaning of sex. Sex has always, including at the time of Title VII, meant biological sex. *See Bostock*, 590 U.S. at 655; *id.* at 734–44 (Alito, J., dissenting) (Appendix A); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017)

(Sykes, J., dissenting); *see also* 42 U.S.C. § 2000e-2(h) (Title VII, permitting employers "to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29," which speaks to "employees of the opposite sex"); 29 C.F.R. § 1604.2(b)(5) (EEOC regulations referring to "employees of each sex").

Sex is real. It "is not a stereotype." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813 (11th Cir. 2022). "Recognizing and respecting biological sex differences does not amount to stereotyping—unless Justice Ginsburg's observation in *United States v. Virginia* that biological differences between men and women 'are enduring' amounts to stereotyping." *L.W. v. Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023) (quoting 518 U.S. 515, 533 (1996)).

Though the EEOC guidance incessantly invokes *Bostock*, it ignores that *Bostock* itself "proceed[ed] on the assumption" that the term "sex," as used in Title VII, "refer[red] only to biological distinctions between male and female." 590 U.S. at 655. Not only did *Bostock* proceed on that assumption, it *depends* on the understanding that gender identity is a "distinct concept[] from sex." *Id.* at 669. *Bostock* provided the hypothetical of "an employer who fires a transgender person" who is biologically male, explaining that "[i]f the employer retains an otherwise identical employee who" is biologically female, "the employer intentionally penalizes a [male] person . . . for traits or actions that it tolerates in a[] [female] employee" and thus engages in sex discrimination. *Id.* at 660. If that is true,[3] it is only because the employee is, in reality, male.

The Supreme Court's other precedents confirm the point and emphasize that sex is an immutable characteristic that implicates enduring, often-relevant differences between males and

[3] *Bostock* appears to assume that being "transgender" simply means identifying as the opposite of one's biological sex. That assumption is not obvious. *See infra* pp. 10–12.

females. *See Frontiero*, 411 U.S. at 686 (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."); *Virginia*, 518 U.S. at 533 (Ginsburg, J.) ("Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." (cleaned up)); *see also Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 55 (2012) (Ginsburg, J., dissenting) ("[I]t is the capacity to become pregnant which primarily differentiates the female from the male." (cleaned up)); *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one.").

The Supreme Court has likewise recognized that policies can and often should recognize the inherent differences between the sexes. As it explained in one case, "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73; *see also, e.g.*, *Virginia*, 518 U.S. at 550 n.19 (explaining that admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("A sign that says 'men only' looks very different on a bathroom door than a courthouse door.").

These principles apply in the Title VII context. Title VII "does 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." *Oncale*, 523 U.S. at 81. Thus, Title VII's "prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Id.* Congress recognized that sometimes biological sex *is* relevant to employment and expressly provides that

an employer may consider sex where it is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e)(1).

When sex provides an appropriate basis for drawing distinctions—as in facilities, certain qualifications, and medical treatments—a person is not excluded "because of" or "based on" gender identity. Instead, a person is excluded based on sex. A man excluded from the women's bathroom is excluded for one reason: because he is a man. His gender identity matters no more than the color of his shoes. And that exclusion is permissible because it does not impose a disadvantageous employment term based on his sex. Instead, the exclusion recognizes that men and women are biologically different and thus, per society's understanding for hundreds of years, should have sex-separated facilities.

Under both general equal protection and Title VII principles, a plaintiff alleging discrimination must show that he "was treated differently than [a] similarly-situated" person. *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006); *see Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 589 (6th Cir. 2014). Anti-discrimination laws "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And "[w]hen it comes to the bathroom policy" and similar sex-based policies, "biological sex is the 'relevant respect' with respect to which persons must be 'similarly situated,' because biological sex is the sole characteristic on which" those policies are based. *Adams*, 57 F.4th at 803 n.6. Thus, biological males are similarly situated to each other for purposes of these policies, and prohibiting a male who identifies as something else from using the women's bathroom does not treat similarly situated people differently.

Any argument otherwise wrongly conflates gender identity with biological sex. For instance, the lead EEOC decision that its guidance relies on found that an employer's decision to

prohibit a male from using the women's restrooms and shower facilities violated Title VII because the male could not "use a restroom that other persons of her gender were freely permitted to use." *Lusardi*, 2015 WL 1607756, at *9. But the male concededly could use the restrooms and showers corresponding to his *sex*. As discussed, at the time of enactment, "sex" in Title VII meant biological sex. *See Bostock*, 590 U.S. at 655. EEOC never contends otherwise.

