AMERICAN CENTER
for LAW & JUSTICE

November 1, 2023

Attn: Raymond Windmiller
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, D.C. 20507

RE: Proposed Enforcement Guidance on Harassment in the Workplace

To Whom It May Concern,

The American Center for Law and Justice ("ACLJ") submits the following comments, on behalf of itself and nearly 567,000 of its supporters[1] opposing the adoption of the proposed Enforcement Guidance on Harassment in the Workplace (hereinafter "Guidance") issued by the U.S. Equal Employment Opportunity Commission (hereinafter "EEOC") on October 2, 2023. As currently written, the Guidance expands abortion protections by incorrectly interpreting Title VII's prohibition of discrimination on the basis of sex.[2]

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion and the right to life of the preborn and have submitted formal comments regarding proposed rulemaking on a wide variety of issues.

[1] These comments are joined by nearly 567,000 ACLJ supporters who have signed our petition to Defund Millions from Planned Parenthood. *Defund Millions From Planned Parenthood*, AMERICAN CENTER FOR LAW AND JUSTICE, https://aclj.org/pro-life/defund-millions-from-planned-parenthood (last visited Oct. 30, 2023).
[2] Proposed Enforcement Guidance on Harassment in the Workplace, 88 Fed. Reg. 67750 (proposed Oct. 2, 2023), https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace [hereinafter Guidance].

The Guidance should not be adopted because the text, legislative history, and judicial precedent of Title VII, without question, prevent the EEOC's proposed guidance that Title VII's sex discrimination protection covers harassment involving abortion and reproductive-related decisions. By interpreting Title VII to define sex as including abortion and reproductive-related decisions, the EEOC has clearly stepped beyond the authority granted it by Congress to implement rules governing protections for female workers experiencing "pregnancy, childbirth, or related medical conditions."[3] Recently, Congress clearly addressed the fact that abortion is not a "related medical condition."[4] As written, the Guidance hijacks the intent and purpose of Congress to protect women from workplace harassment and instead attempts to expand abortion protections by including abortion and reproductive-related decisions as related medical conditions protected by the prohibitions against sexual discrimination.

I. BACKGROUND

a. The Legislative History of the Title VII

Title VII of the Civil Rights Act of 1964 protects against various forms of discrimination, including religious discrimination. The statute prohibits many (but not all) employers that have at least fifteen employees from, among other things, discriminating in employment based on religion. It also requires those employers to grant a reasonable request to accommodate an employee's sincerely held religious beliefs or practices unless doing so would impose a significant cost or burden on business operations.[5]

As amended by the Pregnancy Discrimination Act, Title VII also protects against sex discrimination. It further provides that discrimination based on pregnancy, childbirth, or related medical conditions is a type of unlawful sex discrimination. Congress's purpose in including this provision was to improve the employment opportunities, economic conditions, and fair treatment of women and minorities.[6]

For a period, "pregnancy, childbirth, or related medical conditions" in Title VII was interpreted to include abortion because of now-overturned case law, like *Roe v. Wade*. A current interpretation should reflect the Supreme Court's decision in *Dobbs*, which overturned *Roe*'s inaccurate finding that the Constitution of the United States protected a fundamental "right" to abortion. Thus, that previous interpretation is irrelevant here.

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[3] Guidance, *supra* note 2.
[4] *Id.*
[5] *Questions and Answers: Religious Discrimination in the Workplace*, EEOC, https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace (last visited Oct. 30, 2023).
[6] 29 CFR 1608.1.

In *Bostock v. Clayton County*, the Supreme Court of the United States addressed the meaning of Title VII. When considering the meaning of Title VII's "'because of' sex," the Court interpreted those words plainly as meaning "by reason of" or "on account of," thereby incorporating the "standard of but-for causation." 140 S. Ct. 1731, 1739 (2020). "So long as the plaintiff 's sex was one [of the] but-for cause[s] of that decision, that is enough to trigger the law." *Id*. It also found that the 1991 supplement to Title VII created a "motivating factor test" when it "allow[ed] a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice." *Id*. A defendant must show that sex was either the but-for cause of the employment discrimination or the motivating factor behind the employment discrimination. So, if an employment issue arose because of the actions of a woman, and the same issue would arise if the same actions were perpetrated by a man, the alleged discrimination is not "because of" the person's sex.

