

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION

STATE OF TENNESSEE, *et al.*,

*Plaintiffs,*

v.

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

*Defendant.*

Case No. 3:24-cv-00224

Judge Charles E. Atchley, Jr.

Magistrate Judge Debra C. Poplin

**BRIEF OF SMALL BUSINESS MAJORITY AND MAIN STREET ALLIANCE  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION'S ANTI-HARASSMENT GUIDANCE  
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A § 705 STAY  
AND PRELIMINARY INJUNCTION**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, the undersigned counsel for *Amici Curiae* certify that (1) Small Business Majority and Main Street Alliance have no parent corporation, and (2) no corporation owns any stock in Small Business Majority or Main Street Alliance.

## TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
I. The Anti-Harassment Guidance helps small businesses ensure that they are complying with their obligations under federal workplace civil-rights laws.....	5
II. The Anti-Harassment Guidance is good for businesses' bottom lines and overall success and is supportive of a healthy economy. ....	9
III. Plaintiffs' arguments regarding the burdens imposed by the Anti-Harassment Guidance are unfounded. ....	13
IV. Enjoining the Anti-Harassment Guidance would sow confusion among employers. ....	15
CONCLUSION.....	16

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Baldwin v. Dep’t of Transp.</i> , EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) .....	6, 7
<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005) .....	7
<i>Bostock v. Clayton Cnty.</i> , 590 U.S. 644 (2020) .....	6
<i>EEOC v. Deluxe Fin. Servs. Corp.</i> , No. 15-cv-02646 (D. Minn. Jan. 20, 2016) .....	7
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	7
<i>Lusardi v. Dep’t of the Army</i> , EEOC Appeal No. 0120133385, 2015 WL 1607756 (Apr. 1, 2015) .....	7
<i>Macy v. Dep’t of Justice</i> , EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) .....	6
<i>Mickens v. Gen. Elec. Co.</i> , No. 3:16-cv-00603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) .....	7
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004) .....	7
 <b>Statutes and Regulations</b>	
3 Colo. Code Regs. § 708-1-81.9(B) .....	13
 <b>Other Authorities</b>	
M.V. Lee Badgett et al., <i>The Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies</i> (2014), <a href="https://tinyurl.com/24ryk4jz">https://tinyurl.com/24ryk4jz</a> .....	12
Benevity Impact Labs, <i>The State of Workplace DEI: How DEI Commitments Impact the Employee Experience (2023)</i> , <a href="https://tinyurl.com/rpywhdrh">https://tinyurl.com/rpywhdrh</a> .....	10
Katie Bevilacqua, <i>How Small Businesses Can Better Leverage HR</i> , SHRM (Jan. 18, 2024), <a href="https://tinyurl.com/4u2tk6kt">https://tinyurl.com/4u2tk6kt</a> .....	9