Nonetheless, EEOC agreed with the male that he had been "subjected . . . to sex discrimination when [the employer] treated her differently than other employees because she is transgender." 2015 WL 1607756, at *7.[4] But that's wrong: what matters when a man is excluded from the women's facility is not gender identity or "being transgender," it is his immutable, biological sex. EEOC makes no argument that restroom and changing facility access rules are illegal writ large. So it makes no more sense to say that restroom access rules exclude individuals because of their "gender identity" than it would to say that they exclude individuals because of their shirt color. Both are irrelevant to the access rule.

In sum, the Biden Administration's guidance is again substantively wrong, *ultra vires*, and unlawful. "Sex" under Title VII means biological sex. An employee permissibly excluded from a living facility of the other sex based on sex is not excluded based on gender identity. And employers should not face liability under Title VII for recognizing reality-based differences between men and women. EEOC's guidance is unlawful.

[4] EEOC also proclaimed that "there is no cause to question that Complainant—who was assigned the sex of male at birth but identifies as female—*is* female." *Lusardi*, 2015 WL 1607756, at *8. Whatever that might mean—EEOC does not explain its apparent position that gender identity is immutable and always known (*see infra* pp. 10–12)—there was also "no cause to question" that the complainant's sex "*is*" male. And Title VII cares only about "sex."

II. The guidance would transform Title VII.

The Supreme Court has warned that Title VII should not be treated as a "general civility code" and should be "directed only at discrimination because of sex." *Oncale*, 523 U.S. at 80. "Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real." *Nguyen*, 533 U.S. at 73. By reading Title VII to prohibit accepted sex-based practices grounded in biological reality, EEOC's conflation of sex and gender identity would transform Title VII, denying women and girls protections that Congress never intended to take away. *Cf.* Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21 ("Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."). The consequences of this transformation would be wide-ranging and often absurd.

Title VII prohibits only *sex*-based discrimination. So how could it be that the statute (silently) provides a special exemption based on gender identity from permitted rules about sex-separated facilities? EEOC does not explain, but its logic would spell the end of sex-separated facilities. If "sex" includes gender identity, then allowances for sex-separated facilities "would be rendered meaningless." *Adams*, 57 F.4th at 813. "[R]eading 'sex' to include 'gender identity'" "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based [policy] when the [policy] come[s] into conflict with a transgender person's gender identity." *Id.* at 814.

Put another way, it is impossible to maintain facilities that are *both* sex-segregated and gender identity-segregated. As soon as an employer permits a male to use the female restroom based on that male's gender identity, the restroom is no longer sex-separated. And presumably it would also discriminate based on gender identity to keep males who identify as males from using that formerly-female facility. This interpretation places employers "in an impossible situation,"

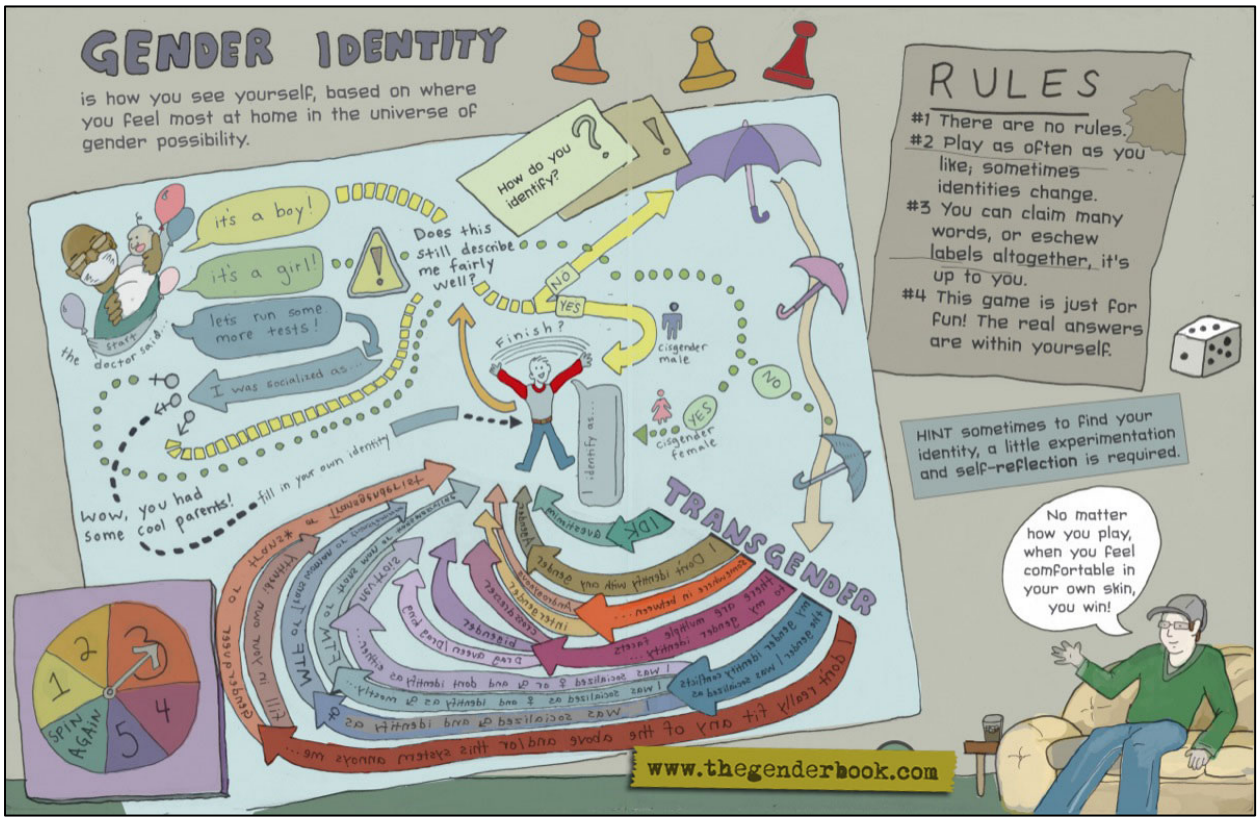
and EEOC's refusal to address this consequence suggests that it is trying to redefine "sex" in Title VII as "*only* gender identity"—contradicting text, history, and tradition. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 737–38 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part) (emphasis added); *see supra* Part I.