b. Biden Administration's Pro-Abortion Agenda

By putting forth the Proposed Guidance, the EEOC is thwarting the intent of Congress. Congress did not intend for sex discrimination protections to include protections for abortions when the Civil Rights Act of 1964 was passed, nor does not it intend to protect abortion now. In fact, Congress has repeatedly refrained from passing abortion-advancing legislation. Since the Supreme Court decided *Dobbs*, the following bills have been introduced in Congress, none of which have been passed into law:

- Women's Health Protection Act of 2022 (HR 8296), aimed at preserving access to abortion nationwide at the federal level;
- Ensuring Access to Abortion Act of 2022 (HR 8297), intended to protect the right to travel to access abortion and prohibit anyone from hindering an individual's ability to cross state lines to obtain an abortion in a state where it is legal to do so;
- Travel for Care Act (H.R.3132), attempting to secure a tax exemption for employer-reimbursed travel expenses for abortion-related care;
- Reproductive Health Travel Fund Act (S.2152), meant to authorize grants to employers to pay for travel-related expenses for individuals seeking abortions; and
- Protecting Service Members and Military Families' Access to Reproductive Care Act of 2023 (S.1610), initiated to grant Armed Forces members an administrative absence and an allowance for travel expenses when they or their spouses want an abortion.

Congress has never passed a law explicitly promoting abortion. It has, however, passed both the Hyde Amendment and the Weldon Amendment. The former prohibits comprehensive health care services provided by the federal government, such as Medicaid, from including abortions (with limited exceptions for rape, incest, and medical emergencies), while the latter bans federal funds from going to federal agencies and programs or state and local governments that discriminate

against health insurance plans, health care institutions or health care professionals that refuse to provide, pay for, or refer for abortions.

On the other hand, this is not the first time the Biden Administration substantiated its undeniable loyalty to abortion advocates and their agenda. On June 23, 2023, Biden's White House released a fact sheet outlining its dedication to not only the pro-choice agenda, but the pro-abortion agenda (an agenda with which only a minority of Americans side).[7] In just one year, this administration has attempted to preempt state law and take the following actions:

- Categorize abortion as "emergency medical care" and ensure all patients experiencing pregnancy loss have access to full protections for emergency medical care;
- Defend FDA approval of mifepristone (also known as "the abortion pill") and secure its availability in pharmacies;
- Fight for "abortion counseling" and "abortion care" for veterans and VA beneficiaries
- Defend the "right to travel to get health care"; and
- Create the Reproductive Rights Task Force, which is meant to monitor any and all pro-life-based action at the state and local level and respond by fighting it.

II. LEGAL ANALYSIS

A. The EEOC Has Wrongfully Interpreted "Harassment" in Title VII To Include Abortion.

a. Abortion Is Not a Covered Provision in Title VII

The proposed Guidance states: "Sex-based harassment includes harassment based on pregnancy, childbirth, or related medical conditions, including lactation. This also can include harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion."[8] As support for including abortion and reproductive-related decisions under medical conditions, it cited *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), *Turic v. Holland Hospitality, Incorporated*, 85 F.3d 1211 (6th Cir. 1996), and *Velez v. Novartis Pharmaceuticals Corporation*, 244 F.R.D. 243 (S.D.N.Y. 2007). These cases used Title VII to interpret its amendment, the Pregnancy Discrimination Act (PDA) of 1978.

[7] *Fact Sheet: Biden-Harris Administration Highlights Commitment to Defending Reproductive Rights and Actions to Protect Access to Reproductive Health Care One Year After Overturning of Roe v. Wade,* THE WHITE HOUSE (June 23, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/23/fact-sheet-biden-harris-administration-highlights-commitment-to-defending-reproductive-rights-and-actions-to-protect-access-to-reproductive-health-care-one-year-after-overturning-of-roe-v-wade/.
[8] Guidance, *supra* note 2.

