

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

STATE OF TENNESSEE; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF IOWA; STATE OF KANSAS; COMMONWEALTH OF KENTUCKY; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; COMMONWEALTH OF VIRGINIA; and STATE OF WEST VIRGINIA,

Plaintiffs,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS, in her official capacity as Chair of the Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; and KRISTEN CLARKE, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

C. A. No. 3:24-cv-00224
Judge Charles E. Atchley, Jr.
Magistrate Judge Debra C. Poplin

**[PROPOSED] *AMICUS CURIAE* BRIEF ON BEHALF OF
THE NATIONAL WOMEN’S LAW CENTER AND OTHER
ORGANIZATIONS ADVOCATING FOR GENDER JUSTICE FOR WORKERS
IN SUPPORT OF DEFENDANTS**

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STATEMENT OF INTEREST¹

Amici The National Women’s Law Center (“NWLC”) and five nonprofit organizations advocate for workers’ rights, gender justice, and robust enforcement of anti-discrimination and labor laws. *Amici* routinely participate in cases before federal district and appellate courts to advance the rights and protections of women and girls, and LGBTQI+ people. The relief Plaintiffs seek in this case would undermine efforts to prevent and address widespread workplace discrimination faced by transgender and nonbinary individuals across the nation—discrimination that causes direct and devastating harm to these workers. *Amici* thus submit this brief in support of Defendants in their opposition to Plaintiffs’ shortsighted request, which puts transgender and nonbinary employees at risk of workplace harassment. A listing of *amici curiae* is attached hereto as Appendix A.

¹ The parties have consented to the filing of this *amici curiae* brief.

INTRODUCTION

Title VII's broad and remedial mandate expressly prohibits sex discrimination against "any individual" in hiring and firing as well as sex-based discrimination regarding the "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). This prohibition includes sex-based harassment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The Supreme Court's decision in *Bostock v. Clayton County* confirms these prohibitions extend to transgender and nonbinary people, because an individual's gender identity is "inextricably bound up with sex." 590 U.S. 644, 655, 658, 660-61, 669 (2020). And the Equal Employment Opportunity Commission's ("EEOC") April 2024 Enforcement Guidance on Harassment in the Workplace operationalizes that mandate, providing that "sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed," and by detailing examples to guide Title VII enforcement efforts. Dkt. No. 1-2 ("Enforcement Guidance") at 17.

This Enforcement Guidance is critically necessary as transgender and nonbinary workers remain victims of widespread and severe workplace harassment because of their gender identity. By one measure, 70 percent of transgender workers reported experiencing discrimination or harassment in the past year alone. Harassment suffered by transgender and nonbinary workers takes a variety of forms, including: intentional misgendering, epithets, physical assault, sexual harassment, property damage, stereotyping, and denial of access to bathrooms and other facilities. Frequently, transgender and nonbinary workers are subjected to various forms of gender-identity-based harassment, often at the same time and for an extended period, as illustrated by numerous recent court decisions chronicling the harassment transgender and nonbinary workers suffer. Predictably, the widespread and severe harassment suffered by transgender and nonbinary workers

harms not only their access to employment opportunities, but also their mental, physical, and financial wellbeing.

Granting Plaintiffs' requested relief and enjoining the Enforcement Guidance would exacerbate these harms by putting transgender and nonbinary workers at greater risk of continued and increased harassment. Therefore, Plaintiffs' motion seeking a stay and preliminary injunction (Dkt. No. 33) should be denied.

ARGUMENT

I. THE ENFORCEMENT GUIDANCE REFLECTS TITLE VII'S GUARANTEE OF PROTECTION AGAINST GENDER-IDENTITY-BASED WORKPLACE HARASSMENT.

In *Bostock v. Clayton County*, the Supreme Court held that Title VII's ban on sex-based discrimination applies to discrimination based on gender identity. 590 U.S. at 683. Writing for the majority, Justice Gorsuch observed, "discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 669. The holding in *Bostock* affirmed longstanding Sixth Circuit precedent recognizing gender-identity-based discrimination and harassment as actionable under Title VII. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) ("Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait."), *aff'd sub nom.*, *Bostock*, 590 U.S. 644; *see also Smith v. City of Salem*, 378 F.3d 566, 571-75 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 740 (6th Cir. 2005) (finding sufficient evidence to support a jury verdict for plaintiff in a sex-discrimination claim under Title VII based on plaintiff's transgender status).

Through its Enforcement Guidance, the EEOC seeks only to help implement *Bostock*, and existing precedent among courts in the Sixth Circuit, by providing explanations and examples to illustrate when gender-identity-based harassment against transgender and nonbinary workers is actionable under Title VII. The Enforcement Guidance cites *Bostock* to explain that “sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed.” Enforcement Guidance at 17. It lists specific forms of “[h]arassing conduct based on sexual orientation or gender identity” and provides two detailed examples, including one illustrating “Harassment Based on Gender Identity.” *Id.* at 17-18.

