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November 9, 2020

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M St., N.E.
Washington, DC 20507

Submitted via regulations.gov

Re: Proposed Update of Commission's Conciliation Procedures, FR Docket Number EEOC-2020-0006, Docket RIN 3046-AB19

Dear Ms. Wilson:

The National Women's Law Center strongly opposes the Equal Employment Opportunity Commission's ("EEOC" or "the Commission") notice of proposed rulemaking, *Update of Commission's Conciliation Procedures*, RIN Number 3046-AB19 (the "Proposed Rule" or "NPRM").

The National Women's Law Center ("the Center") has worked for over 45 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to prevent and remedy workplace discrimination, including sexual harassment, pregnancy discrimination, and pay discrimination, through EEOC processes as well as in the courts.

The Proposed Rule seeks to make conciliation more attractive to employers in a manner that would impose significant and time-consuming requirements on EEOC, and further stack the deck against working people seeking justice in the face of employment discrimination. The NPRM will make it harder for workers who, for example, are fired for being transgender, or sexually harassed at work, or denied a promotion because they are Black, or retaliated against for asking for an accommodation because of a disability to seek and obtain redress for unlawful discrimination from EEOC.

The Commission proposes to provide employers (but not charging parties) with the following new information: (1) a summary of the facts and non-privileged information that the Commission relied on in its reasonable cause finding, and in the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, the criteria that will be used to identify victims from the pool of potential class members; (2) a summary of the

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Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts, as well as non-privileged information it obtained during the course of its investigation that raised doubt that employment discrimination had occurred; (3) the basis for any relief sought, including the calculations underlying the initial conciliation proposal; and (4) identification of a systemic, class, or pattern or practice designation. The Commission also proposes that employers must be provided at least 14 calendar days to respond to the initial conciliation proposal.[1]

The Proposed Rule is based on unsupported assumptions, does not provide appropriate time for notice and comment, contravenes legislative intent and Supreme Court precedent, fails to provide adequate cost-benefit analysis, ignores costs to workers and the Commission, fails to address EEOC's ongoing conciliation pilot program and is harmful not only to workers but also to EEOC's enforcement mission.

The Center strongly opposes this attempt by EEOC to upend its conciliation procedures and urges the EEOC to withdraw the rule.

I. The Rulemaking Process and Unsupported Assumptions Underlying the Proposed Rule Undermine the Integrity of the Rule

A. EEOC'S Decision to Pursue Rulemaking During a Pandemic With a 30-Day Comment Period Is Unconscionable

EEOC's decision to pursue rulemaking in the middle of a national pandemic, and to provide only 30 days for public comment, instead of the customary 60 days, casts doubt on the integrity of the administrative process and the legality of the NPRM.[2] The COVID-19 global pandemic has created an unprecedented public health crisis and widespread economic instability. Quarantine, social distancing, and widespread closures, combined with illness, economic insecurity, relocation, and loss of internet access create substantial barriers to the ability of members of the public—including working people affected by the change sought by the Proposed Rule—to submit comments at all, let alone in a timely manner. EEOC is well aware of these barriers but

[1] Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64079, 64080 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pts. 1601, 1626).

[2] The Administrative Procedures Act requires that agencies allow "interested parties and opportunity to participate." 5 U.S.C. § 553(c). EEOC has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

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nevertheless seeks to continue this rulemaking process, despite requests by NWLC and other civil, women's and workers' rights advocates for an extension.[3]

Moreover, the pandemic exposes and exacerbates existing inequities and economic insecurities that increase risk of discrimination and harassment at work. The pandemic and its economic repercussions are disproportionately impacting women, people of color, and other historically marginalized communities.[4] In a time of economic crisis, amidst a wave of anti-Asian bias, workers now face heightened risks of workplace discrimination, including discrimination based on sex, race, age, and disability, as well as retaliation, and the crisis has made concrete the ways in which the country is depending on the work performed largely by women and people of color.[5] The NPRM provides no explanation for why EEOC needs to depart from the requirements of EO 13563 and makes it almost impossible for workers who will be harmed by the NPRM—many of whom will not be able to obtain legal representation—to weigh in with the agency.[6]

