



**STATEMENT OF MAYA WILEY, PRESIDENT AND CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY**

**HEARING ON “STANDING UP FOR THE RULE OF LAW: ENDING ILLEGAL RACIAL
DISCRIMINATION AND PROTECTING MEN AND WOMEN IN U.S. EMPLOYMENT
PRACTICES”**

June 27, 2024

Chair Comer, Ranking Member Raskin, and members of the committee: My name is Maya Wiley, and I am the president and CEO of The Leadership Conference on Civil and Human Rights, a diverse coalition of more than 240 national organizations working to build an America as good as its ideals; ideals the majority of Americans support — an America that values all her people and recognizes and reckons with its past in order to form a more perfect union and vibrant democracy for all time. We work to ensure that no group of people is excluded from its promise of having a voice in our government, real economic, educational, and societal opportunities, and the ability understand and solve our problems together.

Since our founding in 1950, The Leadership Conference has helped to secure the passage of every major civil rights law, from the Civil Rights Acts of 1957 and 1964, to the Americans with Disabilities Act, and many more. As we celebrate the sixtieth anniversary of the historic and ground-breaking Civil Rights Act of 1964, we remember that it survived a sixty-day filibuster, the nation’s longest and most infamous, designed to block protections from discrimination based on race, color, national origin, gender, and religion in employment, education, health care, and much more. Seventy-three Senators, a bipartisan group, understood the importance of this landmark legislation and ultimately passed it. Unfortunately, both since our founding, and after passage of the Civil Rights Act, we have constantly had to defend the protections and progress we have made, which has been real and meaningful and also insufficient.

The so called “war on woke” is a danger to democracy and to all the progress we have made as a society that has benefited us all. These forces of extremism have grown more bold in recent years. They pretend to be sensible defenders against “woke” radicals. They are the radicals who are waging war on our civil rights. The attacks are based on misinformation, out-right fear mongering, and the desire to take us back to the 1950s, when Black people were segregated, women denied equal rights, and LGBTQI people prosecuted for who they were. It is radical extremism to deny history, to try and block the collection of health data, and block anti-discrimination protections the majority of people in this country believe in and support. It is a war on books by and about people of color and LGBTQ people, and on our rights to determine our own identities and celebrate them. It is a war on learning our history, including our history of slavery and racism, and a war on educational opportunities that develop the critical thinking skills and

values of diversity that support a vibrant and inclusive education and democracy itself. It is also a war on private employers working to grow their businesses and the economy in proven ways, including DEIA programs, and it has become a call to gut government's ability to play its critical enforcement of civil rights laws that have only created progress for everyone, especially those most marginalized by historical and current day discrimination. The war on data collection and understanding and attending to disparities is tantamount to a war on science, inquiry, problem solving, and unity. Those who have declared a "war on woke" are waging a war on all of our civil rights and our democratic values and distract us from their extremism by sowing fear and division.

The facts are the Civil Rights Act of 1964, along with other civil rights laws, helped to increase Black life expectancy. Civil rights laws and their enforcement are a factor in health outcomes.¹ We cut the seven-year gap in the life expectancy of Black Americans compared to white Americans to just over three years. That progress has stalled since 2012 and calls our attention to more work to do to collect data, create programs, and develop resources and practices to ensure that we address gaps in life expectancy by race as well as other measures. While Black and Native American and Pacific Islander women have significantly higher rates for pregnancy related deaths, those who have declared a "War on Woke" have demanded that local, state, and federal governments stop collecting data or developing programs to address real, group-based health disparities. That will take us backward not forward.

Through Title VII of the Civil Rights Act, enforcement against employment discrimination has helped to reduce the gender and racial pay gaps, yet we know we have significantly more work to do to continue to ensure equal pay for equal work and fairness in the workplace. Between 2010 and 2018, the Equal Employment Opportunity Commission (EEOC) received one million complaints of discrimination. That means we need more attention to what is happening in the workplace, not less.

We have made meaningful progress on protecting people's ability to embrace and celebrate their identities with dignity and without discrimination, including gender identity. The US Supreme Court has, importantly, recognized that prohibitions against gender discrimination include a prohibition against employers firing or refusing to hire, or otherwise mistreat people, based on their sexual orientation or gender identity. We know that transgender people, particularly transgender women of color, face deep discrimination and are vulnerable to sexual violence and murder, yet data collection and attention to their safety is lacking. In fact, the very rise in hate crimes and incidents, as we reported in our report, Cause for Concern,² based on federal law enforcement data, rates that are at historic highs despite lower reporting from local law enforcement, demonstrate that our societal work to combat hate and discrimination not only continues, it is a rising priority to protect and preserve the gains we have made in making this union more perfect.

Today's hearing demonstrates the critical need for a fact-driven and values-based discussion on how we enforce actively our civil rights laws and engage in meaningful discussion about expanding them to protect marginalized communities including communities of color, women of all races, LGBTQI people, people with disabilities of all races, the elderly, religious minorities, and immigrants of color. This hearing was noticed the day after Juneteenth and is being held as we mark the 60th anniversaries of the Civil Rights Act of 1964 and Freedom Summer, Immigrant Heritage month, and as most people celebrate

LGBTQI Pride Month, and also as we mark the second anniversary of the *Dobbs* ruling.³ These anniversaries and the persistence of racial, gender, and other disparities call us to elevate and confront critical realities.

First, as most people recognize, a diverse and inclusive workforce benefits everyone. It is consistent with our highest ideals that say everyone should have an equal chance to succeed — no matter their background. Diverse workforces foster innovation, productivity, and growth, benefiting employers and the economy as a whole. Diversity advances our global competitiveness, our national security, and the health of our democracy. And studies show that companies with diverse workforces are more innovative, productive, and profitable.⁴

Second, there is a compelling need for taking action that removes barriers to equal opportunity. Despite the progress our country has made, significant disparities persist in education, employment, health, housing, and business ownership. While the number of Black college graduates has increased, workplace segregation has worsened.⁵ Black people remain in lower wage jobs and less lucrative industries compared to white people with similar levels of education.⁶ Black and Latino workers face higher unemployment rates and lower wages than white workers.⁷ And women and people of color remain underrepresented in leadership positions across industries.⁸

Third, DEIA programs are legal under Title VII. The *Students for Fair Admissions*⁹ decision did not change the legal standards under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981.¹⁰ Courts have previously upheld diversity statements, anti-bias training, aspirational goals, and targeted recruiting programs against a variety of challenges.¹¹ Several members of the EEOC have reaffirmed that these programs remain lawful.¹² So have numerous state attorneys general.¹³ And many anti-equity cases are being thrown out of court.

Fourth, DEIA programs are popular. Business leaders and the general public¹⁴ support DEIA policies in higher education, the workplace, government, and corporate America.¹⁵ Prospective employees seek employers that invest in DEIA.¹⁶ And a majority of workers say focusing on increasing diversity, equity, and inclusion at work is a good thing.¹⁷

There would be consequences to abandoning the goal of diverse workforces and rolling back DEIA programs in the form of increased turnover, lower morale, public backlash, and more exposure to civil rights lawsuits.¹⁸ It would worsen existing inequities and undermine our nation's competitiveness and prosperity. For these reasons, we recently called on President Biden to vigorously defend DEIA programs, in a letter I have included with my testimony,¹⁹ and we call upon Congress to do the same.

Finally, to ensure a diverse and inclusive workforce, Title VII must be protected and robustly enforced. It is important to preserve the EEOC's updates to Title VII enforcement guidance, which help employers comply with civil rights laws, break down unfair barriers to opportunity, and ensure inclusive environments where everyone can succeed.

We continue to see the real-life consequences of discrimination and harassment on a constant basis to this day. In just the past 10 days, the EEOC settled a case where a Black employee was fired because of his own race and because he reported discrimination against women and Hispanic employees.²⁰ It settled another against a grocery store chain after a male supervisor subjected a female employee to a sexually hostile work environment, and the company violated her rights under the Americans with Disabilities Act.²¹ And it resolved a suit against a trucking company that revoked an employee's religious accommodation to have Saturdays off, likened him to a terrorist, and mocked his religious beliefs.²²

The EEOC guidances include its recent one on harassment in the workplace,²³ which clarifies Title VII protections based on sexual orientation, gender identity, and sex characteristics. We support²⁴ the guidance's express recognition of the right of LGBTQI people to go to work as themselves, without discrimination and harassment. It follows the Supreme Court's *Bostock* decision and subsequent rulings, which affirm that Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity. It is especially important as a record-breaking 580+ anti-LGBTQI state bills were introduced in 2023, many of which threatened workers' rights to feel safe at work. The guidance also ensures workers of color, older workers, immigrant workers, survivors of gender-based violence, and others can do their jobs in a safe and respectful workplace.

Opponents of civil rights have always tried to reinforce barriers to opportunity for Black, Latino, Indigenous, Asian American, and other people of color; women; LGBTQI people; and people with disabilities. Those who would turn back the hands on the clock of history to a time when discrimination ran rampant ask us to abandon our national principles, our national progress, and our shared future. We must remain steadfast in support for DEIA and keep working towards a more just and prosperous future for all.

Thank you for inviting me to testify today. I am pleased to answer any questions you may have.

¹ Hahn RA, Truman BI, Williams DR. Civil rights as determinants of public health and racial and ethnic health equity: Health care, education, employment, and housing in the United States. *SSM Popul Health*. 2018 Apr;4:17-24. doi: 10.1016/j.ssmph.2017.10.006. PMID: 29250579; PMCID: PMC5730086.

² *Cause for Concern 2024: The State of Hate (Updated May 2024)*, THE LEADERSHIP CONF. ON CIV. & HUM RTS. (May. 13, 2024), <https://civilrights.org/edfund/resource/2024-the-state-of-hate-updated/#>

³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴ Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 208 (2009); Cedric Herring, *Is Diversity Still a Good Thing?*, 82 AM. SOC. REV. 868 (2017) (updating and reinforcing this analysis); Dame Vivian Hunt, et al., *Why Diversity Matters?*, MCKINSEY & CO. (Jan. 1, 2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters>; MCKINSEY & CO., *DIVERSITY WINS: HOW INCLUSION MATTERS* 20 (2020), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf>; David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, HARV. BUS. REV. (Nov. 4, 2016); William J. Holstein, *Diversity is Even More*

Important in Hard Times, N.Y. TIMES (Feb. 13, 2009) (“[I]t’s difficult, if not impossible, for [a] homogenous board to challenge and offer different perspectives, unique experiences and the broad-based wisdom that makes the board, and therefore the company, as effective as they can be.”); Roger C. Mayer et al., *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 FIN. MGMT. 617 (2018); Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> (describing a 2006 study that found racially diverse groups were more thorough, careful, communicative, and open minded in an effort to reach consensus than racially homogenous groups); Rocío Lorenzo, et al., *How Diverse Leadership Teams Boost Innovation* (Jan. 23, 2018), <https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation>.