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
Taylor N.T. Brown & Jody L. Herman, Williams Inst., The Cost of Employment Discrimination Against Transgender Residents of Florida (2015), <a href="https://tinyurl.com/55yu769h">https://tinyurl.com/55yu769h</a> .....	12
Crosby Burns, Ctr. for Am. Progress, The Costly Business of Discrimination (2012), <a href="https://tinyurl.com/mrxye2a7">https://tinyurl.com/mrxye2a7</a> .....	12
Giulia Carbonaro, <i>America’s Labor Shortage is Most Severe in These 13 States</i> , Newsweek (Aug. 10, 2023), <a href="https://tinyurl.com/4fz773je">https://tinyurl.com/4fz773je</a> .....	10
Lacey Conner, <i>The High Cost of Sexual Harassment in the Workplace</i> , AXCET HR Sols. (Sept. 25, 2019), <a href="https://tinyurl.com/hnpsdaxn">https://tinyurl.com/hnpsdaxn</a> .....	11
EEOC, Enforcement Guidance on Harassment in the Workplace (2024), <a href="https://tinyurl.com/3x8efapr">https://tinyurl.com/3x8efapr</a> .....	2, 5, 6, 8
EEOC, <i>Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII</i> , <a href="https://tinyurl.com/ycdhnyth">https://tinyurl.com/ycdhnyth</a> .....	7
EEOC, <i>Federal-Sector EEO Cases Involving Sexual Orientation or Gender Identity (SOGI) Discrimination</i> , <a href="https://tinyurl.com/476w7ah7">https://tinyurl.com/476w7ah7</a> .....	7
EEOC, <i>Laws Enforced by EEOC</i> , <a href="https://tinyurl.com/36mptjyy">https://tinyurl.com/36mptjyy</a> .....	2
Hum. Rts. Campaign, <i>2023 State Equality Index</i> , <a href="https://tinyurl.com/4n4j5jh3">https://tinyurl.com/4n4j5jh3</a> .....	13
Vivian Hunt et al., McKinsey & Co., <i>Diversity Wins: How Inclusion Matters</i> (2020), <a href="https://tinyurl.com/mscj3dx6">https://tinyurl.com/mscj3dx6</a> .....	12
Iowa Civ. Rts. Comm’n, <i>Sexual Orientation &amp; Gender Identity: An Employer’s Guide to Iowa Law</i> (2018), <a href="https://tinyurl.com/yb4mhn58">https://tinyurl.com/yb4mhn58</a> .....	14
Matt Krentz et al., Boston Consulting Grp., <i>Inclusive Cultures Have Healthier and Happier Workers</i> (Sept. 14, 2021), <a href="https://tinyurl.com/a465naaf">https://tinyurl.com/a465naaf</a> .....	11
Shane McFeely & Ben Wigert, <i>This Fixable Problem Costs U.S. Businesses \$1 Trillion</i> , Gallup.com (Mar. 13, 2019), <a href="https://tinyurl.com/4tr8zva2">https://tinyurl.com/4tr8zva2</a> .....	10

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
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OSHA, Best Practices: A Guide to Restroom Access for Transgender Workers, <a href="https://tinyurl.com/3eyzcv43">https://tinyurl.com/3eyzcv43</a> (2015).....	13
Ramsey Sols., The Small-Business Labor Crisis: 2023 Report (2023), <a href="https://tinyurl.com/5z2pau62">https://tinyurl.com/5z2pau62</a> .....	10
Theodore A. Rizzo et al., Int’l Ctr. for Rsch. on Women, The Costs of Sex-Based Harassment to Businesses: An In-Depth Look at the Workplace (2018) .....	11
Ahva Sadeghi, <i>Building a Diverse, Equitable and Inclusive Culture for Gen-Z</i> , Forbes (Sept. 5, 2023), <a href="https://tinyurl.com/2deb69rh">https://tinyurl.com/2deb69rh</a> .....	11
Brad Sears et al., Williams Inst., LGBT People’s Experiences of Workplace Discrimination and Harassment (2021), <a href="https://tinyurl.com/34rzrya5">https://tinyurl.com/34rzrya5</a> .....	9, 11
Small Business Majority, <i>Scientific Opinion Poll: Small Business Say Commonsense Regulations Needed to Ensure a Competitive Economy</i> (May 22, 2018), <a href="https://tinyurl.com/2s47w9bf">https://tinyurl.com/2s47w9bf</a> .....	8, 15
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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici Curiae* Small Business Majority and Main Street Alliance represent tens of thousands of businesses across the United States that rely on guidance from our nation’s agencies to ensure that they are complying with federal civil-rights laws. Specifically, as relevant here, they rely on the U.S. Equal Employment Opportunity Commission and its guidance documents, including the Enforcement Guidance on Harassment in the Workplace (“Anti-Harassment Guidance” or “Guidance”). *Amici* submit this brief to highlight the importance to employers of having clear guidance regarding their obligations under Title VII and analogous federal workplace-anti-discrimination laws, something that is particularly helpful to small businesses like *Amici*’s members. *Amici* provide the following statements of interest:

Small Business Majority is a national small business organization that empowers America’s diverse entrepreneurs to build a thriving and equitable economy. Small Business Majority engages a network of more than 85,000 small businesses and 1,500 business and community organizations to deliver resources to entrepreneurs and advocate for public policy solutions that promote inclusive small business growth. Small Business Majority’s work is bolstered by extensive research and deep connections with the small business community.