Doe v. *C.A.R.S. Prot. Plus, Inc.* is an employment discrimination case in which the court, in evaluating whether a woman had established a prima facie case, added, "[w]e now hold that the term 'related medical conditions' [in the PDA] includes an abortion." 527 F.3d at 364. In *Turic* v. *Holland Hospitality, Incorporated*, the court upheld the finding that the PDA extended not only to abortion but also contemplation of terminating one's pregnancy. 85 F.3d at 1214. In *Velez v. Novartis Pharmaceuticals Corporation*, the court allowed a manager's comment that an employee should get an abortion to support a class action for pregnancy discrimination. 344 F.R.D. at 266-67. While these cases may currently hold precedential weight in their respective jurisdictions, they ought not be incorporated into the guidance on Title VII. Title VII's only reference to abortion is included in the definitions portion of the statute and is as follows:

> This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.[9]

If "because of sex," "on the basis of sex," and "related medical conditions" included abortion or reproductive-related decisions, then the drafters of Title VII would have defined it as such in Section 2000e(k) when it was defining "because of sex" and "on the basis of sex" and included "related medical conditions."

Furthermore, including abortion and reproductive-related decisions under the definition of sexual discrimination is not in keeping with the precedent of the United States Supreme Court. In *Bostock v. Clayton County,* Justice Gorsuch highlighted that Title VII does not allow sex to play "a necessary and undisguisable role in [employment] decision[s]." 140 S. Ct. 1731, 1737 (2020). The key question for determining whether an employer had discriminated on the basis of sex is whether the employer "would not have questioned [the actions or characteristics of the employee] in members of a different sex." *Id*. Additionally, as discussed above, sex must be the but-for cause of the discrimination or the motivating factor behind it. *Id*. at 1739. In regards to abortion, an employer is not acting because of the sex of the individual. The employer holds a belief that life is valuable and must be protected. That belief is the basis of the employer's actions. If a man were to encourage or pressure someone who he has impregnated to get an abortion, the employer also would question his actions because it is about the value of life of the preborn baby and not the sex of the individual. Additionally, sex is not the motivating factor behind the employer's decisions. The employer is instead motivated by his desire to protect and value the life of the preborn.

[9] The Civil Rights Act of 1964, 42 U.S.C. § 2000e(k), https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

b. EEOC is acting beyond the scope of its proper rule-making authority

The EEOC is encroaching on the powers of Congress. It is not the place of the federal government to preempt congressional intent through binding rulemaking authority. As we have noted before, "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Moreover, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

The Supreme Court affirmed that federal agencies may not step beyond the power granted to them by Congress in *Biden v. Nebraska*. In this case, the Court responded to the Biden Administration enacting the HEROES Act to put forward its mass debt cancellation program by holding that the Secretary of Education does not have the authority to waive or modify loans in the student loan forgiveness program and that any debt cancellation requires clear congressional authorization. The Court stated, "Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. *Biden v. Nebraska*, 600 U.S. __, __ (2023) (citation omitted). Similarly, any decision regarding the potential expansion of abortion access will be of great consequence, as it conjures up so many heated debates and passionate opinions nationwide, and so if there is no clear congressional approval, no action should be taken. Therefore, the federal government and its agencies should not mandate that any employer aid in the facilitation of abortions against their will by requiring the employer provide abortion accommodations, as Congress never purposed to achieve that end.

B. The EEOC's Proposed Guidance Fails to Protect the First Amendment Free Exercise of Religion Rights of Employers and Employees.

The essential right of free exercise of religion belongs to all – including employers in the workplace. As the Fourth Circuit observed, "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008).

The religious diversity within the American workplace reflects the religious diversity of the country itself. Impermissibly discriminating against an employer because of his or her religion not only injures that individual but harms society as a whole, which has a committed interest—as the founders of the country well understood—to protecting the sanctity of conscience and religious exercise. Title VII reflects that commitment by standing for the proposition that persons need not abandon their religious identity and commitments when on the job. The EEOC's Proposed Guidance should reflect that commitment as well.

