

Kalpana Kotagal
Nominee to be a Member of the Equal Employment Opportunity Commission
U.S. Senate Committee on Health, Education, Labor and Pensions
Responses to Questions for the Record

May 10, 2022, Confirmation Hearing
Submitted to the Committee: May 23, 2022

Ranking Member Burr

I. *In General Motors and Conduct on Workplace Picketing Lines*

1. Do you believe it is acceptable under civil rights law for a striking employee to voice misogynistic, sexist derogatory comments through a loudspeaker at a coworker in order to humiliate that coworker? If you will not opine on the legal issue, do you believe it could be a fire-able offense?

Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. These are highly factually specific questions, determined by the caselaw in each circuit and the facts in each case. Comments may – if they meet the legal standards – rise to the level of conduct that is severe or pervasive. The question’s characterization of “misogynistic, sexist derogatory comments” communicated “in order to humiliate that coworker” might present a circumstance that could cause concern with respect to workplace harassment and hostile work environment standards under Title VII. An analysis of whether such conduct would be a “fire-able offense” would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit. All workers deserve to work in workplaces free from discrimination, and if the behavior from the Amazon warehouse in Staten Island issue comes before the Commission, I would be interested in looking at it closely. If a worker there feels she has been subject to harassment or other discrimination, I would encourage her to reach out to the EEOC.

2. Do you believe it appropriate, as an EEOC Commissioner charged with enforcing our equal opportunity laws, for the NLRB to file a petition demanding that an employee be reinstated following such behavior in question 1 a week before a union election, while neglecting to mention the conduct in the court filing that led to his termination?

If I am so fortunate as to be confirmed as a Commissioner of the EEOC, I would see my obligation as being to enforce the workplace non-discrimination laws under the EEOC’s jurisdiction. In my view, all workers deserve to work in workplaces free from unlawful discrimination. NLRB petitions and associated litigation arise under a different statute and are in the jurisdiction of a different agency. I am not familiar with the standards that would inform NLRB’s decisions to file petitions.

3. Given your past support of Jennifer Abruzzo, do you support her actions, both in previous statements and in filing the petition, in discarding the decision of *In General Motors*, and returning, in the words of Judge Millet, an Obama appointee of the D.C Circuit, to a status quo where the Board “continually giv[es] short-shrift to gender targeted behavior, the message of which is to calculated to be sexually derogatory and demeaning”?

In my view, all workers deserve to work in workplaces free from unlawful discrimination. I am not familiar with the *General Motors* case, Judge Millet’s decision referenced above, nor with Ms. Abruzzo’s actions in this area, and therefore have no opinion on this matter.

II. People’s Parity Project

1. You are listed as a member of the People’s Parity Project’s Advisory Council. I appreciate that you updated your HELP form, but why did you not initially disclose this prominent affiliation in your original HELP paperwork?

I initially omitted the People’s Parity Project (“PPP”) Advisory Council because I determined that my involvement on it did not meet the standard of a “membership organization” which is what was requested on the HELP Committee Form. I opted to include the PPP to avoid any possible appearance of a failure to disclose. My role on the PPP Advisory Council is publicly available as it is listed on my bio on Cohen Milstein’s website and on the PPP’s website.

2. As an advisor to the People’s Parity Project (PPP), did you play any role in formulating or approving PPP’s “Trump Accountability” project, in which the PPP openly intended to launch an intimidation campaign “to show the legal profession that there are consequences” for hiring public servants that served in the Trump Administration?

No.

3. Do you agree with the open letter circulated by PPP creating a “blacklist” of select Trump Administration officials and targeting “law firms and law schools” to demand those employers “[r]efuse to hire lawyers” who served in the Trump Administration as “political appointees”?

I am not familiar with nor involved with the open letter referenced in this question. I think it is important for attorneys – whether in private practice or public service – to uphold their ethical obligations as officers of the court. Whether particular attorneys should be hired by “law firms and law schools” is a question that is individualized and fact-specific, dependent on each attorney

seeking a job, they job they seek, the candidate pools, the potential employers, and a number of other factors. I am not involved in the PPP's work described above.

4. For example, the PPP letter urges blacklisting Eugene Scalia for his “refusal to issue worker safety regulations.” Yet, Secretary Scalia has stated existing regulations and guidance were sufficient to sanction employers, and that promulgating a rule that would likely be struck down by federal courts would leave OSHA with less power than it had before. Do you agree that Secretary Scalia should be blacklisted from employment for this reason?

I am not familiar with nor involved with the open letter referenced in this question. I think it is important for attorneys – whether in private practice or public service – to uphold their ethical obligations as officers of the court. Whether particular attorneys should be hired by “law firms and law schools” is a question that is individualized and fact-specific, dependent on each attorney seeking a job, they job they seek, the candidate pools, the potential employers, and a number of other factors. I am not involved in the PPP's work described above.

5. As EEOC Commissioner, you will be charged with handling confidential, deliberative information. Do you agree that pre-decisional, deliberative documents, as a matter of workplace policy and professional ethics, should remain deliberative and confidential from the public?

I have a long-standing commitment, as a litigator and officer of the court, to protect confidentiality as required by the law and in my cases. I understand that the EEOC treats certain materials as confidential. I am committed to following EEOC policy with respect to confidentiality.

6. PPP has praised the leak of the Supreme Court draft opinion in the Dobbs case, heralding the leak as an excuse to further intimidate the court by “allowing the moment to radicalize us”. Do you condone such a statement?

I am not familiar with this statement by PPP; I do not agree with the statement as described in this question.

7. Do you agree with PPP's sentiments that “the Chamber of Commerce, the Federalist Society, and conservative religious forces have strategically turned the federal judiciary into a tool to attack the fundamental rights and freedoms of all but wealthy, cis, straight white men”?

I am not familiar with this statement by PPP; I do not agree with the statement as described in this question.

8. Do you agree with the PPP's characterization of the Supreme Court as an "illegitimate political actor"?

I am not familiar with this statement by PPP; I do not agree with the statement as described in this question.

9. Why do you continue to play, as a Board Advisory Member, a prominent leadership role in an organization that displays these intolerant and extreme views?

I have no prominent leadership role nor formal duties as a member of the Advisory Board of the PPP. I have worked with PPP on two issues: (1) relating to the organization's work to make the legal profession more accessible to qualified people from all backgrounds and (2) relating to mandatory arbitration in employment. Last fall I spoke on a PPP-organized panel about how I work with my clients to tell their stories through litigation. I see PPP's work on those issues as important to the future of the legal profession, an issue about which I have a demonstrated track record of involvement and commitment. However, if confirmed, I would resign from the Advisory Council.

III. Religious Freedom

1. In 2019, you served as lead attorney in a case representing the Center for Reproductive Rights in a lawsuit involving two FOIA requests seeking budget and staffing details for the Center for Religious Freedom. What is the status of that lawsuit?

Cohen Milstein's representation of Center for Reproductive Rights in FOIA litigation remains pending in the United States District Court for the District of Columbia. The parties continue to negotiate regarding the production of responsive documents and provide regular updates to the court regarding those negotiations. The Center for Reproductive Rights has sought documents relating to the U.S. Department of Health and Human Services Conscience and Religious Freedom Division (CRFD).

2. The Center Religious Freedom was created in 2019 by the Trump Administration to "restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscientious and religious freedom." Do you believe that upholding and preserving the freedom of Americans to worship according to their conscience free from incursion from the federal government to be a paramount American value?

The free exercise of religion is a sacred American value enshrined in the First Amendment to the Bill of Rights. Title VII of the Civil Rights Act protects against discrimination on the basis of religion in the workplace. That is an important protection for people of faith in the workplace, and I am committed to enforcing those protections.

3. In that same litigation, your firm claimed that “historically . . . only an extremely small fraction of the complaints received by OCR are related to religious and moral refusal issues.” Do you stand by this characterization of religious freedom? If yes, what data do you have to support such a position?

The language in the question above quotes paragraph 7 of the complaint filed in *Center for Reproductive Rights v. Department of Health and Human Services*. The footnote associated with that paragraph of the complaint cites the following source: Sharita Gruberg, Center for American Progress, *HHS Budget Would Fund Discrimination at Expense of Civil Rights Enforcement* (April 25, 2019). That report states that the U.S. Department of Health and Human Services sought an additional \$1,071,000 for the CRFD for six additional employees, although only 2 percent of complaints received in FY2018 involved conscience or religious freedom issues.

4. Do you believe, as your firm implied, that the worth of defending a constitutional liberty should be measured by the number of complaints received?

I do not believe that the worth of defending a constitutional liberty should be measured by the number of complaints received. At the same time, it is important to ensure that agencies have the resources they need to carry out their mission and that the public’s resources in those agency’s budgets are used most efficiently and effectively to achieve the mission of that agency. The number of complaints may be one indicator of the amount of resources required on a particular issue.

5. Do you believe, as your firm’s remarks indicate, that a form of discrimination and coercion is less worthy of protection if it does not achieve a desirable volume of complaints?

I do not believe that any form of legally prohibited discrimination or coercion is less worthy of protection than any other. Nor do I agree with the assertion that the remarks referenced are indication of such a belief. *All* workers are entitled to work in workplaces free from unlawful discrimination.