B. EEOC's Justification for the Proposed Rule Is Baseless and Unsupported

The NPRM is a solution in search of a problem. EEOC claims the changes proposed by the NPRM are necessary in order to address "a widespread rejection of the [conciliation] process" by employers.[7] The agency estimates that one-third of employers who receive reasonable cause findings decline to conciliate.[8] But recent statistics show increased rates of resolutions reached through conciliation; and as EEOC acknowledges, 41.23% of conciliations were successful between FY 2016 and 2019.[9] EEOC's unsupported assertions about employer motivations

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[3] Letter from The Leadership Conference on Civil & Human Rights to Bernadette B. Wilson, Executive Officer, Executive Secretariat, United States Equal Employment Opportunity Commission (Oct. 21, 2020), https://civilrights.org/resource/extension-of-comment-period-for-rin-3046-ab19-update-of-commissions-conciliation-procedures/#.

[4] *Four Times More Women Than Men Dropped Out of the Labor Force in September*, NAT'L WOMEN'S LAW CENTER (Oct. 2, 2020) https://nwlc.org/resources/four-times-more-women-than-men-dropped-out-of-the-labor-force-in-september/.

[5] *Women on the Front Lines: Tracking Women's Employment in the COVID-19 Crisis*, NAT'L WOMEN'S LAW CENTER: RESOURCE COLLECTION, https://nwlc.org/resources/women-on-the-front-lines-tracking-womens-employment-in-the-covid-19-crisis/ (last visited Nov. 6, 2020).

[6] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *supra* at 2.

[7] Update of Commission's Conciliation Procedures, *supra* note 1, at 64079, 64080.

[8] *Id.*

[9] For FY 2012-2015, the rate was 40%. U.S. EQUAL EMP. OPPORTUNITY COMM'N, All Statutes (Charges filed with EEOC) FY 1997 - FY 2019 *https://www.eeoc.gov/enforcement/all-statutes-charges-filed-eeoc-fy-1997-fy-2019* (last visited Nov. 7, 2020); In a 2015 guidance document issued by the Agency, it painted a significantly more upbeat picture of the conciliation process, documenting that "the EEOC improved its rate of successful conciliations from 27% in fiscal year 2010 to 38% in fiscal year 2014. The successful conciliation rate for systemic cases in fiscal year 2014 is

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regarding conciliation, the lack of any discussion or evidence about workers' experiences, and the failure to address EEOC's ongoing conciliation pilot program all fatally undermine the justification for the NPRM.

The Proposed Rule is based on assumptions about employer behavior that are completely unsubstantiated. Foremost, the Commission assumes that the proposed changes will result in more successful conciliations and that the NPRM will "enhance efficiency and better encourage a negotiated resolution when possible" by giving employers a "better understanding of the EEOC's position in conciliation."[10] There is no evidence in the NPRM of any relevant data to assess the validity of these assertions, such as the number of conciliation proposals sent to employers within a period of time, the point at which they failed and why, interviews with employers to determine why they chose not to engage in the conciliation process, elements of a successful conciliation, numbers of charges settled through private settlement per year, the impact on EEOC's litigation program and monetary and injunctive relief and related benefits for charging parties if the Proposed Rule goes into effect, and other critical metrics.

While EEOC asserts that there are "various reasons" why an employer may decline to conciliate it concludes, without further discussion of these reasons or evidence, that data regarding conciliation "suggest" that all parties may not value the conciliation process,[11] and thus that the changes in the NPRM are necessary. But notably, the NPRM contains no discussion of any other parties. EEOC has failed to present any evidence in the NPRM of workers' perception of the conciliation process, or how the process might be improved or become more favorable to benefit charging parties. That is because EEOC is attempting to re-write the rules of the game for the benefit of employers who EEOC has found reasonable cause to conclude have discriminated against their employees. [12]

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even better -- with 47% of systemic investigations being resolved." The same document notes that "over 14,000 charges are settled with EEOC or through private settlements each year" and that in the cases where conciliation fails, EEOC has a "remarkable" record in court. In 2014, it achieved a favorable result in "approximately 90 percent of all district court resolutions." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-21, WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION (2015), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation.

[10] Update of Commission's Conciliation Procedures, *supra* note 1, at 64081, 64082.