The Guidance explains that employers are not required to accommodate religious expression that will create or has the potential to create a hostile work environment. It also explains that while "Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship,"[10] employers "also have a duty to protect workers against religiously motivated harassment."[11] However, nowhere does the guidance acknowledge that employers are guaranteed protection by the First Amendment. By not stating how employers may freely exercise their religious beliefs in the workplace, the EEOC is creating a dangerous potential for employers to face disciplinary action and lawsuits should they oppose the practice of killing one's baby because of their faith. Employees are already frequently misguided about what rights they have in the workplace under Title VII and employers many times misunderstand the legal duties they are obligated to fulfill. This Proposed Guidance will add to the misguidance. The future of religious freedom in this country cannot ultimately be fully secured unless people are free to exercise their religious beliefs in their own businesses and places of work.

Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected. Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Nonetheless, this religious expression, which includes sharing the belief that God wants all people to respect the lives of the preborn, is protected. Unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech.

C. Implications

Abortion, which the Supreme Court effectively legalized across the whole of the United States when it handed down its 1973 decision in *Roe v. Wade*, has consistently been at the center of contentious litigation. In fact, it is rare to find any point of consensus in this area of law. What is clear, is that it is hardly settled law, and abortion is a continued source of moral controversy for the American people.

Our nation was founded on the principle that human beings have God-given, inalienable rights. As stated in the Declaration of Independence:

[10] *Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 5.
[11] Guidance, *supra* note 2.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.[12]

Americans have always valued the right to life, and we should continue to do so. Although there is robust debate surrounding the issue of abortion in the United States, a recent poll revealed that a majority of Americans believe that abortion is a moral wrong.[13] In addition, a large majority of Americans support restrictions on abortion, and "the finding that 70% of Americans either oppose abortion or favor limits on it rather than having it legal under any circumstances is echoed in the large majorities of Americans who have consistently said it should not be legal in the second (65%) and third (81%) trimesters."[14]

Indeed, abortion is one of the gravest offenses against human life and natural rights because it entails the deliberate killing of an innocent human being. It is a procedure that deliberately takes the life of a human being, ending the heartbeat of a living, preborn child. Such killing embodies disdain for human life and is incompatible with our Declaration of Independence.

At its core, abortion is a moral issue rather than an economic one. Nonetheless, the financial toll of abortion on the United States is significant. For example, the Joint Economic Committee estimates that the economic cost of abortion in 2019 alone was at least $6.9 trillion (32 percent of our nation's GDP) due to nearly 630,000 preborn babies being killed.[15] Further, abortions decrease the labor supply. "Since the *Roe* decision in 1973, an estimated 63 million abortions have occurred in the United States."[16] If all of those babies were given a chance to survive until today, they would add nearly 20 percent to the current U.S. population and about 45 million individuals of working age (18 to 64).[17] Thus, abortion has reduced the U.S. population, and in so doing, shrunk the labor force, prevented innovative ideas from improving American lives, and suppressed total economic output, not to mention increased the individual costs of social security and Medicare while decreasing the diversity of the U.S. population.

III. CONCLUSION

Pro-abortion advocates have pressured the Biden Administration into changing the interpretation of a longstanding protection for civil rights, created to protect the rights of those being discriminated against in their workplace, into a law that would violate the free exercise and free

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[12] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[13] *Where Do Americans Stand on Abortion?*, GALLUP, https://news.gallup.com/poll/321143/americans-stand-abortion.aspx (July 7, 2023).
[14] *Id.*
[15] Staff of S. J. Economic Comm., 117th Cong., *The Economic Cost of Abortion* 1 (2022), https://www.jec.senate.gov/public/_cache/files/b8807501-210c-4554-9d72-31de4e939578/the-economic-cost-of-abortion.pdf.
[16] *Id.* at 6.
[17] *Id.*

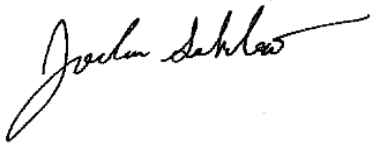
speech rights of employers as well as force employers to violate the free exercise and free speech rights of their employees.

The ACLJ and its supporters oppose the proposed Guidance and urge EEOC to strike all references to and inclusions of abortion. The proposed Guidance is inconsistent with Title VII and Congressional intent and threatens the rights of employers protected under federal law, the First Amendment to the Constitution.

Thank you for the opportunity to provide comment on this critical matter.

Very truly yours,

AMERICAN CENTER FOR LAW & JUSTICE



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