The Plaintiffs’ arguments that the Enforcement Guidance conflicts with Title VII and *Bostock*, or otherwise exceeds the agency’s authority, are meritless. Plaintiffs’ efforts to restrict *Bostock*’s holding only to the *firing* of workers, *see* Dkt. No. 33 at 13, cannot be reconciled with the decision’s broad holding. The decision rested on Title VII’s text—which applies to the “terms, conditions, and privileges of employment” and recognizes no limitation to hiring and firing—and consistently speaks in language that extends beyond firing to any discrimination or harassment covered by Title VII. *See Bostock*, 590 U.S. at 670 (“As enacted, Title VII prohibits all forms of discrimination because of sex, *however they may manifest themselves* or whatever other labels might attach to them.”) (emphasis added).

Simply put, the EEOC’s Enforcement Guidance does not create any new substantive rights for transgender and nonbinary workers; it merely explains the proper application of Title VII, per *Bostock*, to guide enforcement efforts. Far from exceeding the EEOC’s authority, the Enforcement Guidance represents a crucial effort by the agency to make Title VII’s promise of a workplace free from harassment a reality for everyone, including the many transgender and nonbinary workers who continue to endure harassment based on their gender identity in violation of the law.

II. AN INJUNCTION WOULD HARM THE PUBLIC INTEREST BY CREATING CONFUSION ABOUT THE APPLICATION OF TITLE VII.

Although Plaintiffs cabin their arguments against the Enforcement Guidance to its discussion of harassment based on gender identity, they inexplicably seek to enjoin the entirety of the document. Accepting Plaintiffs' arguments and enjoining the Enforcement Guidance on this basis would cause serious, long-lasting harm to workers, and therefore to the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (factors of hardship and public interest merge when the Government is the non-moving party). The EEOC issued its Enforcement Guidance to protect employees from unlawful workplace discrimination, including harassment on the basis of gender identity. As explained by the EEOC, the Enforcement Guidance provides critically important information to workers and employers about the scope of their rights and obligations under Title VII, and the Enforcement Guidance is an essential resource for agency staff enforcing Title VII's protections against harassing conduct. *See* Enforcement Guidance at 8 ("This guidance serves as a resource for employers, employees, and practitioners; for EEOC staff and the 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"). EEOC data makes clear that workplace harassment remains a pervasive problem. For example, the EEOC received 31,354 charges alleging harassment in Fiscal Year 2023 alone, representing a significant uptick in complaints from previous years.² Within this context, the Enforcement Guidance—which had not been updated since 1999—is an important resource for workers and employers seeking to understand the application of Title VII to the modern workplace. Granting the relief sought on the basis of Plaintiffs' meritless arguments about the Enforcement Guidance's discussion of

² *Enforcement and Litigation Statistics*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0>.

harassment based on gender identity would deprive workers and employers of this resource, leaving many workers more vulnerable to discrimination.

The Enforcement Guidance is particularly crucial for transgender and nonbinary individuals given the widespread harassment many transgender and nonbinary workers experience in the workplace today—even after the Supreme Court’s decision in *Bostock*—and the significant negative impacts of this harassment.

A. The Enforcement Guidance provides important clarity about the application of Title VII and Bostock.

The Enforcement Guidance helps protect the safety, dignity, wellbeing, and rights of workers. It provides detailed explanations and examples of the various legally protected characteristics under federal equal employment opportunity law. These examples are intended to reflect the diversity of the country’s workforce and to illustrate how unlawful harassment may manifest in the workplace, including in cases of intersectional harassment, harassment that occurs online, harassment by third parties, and harassment that occurs outside of the workplace but nonetheless creates a hostile work environment. Through its Enforcement Guidance, the EEOC also provides explanations of the legal standards for assessing when harassment may violate federal law, including addressing the standard for evaluating hostile work environment claims and the standard for liability. Employers can use the information in the Enforcement Guidance to help prevent, identify, and address unlawful workplace harassment.

As part of its explanation of sex harassment, the Enforcement Guidance includes a discussion of *Bostock* and provides examples of prohibited harassment based on sexual orientation and gender identity. As discussed above in Section I, the inclusion of *Bostock* in the Enforcement Guidance tracks the Supreme Court’s recognition, consistent with Title VII’s text, that differential treatment and harassment because of one’s sexual orientation or gender identity regarding the

terms, conditions, and privileges of employment amount to unlawful employment practices. This is plainly a salutary aim that benefits the public given the diverse, widespread, and harmful effects of gender-identity-based discrimination on transgender and nonbinary workers. The clarity provided by the guidance is particularly important as many states that have anti-discrimination laws look to Title VII for guidance interpreting their state laws, confirming that the Enforcement Guidance will have the follow-on effect of ensuring protections for these workers. *See, e.g., Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 615 n.3 (8th Cir. 2000) (“Claims premised under the Arkansas Civil Rights Act of 1993 are analyzed in the same manner as Title VII claims. *See Ark. Code Ann. § 16-123-103(c).*”); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005) (“A sexual harassment claim brought under the Kentucky Civil Rights Act (‘KRCA’) is to be analyzed in the same manner as a claim brought under Title VII, its federal counterpart.”) (citing *Ammerman v. Bd. of Educ. of Nicholas Cnty.*, 30 S.W.3d 793, 797-98 (Ky. 2000)); *Stennis v. Bowie State Univ.*, 236 F. Supp. 3d 903, 910 (D. Md. 2017) (observing Maryland’s Fair Employment Practices Act “is the ‘state law analogue of Title VII and its interpretation is guided by federal cases interpreting Title VII.’”), *aff’d in relevant part*, 716 F. App’x 164 (4th Cir. 2017) (citation omitted).

