

November 27, 2017

**Re: Letter of Opposition to Nomination of Janet Dhillon**

Dear Senator:

The National Women's Law Center (the Center), an organization that has advocated on behalf of women and girls for forty-five years, writes to express its strong opposition to the nomination of Janet Dhillon to be Chair of the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC enforces employment antidiscrimination laws in the private workforce and federal sector, including Title VII of the 1964 Civil Rights Act (including the Pregnancy Discrimination Act), the Equal Pay Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act. Laws interpreted and enforced by the EEOC are critical to workplace fairness and opportunity for women, people of color, LGBTQ individuals, and people with disabilities across the country. Janet Dhillon's record reveals that her career has been solely dedicated to fighting on behalf of corporate interests, with no public sector service, and a lack of experience in civil rights enforcement. Her limited experience and the views expressed at her confirmation hearing on critical civil rights issues, combined with her role in founding and leading the Retail Litigation Center, an organization dedicated to advancing narrow legal interpretations of critical antidiscrimination and labor protections, render her unsuitable for the position to which she has been nominated, and cast grave doubt on the future of civil rights enforcement efforts at the EEOC.

**Ms. Dhillon has worked to narrow the scope of rights and remedies under crucial discrimination laws enforced by the EEOC, including those providing protection from sex discrimination, sexual harassment, and retaliation.**

Ms. Dhillon has spent her entire career advancing the interests of, and defending, large corporate employers, primarily in the retail industry, not protecting the rights of working people. The most relevant example of Ms. Dhillon's priorities is her extensive involvement with the Retail Industry Leaders Association's Retail Litigation Center (RLC). The RLC is led by the chief legal officers of large retail companies and describes itself as "dedicated to advocating the retail industry's perspective in those judicial proceedings that are most

important to the retail community.”<sup>1</sup> Most relevant to Ms. Dhillon’s EEOC nomination, in labor and employment cases, the RLC files amicus briefs taking positions in favor of tightening class action standards, narrowing employer liability standards (thus making it more difficult for employees to successfully challenge discrimination); enforcing mandatory arbitration and class action waivers (thus making it harder for employees to come together as a group to challenge company-wide discrimination); and increasing judicial review of EEOC actions (thus placing more procedural obstacles in the way of reaching a resolution on the merits of employment discrimination cases).

Ms. Dhillon was involved in establishing the RLC, served as the first chair of the board of directors from 2010 to October 2013, and remained on the board until March 2015, serving as an emeritus board member thereafter. She has been described as “instrumental in the formation and early success of the Retail Litigation Center.”<sup>2</sup> She is also a member of the Retail Industries Leaders Association, the trade group which launched RLC.

During Ms. Dhillon’s tenure as board chair and her subsequent board membership, the RLC authored or co-authored amicus briefs that successfully advanced positions adverse to working women in several significant Supreme Court cases addressing discrimination and harassment, thus narrowing the protection of antidiscrimination laws. For instance, in *Wal-Mart v. Dukes*, the RLC filed an amicus brief urging the Court not to allow more than one million women who currently or formerly worked for Wal-Mart to challenge the company’s discriminatory pay and promotion practices as a class.<sup>3</sup> The Court’s eventual 5-4 decision in favor of Wal-Mart made it harder for workers to come together as a group to challenge discrimination by large employers, and in particular to challenge employment practices implemented by many individual supervisors within large companies.<sup>4</sup> In *Vance v. Ball State Univ.*, the RLC and National Federation of Independent Business co-authored an amicus brief arguing in favor of a narrow test for determining who is a supervisor for the purposes of holding employers vicariously liable for supervisor harassment.<sup>5</sup> In a 5-4 decision, the Supreme Court sided with the employer, making it harder for employees to succeed in sexual harassment claims against their employers when they are harassed by low level managers, whose ability to harass is enhanced by the control they exercise over employees’ daily work

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<sup>1</sup> Retail Litigation Center, <http://www.rila.org/enterprise/retaillitigationcenter/Pages/default.aspx> (last visited Nov. 19, 2017).