⁵ Ashley Jardina, et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers*, NAT’L BUREAU OF ECON. RESEARCH (Aug. 2023), <https://doi.org/10.3386/w31641>.

⁶ *Id.*

⁷ REBECCA DIXON & AMY TRAUB, *DESEGREGATING OPPORTUNITY: WHY UPROOTING OCCUPATIONAL SEGREGATION IS CRITICAL TO BUILDING A GOOD-JOBS ECONOMY* (2024), <https://www.nelp.org/app/uploads/2024/05/Desegregating-Opportunity-May-2024.pdf>.

⁸ Tina Shah Paikeday et al., *How to Fix the C-Suite Diversity Problem*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 25, 2023),

<https://corpgov.law.harvard.edu/2023/02/25/how-to-fix-the-c-suite-diversity-problem/#:~:text=The%20headline%20finding%20is%20that,in%20most%20C%2Dsuite%20positions>.

⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

¹⁰ 42 U.S.C. §§ 2000e to 2000e-17 (2012); 42 U.S.C. § 1981 (1991).

¹¹ See *The Economic Imperative to Ensure Equal Opportunity*, NAACP LEGAL DEFENSE FUND (Feb. 1, 2024), <https://www.naacpldf.org/wp-content/uploads/2024-02-01-Aff-Axn-Economic-Guidance-2.pdf>.

¹² See Kalpana Kotagal, *Workplace DEI Breaks Down Barriers With Flexible Benchmarks*, BLOOMBERG LAW (June 10, 2024, 4:30 AM), <https://news.bloomberglaw.com/us-law-week/workplace-dei-breaks-down-barriers-with-flexible-benchmarks>.

¹³ *Attorney General Raoul Leads Coalition Of Attorneys General Defending Diversity Initiatives Against Unfounded Attacks*, OFF. OF THE ILL. ATT’Y GEN. (June 20, 2024), <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-leads-coalition-of-attorneys-general-defending-diversity-initiatives-against-unfounded-attacks62024>

¹⁴ *Most Americans approve of DEI, according to Post-Ipsos poll*, THE WASHINGTON POST, (June 18, 2024, 6:00 AM), <https://www.washingtonpost.com/nation/2024/06/18/affirmative-action-dei-attitudes-poll/>.

¹⁵ A recent Harris Poll commissioned by the Black Economic Alliance Foundation found that a majority of people surveyed believe that corporations should take active steps to ensure their businesses reflect the diversity of the country. Press Release, Black Econ. Alliance Foundation, *New Poll by The Black Economic Foundation/The Harris Poll: Corporate Diversity Initiatives Overwhelmingly Supported Across Racial, Ideological, and Generational Lines* (Aug. 23, 2023), <https://foundation.blackeconomicalliance.org/press-release/new-poll-by-the-black-economicalliance-foundation-the-harris-poll-corporate-diversity-initiatives-overwhelmingly-supported-across-racial-ideological-and-generational-lines/>. A majority of workers think DEI is a good thing. Rachel Minkin, *Pew Research Ctr., Diversity, Equity and Inclusion in the Workplace* (2023), <https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/#:~:text=6%25>). Americans’ top-of-mind reactions to the term *affirmative action* are also generally positive. Frank Newport, *Affirmative Action and Public Opinion* (Aug. 2020),

¹⁶ See, e.g., Carolyn Crist, *Half of job seekers say DEI is a major factor in deciding where to work*, HRDIVE (Sept. 11, 2023), <https://www.hrdiver.com/news/workers-see-dei-as-a-major-factor-in-job-decisions/693260/>.

¹⁷ Minkin, *supra* note 14.

¹⁸ See, e.g., Paige McGlaufflin & Joseph Abrams, *Companies are ‘diversity ditching’ which could have long-term consequences on employee retention*, FORTUNE (July 31, 2023, 8:18 AM), <https://fortune.com/2023/07/31/diversity-ditching-retention-labor-market-workforce/>.



¹⁹ *Leadership Conference Letter to President Biden in Support of DEIA*, THE LEADERSHIP CONF. ON CIV. & HUM RTS. (June 18, 2024), <https://civilrights.org/resource/leadership-conference-letter-to-president-biden-in-support-of-deia/#>.

²⁰ Press Release, *Iron Hill Brewery to Pay \$115,000 in EEOC Race Discrimination and Retaliation Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 18, 2024), <https://www.eeoc.gov/newsroom/iron-hill-brewery-pay-115000-eeoc-race-discrimination-and-retaliation-lawsuit>.

²¹ Press Release, *Weis Markets to Pay \$75,000 in EEOC Sexual Harassment, Disability Discrimination Suit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 18, 2024), <https://www.eeoc.gov/newsroom/weis-markets-pay-75000-eeoc-sexual-harassment-disability-discrimination-suit>.

²² Press Release, *Wheeler Trucking to Pay \$65,000 to Resolve EEOC Discrimination and Retaliation Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 21, 2024), <https://www.eeoc.gov/newsroom/wheeler-trucking-pay-65000-resolve-eeoc-discrimination-and-retaliation-lawsuit>.

²³ *Enforcement Guidance on Harassment in the Workplace, No. 915-064*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

²⁴ *Comments in Support of the EEOC's Proposed Enforcement Guidance on Workplace Harassment*, THE LEADERSHIP CONF. ON CIV. & HUM RTS. (Nov. 1, 2023), <https://civilrights.org/resource/comments-in-support-of-the-eeocs-proposed-enforcement-guidance-on-workplace-harassment/>.

APPENDICES

- A. The Leadership Conference on Civil and Human Rights: Letter to President Biden in Support of DEIA
- B. Civilrights.org blog: Why Protecting Diversity, Equity, Inclusion, and Accessibility Is a National Imperative
- C. The Leadership Conference on Civil and Human Rights: Letter to EEOC on Priorities
- D. The Leadership Conference on Civil and Human Rights: Comments on EEOC on Proposed Enforcement Guidance on Harassment in the Workplace



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AAJC

President and CEO

Maya Wiley

June 18, 2024

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear President Biden,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, and the 142 undersigned organizations, we urge you to promote, protect, and strengthen programs that achieve diversity, equity, inclusion, and accessibilityⁱ (DEIA) for private employers and government entities.ⁱⁱ These crucial initiatives seek to remedy past and ongoing racial discrimination, which is often compounded by other forms of discrimination and inequity based on sex, disability, age, or national origin, and ensure that the nation can reap the benefits of diversity, equity, inclusion, and accessibility in our economy and across our society.ⁱⁱⁱ It is not possible for businesses to maximize profit and shareholder value, for federal contractors and private employers to comply with the law, for individual employees to reach their full potential, or for federal agencies to fulfill their mandates, without also pursuing diversity, equity, inclusion, and accessibility. This pursuit is vital to economic growth – while underscoring key American values of equal opportunity, freedom, and fairness.

Diversity, Equity, Inclusion, and Accessibility (DEIA) Programs Are Lawful and Help Ensure Compliance with Civil Rights Laws.

For more than 150 years, federal law has recognized and explicitly prohibited racial discrimination in business arrangements. Signed 125 days after the ratification of the 13th Amendment to the Constitution, the Civil Rights Act of 1866^{iv} made clear that the federal government has a responsibility to affirmatively ensure that Black people and other people of color can fully participate in the nation's economy. Building upon and expanding that basic principle, Congress passed Title VII of the Civil Rights Act of 1964^v nearly 100 years later. Since then, the march of progress has moved forward, even while it has been too slow and incomplete.^{vi}

Today, civil rights laws require employers to provide employees with safe work environments free from discrimination, harassment, and intimidation. As you rightly recognized in signing Executive Order 14035, DEIA strategies help employers meet their

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obligations under these laws^{vii} by enabling them to identify and remedy individual and systemic barriers to opportunity. In this way, DEIA strategies contribute to better working conditions and facilitate compliance with these obligations.^{viii}

Congress has charged federal agencies with advancing these same goals and a whole-of-government commitment is therefore needed.^{ix} While the Department of Justice, Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs (OFCCP) play critical roles in enforcing federal employment nondiscrimination laws and policy,^x other agencies have mandates that require the advancement of diversity, equity, inclusion, and accessibility principles to fulfill their missions. For example, the Department of Commerce is responsible for creating the conditions for economic growth and opportunity for all communities;^{xi} and the Small Business Administration helps Americans start, grow, and build resilient businesses.^{xii} The Department of Labor can use multiple levers, in addition to enforcement of nondiscrimination laws through OFCCP, to promote, and develop the welfare of all wage earners, job seekers, and retirees.^{xiii} DEIA strategies contribute to the work and success of all of these federal agencies.^{xiv}

Unfortunately, opponents seek to manipulate and weaponize civil rights law and the tools of racial progress to maintain white supremacy and reverse the gains we have made toward an America that lives up to its ideals as a nation.^{xv} In addition to disregarding or misrepresenting the well-established role of the federal government in promoting equal economic opportunity, opponents of racial progress have mischaracterized the Supreme Court's June 2023 decisions in *Students for Fair Admissions (SFFA) v. Harvard College/University of North Carolina (UNC)* in a cynical effort to advance a longstanding agenda of economic exclusion and discrimination. The Supreme Court's decisions do not change employers' duty to create workplaces free from discrimination, including through efforts designed to achieve diversity, equity, inclusion, and accessibility.^{xvi} Employers should double down on creating opportunities for all – and the federal government must demonstrate leadership and provide clarity to that end.

Ensuring Diversity, Equity, Inclusion, and Accessibility in Our Economy Benefits Marginalized Communities, Individual Businesses, and the Nation as a Whole.