6. The EEOC receives numerous complaints, of which a number concern Title VII’s religious discrimination and accommodation provisions. However, they are small in number compared to those the EEOC receives based on race, sex, etc. How can we be certain that you will give complaints of religious discrimination the same care and attention you would others that may be higher in volume?

Please be assured that I am personally and professionally committed to upholding workplace non-discrimination laws in their entirety, not a narrow subset of the law. All workers are entitled to workplaces free from unlawful

discrimination, including discrimination based on religion. If I am confirmed, I am committed to enforcing the law to protect all workers from workplace discrimination and to working with my fellow Commissioners and EEOC staff to ensure that all charges filed receive timely and appropriate consideration.

7. In 2021, the EEOC issued an updated Compliance Manual on Religious Discrimination, superseding the 2008 manual. The EEOC said that since 2008, several Supreme Court decisions, as well as decisions from lower courts, have “altered the legal landscape”. Will you commit, if confirmed, to not revising or rescinding any of the 2021 updates to the Compliance Manual?

Workers should be free from discrimination on the basis of their religion in the workplace. In the event I am so fortunate as to be confirmed and the matter of the Compliance Manual on Religious Discrimination comes before the EEOC while I am a Commissioner, I commit to fully understanding the history of, and rationale for, the revisions and giving a full hearing to all points of view on the relevant issues before supporting – or declining to support - any further revisions.

IV. Arbitration

1. In public remarks before a U.S. House subcommittee, you asserted that the proliferation of pre-dispute arbitration agreements in the workplace “has disrupted workers’ abilities to vindicate their substantive rights, in particular their federal statutory rights, creating systemic and persistent disadvantages for workers.” Do you stand by those remarks?

As Justice Blackmun made clear in *Mitsubishi Motors Corp.*, the Federal Arbitration Act (“FAA”) must not impede a prospective litigant’s ability to “effectively[] vindicate its statutory cause of action.” 473 U.S. 614, 637 n.19 (1985). Ever since, the Court has repeatedly cited *Mitsubishi* as one of the foundational opinions for construing the FAA, from Justice Scalia’s opinion in *Italian Colors*, 570 U.S. 228, 235 (2013) (noting the “‘effective vindication’ exception”), to Justice Gorsuch’s opinion in *Epic Systems*, 138 S. Ct. 1612, 1631 (2018). Given the Supreme Court’s mandate, it is imperative that litigators remain vigilant that those subject to mandatory arbitration remain able to effectively vindicate their rights. One area where this is of special concern is in the employment context, where certain arbitration procedures can raise barriers to employees’ abilities to bring claims. This issue is unlikely to come up in my work at the Commission if I were to be confirmed, as the EEOC is not bound by mandatory arbitration provisions.

2. In oral testimony before the same Committee, you stated that only unions acting collectively should be permitted to enter into pre-dispute arbitration agreements. How does this belief that unions should be granted special preferment over individual employees not violate your impartiality as a future Commissioner?

During my oral testimony, I stated that, generally, “[t]here are places that binding arbitration in the employment setting may make sense: where it is the product of negotiation between parties of equal bargaining power.” As Justice Roberts stated in *Lamps Plus*, that arbitration “is a matter of consent, not coercion” is a “rule[] of fundamental importance.” 139 S. Ct. 1407, 1415 (2019). I offered the union/employer context as an example of where that critical requirement – to have parties of equal bargaining power – might be satisfied. If I am confirmed, I will look at every case and decision that comes before me as a Commissioner and evaluate the merits impartially before taking a position.

3. In the same testimony, you have criticized the Supreme Court for “expand[ing] the Federal Arbitration Act’s reach far beyond its original purpose . . . resulting in arbitration’s metastasis”. Please explain to this Committee what you mean by “arbitration’s metastasis.” As a Commissioner, will you commit to upholding and faithfully applying Supreme Court precedent, including *Epic Systems*?

I am firmly committed to upholding and faithfully applying the law and Supreme Court precedent if I am confirmed as a Commissioner. This issue is unlikely to come up in my work at the Commission if I am confirmed, as the EEOC is not bound by mandatory arbitration provisions.

I use the term “metastasis” to refer to the growth of mandatory employment arbitration, as did Cornell Professor Alexander J.S. Colvin in his paper, *The Metastasization of Mandatory Arbitration*. 94 CHI.-KENT L. REV. 3 (2019). The fact that mandatory arbitration in employment has grown over the years is well documented. See Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL STREET JOURNAL (Jan. 25, 2018), <https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201>.

4. You have also supported, H.R. 4841, Restoring Justice for Workers Act, which proposes to amend the National Labor Relations Act to render pre-dispute arbitration agreements unenforceable. Do you continue to support the Restoring Justice for Workers Act?

If confirmed as a Commissioner, I would be committed to faithfully upholding and enforcing any and all applicable federal law. It is the role of Congress to determine which laws to enact that best protect the well-being of American workers and consumers. Moreover, because the EEOC is not bound by arbitration agreements between employers and employees, the state of federal arbitration law would have little bearing on my mandate as a Commissioner if I were confirmed.

In my current role as a private litigator, I have been vocal about what aspects of some legislation might improve the implementation of various dispute resolution procedures. It is part of the democratic process for an engaged citizenry to provide their views on the benefits and drawbacks of congressional legislative proposals. For example, I voiced my support for Congress's recent enactment of the bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.

5. The Restoring Justice for Workers Act also contains an exception for the prohibition of class action waivers for unions. How do you reconcile your support for prohibiting pre-dispute arbitration and class action waivers between employees and employers, but not doing so for agreements between employers and labor organizations?

According to Justice Roberts, a “rule[] of fundamental importance” is that arbitration “is a matter of consent, not coercion.” *Lamps Plus*, 139 S. Ct. 1407, 1415 (2019). When both of the parties that enter into a pre-dispute arbitration agreement are well-resourced, sophisticated entities with experience litigating matters before arbitral bodies, Justice Roberts’s concerns regarding opportunities for coercion are reduced. Moreover, because the EEOC is not bound by arbitration agreements between employers and employees, the state of federal arbitration law would have little bearing on my work as Commissioner, if I were confirmed.

6. Is such an exception and special solicitude not in direct contradiction to Supreme Court precedent, particularly the Supreme Court’s holding in 14 Penn Plaza v. Pyett that “[n]othing in the law suggests a distinction between the status of arbitration agreement agreements signed by an individual employee and those agree to by a union representative”?

Justice Roberts observed in *Lamps Plus*, decided ten years after *Pyett*, that consent rather than coercion is the rule of fundamental importance in arbitration agreements. 139 S. Ct. 1407, 1415 (2019). If Congress were to determine that the statuses of those entering into arbitration agreements impact that rule, such a finding could be a justification for legal distinction.

Moreover, “the law” that the Supreme Court was referencing in *Pyett* the Age Discrimination in Employment Act (“ADEA”). *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (“The Gilmer Court’s interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”). Indeed, Congress may make the policy-based distinctions it deems appropriate and necessary pursuant to any constitutional limitations or requirements. Moreover, because the EEOC is not

bound by arbitration agreements between employers and employees, the state of federal arbitration law would have little bearing on my work as Commissioner, if I were confirmed.

7. Months could be spent reviewing the substantial volume of litigation contesting class certification requirements under Federal Rule of Civil Procedure 23, as well as other federal statutes that have different class litigation procedural requirements. For example, under the FLSA, the Equal Pay Act, and the Age Discrimination in Employment Act, class actions are known as collective actions covered by Section 216(b) of the FLSA. Different opt-in procedural requirements are applicable under Section 216(b) of the FLSA than under Rule 23, which has also spawned time-consuming litigation.
 - a. Is the complex, often indecipherable class action procedural requirements that are applicable in concerted litigation even more confusing to the lay person than the “fine print” and legalese in consumer and employee arbitration agreements?

Because the EEOC is not bound by arbitration agreements between employers and employees and need not pursue class or collective action certification in its cases, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

Because these are highly fact specific determinations, I am not in a position to opine on whether a lay person would find class certification requirements or an arbitration agreement less confusing. The rules for class certification require that experienced class action counsel be appointed to represent the class.

Congress has determined, through a variety of legislation, that the class action or collective action mechanism should be available to litigants when doing so will conserve judicial and party resources. This efficiency is attained when individuals with similar claims achieve economies of scale by pooling their claims into one case. Such pooling is efficient for the parties because many litigants can share one set of expert witnesses, one lawyer, and one round of discovery. Such pooling conserves judicial resources because it results in many claims’ being dispatched by one adjudicator.

In Congress’s judgment, the exact conditions which must be met to ensure these efficiency gains will be accomplished varies depending on the nature of the underlying claims. Parties seeking to pursue their case on a class or collective basis must satisfy the standards set forth in Section 216(b) or Rule 23 and explained in applicable caselaw. Courts must examine the

particulars of each case to determine whether those standards have been satisfied.

- b. Throughout your testimony, you attempted to dispel many myths about arbitration—that it is less costly, cheaper and faster than litigation. Do you disagree or agree with the following quote from Justice Stephen Breyer in Allied-Bruce Terminix Cos. v. Dobson holding that the Federal Arbitration Act applied to all disputes involving commerce?