<sup>2</sup> Jonathan Randles, *JC Penney GC Steps Down In Latest Shake-Up For Retailer*, LAW360.COM, Mar. 23, 2015, <https://www.law360.com/articles/634382/jc-penney-gc-steps-down-in-latest-shake-up-for-retailer>.

<sup>3</sup> *Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner*, Wal-Mart Stores, Inc. v Dukes, No. 10-227 (S. Ct. 2010), available at [http://www.rila.org/SiteCollectionDocuments/Wal-Mart%20v.%20Dukes%20\(merits\).pdf](http://www.rila.org/SiteCollectionDocuments/Wal-Mart%20v.%20Dukes%20(merits).pdf).

<sup>4</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>5</sup> *Brief as Amici Curiae of the National Federation of Independent Business Small Business Legal Center and the Retail Litigation Center in Support of Respondent*, Vance v. Ball State Univ., No. 11-556 (S. Ct. 2012), available at <http://www.rila.org/SiteCollectionDocuments/Vance%20v%20Ball%20State.pdf>.

activities and schedule.<sup>6</sup> The RLC, together with the U.S. Chamber of Commerce, also submitted an amicus brief in *University of Texas v. Nassar*, arguing that Title VII's anti-retaliation provision requires a plaintiff to prove but-for causation, and that a mixed motive is insufficient for employer liability.<sup>7</sup> In another 5-4 decision, the Supreme Court sided with the employer and made it more difficult for employees to succeed in their claims that they were retaliated against for bringing a discrimination claim or participating in an investigation, even when they prove that their employer was motivated by a desire to retaliate against them for pursuing these legal rights.<sup>8</sup>

The decisions in these significant Supreme Court cases impair workers' ability to challenge and hold employers accountable for workplace discrimination, and Ms. Dhillon's leadership and work in support of the outcomes in these cases is at odds with the mission of the agency she is nominated to lead.

**Ms. Dhillon's refusal to commit to prioritizing progress on the EEOC's equal pay data collection threatens to undermine vital efforts to address pay discrimination.**

Ms. Dhillon's testimony at her confirmation hearing, and written responses to post-hearing questions for the record (QFRs), indicate a worrying lack of commitment to the EEOC's effort to move forward with a crucial transparency initiative to collect pay data from employers to strengthen enforcement of protections against pay discrimination.

This is a critical time in the fight for equal pay. Last year, the EEOC revised the EEO-1, a form it had used for several decades to collect employee demographic information from large employers, in order to solicit additional information about compensation. As approved by the Office of Management and Budget (OMB), the EEO-1 equal pay data collection would have allowed the EEOC to confidentially collect pay data by race, gender, and occupational category from large employers and federal contractors.<sup>9</sup> This pay data collection would have shined a light on gender and racial wage gaps, which stubbornly persist and have remained virtually unchanged for nearly 10 years. But in August, without any notice or opportunity for public comment, OMB issued a "review and stay" of the pay data collection in a terse one-and-a-half page memo to EEOC.<sup>10</sup> Despite the fact that the EEOC had determined that the pay data collection was "necessary" and "an effective and appropriate tool" to enforce pay

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<sup>6</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

<sup>7</sup> *Brief of the Chamber of Commerce of the United States of America and the Retail Litigation Center as Amici Curiae in Support of Petitioner*, *Univ. of Texas v. Nassar*, No. 12-484 (S. Ct. Mar. 11, 2013), available at [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-484\\_pet\\_amcu\\_cocus-rlc.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-484_pet_amcu_cocus-rlc.authcheckdam.pdf).

<sup>8</sup> *Univ. of Texas v. Nassar*, 133 S. Ct. 2517 (2013).