The EEOC’s Enforcement Guidance provides workers, employers, and enforcement staff with important clarity about the application of Title VII and *Bostock* to harassment based on gender identity. As discussed below, this clarity is necessary to help address widespread harassment against transgender and nonbinary workers and protect against the harms caused by this harassment.

B. The Enforcement Guidance is critically needed because discrimination and harassment against transgender and nonbinary workers is widespread.

Far from promoting a “gender-ideology viewpoint,” Dkt. No. 33 at 2, the EEOC Enforcement Guidance reflects the reality of life for many transgender and nonbinary workers. This reality—documented in data and in the stories of individuals’ experiences—is that gender-identity-based workplace harassment is widespread, takes many forms, and causes serious, long-lasting harm to workers. Within this context, the EEOC Enforcement Guidance is critically needed to ensure that individual workers are protected from unlawful discrimination as required by Title VII, regardless of anyone’s “gender-ideology viewpoint,” and especially in light of growing animus toward the LGBTQI+ community.

1. Workplace harassment remains widespread even after *Bostock*.

Despite *Bostock*’s clear rejection of gender-identity-based discrimination, workplace harassment based on gender identity remains widespread, demonstrating the critical need for the EEOC’s clear explanation of prohibited behavior in its Enforcement Guidance.

Transgender and nonbinary workers continue to face rampant harassment and discrimination in the workplace at staggering rates. In a 2022 survey, 70 percent of transgender respondents reported experiencing some form of workplace discrimination or harassment in the past year because of their sexual orientation, gender identity, or intersex status.³ In another survey conducted one year after the *Bostock* decision, 43.8 percent of transgender respondents reported

³ Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AM. PROGRESS (Jan. 12, 2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>.

verbal harassment at work, 26.3 percent reported sexual harassment at work, and 28.2 percent reported physical harassment at work.⁴

These survey results mirror a 2015 survey finding that 23 percent of transgender respondents who held a job in the past year experienced their employer, boss, or coworkers taking specific negative actions against them in the past year because they were transgender. These include (i) their boss or coworker sharing their private, personal information, such as their transgender status (16 percent), (ii) their boss giving them a negative review (6 percent), (iii) being told to present in the gender different from their gender identity (4 percent), (iv) not being allowed to use the bathroom consistent with their gender identity (4 percent),⁵ and (v) being forced to transfer to a different position or department at their job because they were transgender (2 percent).⁶

Additionally, data suggests that transgender and nonbinary workers of color and disabled transgender and nonbinary workers are particularly vulnerable to discrimination. LGBTQI+ workers of color and LGBTQI+ workers with disabilities surveyed in 2022 consistently reported experiencing workplace discrimination at higher rates than LGBTQI+ workers who do not identify as people of color or people with disabilities.⁷

⁴ Brad Sears et al., *LGBT People's Experiences of Workplace Discrimination and Harassment*, THE WILLIAMS INST., 12 (Sept. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

⁵ In a more recent survey from 2022, 23 percent of transgender respondents reported being denied access to restrooms or other facilities. Medina & Mahowald, *supra* note 3, at Figure 11.

⁶ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY, 153 (2016, updated Dec. 2017), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁷ Medina & Mahowald, *supra* note 3, at Figure 11.

2. Workplace harassment on the basis of gender identity takes a variety of forms.

Gender-identity-based workplace harassment can take many forms, which may occur in isolation or, often, in combination. This sub-section illustrates just some of the forms harassment can take, drawing on examples from case law and in the media. The available examples and data reflect only an illustrative and extremely limited subset of the harassment experienced by transgender and nonbinary individuals in workplaces nationwide. Much workplace harassment goes unreported or underreported in general.⁸ This is particularly the case for transgender and nonbinary workers, who fear retaliation or other consequences even from raising concerns with their coworkers or supervisors, to say nothing of reporting their experiences to the media or in legal proceedings.