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<sup>1</sup> No party’s counsel authored this brief in whole or in part, and no party, party’s counsel, or other person—besides *Amici* and their counsel—contributed money to the preparation or submission of this brief.

Main Street Alliance is a national network of small businesses, which represents approximately 30,000 small businesses across the United States. MSA helps small business owners realize their full potential as leaders for a just future that prioritizes good jobs, equity, and community through organizing, research, and policy advocacy on behalf of small businesses. MSA also seeks to amplify the voices of its small business membership by sharing their experiences with the aim of creating an economy where all small business owners have an equal opportunity to succeed.<sup>2</sup>

## INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission issues guidance to ensure that employers are aware of their obligations, and employees are aware of their rights, under the federal workplace civil-rights laws that the EEOC enforces. These include Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Pregnant Workers Fairness Act of 2022, among others.<sup>3</sup> Together, these statutes prohibit workplace discrimination, including harassment, on the basis of race, color, religion, sex (including pregnancy, childbirth and related medical conditions, sexual orientation, and gender identity), national origin, disability, genetic information, and age.<sup>4</sup>

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<sup>2</sup> Thousands of *Amici*'s small-business members are covered by the EEOC's Guidance.

<sup>3</sup> See EEOC, *Laws Enforced by EEOC*, <https://tinyurl.com/36mptjyy>.

<sup>4</sup> *Id.*



In April 2024, following a notice-and-comment period, the EEOC finalized its Enforcement Guidance on Harassment in the Workplace—an update of earlier enforcement-guidance documents that were more than 25 years old.<sup>5</sup> The Guidance covers a range of helpful topics regarding the parameters of the law. For example, the Guidance explains what conduct amounts to unlawful harassment, including how harassment may be based on the expression of particular traits related to an employee’s race, sex, or other protected characteristic. The Guidance provides reminders regarding employers’ responsibility to address harassment by third parties, like customers and vendors. And it reminds employers that implementing EEO policies and training, including providing multiple avenues for complaints, can help them to avoid liability in the context of harassment claims.

One key update—and the subject of Plaintiffs’ challenge in this case—is that the Guidance details now-longstanding federal legal protections for LGBTQ+ employees, including by providing examples of prohibited harassment based on sexual orientation and gender identity. Plaintiffs balk at the Guidance’s explaining that, for example, purposefully and repeatedly misgendering an employee with the wrong name or pronouns or denying an employee access to a bathroom or changing room consistent with the employee’s gender identity could amount to unlawful sex-based harassment. *See* Pls.’ Prelim. Inj. Br. 12-17.

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<sup>5</sup> *See* EEOC, Enforcement Guidance on Harassment in the Workplace (2024), <https://tinyurl.com/3x8efapr>. As the Anti-Harassment Guidance explains, it consolidates and supersedes several earlier EEOC policy and enforcement documents issued between 1987 and 1999. *Id.*

Plaintiffs are wrong as a matter of law because, as the EEOC explains, the Guidance imposes no new obligations on regulated entities but merely articulates the relevant standards for when harassment creates a hostile work environment, consistent with Title VII and analogous statutes and the case law interpreting them. *See* EEOC Br. 15-21.

*Amici* write to make several additional points. First, small businesses benefit from the Anti-Harassment Guidance, which helps them understand and comply with their obligations under federal civil-rights laws. Next, the Guidance is good for business. Complying with civil-rights laws, particularly those that guard against sexual-orientation and gender-identity harassment in the face of ongoing and widespread harassment against LGBTQ+ workers—which the Guidance helps *Amici*'s members to do—fosters the creation of more inclusive workplaces where harassment is not tolerated. Maintaining a workplace that addresses and prevents harassment helps to attract, hire, and retain workers of diverse backgrounds,<sup>6</sup> improve worker performance, and reduce turnover—all of which, in return, improves bottom lines, drives business success, and boosts the economy. Further, contrary to Plaintiffs' arguments, the costs of implementing the Anti-Harassment Guidance are minimal. Finally, the costs of enjoining the Guidance are substantial. Businesses appreciate clear guidance from agencies that helps them comply with the laws by which they are bound. And Plaintiffs' interpretation would lead to the