<sup>9</sup> U.S. Office of Mgm't and Budget, *Notice of Office of Management and Budget Action* (Sept. 29, 2016), available at <https://www.reginfo.gov/public/do/DownloadNOA?requestID=275763>.

<sup>10</sup> *Memorandum from Neomi Rao, Adm'r, OIRA, to Victoria Lipnic, Acting Chair, EEOC* (Aug. 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf) [*Rao Memorandum*].

discrimination laws,<sup>11</sup> OMB claimed the data collection “lacked practical utility” and was too burdensome for businesses -- before any employer had even submitted any data -- without offering an explanation or justification for its decision.<sup>12</sup> OMB instructed the EEOC to submit a new proposal and justification for information collection through the EEO-1.

The EEOC must address OMB’s expressed concerns and identify a constructive path forward for equal pay enforcement and the collection of pay data. And given OMB’s failure to provide EEOC with any timeline for action or guidance for next steps, it is critical that the next Chair develop a transparent process to respond to OMB’s purported concerns and move the equal pay data collection forward, including a public hearing and other efforts to engage and solicit input from diverse groups of stakeholders (not just corporate interest groups). Equally critical is commitment to a timeline for promptly completing this process and submitting a revised proposal to OMB for review and approval in the near term, such as the next six months.

Although Ms. Dhillon expressed support for the collection of pay data from employers by the EEOC, she offered no details or commitment at the hearing or in her responses to QFRs regarding a process and timeline to finalize and implement the revised pay data collection.<sup>13</sup> Process and timing matter, because the EEO-1 pay data collection was adopted after an extensive and transparent process over several years, including a public hearing, two rounds of notice and public comment, and detailed documentation by the EEOC of its analysis supporting the pay data collection, published in the Federal Register.<sup>14</sup> In contrast, OMB’s decision to review and stay the pay data collection was made with no notice and no opportunity for public input. OMB’s brief memo provides no explanation or justification for its decision. To date the only specific information that Ms. Dhillon has offered is concern that the assertions by corporate interests that the data collection was burdensome had not been appropriately considered in the process, despite the extensive stakeholder engagement and analysis underlying the final proposal.

Accordingly, it is vital to ensure that the EEOC will be led by an individual with a strong commitment to move the equal pay data collection forward. Ms. Dhillon is not that person.

### **Ms. Dhillon’s lack of commitment to maintaining the EEOC’s position that Title VII prohibits sexual orientation and gender identity discrimination reveals a disturbing**

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<sup>11</sup> U.S. Equal Employment Opportunity Comm’n, *Agency Information Collection Activities: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 45479 (July 14, 2016).

<sup>12</sup> *Rao Memorandum*, *supra* note 10.

<sup>13</sup> *Hearing on the Nomination of Janet Dhillon*, U.S. Senate Committee on Health, Education, Labor and Pensions, Sept. 19, 2017, <https://www.help.senate.gov/hearings/nominations7>.

<sup>14</sup> See U.S. Equal Employment Opportunity Comm’n, *Agency Information Collection Activities: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 45479 (July 14, 2016); U.S. Equal Employment Opportunity Comm’n, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 5113 (Feb. 1, 2016).

**misunderstanding of the EEOC’s role, and a willingness to sanction discrimination against LGBTQ employees.**

In response to repeated questioning at her confirmation hearing, Ms. Dhillon steadfastly refused to commit to maintaining, much less advancing, the EEOC’s position that discrimination on the basis of sexual orientation or gender identity is prohibited sex discrimination under Title VII. She claimed that because the law was “in flux” due to pending cases and a division between federal civil rights agencies, she wants to take a “wait and see” approach, believing Congress and the courts should decide the issue.<sup>15</sup> Ms. Dhillon’s approach fundamentally misconstrues the role of the EEOC.