Transgender and nonbinary workers are often subjected to intentional misgendering, which is the purposeful and repeated use of a name or pronoun inconsistent with that individual's gender identity. If a worker requests to be called by a certain name and referred to with the pronouns "she," "her," and "hers," but a coworker continues to use the incorrect name and refers to her with the pronouns "he," "him," and "his" even after being corrected, the coworker is intentionally misgendering. *See, e.g., Copeland v. Georgia Dep't of Corr.*, 97 F.4th 766, 771 (11th Cir. 2024) (Plaintiff, a transgender man and sergeant employed by the Georgia Department of Corrections, was misgendered on a daily basis by supervisors and subordinates over the facility-wide radio system); *Eller v. Prince George's Cnty Pub. Sch.*, 580 F. Supp. 3d 154, 162-65 (D. Md. 2022) (Plaintiff, a transgender woman and teacher, was repeatedly and intentionally misgendered by staff

⁸ One study found that, for all types of workplace harassment, almost half of workplace violence and harassment survivors had never told anyone about their experience. *See* Steve Crabtree, *Global Study: 23% of Workers Experience Violence, Harassment*, GALLUP (Dec. 14, 2022), <https://news.gallup.com/opinion/gallup/406793/global-study-workers-experience-violence-harassment.aspx>.

and students at three separate schools); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1006-07 (D. Nev. 2016) (Plaintiff’s employer repeatedly used his deadname⁹ and misgendered him on documents); *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (EEOC Comm’n Apr. 1, 2015) (Complainant, a civilian employee with the U.S. Army Aviation and Missile Research Development and Engineering Center, was repeatedly and intentionally misgendered and referred to by her deadname).

Intentional misgendering is a tactic used to cause harm. Transgender and nonbinary individuals who are misgendered have reported feeling humiliated, powerless, devalued, stigmatized, and disrespected.¹⁰ Intentional misgendering has also been shown to have significant psychological impacts, including heightened stress, anxiety, and depression,¹¹ and can expose transgender and nonbinary individuals to other forms of harassment and violence.¹²

⁹ A deadname is the name a transgender person was given at birth and no longer uses because it does not align with their gender. *See Deadname*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/deadname> (last accessed Jun. 24, 2024). Deadnaming, or the act of using a transgender person’s deadname, can induce stress and trauma for a transgender person, and may prompt the transgender person to remember negative moments in their life. *Why Deadnaming Is Harmful*, CLEVELAND CLINIC (Nov. 17, 2021), <https://health.clevelandclinic.org/deadnaming>.

¹⁰ Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, SELF AND IDENTITY, 8, 10, 12 (2014).

¹¹ *See generally* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, INT’L J. OF TRANSGENDER HEALTH, S-107 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9553112/pdf/WIJT_23_2100644.pdf (Using the proper gender “reduce[s] gender dysphoria/incongruence, depression, anxiety, self-harm ideation and behavior, suicidal ideation and attempts.”); *see also* Elizabeth Keohan, *Misgendering: Exploring the Harmful Impact of It*, TALKSPACE (Sept. 8, 2023), <https://www.talkspace.com/blog/misgendering-impact/> (Misgendering can cause “mental health issues and repercussions, like panic attacks, melancholy, self-harm inclinations, or even suicidal thoughts.”).

¹² Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 62 n.85 (2020) (collecting sources showing that persons often deliberately misgender transgender persons in an effort to embarrass and harass them).

Transgender and nonbinary people are also often the target of demeaning and derogatory language because of their gender identity. These terms may involve slurs referencing a person’s sexuality or genitalia in a crude or demeaning manner.¹³ They can also include terms and references alluding to prostitution and pedophilia. *See, e.g., Eller*, 580 F. Supp. 3d at 162. Harassment of this nature can also include asking invasive and inappropriate questions about one’s sexuality, genitalia, and private life. For example, John Doe,¹⁴ a transgender man, worked as a corrections officer in Arizona’s Department of Corrections. *Doe v. Arizona*, 2019 WL 2929953, at *1 (D. Ariz. July 8, 2019). His coworkers and supervisors repeatedly referred to him using slurs and demeaning language and made disparaging remarks about his gender. *Id.* Doe’s supervisors told him that the other officers were offended by his gender identity and presentation and would not respond to emergency calls from him. *Doe v. Arizona*, 2016 WL 1089743, at *1 (D. Ariz. Mar. 21, 2016). In another recent case, James Lammers, a nonbinary individual working as a mental health counselor for Pathways To a Better Life, LLC (“Pathways”), experienced invasive questioning and harassment at the residential treatment facility where they worked. *Lammers v. Pathways To a Better Life, LLC*, 2021 WL 3033370, at *1 (E.D. Wisc. 2021). Lammers’s officemate “frequently asked [] questions about various aspects of [Lammers’s] gender nonconformity, including [their] physiology, [their] clothing, [their] relationship with [their] wife, and [their] family life in general.” *Id.* at *2. Pathways staff “regularly gossiped and frequently made jokes about how Lammers was weird and . . . would regularly treat Lammers differently than

¹³ Sears et al., *supra* note 4, at 3, 5-11 (noting that two-thirds of LGBTQ employees surveyed reported hearing negative comments, slurs, or jokes about LGBTQ people at work and documenting the range of epithets LGBTQ workers reported they had been called or had heard at work).