“ [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules, it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; and it is often more flexible in regard to scheduling of times and places of hearing and discovery devices. ”

Considering this quotation in context will provide some additional clarification. Justice Breyer was quoting a Congressional Report in summarizing an *amicus curiae* argument. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 280 (parenthetical) quoting H.R. Rep. No. 97-542, p. 13 (1982)). In the same discussion, Justice Breyer used language suggesting he was suspicious of the findings in the Congressional Report, (see *id.* (“[A]rbitration’s advantages often would *seem* helpful to individuals.”) (emphasis added)), and ultimately declined to accept that *amicus* argument. See *id.* (“We are uncertain, however, just how the ‘objective’ version of the ‘contemplation’ test would help consumers.”). Justice Breyer then went on to voice his concerns about undue influence in pressuring individuals to sign arbitration agreements. See *id.*

Just two paragraphs below the quotation provided, Justice Breyer stated that he believed the FAA permitted states to invalidate arbitration clauses that they believed would violate general contract law principles. *Id.* To fully understand Justice Breyer’s position on the appropriate role of forced arbitration, it is helpful to place this quotation in the context of his jurisprudence on the topic. See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (joining dissent); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (authoring dissent); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (joining dissent); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (same); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (joining dissent and authoring dissent).

Because the EEOC is not bound by arbitration agreements between employers and employees, the state of federal arbitration law would have little bearing on my work as Commissioner, if I were confirmed.

8. In interviews with my staff, you asserted that you were not familiar with the National Labor Relations Act, nor labor law. Yet you have testified as an expert in favor of legislation, such as the PRO Act and the FAIR Act that would directly amend the NLRA. How do you explain this discrepancy?

I understood the term “labor lawyer” and “labor law” as they are commonly understood in the legal profession to refer to someone who regularly litigates under the National Labor Relations Act or represents labor unions or employers in labor-related/collective bargaining disputes and the associated body of law. In my nearly two decades of litigation experience, I have not litigated on behalf of unions nor employers under the National Labor Relations Act. I focused my efforts on other areas of the law. For example, I have litigated individual suits and class actions arising under federal and state employment and civil rights laws, including Title VII, the Equal Pay Act, the Pregnancy Discrimination Act, the Americans with Disabilities Act, and Family and Medical Leave.

As a litigator filing these types of workplace claims, a threshold question is whether a case should be structured as an individual matter or a class action. Sometimes, that decision is decided for us, because our clients have signed agreements relinquishing their right to bring claims as class actions. The PRO Act and the FAIR Act are directly relevant to my current work, because they include provisions that impact this critical question. The PRO Act makes it illegal for employers to enter into such agreements. The FAIR Act does the same, and also makes it illegal to enter into such agreements when they would infringe on individuals’ consumer, antitrust, or civil rights.

V. Class Action Litigation

1. In your opinion, what is sufficient to meet the commonality and typicality class certification requirements of Federal Rule of Civil Procedure 23(a)?

The standard to meet the commonality and typicality requirements for class certification specified in Rule 23(a) are set forth in that Rule and in the caselaw interpreting that rule, including important circuit court cases and prevailing case law from the Supreme Court. *See* Rule 23(a)(2); Rule 23(a)(3); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

Because the EEOC need not pursue class or collective action certification, the standard for commonality and typicality under Rule 23(a) is not likely to arise in my work as a Commissioner, if I am confirmed.

2. The Supreme Court's 2011 opinion in Dukes v. Wal-Mart criticized the Ninth Circuit for certifying a class that lacked commonality. Do you believe certifying a class of 1.5 million different plaintiffs was appropriate, in light of the fact that basic norms of civil procedure require a conceptual gap between an individual's discrimination claim and "the existence of a class of persons who have suffered the same injury?"

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), the Supreme Court articulated new requirements for class claims challenging discretionary personnel practices, reversing the district court's decision certifying the class and the Ninth Circuit's decision upholding class certification. The district court and Ninth Circuit's decisions applied the law on class certification as it stood at the time, before the Supreme Court's decision in *Dukes*. That decision from the Supreme Court does not foreclose class certification of such claims but, rather, requires that to satisfy Rule 23's commonality requirement for claims alleging a pattern or practice of intentional discrimination, plaintiffs must provide significant proof that the company engaged in a general policy of discrimination. *Id.* at 353. To satisfy the commonality requirement for disparate impact claims, plaintiffs must demonstrate that the company's policy or practice guides managers making the challenged decisions such that the corporate practice contributed to the alleged disparate impact or that the managers are otherwise engaged in a common mode of exercising discretion. The Supreme Court held that, under this articulation, the class did not meet the commonality requirements of Rule 23, and I recognize *Wal-Mart* as the prevailing law from the Supreme Court.

It is important to note that, because the EEOC need not pursue class or collective action certification, the standard for certification of class actions is not likely to bear on my work as a Commissioner, if I am confirmed.

3. Do you believe all 1.5 million women across thousands of stores suffered the same injury?

The Supreme Court's decision in *Wal-Mart v. Dukes* sets forth the prevailing standard to interpret Rule 23's commonality requirement. Plaintiffs' legal team in this case, of which I was a member, relied on case law predating the Court's decision to assert that the class could meet this requirement. The putative class alleged, and the district court and Ninth Circuit, both agreed that all members of the then-certified class were similarly situated with respect to their claims of pay and promotion discrimination. The Supreme Court ultimately disagreed, decertifying the class and articulating the standards for class certification that I rely upon and apply as a litigator.

Because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

4. Do you believe it likely that the mere existence of a policy of giving local supervisors discretion over employment matters is evidence that every employee in a company with that policy has a Title VII disparate impact claim? Please provide an explanation instead of a simple yes or no.

As a litigator that brings class action cases, I adhere to the prevailing case authority interpreting Title VII and Rule 23. To determine whether a policy applies on a classwide basis and supports a classwide Title VII disparate impact claim requires applying the prevailing case authority to the facts, such as the nature of the policy. In *Wal-Mart*, the Supreme Court reaffirmed prior holdings of the Court that systems of subjective decision-making having an unjustified adverse impact can be subject to liability findings. *Dukes*, 564 U.S. 338, 355 (“[A]n employer’s undisciplined system of subjective decision-making [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.”) . Such “appropriate cases” require plaintiffs to identify a “common mode of exercising discretion” when challenging subjective systems. *Id.*

Because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

5. Do you believe, as your litigation record indicates, in the claim of an expert who testified in *Dukes*, a sociologist who asserted that a corporation whose culture could make it vulnerable to gender bias is by itself evidence of a general policy of discrimination?

I recognize that the Supreme Court’s decision in *Wal-Mart v. Dukes* sets forth the prevailing standard on Rule 23’s commonality requirement that for claims alleging a pattern or practice of intentional discrimination, plaintiffs must provide significant proof that the company engaged in a general policy of discrimination. The prevailing law does not treat corporate culture alone as a basis for creating liability for the workplace.

Because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

6. Is it permissible to assert that a class of nearly 2 million people, encompassing different stores with different management classes, present a common contention, or claim, of such a nature that it is capable of class-wide resolution?

Class certification requires demonstrating that the issues of central importance to the case are capable of class-wide resolution. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). In *Wal-Mart*, the Supreme Court held that, “[w]hat matters to class certification . . . is not the raising of common ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 352. These are case-specific issues that must be determined in the context of the particular facts of the case, including whether there is a common policy that ties together all members of the class such that issues of central importance to the claims can be resolved for all members of the class. Importantly, because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

7. Do you agree with the definition of class-wide resolution as being one in which the claim’s truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke?

I agree that the Supreme Court has interpreted Rule 23(a)(2) to require that a common contention “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Importantly, because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

8. Do you agree that the crux of a Title VII inquiry is “the reason for a particular employment decision”, and that a class-action complaint requires the moving party to demonstrate common questions of fact- that an employer discriminated against all of them in the same fashion?

In my role as a litigator who brings class action cases, I adhere to the pertinent legal authority regarding whether a putative class has satisfied the requirements of Rule 23(a) for the Title VII claims. The Supreme Court has held that “[t]he crucial difference between an individual's [Title VII] claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while ‘at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision-making.’” *Cooper v. Fed. Rsrv. Bank of Richmond*, 467

U.S. 867, 876(1984) (quoting *Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977)).

Because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

9. In *Dukes*, you sued and sought relief for millions of employment decisions made at once. Do you believe that millions of disparate employment decisions made at Wal-Mart had sufficient commonality to warrant class certification?

At the time that the legal team brought the case that led to the Supreme Court's decision in *Dukes*, the claims asserted by the putative class adhered to the prevailing legal standard to meet commonality requirements under Rule 23(a). In fact, the district court granted class certification in a lengthy and reasoned opinion, and the Ninth Circuit affirmed that decision. The Supreme Court articulated new standards for commonality and predominance under Rule 23 in reversing class certification in *Dukes*; its decision has been the law for the last decade.

Importantly, because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

10. Can you identify a general policy of discrimination, or even a common mode of exercising discretion that pervades Wal-Mart, sufficient to justify a class action against a company of Wal-Mart's size and geographic scope?