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<sup>6</sup> *Amici* use the terms “diverse” and “diversity” herein to refer to a range of backgrounds and identities, including, among other things, racial, gender, disability, age, and LGBTQ+ identities.

bizarre conclusion that harassment on the basis of a person’s sexual orientation or gender identity would somehow be allowed whereas harassment on the basis of any other legally protected class, like race, disability, or religion, would not. Enjoining the Anti-Harassment Guidance would only confuse employers about their true obligations under federal civil-rights laws.

*Amici* urge the Court to deny Plaintiffs’ motion and allow small businesses and employers around the nation to benefit from the Anti-Harassment Guidance.

## ARGUMENT

### **I. The Anti-Harassment Guidance helps small businesses ensure that they are complying with their obligations under federal workplace civil-rights laws.**

EEOC guidance documents help employers navigate their obligations under federal workplace civil-rights laws, which prohibit discrimination, including harassment, “based on race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, genetic information, and age (40 or over).”<sup>7</sup>

The Anti-Harassment Guidance provides—for the first time in 25 years—updated guidance for employers regarding the current legal standards and scope of liability applicable to workplace-harassment claims. The Guidance reflects several advancements in the law in the intervening decades.

It explains, for example, that race-based harassment may include harassment based not just on the fact of an employee’s race, but also “traits or

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<sup>7</sup> See Anti-Harassment Guidance, *supra* note 5.

characteristics linked to an individual’s race,” including an employee’s “name, cultural dress, accent or manner of speech, and physical characteristics, including . . . hair textures and hairstyles.”<sup>8</sup> It provides updates on pregnancy-related harassment, including harassment based on things like morning sickness and lactation.<sup>9</sup> The Guidance explains that employers face liability for harassing conduct perpetrated by non-employees and third parties, including that carried out by an employer’s independent contractors, clients, or customers.<sup>10</sup> And, recognizing the prevalence of remote and hybrid work environments, the Guidance clarifies the contours of harassing conduct that is conveyed via videoconferencing platforms, social media, and other digital-media sources.

The subject of Plaintiffs’ challenge in this case is the guidance related to harassment against LGBTQ+ people in the workplace. In *Bostock v. Clayton County*,<sup>11</sup> the Supreme Court held that Title VII’s protection against sex discrimination includes discrimination based on sexual orientation and gender identity. Additionally, the EEOC’s history of enforcing Title VII to protect LGBTQ+ persons in the workplace goes back to at least 2011 and long predates the Supreme Court’s confirmation of these protections in 2020 in *Bostock*.<sup>12</sup> And the EEOC was

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 590 U.S. 644 (2020).

<sup>12</sup> *See, e.g., Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (discrimination based on employee’s transgender identity is sex-based discrimination in violation of Title VII); *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (discrimination based on sexual

hardly out on a limb; long before *Bostock*, federal courts—including the U.S. Court of Appeals for the Sixth Circuit—construed Title VII to prohibit discrimination against LGBTQ+ workers.<sup>13</sup> In so doing, both the EEOC and courts interpreted Title VII to encompass not just discrimination and harassment based on the fact of a person’s gender identity or sexual orientation, but also sex harassment stemming from the expression of those characteristics, including exclusion from bathrooms, changing rooms, or other sex-segregated facilities that align with the employee’s gender; adherence to dress codes; and the intentional use of names or pronouns inconsistent with the employee’s gender.<sup>14</sup> The updated Guidance reflects those important applications of Title VII’s prohibition on sex harassment against LGBTQ+ workers in line with federal court precedents around the nation.

The Guidance addresses each element of a workplace-harassment claim, including whether and when conduct qualifies as harassing conduct based on an employee’s legally protected characteristic; whether it resulted in a change in the terms, conditions, or privileges of employment or created a hostile work

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orientation is sex-based discrimination in violation of Title VII); *see also* EEOC, *Federal-Sector EEO Cases Involving Sexual Orientation or Gender Identity (SOGI) Discrimination*, <https://tinyurl.com/476w7ah7> (cataloging EEOC decisions from 2011 to the present holding that sexual-orientation and gender-identity discrimination violate Title VII).