¹⁴ The plaintiff in the case described herein remained anonymous and was referred to as “John Doe.”

other staff.” *Id.* Residents would also frequently make crude and offensive jokes about Lammers’ gender identity. *Id.* Lammers made complaints about their officemate and the comments from residents, but nothing was ever done to address the gender-identity-based harassment Lammers suffered; instead Lammers was fired. *Id.*

Gender-identity-based harassment of transgender and nonbinary workers can also take physical forms. Examples of physical assault include shoving, grabbing, unwanted touching, and hitting. For example, a nonbinary individual was sexually abused by their former boss and co-workers to “prove [they’re] not into guys.”¹⁵ In another instance, a transgender woman was beaten and had her head hit against a trash can when she was taking out the trash at work.¹⁶ The physical harassment suffered by transgender and nonbinary workers in the workplace reflects the heightened rates of physical and sexual violence against transgender and nonbinary individuals in general—indeed, one study found that transgender individuals are over four times more likely than cisgender people to experience violent victimization, including rape, sexual assault, and aggravated or simple assaults.¹⁷

Transgender and nonbinary workers additionally face express threats of physical harassment. In one recent case, a transgender teacher was physically assaulted by students on multiple occasions. Students also threatened her with sexual assault, and a student threatened to burn her house down “because she was ‘not really a person.’” *See Eller*, 580 F. Supp. 3d at 163-

¹⁵ Sears et al., *supra* note 4, at 9.

¹⁶ *Id.* at 8.

¹⁷ “Transgender people experienced 86.2 victimizations per 1000 persons compared with cisgender people’s 21.7 per 1000 persons.” Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, AM. J. PUB. HEALTH (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7958056/pdf/AJPH.2020.306099.pdf>; Rachel Dowd, *Transgender people over four times more likely than cisgender people to be victims of violent crime*, THE WILLIAMS INST., (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/>.

65, 173. In another case, a transgender correctional officer was confronted by another officer who blocked the prison's entrance, threatened to fight him, and later circled him in an armed vehicle as he walked to his car. *See Copeland*, 97 F.4th at 772. Instances of physical violence or threats may also involve property damage or other attempts to intimidate or menace the targeted worker. *See, e.g., Doe*, 2019 WL 2929953, at *1 (Transgender worker's car tires were slashed in an employee parking lot.).

The denial of access to bathrooms or other sex-segregated facilities is another harmful form of gender-identity-based harassment experienced by transgender and nonbinary workers that creates a hostile work environment. This occurs when people are forbidden from using the bathroom aligned with their gender identity. For some, this means they are forced to use a bathroom that is inconsistent with their affirmed gender, an uncomfortable proposition that can cause people not to use the bathroom at all.¹⁸ Others are refused access to *any* bathroom or required to use only single-stall or gender-neutral bathrooms. For example, "Jane," a transgender woman from Missouri, was required by a human resources manager at her workplace to use the single-stall restroom rather than the women's restroom. Because there was only one single-stall restroom in her workplace, Jane was forced to wait when the restroom was occupied, being cleaned, or being worked on by maintenance. In stark contrast, other women at the company were able to use any of the *twenty-eight* women's restrooms instead of having to wait.¹⁹

¹⁸ Meredith Russo, *What It Feels Like to Use the Wrong Bathroom*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/what-it-feels-like-to-use-the-wrong-bathroom.html>.

¹⁹ Julie Moreau, "*Laughed out of interviews*": *Trans Workers Discuss Job Discrimination*, NBC NEWS (Oct. 6, 2019, 2:22 PM), <https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041>.

The denial of access to bathrooms or other sex-segregated facilities has demonstrated, detrimental consequences on employees' well-being. The psychological harm from being denied access to facilities aligning with an individual's gender identity can cause anxiety, depression, and low self-esteem.²⁰ Denial of access can also lead to immediate physical consequences. For example, workers may, as the Third Circuit has explained, "avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the day," which can then cause urinary tract infections and other health problems. *Doe v. Boyerton Area Sch. Dist.*, 897 F.3d 518, 523 (3rd Cir. 2018).

Finally, transgender and nonbinary workers suffer harassment because they do not conform to sex stereotypes associated with their sex assigned at birth. By drawing negative attention to transgender and nonbinary individuals based on their gender presentation, this form of harassment engages in exactly the sort of harmful sex stereotyping the Supreme Court has held is prohibited. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). For example, in one case, when a hospital employee informed her employer that she was transgender and would be transitioning, a vice president told her to avoid wearing overtly feminine attire. *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935, at *1-2 (W.D.N.Y. Sept. 26, 2003). In another instance, Rachel Mosby, a transgender woman, served as the fire chief in Byron, Georgia. Before beginning her transition, Mosby wore a suit and tie to work each day; however, the first time she

²⁰ M. Killian Kinney et al., *Improving "Life Chances": Surveying the Anti-Transgender Backlash, and Offering a Transgender Equity Impact Assessment Tool for Policy Analysis*, THE JOURNAL OF LAW, MEDICINE & ETHICS, 50(3): 489-508 at 494 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9679585/pdf/S1073110522000894a.pdf>.

came to work in a skirt, she was told to “wear[] a uniform.”²¹ In a third example, after Rowan, a nonbinary worker, began to change their gender expression at work, the human resources department warned Rowan that the way they dressed could damage the company’s reputation, and threatened consequences for wearing makeup or dresses to recruiting events.²²

3. Growing animus and rising violence against transgender and nonbinary people underscores the importance of the Enforcement Guidance.

