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June 9, 2021

**Re: Support S.J. Res. 13, a Congressional Review Act Resolution of Disapproval to
Protect Workers from a Harmful EEOC Rule**

Dear Representative:

The undersigned 24 civil and workers' rights organizations urge you to vote for S.J. Res. 13, a Congressional Review Act (CRA) resolution of disapproval to undo a January 14, 2021, Equal Employment Opportunity Commission (EEOC) final rule that threatens to harm working people seeking relief from discrimination and to impede the work of the EEOC.

The EEOC final rule made several changes to conciliation, the process by which the EEOC tries to settle a charge of workplace discrimination. Instead of ensuring that discrimination charges are resolved fairly, the EEOC's final rule imposes several new obligations and disclosures that:

- Significantly weight the conciliation process in favor of employers;
- Delay justice and increase the likelihood of harm to working people;
- Divert scarce EEOC staff time and resources away from investigating discrimination; and
- Contravene controlling U.S. Supreme Court precedent.

The Senate passed S.J. Res. 13 on May 19, 2021. If the House now passes this resolution, Congress could undo this harmful rule and restore the status quo with respect to the EEOC's procedures. A resolution of disapproval is an appropriate exercise of Congress's power in this case, because the CRA is the most expeditious and effective option for addressing the negative impacts of the EEOC's final rule.

The EEOC must be able to conduct its work efficiently in order to be effective in its mission to prevent and remedy workplace discrimination. This mission is even more critical in the middle of a global pandemic that continues to have severe economic repercussions for women, people of color, and other marginalized communities, including a heightened risk of job loss, health and safety hazards, and discrimination based on sex, race, age, and disability.

Individuals who experience discrimination on the job already face significant hurdles to seeking redress, including retaliation, lack of information about their rights, and lack of access to legal assistance. When an individual does file a charge of discrimination against their employer with the EEOC, the agency collects information and conducts an investigation. If the EEOC finds "reasonable cause" to believe employment discrimination has occurred, the parties are invited to participate in the conciliation process, which seeks to settle or resolve the charges of discrimination informally and confidentially, in lieu of filing a lawsuit.¹ Title VII requires the EEOC to attempt resolution of charges informally before

¹ 42 U.S.C. 2000e-5(f)(1).

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considering or proceeding with litigation, and the EEOC may only pursue litigation if conciliation has failed.²

The final rule will only deepen the barriers working people face coming forward to report discrimination and obtain justice. It requires the EEOC to grant the employer access to details of the victim and witnesses' identity and allegations, escalating the risk of retaliation for workers. Claims of retaliation made up more than half of all charges filed at the EEOC in FY 2020, and fear of retaliation prevents many victims of discrimination from coming forward and many witnesses from being forthright — something that may be especially true during an economic crisis. The rule also requires the EEOC to disclose critical information concerning the EEOC's legal analysis of the case to employers, and employers only. In other words, the EEOC would be required to automatically turn over its case files to employers whom the agency believes to have acted unlawfully, but not to the working people who are seeking a remedy for the discrimination they faced. This practice would exacerbate resource and information inequities between the parties to the benefit of employers only. Although the proposed rule would allow disclosures to the charging party upon request, many working people who file charges are unrepresented by counsel and will not know to make such a request. The EEOC, whose mission is to prevent and remedy discrimination, should not, in its own procedural rules, disadvantage the very party seeking to remedy discrimination.

By imposing inflexible rules on the conciliation process, the EEOC final rule also flouts congressional intent and is inconsistent with Supreme Court precedent. In its unanimous 2015 decision *Mach Mining, LLC v. EEOC*, the Supreme Court explained that “every aspect of Title VII’s conciliation provision smacks of flexibility,” which allows the EEOC to tailor its approach to conciliation in the way most appropriate in each case. Without flexibility, the EEOC will be forced to divert resources away from investigating and remedying workplace discrimination and put them toward satisfying the final rule’s burdensome standards, resulting in increased delays at the expense of victims of discrimination.

In addition, the rules would saddle EEOC with wasteful collateral litigation attacking the conciliation process, prolonging harm to workers through increased delay. This tactic was prevalent before *Mach Mining*, and that case itself shows the potential impact: The workers in *Mach Mining* — women excluded from coal mining jobs due to sex discrimination — were forced to wait nine years after the first charge was filed for relief, in part because of unmeritorious employer challenges to the conciliation process.

By invoking the CRA and passing a resolution of disapproval, Congress could quickly restore the status quo with respect to the EEOC’s conciliation procedures, minimizing the harm to workers and eliminating the need for the EEOC to expend its scarce resources either undertaking rulemaking processes to rescind the conciliation rule or implementing the onerous new procedures in the final rule, and defending the sufficiency of the new conciliation process in collateral litigation by employers.

Importantly, application of the CRA to the final rule ensures that the EEOC would be prohibited from promulgating a “substantially” similar rule in the future that would hinder vigorous enforcement of

² 42 U.S.C. § 2000e-5(f)(1).



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federal workplace antidiscrimination laws.³ The final conciliation rule was both procedurally⁴ and substantively flawed, raising concerns about its integrity. As such, Congress's exercise of the CRA would be warranted here.

Accordingly, we urge you to support and vote for S.J. Res. 13, the CRA resolution of disapproval of the EEOC's final rule. Please contact Gaylynn Burroughs of The Leadership Conference on Civil and Human Rights at burroughs@civilrights.org, or Maya Raghu of the National Women's Law Center at mraghu@nwlc.org, if you have any questions.

Thank you,

The Leadership Conference on Civil and Human Rights
National Women's Law Center
A Better Balance
AFL-CIO
American Association of University Women (AAUW)
Anti-Defamation League
Asian Pacific American Labor Alliance, AFL-CIO
Bazelon Center for Mental Health Law
Center for American Progress
Equal Rights Advocates
Feminist Majority
Futures Without Violence
Institute for Women's Policy Research
National Action Network
National Association of Councils on Developmental Disabilities
National Employment Law Project
National Organization for Women
National Partnership for Women & Families
National Workrights Institute
Public Citizen
Sikh Coalition
TIME'S UP Now
Women Employed
Workplace Fairness

³ Section 801(b)(2) of the CRA prohibits federal agencies from issuing a subsequent rule that is “substantially the same” as a disapproved rule.

⁴ The EEOC released the proposed rule before it had completed or evaluated its own conciliation pilot program, which was in progress at the time. See U.S. Equal Emp. Opportunity Comm'n, Press Release, *EEOC Announces Pilot Programs to Increase Voluntary Resolutions* (July 7, 2020), available at <https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions>. Moreover, the EEOC provided stakeholders with only 30 days to comment on the proposed rule and published the final rule in the last week of the prior administration.