***Dukes* articulated new requirements for class claims challenging discretionary measures and remains the prevailing legal authority on this issue. *Dukes* set forth the requirement that to satisfy Rule 23's commonality requirement for claims alleging a pattern or practice of intentional discrimination, plaintiffs must provide significant proof that the company engaged in a general policy of discrimination. Therefore, the basis for the class claims against Wal-Mart in *Dukes* were tailored to the prevailing standard to meet Rule 23(a)(2) at the time. In the years since, I have litigated cases in which – applying the standards set forth in *Dukes* – my colleagues and I have secured certification of company-wide classes.**

Importantly, because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

11. Do you believe a class action was the appropriate forum to obtain relief for victims of discrimination, given that any individual monetary would be reduced by the size of the class?

Class certification determinations in federal court – whether to certify a class or not – are highly case and fact specific and turn on the court’s rigorous review of whether the case in question satisfies the standards set forth in Federal Rule of Civil Procedure 23 as interpreted by the Supreme Court in *Dukes* and in many cases since *Dukes* was decided more than a decade ago. Lawyers bringing class actions must consider many factors before determining whether to proceed on behalf of a putative class, or not, on behalf of victims of discrimination. With respect to damages, if a class establishes liability under Title VII, the court would then address the nature of necessarily relief, including injunctive and declaratory relief as well as the amount and distribution of monetary relief. during the second stage, remedial, of the trial. There are also certainly situations in which a plaintiff may prefer to bring a claim individually.

Importantly, because the EEOC need not pursue class or collective action certification, these issues are not likely to bear on my work as a Commissioner, if I am confirmed.

VI. Component 2 data

1. Should the pay data collected in 2019-2020 pursuant to the Court’s order in National Women’s Law Center v. Office of Management and Budget be used in EEOC investigations or litigation?

It has been my experience as a litigator that robust and reliable data can be valuable for understanding and remedying discrimination in compensation. I understand that the National Academy of Sciences is undertaking an analysis of the compensation data collected in 2019-2020. I would like to review and consider that analysis as well as have an opportunity to study the issue myself, to hear from a wide range of perspectives about the options for use of that data before reaching any conclusions about whether and if so, how that data should be utilized.

2. Did you play any role in the litigation conducted by the National Women’s Law Center that resulted in the court ordering EEOC to resume collection of EEO-1 Component 2 data?

No.

3. Do you support the EEOC collecting Component 2 pay data?

It has been my experience as a litigator that robust and reliable data can be valuable for understanding and remedying discrimination in compensation. . I understand that the National Academy of Sciences is undertaking an analysis of the compensation data collected in 2019-2020. I would like to review and consider that analysis as well as have an opportunity to study the issue myself, to hear from a wide range of perspectives about the options for use of that data before reaching any conclusions about whether and if so, how that data should be utilized.

4. Do you agree with the contention of a variety of left-of-center groups that EEO-1 Component 2 data “can help provide EEOC with information to assist in identifying trends in pay disparities and future enforcement efforts”?

It has been my experience as a litigator that – in nearly any setting -- robust and reliable data can be valuable for understanding and remedying discrimination in compensation. Whether EEO-1 Component 2 data can be such a resource is an issue that I would want to study if I am so fortunate as to be confirmed, and I would listen to a wide range of perspectives on the issue before reaching my own determination.

5. EEOC’s Chief Information Officer has testified with significant concerns about whether the EEOC would be able to protect the confidentiality of submitted pay data information. Therefore, will you commit, if confirmed, to refrain from collecting Component 2 data until the EEOC has the capability and infrastructure to protect and secure such proprietary information?

If I were to be confirmed, I would support ensuring that any data collected is secure. As with other issues relating to the potential re-start of the collection of pay data by the EEOC, I would want to study this issue carefully if I am confirmed before reaching a final determination about how to approach issues of security of any data.

6. The existing EEO-1 report requires 140 data points. Pursuant to the changes proposed by the EEOC in Component 2 forms, covered employers will have to submit forms for each establishment, and each establishment report consists of 3,660 data points. The Component 2 form requires almost 26 times the number of data points to be completed, with the EEOC admitting they failed to properly analyze the “burden of time and effort” it would take to complete the Component 2 form. How does such an admission not directly contradict the Paperwork Reduction Act, and how is the use of such data, that has not been tested, not flawed?

As I am not yet at the EEOC and not immersed in the discussion about this issue nor privy to all of the information I would want to consider, I am not in a position to comment on this question. Before reaching my own determinations about the burden on employers associated with potential Component 2 compliance, I would want to study the issue myself, including by reviewing the forthcoming National Academy of Sciences report, and hearing from a wide range of stakeholders about their views on the benefits and burdens associated with the prior data collection.

7. A major overriding criticism of the Component 2, from a cross-section of independent and well credentialed economists, is that the Component 2 data “would impose enormous burdens and risks on employers who base complex compensation decisions on various factors other than membership in a particular EEO-1 category”.
 - a. Do you believe Component 2 data should convey not only employees’ wage bands, but context as to how employees’ landed in them, such as job experience, education or skill level?

As I am not yet at the EEOC, I am not immersed in the discussion about this issue. It has been my experience as a litigator that robust and reliable data can be valuable for understanding and remedying discrimination in compensation. It has also been my experience that context about workers is valuable in being able to understand their compensation. Education, relevant prior experience, skill levels, job descriptions, and other indicators may be relevant to understanding the compensation of workers. Before reaching my own determinations, I would want to study the issue myself, including by reviewing the forthcoming National Academy of Sciences report, and hearing from a wide range of stakeholders about their views on the prior data collection, including the fields of data sought in that prior data collection.

- b. Is the lack of such necessary context a concern for you?

As I am not yet at the EEOC, I am not immersed in the discussion about this issue. Before reaching my own determinations, I would want to study the issue myself, including by reviewing the forthcoming National Academy of Sciences report, and to hear from a wide range of perspectives about their views on the prior data collection, including the fields of data sought in that prior data collection.

- c. The Component 2 data also requires employers to furnish broad payroll data, data that is often fluid for hourly employees and subject to changes year-to-year due to promotions, pay rate changes, deduction changes, and leaves of

absence. How is it not possible that such data, lacking context, could be used as a weapon by the plaintiff's bar to force settlement in discrimination cases?

As I am not yet at the EEOC, I am not immersed in the discussion about that issue. Before reaching my own determinations, I would want to study the issue myself, including by reviewing the forthcoming National Academy of Sciences report, and to hear from a wide range of perspectives about their views on the prior data collection.

8. If the EEOC decides to move forward on collecting pay data, will you ask Chair Burrows to hold another public hearing and public comment on the proposal before it is finalized? I understand one hearing was held previously but that was on the old pay data proposal that was withdrawn, so will you commit to asking the Chair for a new hearing?

Yes, I believe that a public hearing and receiving public comment on this issue would be valuable.

VII. Transparency and Disclosure

1. What is your view of the role of the Commissioners in the EEOC's litigation program?

For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in oversight of the EEOC's litigation. Litigation is an important aspect of the EEOC's work to enforce the workplace non-discrimination laws. As a litigator myself, I would want to be involved with the litigation program at the Commission, if I am so fortunate as to be confirmed. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider this issue for myself – hearing from a wide range of perspectives before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions.

2. Should Commissioners have to vote on litigation before it is filed? If not, who should make those monumental decisions, and on what basis do you support delegating such an important duty?

For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in oversight of the EEOC's litigation. Litigation is an important aspect of the EEOC's work to enforce the workplace

non-discrimination laws. As a litigator myself, I would want to be involved with the litigation program at the Commission, if I am so fortunate as to be confirmed. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider this issue for myself – hearing from a wide range of perspectives before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions.

3. Do you believe the Commission should be as transparent as possible in all of its public work?

Transparency is an important value for government agencies charged with being responsible stewards of public resources.

4. If so, do you not then concur that the most momentous policy decisions the Commission implements should be voted upon by Senate confirmed Commissioners appointed by an elected President, with a diversity of views?

Transparency and efficiency are both important values for government agencies charged with being responsible stewards of public resources. I would bring a commitment to those values to my work if I am confirmed. The Commissioners should participate equally in the development and approval of Commission policy guidance especially the most momentous policy decisions. If I were confirmed, I would take seriously my duty to ensure the EEOC is setting sound policy for the nation's workers and employers.

5. Do you agree that cases of pattern and practice discrimination can involve a vast expenditure of taxpayer resources, as well as diminish the agency's reputation if the litigation were to fail?

Yes, it is possible that pattern or practice cases can involve significant outlay of resources. However, it is also true that the resource outlay may be entirely appropriate and that failure to litigate could diminish the agency's reputation. The appropriate outlay of resources and the potential reputational effect of pattern or practice cases are case-specific determinations that turn on a variety of questions, including but not limited to the following:

- **How many workers are covered by the case?**
- **What is the theory of the case? What is the harm being challenged?**
- **How do the facts of the particular case relate to the applicable caselaw?**

These are case-by-case and highly fact-specific issues.

6. In keeping with themes of accountability and transparency, do you support then Chair Dhillon's reform of agency procedure modifying EEOC's delegation authority?