The EEOC’s Enforcement Guidance is particularly important in light of the overall climate of hostility and violence that transgender and nonbinary people face in their daily lives. Blocking the Enforcement Guidance could further fuel this animus and undermine efforts to enforce Title VII’s prohibition against workplace harassment based on gender identity and gender stereotypes.

Hate crimes based on gender identity have risen dramatically in recent years. The FBI recorded 469 hate crimes motivated by gender identity in 2022 alone, a nearly 32 percent increase from the previous year.²³ Growing animus is also reflected in the increase in anti-LGBTQI+ bills that have been introduced in state legislatures around the country.²⁴ *See, e.g., Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023) (blocking the application of a Florida state law that bans

²¹ Russ Bynum & Angeliki Kastanis, *Most States Lack Laws Protecting LGBT Workers*, ASSOCIATED PRESS (Oct. 15, 2019, 9:50 AM), <https://apnews.com/article/8b5086b09b9042bf808d82108b7d925c>.

²² Lily Zheng, *Transgender, Gender-Fluid, Nonbinary, and Gender-Nonconforming Employees Deserve Better Policies*, HARVARD BUS. REV. (Nov. 20, 2020), <https://hbr.org/2020/11/transgender-gender-fluid-nonbinary-and-gender-nonconforming-employees-deserve-better-policies>.

²³ *Hate Crimes: Facts and Statistics*, U.S. DEP’T OF JUSTICE (last updated Mar. 15, 2024), <https://www.justice.gov/hatecrimes/hate-crime-statistics>; *The Epidemic of Violence Against the Transgender and Gender Non-Conforming Community in the United States: The 2023 Report*, HUMAN RIGHTS CAMPAIGN FOUNDATION (Nov. 2023), <https://reports.hrc.org/an-epidemic-of-violence-2023>.

²⁴ Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing In States Across the Country*, HUMAN RIGHTS CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country> (noting that there were more state anti-LGBTQI+ bills introduced in 2023 than in the any of the previous five years).

minors from receiving gender-affirming care and finding that the law was motivated by “purposeful discrimination” against transgender people). More than 500 anti-LGBTQ bills were introduced in the last legislative session alone, many of which target transgender people specifically.²⁵ Anti-transgender and -nonbinary laws perpetuate stereotypes regarding gender and encourage the policing and scrutinizing of people’s bodies and expression—particularly of those who do not conform to sex stereotypes. This kind of “policing” encourages violent and exclusionary behavior that also impacts cisgender women. Cisgender women have been “questioned, verbally assaulted, followed, and even forcibly removed from facilities” because they were mistaken for transgender women or were perceived as too masculine to use the spaces.²⁶ This risk increases in the context of bathrooms, where both transgender and cisgender women have reported facing physical violence.²⁷

In this landscape of heightened violence and backlash, the Enforcement Guidance is essential to clarify the protections that exist under Title VII and *Bostock*.

²⁵ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, AM. CIVIL LIBERTIES UNION (last accessed July 4, 2024), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024>; *All Anti-Transgender Legislation*, EQUALITY FEDERATION (last accessed July 3, 2024), <https://www.equalityfederation.org/tracker/cumulative-anti-transgender>.

²⁶ Chan Tov McNamarah, *Cis-Woman-Protective Arguments*, 123 COLUM. L. REV. 845, 917-18 (2023) (listing examples of such harassment, including a woman who was verbally harassed because she was perceived to be transgender, a woman who was confronted when she tried to access a women’s bathroom “because she ‘dress[ed] like a man,’” and a woman who was forcibly removed from a women’s bathroom at a restaurant).

²⁷ *Id.* at 917; Beatriz P. Bagagli et al., *Trans Women and Public Restrooms: The Legal Discourse and Its Violence*, 6 FRONTIERS IN SOCIOLOGY 1, 5 (Mar. 31, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8022685/pdf/fsoc-06-652777.pdf>; Matt DeRienzo, *Woman mistaken for transgender harassed in Walmart bathroom*, DANBURY NEWS TIMES (May 16, 2016), <https://www.newstimes.com/local/article/Woman-mistaken-for-transgender-harassed-in-7471666.php> (recounting a cisgender woman who was perceived as transgender in a women’s restroom, called “disgusting” and told that she “doesn’t belong here”).

C. Gender-identity-based harassment has tangible, deleterious impacts on the mental and physical well-being of transgender and nonbinary workers.