<sup>13</sup> *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *see also* EEOC, *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, <https://tinyurl.com/ycdhnyth>.

<sup>14</sup> *See, e.g., Mickens v. Gen. Elec. Co.*, No. 3:16-cv-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (single-sex bathroom use); *EEOC v. Deluxe Fin. Servs. Corp.*, No. 15-cv-02646 (D. Minn. Jan. 20, 2016) (pronoun use); *Lusardi v. Dep’t of the Army*, EEOC Appeal No. 0120133385, 2015 WL 1607756 (Apr. 1, 2015) (pronoun use).

environment; and whether the employer is liable for the conduct. And, crucially, throughout the Guidance, the EEOC has provided 77 examples of hypothetical scenarios (including some pertaining to LGBTQ+ workers specifically) to demonstrate the contours of the protections, the type of conduct that rises to the level of actionable harassment, or not, and remedial or corrective actions that an employer should take in response to a given situation.<sup>15</sup>

Contrary to Plaintiffs' insistence, the Guidance breaks no new legal ground. The Guidance is just that—explanatory guidance to help employers ensure that they are complying with existing federal workplace civil-rights laws and to help employees understand their rights and protections under these laws. Employers, including many of *Amici's* members, rely on such Guidance to inform their workplace anti-harassment policies and to understand how the EEOC makes enforcement determinations under Title VII and other analogous civil-rights laws by which they are bound.

Small businesses, like many of *Amici's* members, value agency guidance like the Anti-Harassment Guidance.<sup>16</sup> They often lack the resources to retain counsel for compliance assistance, sometimes lacking even Human Resources personnel to track and shift their practices based on evolving employment law and related

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<sup>15</sup> See Anti-Harassment Guidance, *supra* note 5.

<sup>16</sup> Indeed, research by *Amicus* Small Business Majority shows that “an overwhelming majority of small employers” value regulation as a means to even the playing field, do not view it as a hindrance to business success. Small Business Majority, *Scientific Opinion Poll: Small Business Say Commonsense Regulations Needed to Ensure a Competitive Economy* (May 22, 2018), <https://tinyurl.com/2s47w9bf>.

litigation risks given the overall landscape.<sup>17</sup> Easy-to-understand guidance that recounts the rules of the road and provides explanatory examples reduces the costs and burden on small businesses and helps employers comply with legal requirements. And, for a small business, anything that reduces risk and increases stability and predictability makes opening, survival, and growth more possible. Any decrease in costs can be beneficial to a small business, where margins can be slim and incomes modest.

## **II. The Anti-Harassment Guidance is good for businesses' bottom lines and overall success and is supportive of a healthy economy.**

Alongside the harms to workers themselves,<sup>18</sup> harassment in the workplace—specifically harassment against LGBTQ+ workers—has enormous ramifications for employers, resulting in higher rates of turnover, people leaving the workforce, and, ultimately, less diverse workplaces. Mitigating workplace harassment, including through reliance on guidance from the EEOC, attracts people from a range of backgrounds into the workforce, improves employee performance, reduces turnover, and reduces the monetary and reputational costs of charges of discrimination and

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<sup>17</sup> See Katie Bevilacqua, *How Small Businesses Can Better Leverage HR*, SHRM (Jan. 18, 2024), <https://tinyurl.com/4u2tk6kt>.

<sup>18</sup> Despite legal protections for LGBTQ+ workers, workplace harassment based on sexual orientation and gender identity persists. Nearly half of LGBTQ+ workers report that they have experienced mistreatment in the workplace based on their sexual orientation or gender identity. See, e.g., Brad Sears et al., Williams Inst., *LGBT People's Experiences of Workplace Discrimination and Harassment* 5 (2021), <https://tinyurl.com/34rzrya5>. These experiences affect the nature and trajectory of LGBTQ+ workers' participation in the workforce: LGBTQ+ employees have reported staying in jobs for which they are overqualified, declining to seek promotions, quitting jobs in response to harassment, and removing themselves from the workforce altogether. See *id.*

related litigation. Workforces that draw employees from a range of racial, gender, LGTBQ+, disability, and other backgrounds drive business success and bolster economic growth. *Amici* and their members understand that the Anti-Harassment Guidance is not just a helpful tool to ensure their compliance with federal law; it's good for business.