[11] *Id.* at 64,080.

[12] Even JacksonLewis, a large employer-side law firm, in a recent article about the conciliation pilot program did not make this jump. While it did call the lack of information employers receive a "shortfall" it did not state that more information would lead to additional successful conciliations -- but rather wrote that under the current system, "the EEOC has successfully conciliated cause determinations." Nadine C. Abrahams, John M. Nolan & Paul Patten, *EEOC Looks to Increase Early Resolutions with Pilot Conciliation, Mediation Programs*, JACKSONLEWIS (July 8, 2020), https://www.jacksonlewis.com/publication/eeoc-looks-increase-early-resolutions-pilot-conciliation-mediation-programs.

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EEOC also has failed to explain how required disclosures of sensitive information to employers roadmapping the evidence and arguments against them would achieve the goal of preventing discrimination. The proposed mandatory disclosures put workers in an especially precarious position and could substantially increase the risk of retaliation—already the largest source of charges filed at EEOC.[13] The NPRM requires EEOC to disclose facts supporting the reasonable cause determination, which could include the identity of witnesses or other potential claimants, which will only be kept confidential if the witness makes a specific request. The effect will be to chill potential claimants and witnesses from reporting discrimination. Such an outcome is entirely at odds with the EEOC's mission.

Finally, the Proposed Rule is premature because it fails to take account of EEOC's ongoing conciliation pilot program. EEOC is attempting to change its conciliation procedures without any data from or analysis of the pilot program it created to determine whether changing conciliation procedures is even necessary.

On July 7, 2020, EEOC announced that it had initiated a six-month conciliation pilot program on May 29, 2020.[14] The Commission stated that the pilot, which is nationwide and not limited to one or two offices, "seeks to drive greater internal accountability and improve the EEOC's implementation of existing practices." However, the Chair unilaterally implemented these changes, without bringing them to a vote by the Commission's leadership,[15] and without rigorous consultation with or examination of the changes or their effects on all stakeholders. Moreover, EEOC has publicly disclosed virtually no information about the nature of the changes implemented pursuant to the pilot program.

Remarkably, EEOC drafted and sought approval for the Proposed Rule making changes to the conciliation process before it completed or evaluated its own conciliation pilot program, which is still in progress. Making changes to the conciliation process without this information is a waste of the Commission's resources; once the data is gathered and evaluated, it may suggest a different set of responses and changes.

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[13] In FY 2019, retaliation accounted for 53.8% of all charges filed with EEOC. Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.

[14] Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions#:~:text=The%20EEOC's%20conciliation%20pilot%2C%20which,for%20remedying%20complaints%20of%20discrimination.&text=More%20information%20is%20available%20at%20www.eeoc.gov.

[15] Paige Smith, *EEOC Chair Alters Pre-Lawsuit Process for Resolving Bias Claims,* BLOOMBERG LAW (June 1, 2020), https://news.bloomberglaw.com/daily-labor-report/eeoc-chair-alters-pre-lawsuit-process-for-resolving-bias-claims.

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EEOC has not indicated if it has a plan for how information from the pilot program is to be collected and assessed, or whether it will be made public. If EEOC has already collected and evaluated data from the pilot program, it has not said so publicly or provided the public with any notice of this evaluation; nor has it indicated that any data from the pilot program was relied upon for this rulemaking. At best this indicates a lack of transparency, which has been a hallmark of the agency under the Chair's leadership; at worst, it suggests an arbitrary preference for reforms that amount to a thumb on the scale for employers over evidence-based decision-making.

II. The Proposed Rule Contravenes Controlling Precedent and Seeks to Rewrite Title VII Absent Congressional Approval to Create a New Employer Defense

A. The Proposed Rule Is Contrary to Legislative Intent and Controlling Supreme Court Precedent

The Proposed Rule is contrary to the Supreme Court's 2015 decision in *Mach Mining, LLC v. EEOC,* which held that EEOC's statutory obligation to conciliate is subject to narrow judicial review and, most critically for this purpose, unanimously affirmed the importance given Title VII's intent, purposes, and structure of maintaining flexibility in the conciliation process so as to increase the chances of resolution.[16] The Proposed Rule, without justification or explanation, reverses EEOC's position from *Mach Mining*, which was affirmed by the Supreme Court, where the agency argued against regimented, cookie-cutter requirements for conciliation. The mandatory disclosures in the Proposed Rule closely track the information disclosures the employer in *Mach Mining* argued should be imposed on EEOC.[17] With this rulemaking, the agency is acceding to the business community's similar demands in that case – demands that were rejected by a unanimous Supreme Court.