The vast majority of Americans across racial, ideological, and generational lines agree that corporate America should reflect the racial diversity of America, businesses should take active steps to make sure that companies reflect America's racial diversity, and racial diversity in business leads to greater profitability and innovation.^{xvii} As the American public has correctly recognized, racial diversity is good for business.^{xviii}

However, race-based barriers to wage equality, credit access, and educational opportunity continue to hinder economic progress. The widespread effects of ongoing discrimination contribute to the problem of occupational segregation, in which Black workers are overrepresented in lower paying and higher risk industries.^{xix} Racial disparities in hiring, promotion, and pay persist at significant cost to individuals, families, and the economy as a whole.^{xx} From evidence that *low*-credit risk businesses with Black and Latino owners were approved for full financing at nearly the same rate as *high/medium*-credit risk white-

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owned firms,^{xxi} to the ongoing overwhelming underrepresentation of Black women business founders among recipients of venture capital funding (despite comprising the fastest growing group of entrepreneurs)^{xxii} and underrepresentation of Asian American/Native Hawaiian/Pacific Islander, African American/Black, Hispanic/Latino, or Native American/Alaska Native executives among C-Suite roles in the S&P 500,^{xxiii} comprehensive action is urgently needed.

Failure to address discrimination and ensure diversity, equity, inclusion, and accessibility is coming at a significant cost.^{xxiv} If sufficient action had been taken two decades ago to remove these barriers to equal opportunity, research has shown that there might have been an additional 0.2 percentage point growth to real GDP per year, an additional 770,000 new homeowners, an additional \$90 to \$113 billion in income, six million more jobs per year, and \$13 trillion in cumulative revenue.^{xxv}

Ongoing discrimination in our economy, whether demonstrated through responses to national polls,^{xxvi} litigation brought by the federal government,^{xxvii} or macro-economic analysis^{xxviii} demands action by all actors and sectors. America is at its best when we break down barriers to ensure all of us — no matter what we look like or where we come from — can succeed. We all benefit when Black, white, Latino, Asian American and Pacific Islander, Middle Eastern, and Indigenous people are empowered to bring their skills and talents to good jobs where they are valued and treated with respect and dignity. When employers remove unfair barriers, seek out applicants from all racial and ethnic backgrounds, and create a workplace culture that fosters respect, workers, businesses, and the nation as a whole can thrive.

While there are those who seek to roll back the clock, halt racial progress, and undermine the gains we have made as a nation,^{xxix} our laws and our values will not allow us to move backwards. We urge you to do all that you can to promote, protect, and expand programs that lead to diversity, equity, inclusion, and accessibility. We look forward to working with you and leaders across our government to achieve these goals. For any questions, please contact Liz King, education equity senior program director, at king@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
The Leadership Conference Education Fund
A. Philip Randolph Institute
AAPI New Jersey
Act To Change
AFL-CIO
African American Policy Forum
AFT, AFL-CIO
American Association of University Women
American Atheists
American Civil Liberties Union
American Humanist Association
American Pride Rises

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APIA Scholars
Arab American Institute (AAI)
Arizona Asian American Native Hawaiian Pacific Islander for Equity
Asian American Federal Employees for Nondiscrimination (AAFEN)
Asian American Federation
Asian Americans Advancing Justice-AAJC
Asian and Pacific Islander American Vote (APIAVote)
Asian Law Alliance
Association of People Supporting Employment First (APSE)
Autistic Self Advocacy Network (ASAN)
Bazelon Center for Mental Health Law
Center for American Progress
Center for Law and Social Policy
Center for Responsible Lending
Center for WorkLife Law
Children's Defense Fund
Clearinghouse on Women's Issues
Coalition on Human Needs
Communications Workers of America
Crescent City Media Group/Center for Civic Action
Disability Rights Advocates
Disability Rights Education & Defense Fund
EdTrust
Education Law Center-PA
EPIC
Equal Rights Advocates
Equality California
Family Voices NJ
Family Voices of Tennessee
Federation of Families of Central Florida, Inc.
Feminist Majority Foundation
Girls Inc.
Hispanic Federation
Houston Immigration Legal Services Collaborative
Human Rights Campaign
Human Rights First
IDRA (Intercultural Development Research Association)
Impact Fund
Japanese American Citizens League (JACL)
Jewish Council for Public Affairs
Joint Center for Political and Economic Studies
Just Solutions
Justice in Aging

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JustLeadership USA
Keshet
Lambda Legal
Latino Farmers & Ranchers International, Inc.
Lawyers' Committee for Civil Rights Under Law
Lawyers for Good Government
League of United Latin American Citizens [LULAC]
Louisiana Advocates for Immigrants in Detention
Maine Parent Federation
Mi Familia Vota
Minority Business Enterprise Legal Defense and Education Fund, Inc.
Missouri Asian American Youth Foundation
Montgomery County Progressive Asian American Network (MoCoPAAN)
NAAAP
NAACP
NAACP Legal Defense & Educational Fund, Inc. (LDF)
Nathaniel R. Jones Foundation
National Asian American Pacific Islander Mental Health Association (NAAPIMHA)
National Asian Pacific American Bar Association (NAPABA)
National Association for Latino Community Asset Builders (NALCAB)
National Association of Social Workers (NASW)
National Black Justice Coalition
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Coalition for Asian Pacific American Community Development (National CAPACD)
National Coalition on Black Civic Participation/Black Women's Roundtable
National Community Action Partnership
National Consumer Law Center (on behalf of its low-income clients)
National Council of Churches
National Council of Jewish Women
National Council of Negro Women (NCNW)
National Disability Rights Network (NDRN)
National Education Association (NEA)
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Housing Law Project
National Institute for Workers' Rights
National LGBTQ Task Force Action Fund
National Organization for Women
National Partnership for Women & Families
National Urban League
National Women's Law Center
National Young Farmers Coalition

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NCAAT In Action
NETWORK Lobby for Catholic Social Justice
North Carolina Asian Americans Together (NCAAT)
OCA - Asian Pacific American Advocates
Open to All
Parents as Teachers
PEAK Parent Center
PEAL Center
People For the American Way
PERIL: the Polarization & Extremism Research and Innovation Lab
PolicyLink
Pride at Work
Progress Arizona
Project On Government Oversight
Public Justice
Reproaction
Rights CoLab
Robert F. Kennedy Human Rights
Rural Coalition
Self-Help Credit Union
Service Employees International Union (SEIU)
Sikh American Legal Defense and Education Fund (SALDEF)
Silver State Equality-Nevada
Sojourners/SojoAction
South Asian Public Health Association (SAPHA)
Southeast Asia Resource Action Center (SEARAC)
Southern Poverty Law Center Action Fund
SPAN Parent Advocacy Network
Springfield Food Policy Council/40 Acres Farms
Texas Parent to Parent
The Arc of the United States
The Parents' Place of MD
The Restaurant Opportunities Center of Michigan (ROC Michigan)
The Restaurant Opportunities Center of Pennsylvania (ROC PA)
The Restaurant Opportunities Centers United (ROC UNITED)
The Sikh Coalition
The Workers Circle
T'ruah: The Rabbinic Call for Human Rights
Union for Reform Judaism
United Steelworkers
Vermont Federation of Families for Children's Mental Health
Women Employed
Working IDEAL

June 18, 2024
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Workplace Fairness

ⁱ For the purposes of this letter, DEIA programs, policies, and initiatives are those which ensure that all people—regardless of identity, race, ethnicity, sex (including sexual orientation and gender identity), background, disability, culture, religion, age, and beliefs—are consistently and systematically treated fairly, justly, and impartially (including individuals who belong to underserved communities that have been denied such treatment) and have their talents and skills recognized and appreciated; and which are intended to design, construct, develop, and maintain facilities, information and communication technology, programs, and services so that all people, including people with disabilities, can fully and independently use them. These programs include efforts to: expand recruitment efforts to increase the diversity of qualified job applicants; create an inclusive work environment, such as by providing workforce trainings to prevent and remedy harassment; set aspirational workforce representation goals; communicate the value of diversity and its importance to the work; assess artificial barriers to equity, such as algorithmically-based hiring systems, for potentially discriminatory outcomes; and remove job qualifications that are unnecessary and unrelated to the position to increase the diversity of qualified applicants (such as degree requirements that are not job-related).

ⁱⁱ These comments are offered, in part, in response to the Department of Commerce’s Notice published in the Federal Register on November 29, 2023 regarding the draft Business Diversity Principles. Organizations have submitted separate detailed comments that included both support for those principles and specific recommendations for how they should be strengthened. The Department’s Notice requesting comment is available here:

<https://www.federalregister.gov/documents/2023/11/29/2023-26254/business-diversity-principles>

ⁱⁱⁱ This letter is largely focused on ongoing racial disparities in our economy, racial discrimination, and the attacks on efforts to achieve racial diversity, equity, inclusion, and accessibility. Discrimination, exclusion, and inequities do not exist solely on the basis of race and strategies to achieve diversity, equity, and inclusion have never been exclusively about race. For many people of color, these barriers and experiences of discrimination and marginalization are amplified because of their intersectional identities. Women, religious minorities, language minorities, seniors, immigrants, and people who are LGBTQ+ or disabled do not have equitable access to our economy because of the barriers they face. As is the refrain of The Leadership Conference, the struggle of civil rights cannot be won by any one group acting by or for itself alone, but only through a coalition of groups that share a common commitment to equal justice and equal opportunity for everyone.

^{iv} 42 U.S.C. § 1981, commonly referred to as “Section 1981.” For more about Section 1981, see

<https://crsreports.congress.gov/product/pdf/IF/IF12535>.

^v For more about Title VII see: <https://www.justice.gov/crt/laws-we-enforce>. Title VII of the Civil Rights Act makes it unlawful for an employer to discriminate against someone because of race, color, religion, sex (including pregnancy, childbirth, and related conditions, sexual orientation, and gender identity), or national origin. Additional federal laws protecting people from employment discrimination include: the Americans with Disabilities Act, the Rehabilitation Act, the Workforce Innovation and Opportunity Act, the Vietnam Era Veterans’ Readjustment Assistance Act, the Civil Service Reform Act, and the Pregnant Workers Fairness Act.