The business advantages of mitigating harassment and fostering diversity are many. Critically, employers' ability to cultivate a workplace free of harassment and discrimination is crucial to bringing LGTBQ+ people into the workplace and to reducing turnover. Workers are more willing to enter and stay in the workforce when they do not fear discrimination and harassment at every corner. And surveys show that people *want* to work for employers who prioritize diversity and inclusion in the workplace—it is a “business-critical investment” for employers.<sup>19</sup> Moreover, the importance of reducing employee turnover and promoting employee retention can scarcely be overstated. Businesses today—particularly small businesses—are grappling with persistent worker shortages.<sup>20</sup> Incentivizing worker retention is therefore a critical goal for all businesses. And when employers are able to retain

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<sup>19</sup> Benevity Impact Labs, *The State of Workplace DEI: How DEI Commitments Impact the Employee Experience 3* (2023), <https://tinyurl.com/rpywhdrh> (finding that “95% of employees now weigh a prospective employer’s DEI efforts when choosing between job offers with similar salary and benefits” and that “78% . . . would not consider working for a company that fails to commit significant resources to prioritizing DEI initiatives”).

<sup>20</sup> See Ramsey Sols., *The Small-Business Labor Crisis: 2023 Report 3* (2023), <https://tinyurl.com/5z2pau62> (noting that 11.3 million small-business owners report struggling to find the employees they need); Giulia Carbonaro, *America’s Labor Shortage is Most Severe in These 13 States*, *Newsweek* (Aug. 10, 2023), <https://tinyurl.com/4fz773je>.



their existing employees, it saves employers money on recruiting and training new employees.<sup>21</sup> *Amici* believe that the Guidance will serve that aim, promoting employee retention, reducing absenteeism, and solidifying strong equity values in jobseekers pursuing healthy workplace cultures.<sup>22</sup>

Further, as *Amici* know, workplaces free of harassment will not just foster employee retention, but will lead to healthier, more productive, and better-performing employees able to participate fully and freely in the workplace.<sup>23</sup>

And finally, it saves employers costs associated with employee complaints, enforcement actions, and litigation.<sup>24</sup> Aside from incurring legal fees, employers face reputational and publicity costs stemming allegations of harassment, which in turn may “driv[e] away customers, investors, and potential talent.”<sup>25</sup> As described above, the Anti-Harassment Guidance is a valuable resource to help employers

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<sup>21</sup> Shane McFeely & Ben Wigert, *This Fixable Problem Costs U.S. Businesses \$1 Trillion*, Gallup.com (Mar. 13, 2019), <https://tinyurl.com/4tr8zva2> (noting that “[t]he cost of replacing an individual employee can range from one-half to two times the employee's annual salary”).

<sup>22</sup> Ahva Sadeghi, *Building a Diverse, Equitable and Inclusive Culture for Gen-Z*, Forbes (Sept. 5, 2023), <https://tinyurl.com/2deb69rh>.

<sup>23</sup> See, e.g., Matt Krentz et al., Boston Consulting Grp., *Inclusive Cultures Have Healthier and Happier Workers* (Sept. 14, 2021), <https://tinyurl.com/a465naaf>; Brad Sears et al., Williams Inst., *LGBT People’s Experiences of Workplace Discrimination and Harassment*, *supra* note 18, at 23-24.

<sup>24</sup> Lacey Conner, *The High Cost of Sexual Harassment in the Workplace*, AXCET HR Sols. (Sept. 25, 2019), <https://tinyurl.com/hnpsdaxn> (noting that companies regularly expend “upwards of \$100,000 to defend against” a harassment claim).