Transparency is an important value for government agencies charged with being responsible stewards of public resources, as are accountability for the agency's use of those public resources and efficient use of those resources to enforce the workplace non-discrimination laws. I will bring a commitment to those values to my work if I am confirmed. As a litigator myself, I would want to be involved with litigation at the Commission. For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in the EEOC's litigation. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider the issue for myself – hearing from a wide range of perspectives – before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions, including the delegation of litigation authority.

7. Will you commit to maintaining the EEOC's current delegation authority?

As a litigator myself, I would want to be involved with litigation at the Commission, if I am so fortunate to be confirmed. For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in the EEOC's litigation. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider the issue for myself – hearing a wide range of perspectives – before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions, including the delegation of litigation authority.

8. Do you agree or disagree that certain classes of litigation should merit an additional layer of review, particularly cases that implicate novel, unsettled questions of law and cases likely to generate public controversy?

Yes, I agree that certain classes of litigation should merit an additional layer of review.

9. If not, why should these decisions be delegated to Regional Attorneys, who are less accountable and known to the public, and who can offer little, if any rationale, for their litigation choices?

Not applicable

10. Do you also believe the Commission as a whole should vote before submitting *amicus curiae* (friend of the court) briefs?

For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in the EEOC's litigation, including *amicus* briefs. It is my understanding that Commissioners must vote to approve the filing of any amicus brief.

11. Upon implementation of Chair Dhillon's reforms in favor of transparency and accountability, a number of groups submitted a letter to the EEOC opposing the reform that would enable greater transparency. Do you agree with the National Women's Law Center's contention that Chair Dhillon's reforms "would needlessly delay EEOC's litigation efforts and harm workers?"

Transparency and accountability are important public values that I support. I am not fully versed in how former Chair Dhillon's reforms changed EEOC's practices related to transparency and accountability. Because I am not familiar with the letter referenced, I am unable to opine regarding the National Women's Law Center's view expressed in that letter. Before reaching my own determinations, I would want to study the issue myself and to hear from a wide range of perspectives about their views on former Chair Dhillon's changes.

12. Do you agree with the letter's contention that Regional Attorneys should be given full authority in EEOC cases and that Chair Dhillon's reform "communicated a message of deep distrust and disrespect" for civil servants and "builds new inefficiencies" into the EEOC?

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

13. If so, can you identify these inefficiencies?

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

14. Do you believe this reform has resulted in what the National Women's Law Center has portended, namely that the reforms "creates hurdles for the EEOC to initiate litigation," harming those dependent on that litigation for remedies?

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

15. Do you agree giving Commissioners greater authority to decide which cases the EEOC will litigate "will frustrate the EEOC's litigation efforts" and the greater importance of the Commission, whose votes and public meetings have been recorded under Chair Dhillon's leadership, will be "undertaken through a rushed and secretive process?"

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

16. Do you believe such institutional reforms creates additional barriers to recovery for victims of discrimination?

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

17. If so, can you identify any specific data that illustrates a causal relation between Chair Dhillon's reform of the delegation authority and diminished recoveries on the part of plaintiffs?

Because I am not familiar with the letter referenced, I am unable to opine regarding the views expressed in that letter. Before reaching my own determinations, I would want to study the issue and to hear from a wide range of perspectives about their views on this issue.

18. Approximately what percentage of the EEOC's litigation should be comprised of systemic suits?

It is important to strike a balance between systemic litigation and individual charges. Where that balance lies precisely is something I will need to evaluate if

I am so fortunate as to be confirmed. If so, I will be interested in hearing from a wide range of perspectives on this issue.

19. Do you believe the EEOC should pursue litigation on an issue that the EEOC has not given guidance to the public, either through regulation, guidance or technical assistance?

Litigation decisions must be made on a case-by-case basis, looking at the particular facts in a case as well as the applicable law in that circuit. Whether a case should or should not be pursued is highly factually specific. The constitutional requirement of notice is an important safeguard to ensuring potential defendants are not subjected to unfair surprises. If I am confirmed, I would be open to hearing from you and others about your concerns on this issue.

20. If confirmed, will you commit to making your votes publicly available?

Yes, I will make available to the public those votes that do not violate Commission confidentiality policy and practice.

VIII. Conciliation

1. Did you support the EEOC's conciliation rule that Congress recently revoked via the Congressional Review Act?

As I am not yet at the EEOC, I am not immersed in these issues. Accordingly, my understanding of the arguments in support and opposition to the prior conciliation rule is limited. I do not have a position as to whether the now-rescinded conciliation rule would have resulted in an increase in successful conciliations or more remedies for employees. That said, I think it is important – and the statute requires it – to look for opportunities to most efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses.

2. The purpose of the conciliation rule was to remedy a conciliation system that resolved less than half of the charges where EEOC supports a finding of discrimination. The rule also identified a number of challenges with the conciliation system, with approximately one-third of respondents receiving a reasonable cause finding refusing to participate. Only 41% of EEOC's conciliation efforts were successful. How does the repeal of the conciliation rule remedy these defects?

As I am not yet at the EEOC, I am not immersed in the discussion about these issues. Accordingly, my understanding of the arguments in support and opposition to the prior conciliation rule is limited. I do not have a position as to

- whether the now-rescinded conciliation rule would have resulted in an increase in successful conciliations or more remedies for employees. That said, I think it is important – and the statute requires it – to look for opportunities to most efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses.**
3. Do you agree or disagree with the rule’s contention that employees receive a net benefit from conciliation, as an increase in successful conciliations will result in more employees receiving remedies for the discrimination they suffered in an accelerated timeframe?

- As I am not yet at the EEOC, I am not immersed in the discussion about these issues. Accordingly, my understanding of the arguments in support and opposition to the prior conciliation rule is limited. I do not have a position as to whether the now-rescinded conciliation rule would have resulted in an increase in successful conciliations or more remedies for employees. That said, I think it is important – and the statute requires it – to look for opportunities to most efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses.**
4. Do you agree that the conciliation rule saved the taxpayer litigation costs by aiming to resolve more cases by conciliation?

- As I am not yet at the EEOC, I am not immersed in these issues. Accordingly, my understanding of the arguments in support and opposition to the prior conciliation rule is limited. I do not have a position as to whether the now-rescinded conciliation rule would have resulted in an increase in successful conciliations or more remedies for employees. That said, I think it is important – and the statute requires it – to look for opportunities to most efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses.**
5. Though figures differ, the EEOC only litigates a small percentage of cases in which reasonable cause of discrimination is found and conciliation proves unsuccessful, with the Commission filing lawsuit in as low as ten percent of the cases. Is it possible that the rescission of the conciliation rule will once again place a burden on private plaintiffs to pursue their cases, rather than be availed of accelerated remedies?

- As I am not yet at the EEOC, I am not immersed in the discussions about these issues. Accordingly, my understanding of the arguments in support and opposition to the prior conciliation rule is limited. I do not have a position as to whether the now-rescinded conciliation rule would have resulted in an increase in successful conciliations or more remedies for employees. That said, I think it is important – and the statute requires it – to look for opportunities to most**

efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses.

6. Do you agree with the Supreme Court's judgment in *Mach Mining vs. EEOC* that conciliation plays an important role in achieving Congress's goal of ending employment discrimination?

Yes.

7. How much information do you believe does EEOC need to disclose to employers during the conciliation process?

As I am not yet at the EEOC, I am not immersed in EEOC's policies and practices with respect to information disclosed to employers during conciliation. However, I support maximizing transparency while balancing the need to protect the rights of the parties involved. Striking a balance between protecting workers who may fear retaliation, ensuring that the EEOC has the tools it needs to flexibly and quickly resolve disputes, while also ensuring that employers have notice, clarity and information is important to ensuring successful conciliation of charges. If I am so fortunate as to be confirmed as Commissioner, I would look forward to working with my fellow Commissioners and stakeholders to determine how to promote transparency without compromising the EEOC's ability to flexibly and quickly resolve disputes and without undermining the protections afforded workers.

IX. Guidance

1. Will you commit to supporting public comment on EEOC guidance before it is finalized?

I support obtaining public input as EEOC develops guidance.

X. Oversight

1. In your response to the Committee regarding your social media presence and Twitter feed, you claim you have not deleted social media accounts, but "periodically, as a general and regular practice typically once a year, [you] delete old posts from [your] Twitter and Facebook accounts".
 - a. When was the first time you deleted tweets as a matter of practice?

I believe it was around 2019 that I started deleting tweets regularly as a matter of practice.

- b. When was the last time you deleted tweets as a matter of practice?

I believe I last deleted tweets as a matter of practice in late 2020 or early 2021.

- c. In your staff interview, you said you could not give examples of what Tweets you had deleted because there were too many. Please confirm you don't recall what tweets you have deleted or the subject matter.

I do not recall what tweets were deleted or their subject matter. I delete all tweets without reviewing them.

2. If confirmed, do you commit to providing me and my staff with information that I, or other minority members of the Committee, request from EEOC, in the requested time frame?

I recognize the importance of Congressional oversight and will work to accommodate oversight requests.

3. If confirmed, do you commit to providing me and my staff with documents that I, or other minority members of the Committee, request from EEOC, in the requested time frame?