The EEOC’s position on sexual orientation and gender identity has recently come under attack from the White House and the Department of Justice. The Second Circuit Court of Appeals is considering whether “sex discrimination” includes sexual orientation discrimination in a pending case in which the EEOC and Department of Justice filed separate briefs taking opposing positions.<sup>16</sup> The Supreme Court has been asked to grant review of another case considering the same issue.<sup>17</sup> Other EEOC cases challenging gender identity discrimination as a form of sex discrimination are currently before the courts.

Ms. Dhillon’s “wait and see” response ignores the EEOC’s responsibility to enforce and interpret the law, even when courts are not in uniform agreement. It ignores the fact that the EEOC is currently engaged in litigation that presents these very questions, and is called upon to evaluate complaints and (as to federal employees) adjudicate complaints that present these very questions, making it impossible for the EEOC to sit this controversy out. The failure to commit to upholding this position raises the disturbing prospect that if Ms. Dhillon is confirmed, under her leadership the EEOC may step back from its mission to promote equal employment opportunity, to investigate incoming charges of discrimination, and to advocate for its legal positions in the courts. Ms. Dhillon’s position demonstrates an unacceptable openness to advocating that that LGBTQ people are not protected from workplace discrimination by federal civil rights law, and a willingness to sanction employer discrimination – a position utterly at odds with the leadership of a civil rights enforcement agency that protects individuals’ rights to be free from sex discrimination in the workplace.

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<sup>15</sup> *Hearing on the Nomination of Janet Dhillon*, *supra* note 13.

<sup>16</sup> *En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. June 23, 2017), available at <https://www.documentcloud.org/documents/3900222-Zarda-v-Altitude-Express-EEOC-Amicus-2nd.html>; *Brief for the United States as Amicus Curiae*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), available at <https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf>.

<sup>17</sup> *Petition for a Writ of Certiorari*, *Evans v. Georgia Regional Hospital*, No. 17-270 (S. Ct. Sept. 7, 2017), available at <http://www.scotusblog.com/wp-content/uploads/2017/10/17-370-petition.pdf>.

**Ms. Dhillon has advanced legal arguments that undermine the EEOC's enforcement authority.**

During Ms. Dhillon's RLC board tenure, the organization advocated for expanding judicial review of the EEOC's investigation and conciliation efforts, filing an amicus brief in the Supreme Court on behalf of the U.S. Chamber of Commerce and other business associations in *Mach Mining, LLC v. EEOC*.<sup>18</sup> The RLC urged the Court to find that the EEOC's duty to conciliate is subject to judicial review, thereby enabling employers to delay resolution of discrimination claims by asking judges to insert themselves into the conciliation process after the fact. The Court agreed, holding that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit, although the scope of that review is narrow because the EEOC has discretion to determine what kind and amount of communication with an employer is appropriate in a case.<sup>19</sup> Such a delay in resolution of discrimination cases has disproportionate negative effects for women in non-traditional occupations, who face some of the highest rates and most extreme cases of sexual harassment and gender discrimination.

Ms. Dhillon's support for positions seeking to undermine the EEOC's enforcement authority indicates she should not lead a vital civil rights enforcement agency like the EEOC.

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In conclusion, Ms. Dhillon's record is inconsistent with the duty of the Chair of the EEOC to protect workplace rights and enforce civil rights laws. Her record demonstrates that we can expect her to undermine antidiscrimination laws and enforcement efforts that are critical to equality and opportunity for women, LGBTQ people, and other vulnerable and marginalized communities. Accordingly, the Center strongly opposes the confirmation of Ms. Dhillon.

Sincerely,



Fatima Goss Graves  
President and CEO

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<sup>18</sup> *Brief of Amici Curiae Retail Litigation Center, Inc., et al. In Support of Petitioner, Mach Mining, LLC v. EEOC*, No. 13-1019 (S. Ct. Sept. 2014), available at [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-1019\\_pet\\_amcu\\_cocus-et-al.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1019_pet_amcu_cocus-et-al.authcheckdam.pdf).

<sup>19</sup> 135 S. Ct. 1645 (2015).