<sup>25</sup> U.S. GAO, GAO-20-564, *Workplace Sexual Harassment: Experts Suggest Expanding Data Collection to Improve Understanding of Prevalence and Costs* 26 (2020), <https://tinyurl.com/36aztju8> (quoting Theodore A. Rizzo et al., Int’l Ctr. for Rsch. on Women, *The Costs of Sex-Based Harassment to Businesses: An In-Depth Look at the Workplace* 6-7 (2018)).

make sense of legal developments over the last several decades and, in turn, fulfill their obligations under Title VII and related civil-rights laws to keep their workplaces free of illegal harassment. The reduction of enforcement-related costs is all the more important for many of *Amici*'s members, small businesses without disposable resources to pour into legal and compliance tracking, and margins that can ill-accommodate costly enforcement proceedings.

Ultimately, workplaces composed of employees from across a range of backgrounds—made possible only by, among other things, employers' ability to protect their employees from workplace harassment—benefit from improved collaboration, creativity, and innovation in the workplace and, in turn, promote economic growth.<sup>26</sup> Diversity in the workplace, meaning the inclusion of workers from a range of backgrounds and lived experiences, helps drive business success. Allowing workplace harassment to go unaddressed, by contrast, takes a material and financial toll on businesses and the economy as a whole.<sup>27</sup> As *Amici* and their members well know, tools like the Anti-Harassment Guidance that help businesses

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<sup>26</sup> See, e.g., Vivian Hunt et al., McKinsey & Co., *Diversity Wins: How Inclusion Matters* (2020), <https://tinyurl.com/mscj3dx6> (explaining the economic benefits of diversity in employers' leadership).

<sup>27</sup> See, e.g., Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination* (2012), <https://tinyurl.com/mrxye2a7>; Taylor N.T. Brown & Jody L. Herman, Williams Inst., *The Cost of Employment Discrimination Against Transgender Residents of Florida* (2015), <https://tinyurl.com/55yu769h>; cf. M.V. Lee Badgett et al., *The Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies* (2014), <https://tinyurl.com/24ryk4jz>.

prevent and address workplace harassment are good for their bottom lines and overall success.

### **III. Plaintiffs' arguments regarding the burdens imposed by the Anti-Harassment Guidance are unfounded.**

Plaintiffs contend that allowing the Anti-Harassment Guidance to remain in effect during the pendency of this legal challenge would burden employers and create irreconcilable tension between federal and state law. They argue that the Guidance subjects employers to workplace challenges and saddles them with the “impossible” task of “discern[ing] and verify[ing] [an employee’s] gender identity” in order to comply with the mandates of Title VII. Pls.’ Prelim. Inj. Br. 23. They also contend that the Guidance is at odds with many states’ own laws governing things like pronoun usage and access to sex-segregated facilities. *Id.* at 24-25. Their arguments regarding these supposed burdens are unfounded.

The rights and obligations that Plaintiffs suggest are so burdensome in fact already exist in approximately half the nation’s states and scores of localities—and have for years.<sup>28</sup> By way of example, for more than a decade, Colorado regulations have required employers to “allow individuals the use of gender-segregated facilities that are consistent with their gender identity.”<sup>29</sup> Iowa’s Civil Rights Commission mandates that employees have access to bathroom facilities consistent with their

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<sup>28</sup> See Hum. Rts. Campaign, *2023 State Equality Index*, <https://tinyurl.com/2p8xaxf3>; see also, e.g., OSHA, *Best Practices: A Guide to Restroom Access for Transgender Workers*, <https://tinyurl.com/3eyzcv43> (2015).