^{vi} See, for example: Bowdler, Janis and Benjamin Harris. “Racial Inequality in the United States.” U.S. Department of the Treasury. July 21, 2022. <https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states>; Perry, Andre, Hannah Stephens and Manann Donoghoe. “Black wealth is increasing, but so is the racial wealth gap.” *Brookings*. January 9, 2024. <https://www.brookings.edu/articles/black-wealth-is-increasing-but-so-is-the-racial-wealth-gap/>; McKay, Lisa Camner. “How the racial wealth gap has evolved—and why it persists.” *Federal*

Reserve Bank of Minneapolis. October 3, 2022. <https://www.minneapolisfed.org/article/2022/how-the-racial-wealth-gap-has-evolved-and-why-it-persists>;

^{vii} U.S. Equal Employment Opportunity Commission, “Best practices for employers and human resources/eeo professionals,” available at <https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resourceeseo-professionals>

^{viii} Courts have already considered and answered the question of whether DEIA policies alone violate civil rights law. See, for example: *Bissett v. Beau Rivage Resorts Inc.*, 442 F. App’x 148, 152–53 (5th Cir. 2011); *Roy v. Soar Corp.*, 2014 WL 4209549 (E.D. Pa. Aug. 25, 2014); *Jones v. Bernanke*, 493 F. Supp. 2d 18, 29 (D.D.C. 2007), aff’d on other grounds, 557 F.3d 670 (D.C. Cir. 2009).

^{ix} In addition to the mandates of individual federal agencies, previous presidents have for many decades also invoked the national imperative of achieving diversity, equity, inclusion, and accessibility. On June 25, 1941, President Franklin D. Roosevelt signed EO 8802 prohibiting ethnic or racial discrimination in the nation’s defense industry, including in companies, unions, and federal agencies and establishing the Fair Employment Practice Committee (see: <https://www.archives.gov/milestone-documents/executive-order-8802>). This was built upon by President Dwight D. Eisenhower who signed EO 10479 on August 13, 1953 establishing the anti-discrimination Government Contract Committee (see: <https://www.presidency.ucsb.edu/documents/executive-order-10479-establishing-the-government-contract-committee>). This was superseded by EO 10925, signed by President John F. Kennedy on March 6, 1961, establishing the President’s Committee on Equal Employment Opportunity (see: https://archives.federalregister.gov/issue_slice/1961/3/8/1975-1980.pdf). On September 24, 1965, President Lyndon B. Johnson signed EO 11246 prohibiting federal contractors and federally-assisted construction contractors and subcontractors from discriminating in employment decisions on the basis of race, color, religion, and national origin. President Johnson amended the Executive Order with EO 11375 on October 13, 1967 to include sex and President Barack H. Obama further amended EO 11246 to include sexual orientation and gender identity on July 21, 2014 with EO 13672 (see: <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> and https://archives.federalregister.gov/issue_slice/1967/10/17/14299-14304.pdf).

^x See: “Overview”. U.S. Equal Employment Opportunity Commission. Accessed on May 22, 2024. <https://www.eeoc.gov/overview> and “About Us”. Office of Federal Contract Compliance Programs. Accessed on May 22, 2024. <https://www.dol.gov/agencies/ofccp/about>.

^{xi} “About Commerce”. U.S. Department of Commerce. Accessed on May 22, 2024. <https://www.commerce.gov/about>

^{xii} “Organization”. U.S. Small Business Administration. Accessed on May 22, 2024. <https://www.sba.gov/about-sba/organization>

^{xiii} “About Us.” U.S. Department of Labor. Accessed on May 22, 2024. <https://www.dol.gov/general/aboutdol>

^{xiv} See also: Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government signed on January 20, 2021 (available here: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>); Executive Order 14035: Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce signed on June 25, 2021 (available here: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>); and Executive Order 14091: Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government signed on February 16, 2023 (available here: <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>). The Leadership Conference Education Fund released a report in April 2023 evaluating the work of federal agencies in implementing the mandates of these Executive Orders: <https://civilrights.org/2023/04/13/one-year-after-biden-administration-releases-agency-equity-action-plans-civil-rights-group-calls-for-data-to-track-progress/>.

^{xv} See, for example: D’Innocenzio and Alexandra Olson, “DEI opponents are using a 1866 Civil Rights law to challenge equity policies in the workplace.” *APNews*. January 14, 2024. <https://apnews.com/article/dei-corporate-diversity-supreme-court-affirmative-action-a4ddf354423fee9697310366248f646>

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- ^{xvi} See, for example, statement from EEOC Chair Charlotte A. Burrows, Chair of the U.S. Equal Employment Opportunity Commission (EEOC): <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>
- ^{xvii} “New Poll by the Black Economic Alliance Foundation/The Harris Poll: Corporate Diversity Initiatives Overwhelmingly Supported Across Racial, Ideological, and Generational Lines.” Black Economic Alliance Foundation. August 28, 2023. <https://foundation.blackeconomicalliance.org/press-release/new-poll-by-the-black-economic-alliance-foundation-the-harris-poll-corporate-diversity-initiatives-overwhelmingly-supported-across-racial-ideological-and-generational-lines/>.
- ^{xviii} See, for example: Dixon-Fyle, Sundiatu and Celia Huber, María del Mar Martínez Márquez, Sara Prince, Ashley Thomas, and Dame Vivian Hunt. “Diversity matters even more: The case for holistic impact.” McKinsey & Company. December 5, 2023. <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact>; Adams, Desmond. “Harnessing the Power of Diversity For Profitability.” *Forbes*. March 3, 2022. <https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/03/harnessing-the-power-of-diversity-for-profitability/?sh=1dc089c8459a>
- ^{xix} Role, Kemi. “Addressing Occupational Segregation Means Centering Black Women Workers”. National Employment Law Project. December 13, 2022. <https://www.nelp.org/addressing-occupational-segregation-means-centering-black-women-workers/>
- ^{xx} Connley, Courtney. “Why Black workers still face a promotion and wage gap that’s costing the economy trillions”. *CNBC*. April 16, 2021. <https://www.cnbc.com/2021/04/16/black-workers-face-promotion-and-wage-gaps-that-cost-the-economy-trillions.html>
- ^{xxi} “Small Business Credit Survey.” Federal Reserve Bank of New York. April 15, 2021. <https://www.newyorkfed.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>
- ^{xxii} “Black women are the fastest growing group of entrepreneurs. But the job isn’t easy.” J.P.Morgan. October 12, 2021. <https://www.jpmorgan.com/insights/business/business-planning/black-women-are-the-fastest-growing-group-of-entrepreneurs-but-the-job-isnt-easy>
- ^{xxiii} Paikeday, Tina Shah, and Nisa Qosja, Russell Reynolds Associates. “How to Fix the C-Suite Diversity Problem.” Harvard Law School Forum on Corporate Governance. February 25, 2023. <https://corpgov.law.harvard.edu/2023/02/25/how-to-fix-the-c-suite-diversity-problem/#:~:text=The%20headline%20finding%20is%20that,in%20most%20C%2Dsuite%20positions>
- ^{xxiv} For additional evidence of diversity’s impact on business results see, for example: Gompers, Paul and Silpa Kovvali. “The Other Diversity Dividend.” *Harvard Business Review*. July-August 2018. <https://hbr.org/2018/07/the-other-diversity-dividend>; Rock, David and Heidi Grant. “Why Diverse Teams Are Smarter.” *Harvard Business Review*. November 4, 2016. <https://hbr.org/2016/11/why-diverse-teams-are-smarter>;
- ^{xxv} “Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.” Citi. September 2020. https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D
- ^{xxvi} See, for example: Lloyd, Camille. “One in Four Black Workers Report Discrimination at Work.” *Gallup*. January 12, 2021. <https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx>
- ^{xxvii} See, for example: “EEOC Sues Tesla for Racial Harassment and Retaliation.” U.S. Equal Employment Opportunity Commission. September 28, 2023. <https://www.eeoc.gov/newsroom/eeoc-sues-tesla-racial-harassment-and-retaliation>; and “Pensec Settles EEOC Race Discrimination Claim.” U.S. Equal Employment Opportunity Commission. February 28, 2022. <https://www.eeoc.gov/newsroom/pensec-settles-eeoc-race-discrimination-claim>.
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- ^{xxix} See, for example: attorneys general letter to CEOs of Fortune 100 companies <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf> (note also a letter of response sent by 20 different attorneys general <https://oag.dc.gov/sites/default/files/2023->

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[07/Fortune%20100%20Letter%20-%20FINAL.pdf](#)); United States Senator Tom Cotton letter to law firms threatening them with future investigations <https://www.cotton.senate.gov/imo/media/doc/Senator%20Cotton%20Letters%20to%20Law%20Firms%20re%20DEI.pdf>; *National Center for Public Policy Research v. Schultz*, No. 22-cv-267 (E.D. Wash., dismissed Sept. 11, 2023); *Roberts v. Progressive Preferred Insurance Co.*, No. 23-cv-01597 (N.D. Ohio, filed Aug. 16, 2023); *Alliance for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2023 WL 6862856 (5th Cir. Oct. 18, 2023); America First Legal letters to the U.S. Equal Employment Opportunity Commission (EEOC) such as <https://aflegal.org/category/press/>.

Why Protecting Diversity, Equity, Inclusion, and Accessibility Is a National Imperative

Next month, we mark a momentous civil rights milestone — the 60th anniversary of the Civil Rights Act of 1964. Historic anniversaries provide an ideal opportunity to reflect on how far we have come and to rededicate ourselves to what lies ahead.

Sixty years ago, schools, restaurants, public bathrooms, and even drinking fountains were strictly segregated through much of the South. In the 1960s, a series of landmark federal laws was enacted to make real the constitutional commitment of equal protection. The first of these, the Civil Rights Act of 1964, catalyzed the most successful peaceful revolution in human history.

Sixty years later, however, America's track record of creating opportunities for people of color and ending racial discrimination is decidedly mixed. As more than 140 organizations [told President Biden](#) on the eve of the Juneteenth holiday commemorating the effective end of slavery in the United States, we still struggle to turn the language of landmark legislation into living realities for all of our people.