I recognize the importance of Congressional oversight and will work to accommodate oversight requests.

4. If confirmed, do you commit to providing me and my staff, or other minority members of the Committee, with briefing requests from you and/or your staff, within the requested time frame?

I recognize the importance of Congressional oversight and will work to accommodate briefing requests.

5. Do you commit to providing the EEOC Inspector General and the Government Accountability Office with any information, briefings, and documents they may request?

I recognize the importance of work done by the EEOC Inspector General and the Government Accountability Office and will work to respond to requests from EEOC's Inspector General and the Government Accountability Office for information, briefings, or other materials.

6. Do you commit to not seeking an ethics waiver?

Yes.

Senator Murkowski

1. You have served as a spokesperson for the Illinois chapter of the U.S. Public Interest Research Group (USPIRG) on climate matters and as a lobbyist for USPIRG. Both entities have posted on their websites the position that, “we must retire coal-fired power plants, oil-based transportation systems and other fossil fuel infrastructure” and that the nation should transition “to 100 percent renewable energy”. The USPIRG’s Climate Solutions plan “calls for federal, state and local governments to end subsidies and other incentives for fossil fuel infrastructure”. Do you personally agree that that we must stop investing in and using fossil fuel infrastructure?

My personal views from over 20 years ago related to fossil fuels will not impact my ability to treat employers in the fossil fuel industry fairly. In the event I am so fortunate as to be confirmed as a Commissioner, my personal views on climate issues would not impact my enforcement of federal workplace non-discrimination laws. If I am confirmed, I will look at every case and decision that comes before me as a Commissioner and evaluate the merits impartially before taking a position. Were I to be confirmed, my professional and ethical obligation would be to follow and uphold the law, and I would do so. The letters submitted in support of my nomination from my opposing counsel and those from different political and professional backgrounds underscores my ability to approach the work of being a Commissioner in a thoughtful, open-minded, and unbiased way.

2. When Title VII was passed, the original sponsors, including Senator Humphrey and also Senator Dirksen and Senator Case, stated that Title VII issues were best resolved by conciliation. Previously, EEOC issued rules which gave the conciliation and mediation process some structure and required the EEOC to provide detailed information to employers to make the process meaningful. Although the conciliation regulation was invalidated through a Congressional Review Act resolution, nothing stops EEOC from using the conciliation and mediation process on its own initiative—as Senators Humphrey, Dirksen and Case envisioned.
 - Do you agree that Title VII directs EEOC to engage in conciliation before initiating litigation?

Yes.

- Do you believe that employers deserve to know the details about how EEOC determined they are at fault to facilitate conciliation?

As I am not yet at the EEOC, I am not immersed in EEOC's policies and practices with respect to information disclosed to employers during conciliation. However, I support maximizing transparency while balancing the need to protect the rights of the parties involved. Striking a balance between protecting workers who may fear retaliation, ensuring that the EEOC has the tools it needs to flexibly and quickly resolve disputes, while also ensuring that employers have notice, clarity and information is important to ensuring successful conciliation of charges. If I am so fortunate as to be confirmed as Commissioner, I would look forward to working with my fellow Commissioners and other stakeholders to determine how to promote transparency without compromising the EEOC's ability to flexibly and quickly resolve disputes and without undermining the protections afforded workers.

- Do you believe that using a procedure that is more likely to give employees and employers the opportunity to resolve matters quickly at less expense is better than to rely on costly, uncertain litigation?

In my experience as a litigator, the opportunity to resolve cases through settlement can be advantageous to all parties – litigation is not always necessary, nor desirable. I think it is important – and the statute requires it – to look for opportunities to most efficiently resolve charges through conciliation without impeding the vindication of statutory rights and protections of American workers and businesses. Litigation determinations must be made on a case-by-case basis, accounting for all of the potential strengths and weaknesses of a case, prevailing law in that circuit, and other factors. Questions of expeditiousness, expense, and certainty around litigation can vary greatly from case to case.

3. In a recent case, Amazon terminated an employee for making vulgar, offensive remarks to a female employee through a bullhorn while protesting as part of a union organizing campaign. He also videotaped himself making these remarks, and then posted it on the internet. His remarks seem to constitute sexual harassment under EEOC Guidance and would be the subject of a charge if the employer did not act upon the situation. An NLRB Administrative Judge ordered Amazon to reinstate the employee and pay him back pay.
- Does this example expose a tension between the NLRA and Title VII where behavior that might be prohibited under Title VII is protected under the NLRA? If so, what actions would you take, if you are confirmed, to address such a tension?

Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. These are highly factually specific questions, determined by the caselaw in each circuit and the facts in each case. Comments may – if they meet the legal standards – rise to the level of conduct that is severe or pervasive. “Vulgar, offensive remarks to a female employee” might present a circumstance that could rise to a violation of Title VII.

An analysis of whether conduct prohibited under Title VII and protected under the NLRA would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit.

All workers deserve to work in workplaces free from unlawful discrimination, and if the behavior from the Amazon warehouse in Staten Island issue comes before the Commission, I would be interested in looking at it closely. If a worker there feels she has been subject to harassment or other discrimination, I would encourage her to reach out to the EEOC.

Senator Braun

EEOC Litigation Delegation:

Title VII of the Civil Rights Act of 1964 gave the Commission authority to commence or intervene in litigation against private sector employers to enforce the nation's employment discrimination laws. However, since 1995 most of this authority was delegated the General Counsel at the EEOC. In March 2020 and again in January 2021, the Commission voted to revise the delegation of litigation to require Commission approval for certain cases and give Commissioners the ability to call for a vote on all recommendations to litigate. The Commission also embraced additional transparency and accountability by posting the votes publicly online. With these changes in effect, the number of lawsuits filed increased by 24.7% – 116 in FY21 versus 93 in FY20. During the hearing you declined to commit to keeping these measures in place, citing your lack of knowledge on the topic.

1. Do you agree that Congress gave the Commissioners the authority to commence or intervene in litigation? Do you agree that the General Counsel's legal authority is to conduct this litigation?

Litigation is an important aspect of what the EEOC does to enforce the workplace non-discrimination laws. As a litigator myself, I would want to be involved with the litigation program at the Commission, if I am so fortunate as to be confirmed. For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in the EEOC's litigation. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider the issue for myself – hearing from a wide range of perspectives – before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions.

2. Do you believe that the Commission should review and vote on all litigation? Do you believe that the Commission should be transparent and held accountable by posting these votes publicly online?

Litigation is an important aspect of what the EEOC does to enforce the workplace non-discrimination laws. As a litigator myself, I would want to be involved with litigation at the Commission, if I am so fortunate to be confirmed. For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in the EEOC's litigation. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider the issue for myself – hearing all perspectives from both sides of the aisle – before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions. As to the public posting of litigation-related votes, I believe that transparency is an important value. It makes sense to post Commission litigation vote results online consistent with

the Commission's confidentiality obligations, such as the information currently posted publicly online.

3. Do you believe it is important for a nominee to be a Member of the EEOC to be familiar with issues that impact the daily function and authority of the EEOC before being confirmed?

I would bring my decade and a half experience as an employment and civil rights attorney to the Commissioner position if I am confirmed, and will commit myself to studying the details of each issue and hearing the perspectives of all sides of any issue before reaching my own independent determination on each issue. While I have become familiar with the issues that come before the EEOC, as a member of the public I do not know all the details of the daily functioning of the Commission due to statutory confidentiality limitations and deliberative process concerns.

Collection of Pay Data:

Under the Obama Administration, the EEOC expand its EEO-1 report to include EEO-1 Component 2 Data which consists of pay data, such as an employees' W-2 income information, broken down by gender, race/ethnicity, and job category. Employers are concerned that this data collection will be reinstated as it forces them to shoulder vastly increased costs of implementing and completing the data. This typically requires employers to re-form their HR systems to meet the new obligations. There are serious flaws to this type of data as it provides no context to the wages, such as job experience, education or skill level.

The previous Component 2 was simply a "data dump," which unfortunately can be misused and abused in a number of different ways, including serving as the basis for inappropriate class action lawsuits against employers by both the Commission and the private bar. Dr. Samuel Haffer, the EEOC's Chief Data Officer and Director of the Commission's Office of Enterprise Data and Analytics, at the April 16th, 2019 hearing regarding whether the Component 2 procedure should continue to be pursued by the Commission as follows: "...there is a lot of evidence, information available, that collecting data, pay data, in pay bands is not a valid way of collecting pay data for purposes of enforcing discrimination laws."