In the *Mach Mining* decision, the Supreme Court rejected the employer's proposal, explaining that rather than requiring the Commission to conciliate through a rigid process, Title VII is centered on achieving substantive end results in eliminating unlawful discrimination from the

[16] *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480 (2015).
[17] *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480, 490–91 (2015). ("In every [conciliation] case, the EEOC must let the employer know the 'minimum ... it would take to resolve' the claim—that is, the smallest remedial award the EEOC would accept. Tr. of Oral Arg. 63. The Commission must also lay out 'the factual and legal basis for' all its positions, including the calculations underlying any monetary request. Brief for Petitioner 39. And the Commission must refrain from making 'take-it-or-leave-it' offers; rather, the EEOC has to go back and forth with the employer, considering and addressing its various counter-offers and giving it sufficient time at each turn 'to review and respond.'")

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workplace.[18] As such, the Supreme Court held that EEOC should maintain the wide latitude conferred by Congress in Title VII to guide individual conciliation processes.[19] Far from imposing an inflexible set of required disclosures, the Court reasoned, "every aspect of Title VII's conciliation provision smacks of flexibility."[20] The Court also observed that the employer's proposed judicial review process "flout[ed]" the manner in which Title VII meant to protect the confidentiality of the conciliation process.[21] As Title VII directs, "[n]othing said or done during and as a part of such informal endeavors [conciliation] may be made public by the Commission"[22] or in subsequent proceedings without the written consent of both parties; but the employer's requested review in *Mach Mining* would have necessitated disclosures about the conciliation in order for a court to assess its sufficiency. The same problem plagues this NPRM. Should it be finalized, it would almost certainly lead to litigation by employers challenging the sufficiency of the conciliation proceeding, which in turn would put the confidentiality of the conciliation in jeopardy.

The Proposed Rule distorts *Mach Mining's* recognition of the importance of flexibility in the conciliation process to conclude that EEOC has the "flexibility" to impose binding, one-size-fits-all mandates, thus burdening agency enforcement processes, exposing workers to retaliation from their employer, and giving employers outsized power in the process.

EEOC can hardly claim ignorance about the correct reading of *Mach Mining* or Congressional intent in crafting a flexible conciliation process. During an August 18, 2020, public meeting about the draft of the NPRM, Commissioner Charlotte Burrows put forward an amendment to the draft rule that was unanimously adopted by the Commissioners, which sought to clarify both the correct reading of *Mach Mining* as well as Congressional intent with regard to conciliation procedures in Title VII. Troublingly, despite this amendment, the Proposed Rule is still in conflict with the correct reading of *Mach Mining*.[23]

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[18] *Mach Mining*, 575 U.S. at 491 (2015) ("Its conciliation provision explicitly serves a substantive mission: to "eliminate" unlawful discrimination from the workplace. 42 U.S.C. § 2000e–5(b). In discussing a claim with an employer, the EEOC must always insist upon legal compliance; and the employer, for its part, has no duty at all to confer or exchange proposals, but only to refrain from any discrimination.").

[19] *Id.* at 495 ("[R]eflecting the abundant discretion the law gives the EEOC to decide the kind and extent of discussions appropriate *in a given case*."(emphasis added)).

[20] *Id.* at 492

[21] *Id.*

[22] 42 U.S.C.A. § 2000e-5 (West)

[23] Meeting of August 18, 2020 - Discussion of Notice of Proposed Rulemaking on Conciliation - Transcript, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/meetings/meeting-august-18-2020-discussion-notice-proposed-rulemaking-conciliation/transcript (last visited Nov. 9, 2020).