<sup>29</sup> 3 Colo. Code Regs. § 708-1-81.9.

gender identity.<sup>30</sup> And in New York, the intentional misgendering of an employee violates state employment-nondiscrimination protections.<sup>31</sup>

And regardless, as discussed above, with regard to federal law, the Anti-Harassment Guidance does not create new law or change existing law—it explains existing legal principles regarding protections against harassment in the workplace. While the Guidance may provide clarifying examples of conduct that amounts to harassment on the basis of sex, it does not impose new obligations on Plaintiffs or anyone else for that matter, but only underscores that those obligations already exist, and have since at least 2020 (as confirmed by the Supreme Court in *Bostock*), if not before. Hence, employers around the country are *already* required to comply with them. And insofar as Plaintiffs have state or local laws, or employment policies or guidance of their own, that are inconsistent with the Guidance’s explanation of the contours of Title VII, those inconsistencies would not be remedied by enjoining the Guidance. They will continue to exist because federal law through Title VII and the body of case law pre- and post-dating *Bostock* interpreting Title VII continue to exist and govern the actions of these and other employers.<sup>32</sup>

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<sup>30</sup> Iowa Civ. Rts. Comm’n, *Sexual Orientation & Gender Identity: An Employer’s Guide to Iowa Law* (2018), <https://tinyurl.com/yb4mhn58>.

<sup>31</sup> *See* N.Y. Div. of Hum. Rts., *Guidance on Protections from Gender Identity Discrimination Under the New York State Human Rights Law 6-7* (2020), <https://tinyurl.com/2rrspm6>.

<sup>32</sup> What’s more, many state laws that Plaintiffs cite in their complaint and briefing as supposedly in conflict with the Guidance are laws imposing obligations on the operations of public schools, including students’ use of single-sex bathrooms and changing rooms—a context that the Guidance plainly does not countenance.

**IV. Enjoining the Anti-Harassment Guidance would sow confusion among employers.**

Allowing the Guidance to remain in effect will not burden employers; enjoining it stands to harm and confuse them, particularly small businesses like *Amici*'s members. As an initial matter, employers *appreciate* guidance that helps them ensure that they are not running afoul of their legal obligations, including their obligations to prevent and address workplace harassment.<sup>33</sup>

Moreover, Plaintiffs push a confused, dual-track legal framework for interpreting Title VII and the other relevant civil-rights statutes that treats the harassment of LGBTQ+ workers differently than members of other protected classes. In the ordinary course, if a worker is protected against discrimination based on a protected characteristic—whether race, color, religion, sex, national origin, disability, age, or genetic information—it is also illegal under the civil-rights laws to harass them based on that protected characteristic. But under Plaintiffs' interpretation, the standard for what may constitute cognizable gender-identity or sexual-orientation harassment under Title VII does not mirror what constitutes cognizable discrimination under Title VII more broadly, including on the basis of race, color, religion, sex, or national origin, or analogous laws barring workplace discrimination and harassment on the basis of age, disability, or genetic information. Under Plaintiffs' theory of Title VII, for example, harassment on the basis of a person's sexual orientation or gender identity, even when severe or

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<sup>33</sup> See, e.g., Small Business Majority, *Scientific Opinion Poll*, *supra* note 15.

pervasive, may be legal, while harassment tied to all of the other protections named in the law is not. That is not how civil-rights laws work.

Such a carve-out is not just legally incorrect but also burdensome on the good-faith efforts of employers, particularly small businesses, to comply with the requirements of the federal employment civil-rights laws. And because, as described elsewhere in this brief, the Anti-Harassment Guidance does not create new law or change existing law, enjoining the law would only leave employers like *Amici's* members confused about their legal obligations. Plaintiffs' proffered interpretation of the civil-rights laws only serves to sow confusion and add compliance costs, imposing an unnecessary burden on employers, particularly small businesses that lack a range of employment-law experts at their command.

Employers desire and deserve guidance, including this one, to help them ensure that they are complying with federal civil-rights mandates, and workers likewise deserve the benefits of clearly articulated guidance regarding these protections. Accepting Plaintiffs' arguments and enjoining the Anti-Harassment Guidance would undermine both of these worthy interests.

## CONCLUSION

For the foregoing reasons, *Amici* urge the Court to deny Plaintiffs' motion for a stay and preliminary injunction.

Dated: July 5, 2024

Respectfully submitted,

*s/ Melissa J. Stewart*

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## CERTIFICATE OF SERVICE

I certify that on July 5, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

Dated: July 5, 2024

*s/ Melissa J. Stewart*

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