Instances of discrimination and harassment such as misgendering, the use of epithets, differential treatment from cisgender employees, and other denials of social affirmation have measurably negative effects on transgender workers.²⁸ In a 2022 survey, 78 percent of transgender individuals reported that in the past year, discrimination affected their mental well-being “moderately” or “to a significant degree,” while 62 percent said the same regarding their spiritual well-being, 51 percent regarding their physical well-being, and 41 percent regarding their financial well-being.²⁹ Conversely, environments that accept and affirm transgender and nonbinary persons’ gender expression can help reduce gender dysphoria,³⁰ which is in turn associated with improved mental health and body-image satisfaction.³¹

To avoid discrimination and harassment, many transgender and nonbinary individuals engage in “covering” behaviors to hide their transgender status—which can cause additional harms. Such behaviors include “changing their physical appearance; changing when, where, or how frequently they use the bathroom; and avoiding talking about their personal families or social lives while at work.”³² In a recent study, 36.4 percent of transgender employees reported changing their physical appearance at work and 27.5 percent reported changing their bathroom use at work; and an additional 30 percent of transgender employees reported changing their voice or

²⁸ See Coleman et al., *supra* note 11, at S126-27, S175; Medina & Mahowald, *supra* note 3.

²⁹ Medina & Mahowald, *supra* note 3.

³⁰ See Coleman et al., *supra* note 11, at S107.

³¹ See *id.* at S46.

³² Sears et al., *supra* note 4, at 4.

mannerisms as a covering behavior.³³ In another study, 68 percent of transgender and nonbinary workers reported covering.³⁴

Taking such measures to conceal one's gender identity comes at a cost. Research shows that covering behavior increases the risk of psychological distress.³⁵ In a recent study, 74 percent of workers reported that the need to cover at work negatively impacted them, including 60 percent who reported it negatively impacted their overall well-being and 54 percent who reported it negatively affected their ability to perform their job to the best of their ability.³⁶ In one recent example, a worker in the facilities department at Vanderbilt University was forced to delay her plans to receive gender-affirming care for nine months, against the recommendation of her medical provider, because the harassment she experienced led her to “believ[e] it would be safest for her to continue to hide her true self at work.” See Complaint at ¶¶ 28-33, *Hill v. Vanderbilt Univ.* 3:21-cv-00747, Dkt No. 1 (M.D. Tenn. Sept. 29, 2021).

Some transgender and nonbinary workers are forced out of their jobs entirely as a result of discrimination. One study found that fifteen percent of transgender respondents who held a job in the past year reported that they quit their job to avoid workplace discrimination.³⁷ Ensuring that transgender and nonbinary workers are safe at work and can maintain their employment without confronting the risk of gender-identity-based harassment is particularly important, given that transgender and nonbinary individuals disproportionately “face housing and food insecurity,

³³ *Id.* at 22.

³⁴ Joanne Stephane et al., *Uncovering culture: A call to action for leaders*, DELOITTE DEV. LLC, 5 (2023), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/dei/us-uncovering-culture-a-call-to-action-for-leaders.pdf?dl=1>.

³⁵ Richard Bränström and John E. Pachankis, *Country-level structural stigma, identity concealment, and day-to-day discrimination as determinants of transgender people's life satisfaction*, SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 56:1537, 1542-44 (2021).

³⁶ Stephane et al., *supra* note 34, at 9.

³⁷ James et al., *supra* note 6, at 153.

homelessness and criminalization,”³⁸ and in one recent survey, 30 percent of transgender respondents reported experiencing poverty in their lifetimes.³⁹

For transgender and nonbinary workers, the gender-identity-based harassment that Title VII and the Enforcement Guidance protect against is widespread, it is multifarious, it is severe, and it is deeply harmful to transgender and nonbinary workers and to the public at large.

III. THE PLAINTIFFS WILL NOT BE IRREPARABLY HARMED ABSENT INJUNCTIVE RELIEF.

The Plaintiffs will suffer no harm if the Enforcement Guidance remains in effect. Harassment based on gender identity is unlawful under Title VII, as confirmed by *Bostock*. The Enforcement Guidance simply provides guidance on the application of the law; it does not impose any new obligations or costs on the Plaintiffs.

Nor does the Enforcement Guidance, which merely clarifies and enforces existing federal law, cause any harm to other workers. For example, one study of localities in Massachusetts found no relationship between the implementation of local nondiscrimination policies providing explicit gender identity protections in public restrooms, locker rooms, and changing rooms, and the number or frequency of criminal incidents in these facilities.⁴⁰ See also *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (holding that a school district’s policy of allowing a transgender teacher to use the women’s faculty restroom did not create a hostile work environment for other

³⁸ Chase Strangio, *Deadly Violence Against Transgender People Is on the Rise. The Government Isn’t Helping*, AM. CIVIL LIBERTIES UNION (Aug. 21, 2018), <https://www.aclu.org/news/lgbtq-rights/deadly-violence-against-transgender-people-rise>.

³⁹ Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY, 21 (Feb. 2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

⁴⁰ Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, UNIV. OF CAL. LOS ANGELES (July 23, 2018), <https://escholarship.org/content/qt4rs4n6h0/qt4rs4n6h0.pdf?t=qecca2>.

teachers). To the contrary, the Enforcement Guidance helps ensure a safe and productive working environment for all workers.