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B. EEOC Is Using the Regulatory Process to Create a New Defense For Employers Without Statutory Authorization

The Proposed Rule also entirely fails to acknowledge that the EEOC may also have to defend its conciliation process in cases brought by private individuals. For these cases, the NPRM provides employers an opportunity to require the individual or the EEOC to litigate about the EEOC's conciliation of the charge. This will be a drain on the agency's resources and could harm the cases brought by individuals who have been discriminated against.

The mandatory disclosures in the Proposed Rule will result in additional challenges to the Commission's conciliation efforts by litigious defendants and will in effect create a new defense for employers, circumventing and subverting *Mach Mining*.

In *Mach Mining* the Supreme Court indicated that EEOC was in charge of conciliation and had the latitude and flexibility to manage those efforts appropriately. It rejected the argument that employers could use the courts to closely scrutinize and second guess these processes. The mandatory nature of the disclosures and procedures in the Proposed Rule invite employers to bring motions attacking the manner and substance of EEOC's conciliation efforts before the case is even underway, delaying or foreclosing resolution of the merits of the claim. The proposed changes would result in additional litigation – and expenditure of agency resources -- and would undermine EEOC's statutory mission to protect workers from employment discrimination.

III. EEOC Has Failed to Provide an Adequate Cost-Benefit Analysis of the Proposed Rule, Ignoring the Costs to Victims of Discrimination and to the Commission

While EEOC focuses on the benefits of the NPRM to employers, and makes dubious assertions about the benefits to the economy, it conspicuously fails to provide sufficient economic analysis to quantify the costs of its proposal to working people and to the agency itself. In so doing, the Commission violates its responsibility to quantify costs and benefits of proposed regulations[24] and abandons its duty to the public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law.

[24] *See* Exec. Order 13563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, at 18-27 (2003).

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EEOC calculates an estimated $4 million per year cost saving to employers if it successfully conciliates 100 more cases per year pursuant to the proposed changes.[25] It bases this calculation on the likelihood that out of every 100 cases where conciliation is unsuccessful, half will be litigated. EEOC estimates that of that half, it will bring 10% of those cases. It estimates that 40% of the cases with a cause finding will be litigated by a private attorney, yet attempts to estimate the cost of litigation *only for the employer.* EEOC admits in a footnote that its analysis "focuses only on an employer's litigation costs" but fails to justify why that is the case.[26]

To add insult to injury, EEOC then relies on a trickle-down economics theory to claim that this cost-saving will "benefit the economy as a whole" with nary an explanation as to how, beyond the vague claim that employer cost-savings can be put towards "expanding business and hiring more employees."[27] EEOC has not attempted quantify this supposed benefit to the economy as a whole, nor has it put forward any evidence in support of its conclusion that employers who avoid discrimination litigation hire more employees as a result.

EEOC also claims the agency will offset costs because if the agency issues fewer right to sue notifications as a result of more successful conciliations, it will not have to spend money responding to charging parties' FOIA requests for their files.[28] First, the agency could decide to disclose a charging party's file without a FOIA request, saving money by streamlining and normalizing the system for disclosing information to a charging party. Second, EEOC did not support its claim by providing an estimate of how much it would save on FOIA costs due to the NPRM.

The Commission's failure to include a quantitative analysis of the costs and benefits of the proposed rule in its NPRM runs counter to standard practice and multiple rulemaking authorities. This failure alone could render the agency's actions arbitrary and capricious, in light of its duties to both consider and publicize the likely effect of the proposed rule on working people and the agency itself.[29] It is all the more galling given that EEOC is rushing this NPRM with a 30-day comment period, allowing inadequate time for independent review, analysis, and feedback.

A. The Proposed Rule Will Impose Significant Costs and Negative Impacts on Workers

[25] Update of Commission's Conciliation Procedures, *supra* note 1, at 64082.
[26] Update of Commission's Conciliation Procedures, *supra* note 1, at 64084, footnote 12.
[27] Update of Commission's Conciliation Procedures, *supra* note 1, at 64082.
[28] Update of Commission's Conciliation Procedures, *supra* note 1, at 64081.
[29] *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'" (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009))); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

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The Proposed Rule will impose significant monetary costs and other negative impacts on workers who have experienced discrimination, by skewing the conciliation process in favor of employers, potentially prolonging the conciliation process through litigation challenging the sufficiency of conciliation procedures, and increasing the risk of retaliation for those workers by exposing details of these individuals' identity and allegations to the employer – potentially making workers less likely to challenge discrimination at all in the future. Individuals not represented by counsel will be at a particular disadvantage, as they depend on EEOC to protect their interests and move a timely resolution forward.