In 2024, while drinking fountains may be open to all, race-based barriers to wage equality, credit access, and educational opportunity continue to hinder economic progress. Too many workers continue to face discrimination because of their race or ethnicity, including being denied apprenticeship and job opportunities, being subjected to more dangerous job duties and lower pay, and facing increased scrutiny. [For example](#), while 11 percent of the U.S. workforce overall is Black, Black people represent only 9 percent of STEM workers; similarly, while 16 percent of the U.S. workforce is Latino, Latino people represent only 7 percent of all STEM workers. The median Black worker [earns 24.4 percent less](#) per hour than the typical white worker, and Black women [are paid](#) 67 cents for every dollar paid to white, non-Hispanic men. Latinas [were compensated](#) just 57 percent of what non-Hispanic white men were paid in 2022.

Moreover, for many people of color, these barriers and experiences of discrimination and marginalization are amplified because of their intersectional identities. Women, religious minorities, language minorities, seniors, immigrants, and people who are LGBTQI+ or disabled also do not have equitable access to our economy because of the barriers they face.

In enacting the Civil Rights Act, Congress strongly encouraged employers to make voluntary efforts to break down barriers, end occupational segregation, and increase access to opportunity. Congress has charged federal agencies with advancing these same goals, and a whole-of-government commitment is therefore needed.

Programs that achieve diversity, equity, inclusion, and accessibility (DEIA) are designed to help employers and agencies comply with these longstanding civil rights obligations and increase opportunity. These programs include efforts to:

- Expand recruitment efforts to increase the diversity of qualified job applicants;
- Create an inclusive work environment, such as by providing workforce trainings to prevent and remedy harassment;
- Set aspirational workforce representation goals;
- Communicate the value of diversity and its importance to the work; assess artificial barriers to equity, such as algorithmically based hiring systems, for potentially discriminatory outcomes;

- And remove job qualifications that are unnecessary and unrelated to the position to increase the diversity of qualified applicants (such as degree requirements that are not job-related).

Beyond helping to meet employers' legal obligations to create workplaces free from discrimination, DEIA programs can also make businesses more competitive, successful, and profitable. When employers remove unfair barriers, seek out applicants from all racial and ethnic backgrounds, and create a workplace culture that fosters respect, workers, businesses, and the nation as a whole can thrive.

That's why civil rights, employment, education, labor, women's, and public interest organizations [are urging President Biden](#), who has already issued three groundbreaking executive orders on racial equity, to promote, protect, and strengthen programs that achieve diversity, equity, inclusion, and accessibility for private employers and government entities.

Both Republican and Democratic presidents have for many decades invoked the national imperative of achieving diversity, equity, inclusion, and accessibility. A commitment to this national imperative by President Biden would be consistent with the values reflected in his [executive orders](#), which stated that "Equal opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths" and that "Achieving racial equity and support for underserved communities is not a one-time project. It must be a multi-generational commitment, and it must remain the responsibility of agencies across the Federal Government."

At a time when DEIA programs are under attack, the groups are calling for employers to double down on creating opportunities for all — and for the federal government to demonstrate leadership and provide clarity to that end. In addition to disregarding or misrepresenting the well-established role of the federal government in promoting equal economic opportunity, DEIA opponents have mischaracterized the Supreme Court's June 2023 decisions in *Students for Fair Admissions (SFFA) v. Harvard College/University of North Carolina* in a cynical effort to advance a longstanding agenda of economic exclusion and discrimination.

However, the Supreme Court's decisions do not change employers' duty to create workplaces free from discrimination, including through efforts designed to achieve diversity, equity, inclusion, and accessibility. As Charlotte Burrows, chair of the U.S. Equal Employment Opportunity Commission, has rightly [emphasized](#), "It remains lawful for employers to implement diversity, equity and inclusion (DEI) and accessibility programs that seek to ensure that workers of all backgrounds are afforded equal opportunity in the workplace."

Historic anniversaries like the ones we will celebrate this year remind us that our journey toward justice is like an Olympic relay; we take the torch from those who came before us and pass it along to those who will follow. This year, as we recall the generation of giants whose sacrifices came before us, we are inspired to make the less risky but still righteous commitment to carry their work forward in removing barriers to opportunity and ensuring equal justice and equal opportunity for all.



October 26, 2023

Chair Charlotte Burrows
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Burrows,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 240 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and The Leadership Conference's Employment Task Force, we write to share our priorities for the work of the U.S. Equal Employment Opportunity Commission (EEOC).

This year, we marked the 60th anniversary of the March on Washington for Jobs and Freedom, which led to the passage of the Civil Rights Act of 1964 and the creation of the EEOC, with its mission to combat employment discrimination and ensure equal employment opportunity for all. The EEOC plays a critical role in enforcing our civil rights in the workplace and in bringing the goals of the March to life. Our priorities for the Commission are outlined below.

Diversity, equity, inclusion, and accessibility in the workplace. When employers remove unfair barriers, seek out applicants from all racial and ethnic backgrounds, and create a workplace culture that fosters respect, people are able to thrive in their jobs. The Supreme Court's decision in *Students for Fair Admissions (SFFA) v. Harvard* and *SFFA v. UNC* does not change employers' duty to create workplaces free from discrimination, including through efforts designed to achieve diversity, equity, inclusion, and accessibility (DEIA). We welcome your strong statement to that effect after the ruling. The EEOC should take further steps to ensure that employers and workers understand that the ruling does not change Title VII of the Civil Rights Act of 1964 and that DEIA programs help employers meet their nondiscrimination obligations and advance opportunity for all. The EEOC should release guidance outlining the effect and/or non-effect of the *SFFA* decision on employment and the practices that remain lawful. This guidance should clearly differentiate between programs that use race as a criterion in employment decisions — which remain permissible in limited circumstances — and DEIA efforts, which generally do not. The EEOC should also incorporate discussions of the decision into training and continuing legal education (CLE) programs, and should provide additional training and technical assistance to employers on how to implement lawful DEIA initiatives. And the EEOC must utilize the full extent of its enforcement authority to ensure that employers meet their nondiscrimination obligations under civil rights laws.

Fairness for pregnant workers. The passage of the Pregnant Workers Fairness Act (PWFA) was a significant victory for women, pregnant and postpartum workers, and families across our nation. The new law requires employers to provide reasonable workplace accommodations to workers who need a change in duties or policies because of pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the employer. We applaud the EEOC for moving quickly to develop draft regulations to implement the law. We look forward to publication of the final

regulations and urge the EEOC to back them up by continuing the Commission's education and outreach efforts and taking strong enforcement action to make the rights guaranteed by the PWFA a reality.

Pay equity. Sixty years after the passage of the Equal Pay Act of 1963, wage gaps based on gender, race, and other lines of difference persist in our economy. Today, women working full-time, year-round are typically paid just 84 cents for every dollar paid to men, and that gap is even wider and more costly for Black, Latina, Native, and many groups of Asian American, Native Hawaiian, and Pacific Islander women, who stand to lose out on close to or more than \$1 million in earnings over the course of a 40-year career. Analyses also find wage gaps between LGBTQIA+ workers and their peers, and when comparing the median earnings of all workers, regardless of hours or weeks worked, women are typically paid just 77 cents for every dollar paid to men. Gender and race-based pay gaps are caused by a multitude of factors, including discrimination, and rooting out that discrimination requires pay transparency. The EEOC took a major step aimed at strengthening compliance with anti-discrimination laws in 2018 when the Commission, after an extensive deliberative process, adopted an expanded EEO-1 data collection that required employers to report summary pay data by gender, race, ethnicity, and job category. Though this effort was cut short by the Trump Administration, the EEOC collected FY 2017 and FY 2018 data under a federal court order. We urge EEOC to use this previously collected pay data to help identify charges that may merit closer review for systemic discrimination. This use is consistent with the findings of the National Academies of Sciences, Engineering, and Medicine (NASEM), which independently examined the quality and utility of the Component 2 data and determined that EEOC could use the collected data to prioritize investigations and the allocation of EEOC resources, including for public outreach, education, training, and compliance assistance. In addition, we urge the EEOC to reinstate a pay data collection informed by the NASEM report, which recognized pay data as an essential tool in preventing and combating pay discrimination.

Anti-LGBTQ discrimination. A record breaking 580+ anti-LGBTQ state bills have been introduced in 2023. Many of these bills threaten workers' rights to insurance coverage for transgender-inclusive healthcare, access to restrooms and other facilities consistent with gender identity, nondiscrimination in hiring and termination, and a work environment free from harassment. The EEOC must protect LGBTQ workers by providing further guidance to employers so that they comply with Title VII, and fully implement the Supreme Court's decision in *Bostock v. Clayton County* that Title VII's protections against sex discrimination apply to instances of discrimination on the basis of sexual orientation and gender identity.

Workplace harassment. Harassment along the lines of sex, race, disability, and other protected characteristics remains a widespread problem in U.S. workplaces, and we welcome the EEOC's continued recognition of and engagement with these often intersectional forms of discrimination. People holding multiple marginalized identities continue to face unique and pernicious forms of discrimination that are constantly evolving. We thank the EEOC for its release of updated enforcement guidance on workplace harassment. The EEOC's efforts to address harassment should prioritize workers that are most vulnerable to harassment and least able to enforce their rights, including low wage workers and workers experiencing harassment based on sexual orientation and gender identity.

Automated systems, including artificial intelligence (AI). Employers are increasingly implementing AI and other automated systems to aid in and make employment decisions, from

recruitment and hiring to surveillance, evaluation, discipline, and termination. These systems can be used to further limit job opportunities on a discriminatory basis and impose working conditions that harm workers' physical and mental health. Workers that face these tools are at an extreme information disadvantage, often with little or no knowledge or insight that such tools are being used, and if so, how they are being used to assess workers - including whether their use results in an unfair or discriminatory decision. We applaud the EEOC for its ongoing work and engagement in this space, including the release of technical assistance and a joint statement with federal agencies asserting enforcement authority. In collaboration with federal agency partners, the EEOC should build on those efforts by issuing guidance that outlines specific steps to ensure that these systems comply with Title VII and other civil rights laws and provides for oversight and accountability that evens the playing field for workers and job seekers subject to these systems. AI and other automated systems should not discriminate, only measure traits and skills directly related to job performance, include notice of how the assessment works and how to access accommodations, allow workers to opt out of automated assessments without punishing them for doing so, and be thoroughly and regularly audited.