Plaintiffs claim that the EEOC and Department of Justice Defendants “will suffer no harm from sticking to the status quo” if this court were to grant the requested relief. Plaintiffs are correct only inasmuch as harassment based on gender identity would still be unlawful under Title VII—as *Bostock* confirms—but blocking the guidance would cause harm by undermining efforts to prevent and address this harassment, which, as demonstrated above is widespread and results in negative impacts to the health, well-being, and financial security of transgender and nonbinary workers. Confusion about the application of Title VII may also make transgender and nonbinary workers more vulnerable to harassment and discourage workers from reporting harassing behavior. In this way, enjoining the Enforcement Guidance does not preserve the status quo. It disrupts it by calling into question the legal authority it consolidates and by undermining this Circuit’s existing precedent. Plaintiff states should have no interest in denying any worker, including transgender and nonbinary workers in their states, the protection of an existing federal anti-discrimination law that prohibits offensive conduct that is so severe or pervasive that it creates a hostile work environment.

Given that the Enforcement Guidance is well within the EEOC’s authority; works to the public’s benefit by ensuring that transgender and nonbinary workers are provided the protection from gender-identity-based harassment that Title VII and *Bostock* guarantee; and does not cause irreparable harm to the Plaintiffs; it should not be enjoined.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to deny Plaintiffs’ Motion for a § 705 Stay and Preliminary Injunction.

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APPENDIX A: LIST OF AMICI

American Civil Liberties Union: The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than three million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the civil rights laws. The ACLU of Tennessee—the ACLU’s state affiliate—has a long history of advocating for the civil rights and civil liberties of Tennesseans in both state and federal courts. As organizations that advocate for First Amendment liberties as well as equal rights for LGBTQ+ people, the ACLU and the ACLU of Tennessee have a strong interest in protecting those individuals from on-the-job harassment and abuse, and have appeared as counsel-of-record or amici in many cases involving the application of nondiscrimination protections to transgender and LGBQ people, including as counsel for Aimee Stephens in *Bostock v. Clayton County*, 590 U.S. 644 (2020).

Equal Rights Advocates: Equal Rights Advocates (“ERA”) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women, girls and people across gender identities. Since 1974, ERA has advocated for the rights of all individuals to be free from harassment and other forms of discrimination based on sex and other protected characteristics, through policy advocacy and litigation. ERA has litigated and appeared as amicus curiae in numerous cases before U.S. Courts of Appeal and the United States Supreme Court on issues of gender discrimination and civil rights, including workplace harassment. ERA has an interest in ensuring that the EEOC enforcement guidance applies Title VII's ban on sex-based discrimination to discrimination based on gender identity consistent with existing law.

Human Rights Campaign: Human Rights Campaign (“HRC”) is the largest national LGBTQ+ civil rights organization. HRC envisions an America where LGBTQ+ people are

ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity.

National Employment Law Project: The National Employment Law Project (“NELP”) is a national non-profit with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive access to good jobs and the full protection of labor and employment laws. NELP’s community-based partners, including worker centers, unions, and other worker-support organizations in communities across the 50 states, have seen the kinds of impacts raised in this case, and would be harmed if the Court rules against the EEOC in this case. NELP has litigated and participated as amicus curiae in countless cases in federal circuit and state courts and the U.S. Supreme Court addressing the importance of compliance with workplace protections.

National Partnership for Women & Families: The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combating barriers to equity and opportunity for women. The National Partnership works for a just and equitable society in which all women and families can live with dignity, respect, and security; every person has the opportunity to achieve their potential; and no person is held back by discrimination or bias. Our organization has a long history of combating workplace harassment, including successfully litigating *Barnes v. Costle*, the first sexual harassment case in the country; contributing amicus briefs in *Meritor Savings Bank v. Vinson*, the landmark Supreme Court case recognizing sexual harassment as sex discrimination; and testifying before the Senate on the issue of sexual harassment. As a result of this history, we have a strong understanding of the history,

details and legislative intent informing the law and are deeply invested in ensuring that the promise of the law is comprehensively enforced. In line with our mission and expertise, the National Partnership believes that fair labor and employment practices, like the Equal Employment Opportunity Commission’s April 2024 Enforcement Guidance on Harassment in the Workplace, are critical to women’s ability to succeed and thrive in our economy and to building an economy that benefits workers, businesses and the nation as a whole. This is particularly true for women of color, disabled women, LGBTQI+ people, and women living at the intersection of multiple identities more broadly.

National Women’s Law Center: *Amicus curiae* The National Women’s Law Center (“NWLC”) is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQI+ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. This work has included participating in numerous cases, including before District Courts, Courts of Appeals, and the United States Supreme Court, to ensure that rights and opportunities are not restricted based on sex. Given that discrimination based on transgender status is necessarily linked to harmful sex stereotypes, NWLC has a particular interest in ensuring that discrimination against LGBTQI+ individuals, including against transgender and nonbinary individuals, is not perpetuated in the name of women’s rights.