All of this comes at a financial cost by making remedies for discrimination less available. Discrimination severely undercuts worker earnings. For example, in 2016, the estimated total impact of the unexplained causes of gender wage inequality, presumed to be attributable to discrimination, resulted in $303.7 billion in wage differences between women and men. Or, put another way, more effective anti-discrimination enforcement of equal pay laws alone could result in increased earnings to women up to $300 billion per year.[30] EEOC should not be proposing rules which will hurt working people who have experienced discrimination and make it more difficult for the agency to carry out its enforcement duties.

This Proposed Rule will also harm workers by delaying redress for discrimination. Employers who are the subject of a reasonable cause determination will be able to prolong the conciliation process by challenging the sufficiency of the required disclosures at every turn and refusing to cooperate for months by dragging their feet, and blocking efforts – even if they do not outright refuse to comply with demands – and then could litigate the issue of EEOC's conciliation process in court. The NPRM would turn back the clock to the days before the Supreme Court's *Mach Mining* decision, discussed in Section II(A). In fact, the *Mach Mining* case itself is an illustrative example of the dangers the NPRM poses for workers.

In *Mach Mining*, the EEOC brought suit on behalf of women were denied work in a coal mine based on their sex. [31] EEOC alleged a pattern or practice of discrimination at the employer at least since January 2006.[32] The case reached the Supreme Court in 2015, but the merits of the underlying claim were not at issue. Instead, the litigation had been snarled for years in a dispute about the sufficiency of EEOC's conciliation processes; as several women's rights

[30] WASHINGTON CENTER FOR EQUITABLE GROWTH, GENDER WAGE INEQUALITY 46 (2018), https://equitablegrowth.org/research-paper/gender-wage-inequality/.
[31] Irin Carmon, *Sex Discrimination Before the Supreme Court*, MSNBC (Jan. 12, 2015, 11:31 PM), https://www.msnbc.com/msnbc/sex-discrimination-the-supreme-court-msna503471.
[32] *E.E.O.C. v. Mach Min.*, LLC, No. 11-CV-879-JPG-PMF, 2013 WL 319337, at *1 (S.D. Ill. Jan. 28, 2013), rev'd, 738 F.3d 171 (7th Cir. 2013), vacated and remanded sub nom. *Mach Mining, LLC v. E.E.O.C.,* 575 U.S. 480, 135 S. Ct. 1645, 191 L. Ed. 2d 607 (2015).

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organizations, including the Center, argued in their 2015 amicus brief in support of the women, "justice delayed is justice denied."[33] The women who were illegally denied employment eventually settled the case in 2017 – over a decade after the discrimination first occurred.[34] For those women, there is no getting back the years of their lives they spent waiting for justice and no way to fully recoup their economic losses or to quantify the pain they endured while their lives were on hold as the result of a protracted legal battle on a matter ancillary to the harm they experienced. This NPRM would ensure that many other workers find themselves shouldering similar costs and harms.

The proposed changes to the conciliation process will also harm workers by giving employers an enormous amount of information from EEOC, including confidential information related to potential litigation strategy– and thereby an enormous amount of power to manipulate the process without even committing to a resolution of the case. In the NPRM, disclosures to the employer are mandatory. Disclosures will be made to charging parties only if they request, and many will not know to make a request. The employer must be given at least 14 days to respond. There is no such protection for the charging party when it comes to windows of time or timelines to respond to employers' offers.

This revised process virtually ensures that employers will be able to mount a stronger legal defense to any case brought by EEOC or the private plaintiff in litigation if they do not reach a successful resolution in conciliation. This would ultimately result in fewer successful litigation related resolutions for EEOC, and by extension the workers who are relying on EEOC's litigation program to help them achieve justice.