Longstanding shortfalls in age discrimination remedies and enforcement. In the last thirty years, several laws long enforced by EEOC have added important remedies (e.g., Title VII added compensatory and punitive damages) and greatly expanded coverage. Yet the Age Discrimination in Employment Act (ADEA) continues to lag. Its lesser remedies – no damages, only lost wages, in cases involving private employers, and no monetary relief at all against state employers – discourage private enforcement generally and mean that, in particular, no meaningful relief is available to address private claims of on-the-job-age-based harassment. This urgently justifies greater attention from the EEOC. And, the ADEA's lesser coverage in the key area of hiring discrimination – due to two en banc courts finding that ADEA applicant-claimants have no disparate impact claim – is another huge barrier calling for EEOC attention. Overall, since *Gross v. FBL Fin. Servs., Inc.*, 557 U.S 167 (2009), freedom from age bias has often been dismissed – by courts and defendants – as a second-class civil right. Yet, overt age bias continues to be widely tolerated and recently has become a focus of digital discrimination. In righting this imbalance, EEOC should also revisit ADEA regulations that promise to “carefully scrutinize” the use of age-based and age-related inquiries but which, so far, do not appear to have led to significant enforcement activity or to have discouraged employers from routinely considering age in choosing workers, without any legitimate business purpose for doing so.

Caregiver discrimination. Workers with caregiving responsibilities continue to face discrimination - which harms all workers, but particularly impacts women and especially women of color. This form of discrimination was exacerbated by the COVID-19 pandemic, which created new caregiving responsibilities, including caring for newly sick or disabled family members and supporting children participating in remote education - often while simultaneously dealing with their own new or worsened disabilities as a result of COVID. Demand for care work also grew at a record pace during the pandemic, which negatively impacted labor force participation. Discrimination stemming in part from gender and racial stereotypes about the competence of mothers in the paid workforce creates a penalty for caregivers, which can exacerbate the gender wage gap. The existing EEOC guidance on caregiver discrimination must be formally updated to account for the stresses of the pandemic, as laid out in the agency's March 2022 technical assistance.

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Thank you for your consideration of our views. If you have any questions, please contact Kanya Bennett, managing director of government affairs, at bennett@civilrights.org.

Sincerely,

Judith M. Conti, Employment Task Force Co-Chair
Yona Rozen, Employment Task Force Co-Chair
The Leadership Conference on Civil and Human Rights



November 1, 2023

Charlotte A. Burrows, Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via regulations.gov

RE: RIN 3046–ZA02, Proposed Enforcement Guidance on Harassment in the Workplace

Dear Chair Burrows:

The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, submits these comments in support of the Equal Employment Opportunity Commission’s (“EEOC”) Proposed Enforcement Guidance on Harassment in the Workplace (“Proposed Guidance”).¹

The Leadership Conference is the nation’s oldest, largest, and most diverse civil and human rights coalition and provides a powerful unified voice for the many constituencies we represent. As an organization dedicated to advancing civil and human rights, we are committed to reducing all forms of discrimination — including harassment — in the workplace. Our coalition understands that strong enforcement of the federal laws prohibiting workplace harassment is one the most important civil rights issues of our day. Efforts to make the workplace safer and more inclusive for all people will in turn lead to a more open and just society — an America as good as its ideals.

We thank the EEOC for issuing this Proposed Guidance, which we believe will promote strong enforcement of the federal laws prohibiting workplace harassment. Our comments below express support for many elements of the Proposed Guidance and offer suggestions for further clarifying and strengthening the Final Guidance.

I. The Proposed Guidance Will Promote Stronger Enforcement of Laws Prohibiting Workplace Harassment.

Robust and thoughtful guidance is a critical tool for the effective enforcement of anti-discrimination law. We appreciate the EEOC’s significant work in 2016-2017 to propose workplace harassment guidance and are grateful the EEOC has continued this important work by issuing the Proposed Guidance, as well as

¹ 88 Fed. Reg. 67750 (proposed Oct. 2, 2023); U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE, <https://downloads.regulations.gov/EEOC-2023-0005-0001/content.pdf> [hereinafter Proposed Guidance].

including within its strategic priorities preventing and remedying systemic harassment and protecting vulnerable workers and people from underserved communities from harassment.

We strongly support the Proposed Guidance and the significant positive impact it would have on the enforcement of laws prohibiting workplace harassment. We believe the Proposed Guidance effectively supports these goals by providing in-depth information and specific, relevant examples in a straightforward and clearly structured manner. In particular, we applaud the Proposed Guidance for thoughtfully reflecting and responding to recent notable legal and cultural changes related to workplace harassment, including by incorporating learnings from the #MeToo Movement and the EEOC's 2016 Select Task Force on the Study of Harassment in the Workplace.² While the EEOC has been enforcing workplace harassment law for decades, we recognize the nuance and evolution of both law and culture that are reflected in the proposed guidance. We particularly commend the EEOC making explicit that the definition of sex-based harassment includes discriminatory conduct based on pregnancy, childbirth, or related conditions, as well as sexual orientation and gender identity, as recognized in the U.S. Supreme Court's ruling in *Bostock v. Clayton County*³ and related cases. We also appreciate the Proposed Guidance's attention to virtual harassment, harassment in non-work settings, a robust understanding of stereotypes, and the impacts of systemic harassment.

The Leadership Conference is committed to advancing civil rights in the workplace. When employers remove unfair barriers, seek out applicants from all racial and ethnic backgrounds, and create a workplace culture that fosters respect, people are able to thrive in their jobs. We know that people holding multiple marginalized identities continue to face unique and pernicious forms of discrimination that are constantly evolving. Efforts to address this discrimination must prioritize the workers who are most vulnerable to harassment and least able to enforce their rights, which includes low wage workers and workers experiencing harassment based on sexual orientation and gender identity. Harassment along the lines of sex, race, disability, and other protected characteristics remains a widespread problem in U.S. workplaces, and we welcome the EEOC's continued recognition of and engagement with these often intersectional forms of discrimination. Once finalized, the Proposed Guidance will provide vital detail and clarity about the EEOC's enforcement of federal equal employment opportunity laws that will benefit employees, employers, and enforcement officials alike.

II. The Final Guidance Should Provide Additional Examples of Sex-Based and Other Forms of Harassment.

A. Pregnancy, Childbirth, or Related Medical Conditions

² Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf.

³ 140 S. Ct. 1731 (2020).

While the Proposed Guidance appropriately recognizes that sex-based harassment includes harassment on the basis of “pregnancy, childbirth, or related medical conditions,” including harassment based on an employee’s reproductive decisions,⁴ the Final Guidance should provide more examples of this form of sex harassment. In particular, and in light of the new Pregnant Workers Fairness Act,⁵ we recommend that the Final Guidance include an example of a worker who is harassed because of their request for, or receipt of, a reasonable accommodation related to pregnancy, childbirth, or a related medical condition. In addition, as workers continue to be threatened or punished at work for their reproductive health decisions,⁶ we recommend that the Final Guidance include examples that illustrate how such harassment may manifest — for example, an unmarried woman who becomes pregnant and faces harassment based on the gendered expectation that women should not have sex outside of marriage, or a worker who faces harassment based on their decision to have or not to have an abortion or to use infertility treatment to start a family. We further urge the EEOC to explicitly recognize that transgender men and nonbinary people assigned female at birth also experience sex-based harassment related to reproductive health decisions. In light of the continued attacks both at the federal and state level on access to abortion and reproductive health care, it is deeply important to our coalition that these examples are embedded within the Final Guidance.

B. Sexual Orientation, Gender Identity, and Sex Characteristics

We strongly support the Proposed Guidance’s express recognition that LGBTQI+ people maintain the right to go to work as themselves, without the threat of discrimination and harassment. A record breaking 580+ anti-LGBTQ state bills have been introduced in 2023. Many of these bills threaten workers’ rights to feel safe in a work environment free from harassment.

We are glad to see that the EEOC’s Proposed Guidance recognizes the prevalence of these forms of discrimination and the need to protect LGBTQ workers who face discrimination on the basis of sexual orientation and gender identity. The Proposed Guidance follows the Supreme Court’s *Bostock* decision, and the decisions of various lower courts before and after *Bostock*,⁷ which affirm that Title VII’s

⁴ Proposed Guidance at 9-10. Case law and the EEOC’s Enforcement Guidance on Pregnancy Discrimination make clear that Title VII’s prohibition of discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, and related medical conditions, including the use of contraceptives, infertility and/or the use of fertility treatment, abortion, and the decision not to have an abortion. *See generally* U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#> (discussing the EEOC’s interpretation of the coverage of the PDA and citing federal case law similarly holding that discrimination based on lactation, infertility treatment, use of contraception, and abortion or the decision not to have an abortion violate the PDA).

⁵ 42 U.S.C. § 2000gg et seq. (employers must provide reasonable accommodations for workers who have limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship).

⁶ *See, e.g., States Take Action to Stop Discrimination Based on Reproductive Health Care Decisions*, NAT’L WOMEN’S LAW CTR. (Mar. 2022), https://nwlc.org/wp-content/uploads/2022/03/NWLC_FactSheet_State-Laws-Against-Employment-Discrimination-Based-on-Reproductive-Health-Decisions-3.25.22.pdf (describing examples in which employers fired or threatened to fire workers who used assisted reproductive technology, became pregnant outside of marriage, had an abortion, or used birth control).

⁷ *See* Proposed Guidance at n.29 & n.33.

prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity.⁸

We urge the EEOC to include additional examples of harassment based on sexual orientation and gender identity in its Final Guidance, especially because of nationwide reports of increasing violence and harassment against LGBTQI+ people.⁹ Many LGBTQI+ employees live and work in states, counties, and towns that have or are actively working to implement policies that undermine existing legal protections for LGBTQI+ people.¹⁰ Employers would benefit from precise and clear guidance regarding the type of conduct and practices federal anti-discrimination law prohibits. Additionally, some workplaces are implementing transgender- and nonbinary-inclusive policies for the first time. More detailed examples and explanations of harassment based on gender identity would answer employers' questions as they adopt these employment policies.