Dr. Joshua W. Mitchell, Senior Economist of Wells Consulting, in his testimony at the EEOC's November 20th, 2019 public hearing, summarized a number of concerns from various sources regarding the deficiencies of Component 2 data as follows: "There are at least six reasons why an analysis of aggregate pay band data is unlikely to yield similar results to a formal pay equity analysis. First, the EEO job categories are very broad and unlikely to properly group workers together who are truly similarly situated. A reporting hospital, for example, must categorize such diverse occupations as doctors, nurses, and attorneys in the same "Professional" EEO job category. The courts have rejected broad job categories in Title VII compensation litigation, and even the OFCCP, in its Directive 2018-05, advocates developing Pay Analysis Groupings of similarly situated employees. Second, the W-2 Box 1 annual taxable wage concept is intended for IRS accounting purposes but is ill-suited for comparing employee pay rates because it conflates employer and employee decisions and ignores employment changes that affect compensation. Employees who are promoted halfway through the year, for example, will have low annual taxable wages even if they are receiving the same rate of pay as other similarly-situated workers at the time

of the snapshot. An additional problem with Box 1 of the W-2 is that it excludes nontaxable compensation such as employee payments for health insurance premiums and contributions to 401(k)-type plans. As a result, two workers could receive the exact same gross pay but appear to be paid differently according to Box 1 because one of the workers contributed more to a retirement account. Third, the 12 pay band reporting scheme, which was created as part of the sampling design for the BLS Occupational Employment Statistics (OES) survey, is unlikely to reflect the compensation distribution of most companies' pay structures. Collapsing the data into pay bands can both exaggerate differences between employees who are paid just above and below an arbitrary cutoff, as well as hide considerable pay differences among employees in the same pay band. Fourth, the grouping together of non-exempt and exempt workers and the imputation of 20 hours for part-time work and 40 hours for full-time work to all exempt employees is not consistent with many companies' employment practices. Fifth, the Component 2 form doesn't collect information on any legitimate factors that could explain differences in employee pay. This means an employee who is just starting his or her career is treated the same as another employee who has worked at the company for 30 years. Sixth, the kinds of statistical testing available with aggregate pay band data, such as Mann-Whitney and interval regression, are unlikely to correspond well with the standard statistical testing used in employee-level multivariate regression analysis, and there is no obvious way to integrate the collected hours of information into the testing of pay band representation differences."

Dr. Mitchell also testified regarding the inadequacy of Component 2 type data as follows: "Finally, it should be noted, that the EEOC already receives aggregate pay band data on the EEO-1-4 form as part of the state and local government collection data program. When interviewed about the use of this data by the ... National Research Council Panel, both the [Department of Justice] and EEOC indicated that the pay data was not useful."

1. Do you support reinstating the collection of pay data?

It has been my experience as a litigator that robust and reliable data can be valuable for understanding and remedying discrimination in compensation. I understand that the National Academy of Sciences is undertaking an analysis of the compensation data collected in 2019-2020. I would like to review and consider that analysis as well as have an opportunity to study the issue myself, to hear from a wide range of perspectives about the options for use of that data before reaching any conclusions about whether and if so, how that data should be collected and maintained.

2. Do you believe this data is useful and had utility?

It has been my experience as a litigator that robust and reliable data can be valuable for understanding and remedying discrimination in compensation. I understand that the National Academy of Sciences is undertaking an analysis of the compensation data collected in 2019-2020. I would like to review and consider that analysis as well as have an opportunity to study the issue myself, to hear from a wide range of perspectives about the options for use of that data before reaching any conclusions about whether

and if so, how that data should be used.

3. Do you support forcing businesses to reveal sensitive information about their employees through form EEO-1?

EEO-1 Component 1 data has long been collected from employers by the EEOC in a manner that protects the privacy of workers and advances equal opportunity in the workplace.

4. Do believe the EEOC should do a Notice of Proposed Rulemaking and follow the rulemaking process should it choose to reinstate the collection of pay data? Will you commit to following the rulemaking process?

I believe that a public hearing and receiving public comment on this issue would be valuable.

Religious Discrimination:

On January 15, 2021, by a 3-2 vote, the EEOC issued an updated Compliance Manual on Religious Discrimination. The new manual broadly defines religious beliefs as “unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs.” The guidance also interprets Title VII to command employers “to accommodate religious beliefs, practices and observances if the beliefs are ‘sincerely held’ and the reasonable accommodation poses no undue hardship on the employer. The Trump Administration made a point of focusing on stronger federal protections for religious liberty and conscience.

1. Do you support repealing the updated Compliance Manual on Religious Discrimination either in its entirety or any components of it? If only certain components, which components?

Workers should be free from discrimination on the basis of their religion in the workplace. In the event I am so fortunate as to be confirmed and the matter of the Compliance Manual on Religious Discrimination comes before the EEOC while I am a Commissioner, I commit to fully understanding the history of, and rationale for, the revisions and giving a full hearing to all points of view on the relevant issues before supporting – or declining to support - any further revisions.

Conciliation:

The EEOC under the Trump Administration promulgated a conciliation rule requiring the EEOC to disclose a written summary of known facts that led to the discrimination finding, and give employers at least 14 days to respond to a conciliation proposal. As the EEOC only litigates a small percentage of cases that fail conciliation, the conciliation rule afforded greater transparency and allowed EEOC to remedy pattern or practice discrimination for a wider array of employees and employers. On June 30, 2021, the conciliation rule was repealed via a narrowly passed joint resolution under the Congressional Review Act (CRA). With the repeal of the conciliation rule under the CRA, the extent of the EEOC’s conciliation requirements revert back to the minimal standards articulate by the Supreme Court in Mach Mining LLC, v. EEOC. In *Mach Mining*, the

Court held the EEOC need only provide a sworn affidavit stating the Commission had communicated an “alleged unlawful employment practice” to the employer to satisfy its statutory conciliation obligations.

1. Do you support limiting the information provided to employers during conciliation?

As I am not yet at the EEOC, I am not immersed in EEOC’s policies and practices with respect to information disclosed to employers during conciliation. However, I support maximizing transparency while balancing the need to protect the rights of the parties involved. Striking a balance between protecting workers who may fear retaliation, ensuring that the EEOC has the tools it needs to flexibly and quickly resolve disputes, while also ensuring that employers have notice, clarity and information is important to ensuring successful conciliation of charges. If I am so fortunate as to be confirmed as Commissioner, I would look forward to working with my fellow Commissioners and other stakeholders to determine how to promote transparency without compromising the EEOC’s ability to flexibly and quickly resolve disputes and without undermining the protections afforded workers.

Independent Contractors and PRO Act:

In a 2019 Heels of Justice Podcast you discussed independent contractors and how this worker classification is one of the biggest barriers to Title VII at the federal level. You state that this is a “...structural barrier that holds workers back,” and go on to list it as one of your top two priorities that you’d like to see fixed. You also discuss and state that federal employment law has fallen behind as related to the “gig economy”. In Congress, Democrats have introduced the Protecting the Right to Organize (“PRO”) Act, which would amend the NLRA by adopting the “ABC test” to determine employee status in relation to the National Labor Relations Act. This test attempts to place the burden on the independent contractor to prove that their work fits into three restrictive elements attempts to apply a narrow, restrictive test to the vibrancy of a twenty-first century economy. Such a restrictive test, which in essence operates under the presumption that most workers are employees unless they can prove otherwise, would greatly disrupt industries that rely on independent contractors. This would likely lead to millions of jobs being eliminated or restructured.

1. Do you believe that the “gig economy” has led to the misclassification of workers as independent contractors?

No.

2. Do you support the PRO Act or the “ABC” test?

It is the job of Congress to determine what federal policies best protect the well-being of American workers and consumers. If I am confirmed as a Commissioner, I commit to upholding the law as enacted by Congress and interpreted by the courts.

3. Do you support any actions by the Administration, including the EEOC, that attempt to target industries that rely on independent contractors?

I am committed to enforcing the law to ensure that all workers covered by the federal workplace non-discrimination laws are able to work in workplaces free from unlawful discrimination. If I am so fortunate as to be confirmed, I commit to taking a thoughtful and unbiased approach to all issues that come before the Commission, including the fact-specific inquiry of whether a worker in a particular case meets the statutory definition of “employee” and is covered by the equal employment opportunity laws.

The NLRB and EEOC:

In April 2020, a male worker protesting at an Amazon facility in Staten Island, New York, shouted over a bullhorn at a female co-worker, calling her (please note these are direct quotes) “gutter bitch,” “ignorant and stupid,” “crack-head ass,” “crack ho,” and “queen of the swamp” and accusing her of being “high” and on “fentanyl,” because she disagreed with his protest. The male worker’s verbal tirade directed at and about the female coworker continued well after the female worker had disengaged and left the area. The male worker knew the exchange was being live-streamed on the internet. He specifically noted that once the video was publicly posted, the female worker would “look stupid.” The video was then posted on the internet by another worker, who also joined in the protest.

On March 17, 2022, the National Labor Relations Board General Counsel filed suit seeking reinstatement of this person on the grounds the speech was made during a protest, and the employer allegedly didn't punish other employees with full termination even though they had made equally offensive remarks. The employer disputes this, claiming the other incidents were either not sexually charged or were less severe, of less duration and had not been posted publicly.

Importantly, the EEOC has raised concerns with the NLRB’s recent tolerance of such language and misconduct in the workplace. In the NLRB’s 2019 *General Motors* case, the EEOC filed an amicus brief, in which the Commission said, “Under [the] negligence standard [under Title VII of the Civil Rights Act,] employers bear the obligation of preventing and correcting harassment in the workplace... if the employer fails to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability... employers should be able to address and take corrective action vis-à-vis workers who use this kind of racist and sexist language while otherwise lawfully exercising their rights under the NLRA.” The EEOC called on the Board to “consider a standard that permits employers to take action to correct conduct that violates Title VII or other antidiscrimination statutes.”