EEOC's public litigation also has an important preventative effect on discrimination by employers. The NPRM fails to account for the costs of additional discrimination that is likely absent the deterrent effect of public EEOC litigation. While conciliation is typically confidential, EEOC files a press release with each new case, and litigates in the public view. EEOC also issues press releases when it resolves matters through consent decrees. In these ways, EEOC litigation is an educational and outreach tool and may lead other employers to change practices, or to conclude that discrimination does not pay. Public enforcement activities have been shown to have a preventative impact with regard to other workplace protections. In a groundbreaking

[33] Brief for Women's Rights Organizations & Individuals as Amici Curiae Supporting Respondents, Mach Mining, LLC v. E.E.O.C., 575 U.S. 480 (2015), https://www.legalmomentum.org/amicus-briefs/mach-mining-v-equal-employment-opportunities-commission; Irin Carmon, *Sex Discrimination Before the Supreme Court*, MSNBC (Jan. 12, 2015, 11:31 PM), https://www.msnbc.com/msnbc/sex-discrimination-the-supreme-court-msna503471.
[34] Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, Mach Mining and Affiliated Companies to Pay $4.25 Million to Settle EEOC Sex Discrimination Suits (Jan. 25, 2017), https://www.eeoc.gov/newsroom/mach-mining-and-affiliated-companies-pay-425-million-settle-eeoc-sex-discrimination-suits.

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research paper, academic Matthew Johnson found that publicizing the Occupational Safety and Health Administration's findings of safety and health violations led other facilities to improve compliance and experience fewer injuries.[35]

This Proposed Rule will also severely increase the risk of retaliation to workers – already a serious problem – which in turn would make workers in need of help less likely to report discrimination to EEOC. Discrimination carries many potential costs for which EEOC does not account. Employment discrimination wastes money because it leads to employers not obtaining the best talent and experiencing unnecessary and costly worker turnover. Discrimination also imposes economic and non-economic costs on workers in the form of lost wages and benefits, out of pocket medical expenses, costs associated with job searches, and costs related to negative mental and physical health consequences of discrimination. The Proposed Rule fails to address these significant costs to workers.

B. The Proposed Rule Will Impose Significant Costs on EEOC and Undermine Its Enforcement Mission

EEOC observes that "the proposed rule imposes no direct costs on any third parties and only imposes requirements on the EEOC itself." Yet EEOC fails to acknowledge that the significant new requirements imposed by the Proposed Rule will undermine, and divert scarce resources away from EEOC's enforcement activities, thus harming the working people whom the EEOC is intended to serve.

The mandated disclosures in the Proposed Rule will expend scarce agency resources. Preparing and providing the required extensive disclosures to employers will result in a heavy burden on EEOC enforcement staff and divert resources away from enforcement activities. EEOC is also considering allowing such disclosures to be made orally as well as in writing. Oral disclosures leave no record, perpetuating lack of transparency about communications between the agency and respondents, to the detriment of charging parties. This could also undermine efforts to defend EEOC's conciliation efforts in litigation employers will likely bring to challenge conciliation efforts.

The Proposed Rule would jeopardize EEOC's enforcement activities by requiring EEOC to turn over its factual and legal analysis and strategy to every respondent during conciliation, risking waiver of EEOC's deliberative process and attorney-client privileges over confidential pre-

[35] Matthew S. Johnson, Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws, 110 AM. ECON. REV. 1866 (2020), *https://www.aeaweb.org/articles?id=10.1257/aer.20180501.*

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litigation strategy discussions.[36] The privileges help facilitate candid discussions within the Commission and its investigators' consultation with the Commission's attorneys. Requiring EEOC to potentially reveal its internal deliberations and legal arguments as part of these disclosures will significantly undermine the strength of the Commission's legal position – and thus a worker's ability to obtain redress for unlawful discrimination. And the potential waiver of privilege not only harms the agency in the context of a particular case but also in subsequent cases and litigation, where respondents likely will be able to successfully challenge privilege assertions. The Proposed Rule should at minimum have made clear that such information need not be produced as part of the disclosures to employers following a reasonable cause determination.

