U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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Commissioner
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COMMISSIONER ANDREA R. LUCAS'S STATEMENT ON EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

Women's sex-based rights in the workplace are under attack—and from the EEOC, the very federal agency charged with ***protecting women*** from sexual harassment and sex-based discrimination at work. In its new harassment guidance, the Commission formally takes the position that for both private companies and federal employers, harassing conduct under Title VII includes "denial of access to a bathroom or other sex-segregated facility consistent with [an] individual's gender identity." Relatedly, the Commission declares that harassing conduct includes "repeated and intentional use of a name or pronoun inconsistent with [an] individual's known gender identity."[1] The Commission's guidance effectively eliminates single-sex workplace facilities and impinges on women's (and indeed, all employees') rights to freedom of speech and belief. In issuing this guidance, the EEOC ignores biological reality; dismisses the sex-based privacy and safety needs of women; disregards decades of safeguarding principles for women and girls; and fundamentally betrays its mission.

Biological sex is real, and it matters. Sex is binary (male and female) and is immutable. In the words of Justice Ginsburg for the Supreme Court in *United States v. Virginia*, "[p]hysical differences between men and women . . . are enduring: The two sexes are not fungible."[2] It is not harassment to acknowledge these truths—or to use language like pronouns that flow from these realities, even repeatedly. Relatedly, each sex has its own, unique privacy interests, and women have additional safety interests, that warrant certain single-sex facilities at work and other spaces outside the home. It is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities which implicate these significant privacy and safety interests. And the Supreme Court's decision in *Bostock v. Clayton County* does not demand otherwise: the Court explicitly stated that it did "not purport to address bathrooms, locker rooms, or anything else of the kind."[3]

The Commission's guidance turns anti-harassment principles completely upside down. Under the Commission's pronouncement, a company denying biological males access to its women's workplace bathroom, shower, locker or dressing room, or sleeping facilities no longer is exercising reasonable care to *prevent* harassment of female workers. To the contrary, taking this reasonable and necessary step to protect women now is deemed evidence of *harassment* against any biological male who self-identifies as having a female "gender identity."

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[1] The EEOC's Chair previously attempted to unilaterally declare these positions via a "technical assistance" document (a category of sub-regulatory document not voted on by the full Commission panel). This attempt was soundly rejected and vacated in *Texas v. EEOC et al.*, 2:21-CV-194-Z, 633 F.Supp.3d 824 (N.D. Tex. 2022).

[2] 518 U.S. 515, 533 (1996) (cleaned up).

[3] *Bostock v. Clayton County,* 590 U.S. 644, 681 (2020); *see also id.* at 655-56 (assuming that "sex" refers "only to biological distinctions between male and female.").

Women in the workplace will pay the price for the Commission's egregious error. Every female worker has privacy and safety rights that necessitate access to single-sex workplace bathrooms limited to biological women. But it is important not to lose sight of the fact that this is not just about white-collar female workers' daytime access to bathrooms in the large, clean, modern facilities of major corporate employers, companies which can afford to create costly multiple single-stall all-gender bathrooms in an attempt to balance women's safety and privacy interests with the Commission's new edict. Thousands 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. 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. Numerous women work the night shift at factories and plants, in hospitals, or in janitorial and cleaning roles in businesses across the country. Many young teenage girls work in the evening and at night at fast-food and quick-service restaurants. Moreover, many women and girls who themselves are not employees (but rather are customers, clients, or students) also use single-sex facilities at locations in which employees perform duties, like a store dressing room or a gym, spa, or school locker room or showers. A woman or girl's risk of sexual harassment or assault from a biological male is exponentially higher when undressing, showering, or sleeping, or when working after dark or in isolated or remote locations. Many of these groups of women already are at increased risk of sexual harassment, assault, or rape—indeed, each year, the Commission admirably files many lawsuits on behalf of hundreds of such female workers who have suffered sexual harassment and assault at work. But the Commission's new harassment guidance will elevate "gender identity" over these and other women's interests.

Congress did not grant the Commission authority to issue substantive regulations under Title VII.[4] The Commission states in the harassment guidance that the "contents of this document do not have the force and effect of law, [and] are not meant to bind the public in any way." That disclaimer is worth little. A rule called by any other name is still a rule. The Commission separately describes the guidance as a "resource for employers, employees, and practitioners; for EEOC staff and staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues." As the guidance makes clear at its very start, it "communicates the Commission's position on important legal issues," that is, the agency's enforcement positions. Many employers will conform their workplaces accordingly to avoid investigation and litigation by the EEOC, including by effectively eliminating single-sex facilities in favor of ones separated by "gender identity" and by policing speech and belief expressing biological reality. Women will suffer the consequences.

[4] *See* 42 U.S.C. § 2000e-12(a) (granting Commission authority only to issue "suitable procedural regulations" to carry out Title VII); *see, e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Texas*, 633 F. Supp. 3d at 841-42.