Perhaps EEOC would respond that employers should have *four* facilities: for females who identify as females, females who identify as males, males who identify as males, and males who identify as females. Beyond being administratively impossible, that solution would *still* discriminate, at least applying EEOC's own interpretation. The World Professional Association for Transgender Health refers to "gender identity" as a "person's deeply felt, internal, intrinsic sense of their own gender." *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, S252 (2022), https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 ("WPATH Standards"). Transgender advocacy groups say there are at least 100 such identities. *See supra* note 2. Further confusing the matter is that, according to the American Psychological Association, "some people" "experience their gender identity as fluid." *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 836 (Dec. 2015), https://www.apa.org/practice/guidelines/transgender.pdf.[5]

Likewise, the American Academy of Pediatrics says that being transgender is not limited to those "whose gender identity does not match their assigned sex," but "also encompasses many other labels individuals may use to refer to themselves" (and "can be fluid, shifting in different contexts"). Jason Rafferty, *Ensuring Comprehensive Care & Support for Transgender & Gender-*

[5] *See* Kylin Camburn, *9 Young People Explain what Being Non-binary Means to Them* (July 14, 2019), https://www.glaad.org/amp/9-young-people-explain-what-being-non-binary-means-them ("I choose to see my gender as a creature that exists not *because* of me or *for* me, rather, it exists *through* me. I am merely a conduit of expression for the multitude of ways gender takes form. Each day is different.").

Diverse Children & Adolescents, 142 Pediatrics no. 4, at 2 (Oct. 2018), https://tinyurl.com/38ans522; *see id.* at 3 ("transgender" is "not [a] diagnos[i]s," but a "personal" and "dynamic way[] of describing one's own gender experience"). The American Academy of Pediatrics suggests the following "explanation" of "gender identity," *id.*—note especially the "Rules":



The Gender Book, https://tinyurl.com/ypxynhkh.

If these definitions are imported into Title VII, as EEOC seems to demand,[6] the statute loses all meaning. Take a male employee who has a "gender identit[y] that encompass[es] or

[6] Though EEOC's guidance did not bother to define the critical terms "gender identity" or "transgender," other parts of the federal government use broad (and circular) definitions. *See, e.g.*, CDC, *Terminology*, https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm ("gender identity": "[a]n individual's sense of their self as man, woman, transgender, or something else"); Dep't of Labor, *Gender Identity: Key Terminology*, https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity ("gender identity": "[a] person's internal sense of being male, female, or something else such as agender, binary, gender fluid, gender nonconforming, genderqueer, or nonbinary").

blend[s] elements of other genders"—and one "that changes over time." WPATH Standards S80. He wishes to use female shower facilities. Under EEOC's guidance, how would an employer avoid federal government investigation and a Title VII charge? Has the employer discriminated against this person for not letting him use the female showers? The employer has not treated him differently from other males—and the only statutory prohibition is on "sex" discrimination—but EEOC insists that is not good enough. The employer has no one else with an identical gender identity to compare him to, at least that day, much less one whose sex is female to play a "change the sex and see what happens" game. And yet, if the employer did not give the employee access to the showers that he desired that day, but gave it to employees with other gender identities, that seems to be enough for a Title VII investigation and EEOC violation. If so, Title VII is incomprehensible, and bathrooms, locker rooms, and living facilities cannot be subject to any meaningful rules at all.