The Proposed Rule's mandated disclosures also will undermine EEOC's ability to pursue systemic or class litigation on behalf of classes of harmed individuals.[37] Under the proposed rule, the EEOC must disclose the names of potential victims in class cases. At times, EEOC finds a violation of the law based on an illegal policy or practice and then identifies the full universe of victims of the policy or practice only through the litigation process. However, the NPRM requires EEOC to provide information up front as to how they will identify class members, including the claims process that will be used subsequently to identify aggrieved individuals and the criteria that will be used to identify victims from the pool of potential class members. This stage – determining who the victims are and naming them – is one that normally happens after liability is determined or the case is settling. Requiring EEOC to make this disclosure when it has not had the chance to go through discovery almost ensures that individuals may be left out. Employers, armed with the new rule on conciliation, will argue that newly found individuals are not entitled to relief, creating another round of costly litigation and potentially denying relief to claimants whose rights have been violated.

As a result of the disclosures required by the Proposed Rule, charging parties are more likely to feel compelled to settle, and for lower amounts, because the respondent employer will have significant additional leverage. The Proposed Rule and disclosures also may result in more

[36] David Lopez, *EEOC Proposed Regulation Would Impede Its Ability to Combat Workplace Discrimination*, THE HILL: CONGRESS BLOG (Aug. 20, 2020, 7:00 PM), https://thehill.com/blogs/congress-blog/politics/513015-eeoc-proposed-regulation-would-impede-its-ability-to-combat.

[37] For example, if an employer fails to accommodate pregnant women but accommodates others who need short-term modifications to their work, that would violate federal civil rights laws. In that case, EEOC may use letters or other outreach efforts to identify and locate victims of the illegal policy. It would not make sense for EEOC to engage in those efforts before knowing if the employer is willing to change their policy or provide damages. In such a case, conciliation efforts may take years before EEOC could file suit. If pre-litigation resolution fails, EEOC could file suit and subsequently work to locate the victims at the appropriate time, likely after several stages of the case including motions to dismiss or in some cases, summary judgment. It is not feasible to alert the employer to all of the harmed individuals during the conciliation or pre-litigation process.

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settlements focused on individual relief, leading EEOC to address multiple individual charges against the same employer in isolation without addressing the underlying discriminatory practices, instead of obtaining wide ranging changes through systemic litigation.

This requirement can also create enormous delays in the process, and the deep involvement of EEOC's legal team to advise the investigators, even before there is any indication that an employer might be interested in changing its policy or resolving the case. In the event that the matter does not resolve during conciliation, it also tips EEOC's hand as to its litigation strategies in some of its most important cases, and encourages employers not to settle those cases until and unless all of the victims are found and named --- all before litigation ensues. This will take up vast resources at EEOC, again, potentially for matters that some employers will have no interest in resolving.

Incentivizing conciliation at the expense of EEOC's litigation efforts greatly harms EEOC's mission to use its litigation to educate the broader employer community about their obligations and to inform workers about their rights. EEOC's litigation program is a vital lever to encourage employers to prevent discrimination, come into compliance, and resolve matters to avoid being the target of litigation efforts. Significantly, conciliations are typically confidential resolutions. Litigation, in contrast, can play an important role in raising public awareness, educating the judiciary and encouraging progressive legal change.[38]

For these reasons, the National Women's Law Center opposes this harmful and unnecessary Proposed Rule and strongly urges EEOC to withdraw it.

Sincerely,

Sarah David Heydemann
Senior Counsel for Education & Workplace Justice

[38] Robert D. Friedman, Comment, *Confusing the Means for the Ends: How a Pro Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. Pa. L. Rev. 1361, 1366 (2013) ("Without being able to point to previous prevailing plaintiffs, an employee loses significant leverage when bargaining with her employer. Similarly . . . an employee reviewing a largely undeveloped caselaw will find it harder to assess the degree of risk involved when deciding whether to reject a settlement."); see also, generally, Kaitlin Owens, Women's Legal Education and Action Fund, *This Case Is About Feminism: Assessing the Effectiveness of Feminist Strategic Litigation* (2020) (on file with authors) (identifying metrics used to determine whether a case has had the desired impact, based upon interviews with activists engaged in feminist strategic litigation; at pp 40-41 "Even where litigation does not immediately bring about a change in law, it produces a narrative which may uplift issues in the public imagination.")

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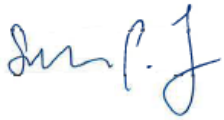

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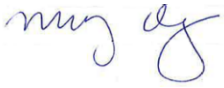

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