The Proposed Guidance already includes some helpful examples regarding LGBTQI+ people. For example, it clarifies intentionally and repeatedly referring to someone with the incorrect name, pronouns, or gendered language inconsistent with the employee's gender identity constitutes harassment.¹¹ But the EEOC must provide additional examples of harassment based on sexual orientation and gender identity throughout its Final Guidance to address LGBTQI+ employees' range of experiences and the many forms that anti-LGBTQI+ animosity takes in the workplace, including through verbal, physical, and sexual harassment.¹²

We also urge the EEOC to address harassment based on sex characteristics, including intersex traits. Approximately 1.7 percent of the world population has intersex traits — i.e., physical, hormonal, or genetic attributes that do not fit binary notions of sex.¹³ Intersex people face distinct forms of prejudice

⁸ For years, the EEOC has recognized harassment based on sexual orientation and gender identity violates Title VII, but its guidance has not consistently reflected this fact. See, e.g., *Fact Sheet: Notable EEOC Litigation Regarding Title VII & Discrimination Based on Sexual Orientation and Gender Identity*, U.S. Equal Emp. Opportunity Comm'n, <https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-regarding-title-vii-discrimination-based-sexual-orientation-and> (last visited Oct. 25, 2023). The Proposed Guidance is therefore a long-needed update to the EEOC's Title VII enforcement guidelines.

⁹ See HUMAN RIGHTS CAMPAIGN, *LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION* (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>; see also *FBI Releases 2022 Crime in the Nation Statistics*, FBI (Oct. 16, 2023), <https://www.fbi.gov/news/press-releases/fbi-releases-2022-crime-in-the-nation-statistics> (the most recent hate crimes data compiled by the FBI, showing that anti-LGBTQ+ hate crimes increased sharply compared to the prior year with a 13.8% increase in reports based on sexual orientation and a 32.9% increase in reported hate crimes based on gender identity).

¹⁰ See, e.g., HUMAN RIGHTS CAMPAIGN, *LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION* (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>.

¹¹ We likewise commend the EEOC for correctly noting that derogatory comments about LGBTQI+ people made within the workplace are facially discriminatory and subject LGBTQI+ employees to impermissible harassment even if they are not the subject of those comments. Proposed Guidance at 22.

¹² See, e.g., BRAD SEARS ET AL., WILLIAMS INST., *LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

¹³ Melanie Blackless et al., *How Sexually Dimorphic Are We? Review And Synthesis*, 12 AM. J. HUMAN BIOLOGY 151 (2000).

and harassment that should be directly addressed by this guidance. The reasoning of *Price Waterhouse v. Hopkins*¹⁴ and *Bostock* clarify that Title VII's prohibition against sex discrimination applies to intersex discrimination.¹⁵ Indeed, courts have recognized similar anti-discrimination laws to prohibit intersex discrimination.¹⁶ Moreover, the EEOC should clarify the application of the Genetic Information Nondiscrimination Act (GINA) to intersex discrimination.¹⁷ The EEOC's Final Guidance must recognize these protections and include a discussion of intersex people and people with sex variations in the workplace.

C. Intersectional Harassment

We appreciate that the Proposed Guidance properly recognizes that an attack on the civil rights of one group is an attack on the civil rights of all — and that often, harassment is amplified for those at the intersection of multiple protected identities. The Proposed Guidance makes clear that harassment may be based on one's intersectional identity, such as one's identity as a Muslim woman or a Black woman.¹⁸ The report of the co-chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace cites research highlighting the “intersectional nature of harassing behavior” and indicating that “targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion.”¹⁹ Recognizing that harassment is often intersectional²⁰ — and that

¹⁴ 490 U.S. 228, 251 (1989) (emphasizing Title VII “intended to strike at the entire spectrum of disparate treatment of [individuals] resulting from sex stereotypes.”), quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.3 (1978), and *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

¹⁵ Even before *Hopkins* and *Bostock*, the Court clarified Title VII's sex stereotyping framework rejects an employer's assumptions about any generalization about sex, whether the assumption involves a physical characteristic, behavior, or statistical findings about life expectancy. See, e.g., *Manhart*, 435 U.S. at 708 (striking pension plan where cost to women was more, even though it was based on actuarial mortality differences among the sexes, and observing, “Even a true generalization about a class is an insufficient reason to disqualify an individual to whom the generalization does not apply.”); see *id.* at 709 (stressing Title VII rejects “[p]ractices that classify employees in terms of . . . sex” because they ordinarily preserve generalized and “traditional assumptions” about sex “rather than thoughtful scrutiny of individuals.”); accord *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1079-86 (1983); *id.* at 1085 n.15 (Title VII “clearly would not permit” an employer's use of sex as a proxy for an employment qualification, “regardless of whether a statistical correlation could be established.”).

¹⁶ See, e.g., *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 2023 U.S. App. LEXIS 19785, *21-22 (7th Cir. Aug. 1, 2023) (in dicta); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (in dicta); *Hughes v. Home Depot, Inc.*, 804, F.Supp.2d 223 (D.N.J. 2011); *Kastl v. Maricopa County Community College District*, No. 02-1531, 2004 WL2008954 (D. Ariz. June 3, 2004), *summ. judg. granted on other grounds*, No. CV-02-1531-PHX-SRB (D. Ariz. Aug. 22, 2006); see also *Hecox v. Little*, 2023 U.S. App. LEXIS 21541 (9th Cir. Aug. 17, 2023) (recognizing that the concept of “biological sex” includes intersex variations); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (same).

¹⁷ 42 U.S.C. § 2000ff et. seq.

¹⁸ Proposed Guidance at 17.

¹⁹ See Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 13-14 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf.

²⁰ See generally Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J. L. & GENDER 185 (2014) (describing how experiences of gender discrimination and harassment in the workplace vary by race); AMANDA ROSSIE ET. AL, NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 8 (2018), <https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf> (analyzing sexual harassment charges filed with the EEOC between 2012 and 2016, and noting that “The sexual harassment charge data also suggests that many women experience racialized sexual harassment, or harassment based not only on their sex but also their race.”); NAT'L WOMEN'S LAW CTR. & TIME'S UP LEGAL

many employers and courts still do not understand this distinct but common and pernicious variant of harassment — we encourage the EEOC to provide additional examples that illustrate the dynamics of intersectional harassment. These could include examples of harassment involving racialized sexual references or slurs based on stereotypes about both race and gender.²¹

D. Survivors of Gender-Based Violence

We also urge that the Final Guidance clarify the scope of harassment to include harassment based on sex-based assumptions of victims of domestic violence, dating violence, sexual assault, and stalking. In its Strategic Enforcement Plan for FY 2024-2028, the EEOC expanded its list of vulnerable workers and persons from underserved communities to include survivors of gender-based violence (GBV).²² In some instances, harassment involving survivors of GBV may violate Title VII because it is rooted in stereotyping and sex-based assumptions (and/or stereotypes against another protected class). Harassment against survivors of GBV may also violate the Americans with Disabilities Act (ADA).²³ In the last several decades, some jurisdictions have gone even further to protect victims of gender-based violence from discrimination and harassment in the workplace. In particular, 10 states and Washington, D.C. have adopted laws that prohibit employment discrimination against victims of domestic violence based on their status as victims of these crimes.²⁴

As employers react to and manage the effects of gender-based violence in the workplace, sex-based stereotypes against survivors of violence lead to harassment and discrimination, including retaliation. We urge the EEOC to include language and further examples in the Final Enforcement Guidance of prohibited harassment against victims of gender-based violence consistent with its Question & Answer guidance issued in 2012.²⁵

DEFENSE FUND, COMING FORWARD: KEY TRENDS AND DATA FROM THE TIME'S UP LEGAL DEFENSE FUND 4, 16-17 (2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf (noting that 18% of people who sought help from the Time's Up Legal Defense Fund reported that they experienced discrimination or harassment "based on sex and other aspects of their identities," including race, disability, and sexual orientation or gender identity).

²¹ See, e.g., Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMPLOYEE RTS. & EMP. POL'Y J. 13, 16-17 (2021) (describing cases involving intersectional harassment experienced by Black women).

²² U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2024-2028 (2023), <https://www.eeoc.gov/sites/default/files/2023-09/SEP%20FY%2020242028%20FINAL%20APPROVED.pdf>.

²³ *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

²⁴ See WORKPLACES RESPOND TO DOMESTIC & AND SEXUAL VIOLENCE & LEGAL MOMENTUM, STATE GUIDE ON EMPLOYMENT RIGHTS FOR SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING, (2022) (listing California, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, New York, Oregon, Puerto Rico, Vermont, U.S. Virgin Islands, Washington State and Washington, DC as states that have anti-discrimination laws) <https://www.workplacesrespond.org/wp-content/uploads/2017/01/State-Employment-Guide.pdf>.

²⁵ *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

E. Intragroup Harassment

The EEOC appropriately recognizes that individuals may unlawfully harass others sharing the same protected characteristics.²⁶ We propose that the agency illustrate this common occurrence with some examples, beyond Example 9, which concerns same-sex harassment. For instance, the section on color-based harassment would benefit from an example reflecting a lighter-skinned Black worker's harassment of a darker-skinned Black person;²⁷ the sex-based harassment section could use an example of a woman without children harassing a woman who is a mother with child care obligations; and the national origin harassment section could provide an example of an employee of Dominican descent harassing a Mexican American co-worker, to name just a few potential scenarios. Employers often are dismissive of harassment occurring in such contexts; if the EEOC emphasizes that such conduct is no less abusive because it is perpetrated by a person who has the same protected characteristic, it would be invaluable in debunking such preconceptions.

III. The EEOC Should Provide Further Clarity on the Following Areas.

A. Harassment That Results in an Explicit Change to the Terms, Conditions, or Privileges of Employment

The Proposed Guidance distinguishes harassment that results in an “explicit change to the terms or conditions of employment” from harassment that does not result in an “explicit change” but changes the terms or conditions of employment by creating a hostile work environment.²⁸ We encourage the EEOC to further clarify what constitutes an “explicit change to the terms or conditions of employment” in the Final Guidance. Specifically, the discussion in Section III.A of the Proposed Guidance regarding harassment that results in an “explicit change” to the terms or conditions of employment could be read to suggest that in order to establish a cognizable claim, an employee must show that the employer *expressly* stated that the submission to or refusal of sexual advances was the basis for the change to the terms and condition of employment, or must otherwise prove a subjective intent to harass.²⁹ This would be a misrepresentation of the law.³⁰ The Final Guidance should make clear that such an express statement is not required to establish a claim that harassment resulted in an explicit change to the terms or conditions of employment. For example, if a supervisor fired an employee the day after she refused his sexual advances because of

²⁶ Proposed Guidance at 17 & n.51.