In practice, as Commissioner Lucas explained, "major corporate employers" can easily enough "afford to create costly multiple single-stall all-gender bathrooms in" their "large, clean, modern facilities" in big cities—partially avoiding the difficulties created by EEOC's guidance. Commissioner Andrea Lucas, *Statement on EEOC Enforcement Guidance on Harassment in the Workplace* 2 (Apr. 29, 2024). But many "[t]housands of women across the country work in jobs—often blue-collar, agricultural, or low-wage service positions—that require them to change clothes in locker rooms or shower at work." *Id.* "Some women even must sleep in work-provided lodging, including thousands of female migrant agricultural workers, many of whom are non-English speakers who are especially vulnerable to sexual assault and likely to have little recourse if the worst happens." *Id.* "Numerous women work the night shift at factories and plants, in hospitals, or in janitorial and cleaning roles in businesses across the country." *Id.* And "[m]any young teenage girls work in the evening and at night at fast-food and quick-service restaurants." *Id.* It is *these*

women, whose workforce participation is vital to bread-and-butter American industries, who "will pay the price for the [EEOC's] egregious error." *Id.*

Of course, all employers should fear this guidance, for it poses no end of practical problems. Take Title VII's permission for an employer to discriminate based on sex when "sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). Such "BFOQ" qualifications are common, for instance, in prisons, where they "materially advance a constellation of interests"—"the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates." *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 753 (6th Cir. 2004); *see also Reed v. Cnty. of Casey*, 184 F.3d 597, 600 (6th Cir. 1999). But if "'sex' includes . . . gender identity," as EEOC's guidance asserts, then apparently a male becomes qualified for a female occupation by changing gender identities—at least changing to female, if not also to eunuch and the other dozens of gender identities. And once the employer lets some males take female occupations, how could it show a legitimate interest in excluding other males? Again, EEOC's guidance destroys the statutory scheme.

Take one final way in which EEOC's guidance implodes the statute: employer health care plans. Applying EEOC's interpretation, the United States has asserted that an employer health care plan that does not cover sex change operations violates Title VII as to a male employee who sought a vaginoplasty for gender transition. The United States insists that "exclusions of coverage for gender-affirming care, where such care would otherwise be covered if provided for other medically necessary reasons, violate Title VII's prohibition on sex discrimination." Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee 12–13, *Lange v. Houston County*, No. 22-13626, 2023 WL 2648303 (11th Cir. Mar. 17, 2023).

But applying a general denial of coverage for sex change operations to deny a male employee a transitioning vaginoplasty—an inversion and removal of male genitalia that is *not possible* in a female and is not used for any other reason—could not violate Title VII. A denial for sex-change operations applies "across-the-board": it "does not include one sex and exclude the other." *Skrmetti*, 83 F.4th at 480. Plus, a transitioning vaginoplasty—like other transitioning procedures—is an operation that "only one sex can undergo." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (holding that regulation of such procedures does not facially discriminate); *see also Lange v. Houston Cnty.*, 101 F.4th 793, 806 (11th Cir. 2024) (Brasher, J., dissenting) ("[T]he male-to-female sex change procedure requires that a person's testicles be removed, the urethra be shortened, and the penile and scrotal skin be used to line the neovagina, the space between the rectum and the prostate and bladder." (cleaned up)).

That sex-change operations "are themselves sex-based" does not make every regulation pertaining to them discriminatory. *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023) ("treatments for gender dysphoria are different for males and for females because of biological differences between" them). Slicing off a male's genitals is not the same procedure as correcting a female's congenital absence of a vagina. Giving a female testosterone to transition is not the same procedure as giving testosterone to a male to treat hypogonadism.

If the United States were right that a health plan's sex-change operation exclusion is sex discrimination, then a plan would also discriminate by covering transitioning hormones—say, testosterone for females to look more "masculine"—and refusing to cover testosterone for males who want to look more "masculine." Same goes for any number of other implants, augmentations, enhancements, and drugs. *And* it would violate Title VII to fail to cover "sex change *reversals*." *Lange*, 101 F.4th at 804 (Brasher, J., dissenting). Once again, echoing the absurd consequences of

EEOC's guidance for bathrooms and BFOQs, this logic would mean that any procedure related to gender transition—or sex generally—gets special (and universal) coverage, regardless of why or how the procedure is used. *See id.* at 805; *contra Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981) (explaining that Title VII "does not demand that an employer give preferential treatment").

* * *

"Changing how we define 'female' so that it includes individuals of both sexes, and then disallowing any distinctions among them on the basis of sex, is by definition and in effect a rejection of" Title VII's text, history, and longstanding traditions. *Adams*, 57 F.4th at 820 (Lagoa, J., concurring) (cleaned up). EEOC's guidance is substantively unlawful and would lead to intractable workplace conflicts.

CONCLUSION

The Court should issue a preliminary injunction.

Respectfully submitted,

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