²⁷ Footnote 11 of the Proposed Guidance contains citations to numerous such cases from which to draw illustrative fact patterns.

²⁸ Proposed Guidance at 28.

²⁹ Proposed Guidance at 28-29 (providing an example in which an employer makes an explicit threat to deny a job benefit if an employee rejects his sexual advances, and then denies the job benefit).

³⁰ Federal courts have found that plaintiffs established cognizable claims of harassment where they rejected sexual advances and subsequently experienced a change to the terms or conditions of employment, even in the absence of an express statement that the rejection was the basis for the change. *See, e.g., Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000) (concluding that harassment of an art teacher led to a tangible change to the terms and conditions of her employment when a school principal took back supplies he had given her and gave her a negative evaluation after she rejected his advances); *Hulsey v. Pride Restaurants LLC*, 367 F.3d 1238 (11th Cir. 2004) (stating that plaintiff's allegations, if true, would be sufficient to establish harassment resulting in a tangible employment action, where plaintiff was terminated immediately after rejecting a supervisor's sexual advances).

her refusal, even if not expressly stated, then this would represent an “explicit change to the terms or conditions of employment.”

B. Standard for Showing a Hostile Work Environment

We applaud the EEOC’s appropriately broad reading of the factors that will contribute to creation of an unlawful hostile work environment. The EEOC’s early recognition of hostile work environment harassment³¹ was integral to the U.S. Supreme Court’s eventual acknowledgment in *Meritor Savings Bank, FSB v. Vinson*³² that harassment is discriminatory even where it does not cause economic harm. With this new guidance, the agency has the opportunity to again influence courts’ — and thus employers’ and workers’ — understanding of unlawful harassment.

Unfortunately, in the years since *Meritor* — as well as the next hostile environment case to be considered by the Court, *Harris v. Forklift Systems, Inc.*³³ — the federal courts have interpreted the requirement that the challenged harassment be “sufficiently severe or pervasive to ‘alter the conditions of [the victim’s] employment and create an abusive working environment,’” in inconsistent, erroneous, and sometimes downright head-scratching ways.³⁴ Some courts have also imposed an exceptionally high bar for meeting the “severe or pervasive” threshold, resulting in a wide range of egregious conduct being found merely “offensive,” “unprofessional,” or “inappropriate.”³⁵ Such findings are particularly likely when the

³¹ *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(a) (Nov. 10, 1980).

³² 477 U.S. 57, 65-67 (1986) (discussing the *Guidelines* and unanimous federal courts’ adoption of the hostile environment doctrine).

³³ 510 U.S. 17 (1993).

³⁴ See generally Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>. Among the most egregious of these is the requirement that harassment be “severe and pervasive” in order to be found unlawful, either because the court explicitly misstates the standard or because it imposes a requirement that the conduct be serious and frequent or widespread among several harassers. See, e.g., *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557, 568 (6th Cir. 2021) (six instances of harassment over roughly 15 months insufficient to survive summary judgment); *Stewart v. Miss. Transp. Comm’n*, 586 F.3d 321, 330-31 (5th Cir. 2009) (supervisor’s six incidents of telling subordinate he loved her over the course of a month meant that the plaintiff “was allegedly subject to one subjectively offensive utterance by [her supervisor] every few days”), citing *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871, 874 (5th Cir. 1999) (sexual teasing and touching over two-year period not sufficiently “severe”).

³⁵ See, e.g., *Lopez v. Whirlpool Corp.*, 989 F.3d 656, 663 (8th Cir. 2021) (conduct not severe or pervasive where harasser touched the plaintiff “almost every time he saw her” over several months, including “touch[ing] her back, invad[ing] her personal space, and [blowing] on her finger while calling her ‘baby’”); *Stewart v. Miss. Transp. Comm’n*, 586 F.3d 321, 330-31 (5th Cir. 2009) (supervisor’s repeatedly telling plaintiff that he “loved” her did not constitute harassment “because [his statements] were not severe, physically threatening or humiliating; at most they were unwanted and offensive.”); *Mitchell v. Pope*, 189 F. Appx. 911, 913-14, n.3 (11th Cir. 2006) (granting summary judgment to employer where plaintiff alleged superior officer harassed her, including trying to kiss her and calling her a “frigid bitch” when she refused, showed up at her home unannounced several times, told her “you can just walk into the room and I’d get an erection,” forced her to share a hotel room at a conference, and chased her around the office); *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1100, 1102-03 (8th Cir. 2005) (finding conduct was not severe or pervasive where priest asked employee to watch pornographic movies with him, asked him to “jerk off with [him],” kissed him, grabbed his buttocks, and reached for his genitals).

harassment consists of “verbal conduct only.”³⁶ These errors occur in all types of harassment cases, not just those involving sex-based harassment.³⁷

While the Proposed Guidance in some respects implicitly rejects these developments — particularly in its discussion of the proof required to show that a given environment is “objectively” hostile³⁸ — we urge the EEOC to explicitly address the widespread flawed readings of when harassment is sufficiently “severe or pervasive” to constitute a hostile work environment. We further urge the agency to include examples specifically demonstrating “severity”; the Proposed Guidance currently includes none. Finally, with respect to its remarks introducing the concept of a hostile work environment, we urge that the EEOC expand the list of factors constituting the “totality of the circumstances” inquiry. Currently, the Proposed Guidance chiefly relies on the four factors listed in *Harris*³⁹; three of these, however, would place the conduct at the outer limits — i.e., whether the conduct is “physically threatening or humiliating,” whether it “interfered with the complainant’s work performance,” and “the degree to which it caused the complainant psychological harm,” which are factors that the Proposed Guidance elsewhere states are *not* preconditions for a liability finding. This 30-year-old standard, without more, is an unnecessarily cramped recitation of what kinds of “circumstances” have been recognized to “alter the conditions of employment and create an abusive working environment.” We suggest that the Final Guidance expressly state additional relevant factors approved by the courts and by the EEOC itself, including but not limited to (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct occurred; (iv) the number of individuals engaged in the conduct; (v) the nature of the conduct; (vi) any power differential between the alleged harasser and the person allegedly harassed; (viii) any use of epithets, slurs, or other conduct that is humiliating or degrading; and (ix) whether the conduct reflects stereotypes about individuals in the protected class involved.

C. Retaliatory Harassment

We appreciate that the Proposed Guidance addresses harassment as a form of retaliation and encourage the EEOC to clearly state the standard for unlawful retaliatory harassment in the Final Guidance. Retaliation is the most commonly filed charge with the EEOC, comprising 51.6 percent of all

³⁶ *Paskert v. Kemna-Asa Auto Plaza, Inc.*, 950 F.3d 535, 538-39 (8th Cir. 2020) (“[P]laintiff only alleges one instance of unwelcome physical contact, one or two statements where [supervisor] stated he could ‘have [plaintiff],’ and several statements about how he never should have hired a female and wanted to make [plaintiff] cry. All of this behavior is inappropriate and should never be tolerated in the workplace, but it is not [severe or pervasive].”); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826-27 (6th Cir. 1997), citing with approval *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1995). See also *Mitchell*, 189 F. Appx. at 913 (“most [of the instances alleged by plaintiff] involved ‘offensive utterances’”; “[o]nly three times did [the supervisor] touch her or attempt to touch her”).

³⁷ See, e.g., *Shaver v. Independent Slave Co.*, 350 F.3d 716 (8th Cir. 2003); (disability); *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839 (8th Cir. 2002) (race); *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996) (age).

³⁸ We also applaud the EEOC’s recognition that where a plaintiff satisfies the “subjective” prong of the hostility inquiry, they need not *also* prove that the conduct was “unwelcome.” Proposed Guidance at 39.

³⁹ “Some such circumstances include the frequency and severity of the conduct; the degree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee’s work performance; and the degree to which it caused the complainant psychological harm.” Proposed Guidance, at 30, citing *Harris*, 510 U.S. at 23.



discrimination charges filed with the agency in 2022.⁴⁰ In cases where a complainant reports both discrimination based on a protected class and related retaliation, it is common for the retaliation allegations to be substantiated when allegations of the original discriminatory conduct are not.⁴¹ This includes matters in which a complainant files charges of both retaliatory harassment and other form(s) of discriminatory harassment.⁴² The prevalence and relative success of retaliation charges make it a particularly important issue area to provide clear guidance around, including in the harassment context.

The Proposed Guidance notes that retaliation claims — including those involving alleged retaliatory harassment — are enforced under a different legal standard than claims involving harassment based on a protected class.⁴³ Since the threshold for establishing retaliatory harassment is less stringent than for discriminatory hostile work environment, the Final Guidance should take advantage of the opportunity to provide greater clarity on the issue by including an explanation of the relevant differences between these standards in the text, instead of directing readers to the EEOC’s 2016 Enforcement Guidance on Retaliation and Related Issues for additional information.⁴⁴ We urge the commission to incorporate its guidance of retaliatory harassment within the Final Guidance and explicitly explain that, “If [] conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.”⁴⁵

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We applaud the EEOC for issuing this comprehensive Proposed Guidance. Thank you for the opportunity to submit comments on the Proposed Guidance and for taking the time to consider our views and the impact the guidance will have on the civil and human rights of the communities our coalition represents. Please do not hesitate to reach out to Peggy Ramin, policy counsel for health and anti-poverty, at ramin@civilrights.org with any questions.

Sincerely,
The Leadership Conference on Civil and Human Rights

⁴⁰ *Charge Statistics FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022> (last visited Oct. 25, 2023).

⁴¹ Romella Janene El Kharzazi, Mxolisi Siwatu, and Dexter R. Brooks, *Retaliation- Making It Personal*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/retaliation-making-it-personal#_3 (last visited Oct. 25, 2023).

⁴² Examples of employees being harassed in retaliation for filing a claim of discrimination, including harassment based on a protected class, are numerous and the interplay between the forms of harassment can have a compounding effect. *See, e.g.*, Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE (2018) <https://www.stanfordlawreview.org/online/ending-harassment-by-starting-with-retaliation/>; Blair Druham Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 677 (2021) (“[H]arassment retaliation is a unique and prevalent problem. Harassment charges are more than 90% more likely to include a retaliation charge than any other type of charge [filed with the EEOC].”).

⁴³ Proposed Guidance at 19.

⁴⁴ U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>.

⁴⁵ U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* § II.B.3(2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>.