1. Would you say the male employee's comments, his manner of delivery (via a bull horn), and the taping and posting of the incident are evidence of sexual harassment under the federal anti-discrimination laws enforced by the EEOC?

Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. These are highly factually specific questions, determined by the caselaw in each circuit and the facts in each case. Comments may – if they meet the legal standards – rise to the level of conduct that is

severe or pervasive. The comments described in the question raise concerns that the conduct might have violated workplace harassment and hostile work environment standards under Title VII. Such an analysis would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit. All workers deserve to work in workplaces free from unlawful discrimination, and if the behavior from the Amazon facility in Staten Island issue comes before the Commission, I would be interested in looking at it closely. If a worker there feels she has been subject to harassment or other discrimination, I would encourage her to reach out to the EEOC.

2. What are employers' obligations under anti-discrimination laws once they become aware of an incident like this?

It is important for employers to take steps to prevent violations of workplace harassment laws if they are made aware of conduct such as that described in the question. Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. It creates obligations for employers to promptly address and remedy harassment. An employers' obligations are highly factually specific and may change depending on the circumstances, such as whether this incident is isolated or one of several involving the same alleged aggressor. An analysis of the employers' obligation under Title VII would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit.

3. In your view, if the female employee had filed a charge with the EEOC, what would the EEOC expect an employer to do to protect the employee and coworkers from similar abuse?

As noted in the answer above, Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. It creates obligations for employers to promptly address and remedy harassment. An employer's obligations are highly factually specific and may change depending on the circumstances, such as whether this incident is isolated or one of several involving the same alleged aggressor. For instance, in the #MeToo era, many employers have seen the value of having a reporting process in place for workers to raise allegations of harassment. Ideally, the reporting mechanism would be available to workers and confidential. There should be a means to investigate the allegation(s). Any further action from the investigation would be highly dependent on the findings. An analysis with respect to the employer's obligation under Title VII would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit.

4. If the employer failed to take such action, would they, in your view, face a potential suit from the agency or the employee?

It is important for employers to take steps to prevent violations of workplace harassment laws if they are made aware of such conduct. Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. It

creates obligations for employers to promptly address and remedy harassment. Whether an employer faces potential suit is highly factually specific and may change depending on the circumstances, such as what actions an employer takes, whether this incident is isolated or one of several involving the same alleged aggressor, who initiated the interaction, and how the employer has handled similar encounters, if any. An analysis of the employers' obligation under Title VII would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit.

5. If the male employee is reinstated but engages in similar abuse of coworkers in the future, is the employer shielded from liability since the NLRB required his reinstatement? Do you know if the government - either the NLRB or the EEOC - would end up picking up the tab for back pay and compensatory damages for any injuries suffered by workers who are harmed by future discriminatory acts by the male employee if he is reinstated?

I do not know.

6. Regardless of the merits of the legal charges the Board has filed, do you think the NLRB should pursue reinstatement as a remedy given not only the male employee's behavior but the fact that the behavior was posted on the internet?

I have not litigated cases under the National Labor Relations Act and therefore do not have an opinion on the standard for remedies, including reinstatement, under the statute. As the EEOC does not enforce the NLRA, this issue is not likely to bear on my work as a Commissioner if I am confirmed.

7. What message does the government send to female workers by requesting reinstatement of the male employee? Is the message consistent with the EEOC's objectives?

All workers deserve to work in workplaces free from unlawful discrimination, this includes the workers at the Amazon facility in question. I have not litigated cases under the National Labor Relations Act and therefore do not have an opinion on the standard for remedies, including reinstatement, under the statute.

Decline of Charges:

The Commission's FY 2023 budget requests an increase of over \$60 million from the FY 2022 budget level. Part of the Chair's justification for this increase is the argument that the EEOC needs more staff to handle an increased workload. However, according to the EEOC's own data the number of charges have steadily declined over the last five years.

1. Do you believe that there has been a decline in the number of discrimination cases in the U.S.?

I have not assessed the EEOC's data on the number of charges over the past five years and the factors that may have caused this decline. I do not believe that a decline in charges

necessarily correlates to a decline in the instances of discrimination occurring. A decline in charges could be caused by a decline in reporting. I would want to study the issue thoroughly before coming to a conclusion about the reason charges filed with the EEOC have declined. It is important to ensure that agencies have the resources they need to support their missions, and that the public's resources in those agency's budgets are used most efficiently and effectively to achieve the mission of that agency. The number of complaints may be one indicator of the amount of resources required by the agency, though it is not the only indicator.

People's Parity Project:

You sit on the Advisory Council of the People's Parity Project. This group has led campaigns urging firms against hiring former Trump Administration official in attempt to "blacklist" these individuals. Additionally, the People's Parity Project led a national campaign "galvanizing fellow law students to not participate in the recruiting process" of law firms that represent the Trump campaign or any Republican allies. You said during your hearing that all attorneys would receive a fair hearing before you at the EEOC, but the Peoples Parity Project said that "The Federalist Society's official silence, in the face of evidence that the organization's leadership planned a coup, illustrates what the Federalist Society has become: an anti-democratic organization." and "the Federalist Society—an organization that sits at the heart of the conservative legal movement—actively aided insurrectionists." They have further commented, "attorneys from Jones Day, Porter Wright, King & Spalding, and Consovoy McCarthy are leading the charge. They are not just complicit – they are enabling despotic attempts to threaten our election integrity and the future of our nation."

1. Why did you not disclose your role with the People's Parity Project to the Senate Health, Education, Labor and Pensions Committee as required, despite disclosing roles such as being on the Parent Steering Committee of your child's school?

I initially omitted the People's Parity Project ("PPP") Advisory Council because I determined that my involvement on it did not meet the standard of a "membership organization" which is what was requested on the HELP Committee Form. I opted to include the PPP to avoid any possible appearance of a failure to disclose. My role on the PPP's Advisory Council is publicly available as it is listed on listed on my bio on Cohen Milstein's website and on the People's Parity Project's website.

2. What role, directly or indirectly, did you have with the campaigns against former Trump officials, or firms that represented the Trump campaign and Republican allies?

I did not play any role in PPP's work on these issues.

3. Do you renounce the statements made by the People's Parity Project smearing conservative advocates?

I did not play any role in the PPP's statements regarding conservative advocates.

4. Will you recuse yourself from any cases involving these firms if you are confirmed?

I will follow the guidance of the Agency's ethics counsel with regard to recusal on any matter and will recuse myself from cases as necessary.

Affirmative Action:

1. Under Title VII and Supreme Court precedent, in what situations, if any, is affirmative action appropriate?

Title VII and Supreme Court precedent permit affirmative action in very narrow circumstances. The statute itself does not require formal affirmative action programs; such programs are permitted in very narrow circumstances. For example, affirmative action can be required as a condition of doing business with the federal government, which comes under the jurisdiction of the OFCCP. Also, a court may require an affirmative action program as a remedy for discrimination within the confines of prevailing legal authority. Voluntary affirmative action programs may be implemented by a private employer only if consistent with Title VII and the prevailing legal standards, including those articulated by the Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

2. Should the EEOC revisit its 1982 policy guidance on affirmative action (EEOC-CVG-1982-1, CM-607 Affirmative Action) to alter or expand the situations in which the EEOC deems race, sex, and national origin conscious decisions to be permissible (that is, lawful under Title VII)?

The EEOC should provide policy guidance to the public that conforms with the current state of the law and revisit guidance when necessary. In the event I am so fortunate as to be confirmed and the matter comes before the EEOC while I am a Commissioner, I commit to fully understanding the history of and context for this guidance and giving a full hearing to all points of view on the relevant issues.

Definition of "Woman":

1. Can you define the term "woman" for purposes of sex discrimination?

Title VII bans discrimination on the basis of *anyone's* sex or gender identity, regardless of what that gender identity is, which means that it is not necessary to define "woman" in order to identify and remedy sex discrimination. Title VII prohibits changing the terms or conditions of an individual's employment because of their sex or gender identity.

Defund the Police:

You represented Liyah Brown. Ms. Brown has commented that, "Police and prisons are institutions of White supremacy rooted in chattel slavery. This grave historical truth warrants total abolition instead of mere tweaks for "better" plantations and overseers."

1. Do you disavow Ms. Brown's incendiary comments related to law enforcement and regret representing someone who is so hostile to law enforcement?

I do not support defunding or abolishing the police. It is important to know that I have represented clients who do not share all the same political or social viewpoints as me. I choose to represent clients based on my assessment of whether they have suffered workplace discrimination in accordance with the relevant non-discrimination laws because I believe every worker is entitled to a workplace free from unlawful discrimination – regardless of their social or political views.

Dismissal of the EEOC General Counsel:

On March 5, 2021, President Biden suddenly dismissed Ms. Sharon Fast Gustafson, General Counsel of the Equal Employment Opportunity Commission (EEOC), after she rejected an ultimatum to step down. In her letter refusing to resign, Ms. Gustafson mentioned that President gave no reason for demanding she step down. As General Counsel, she was nominated by the President and confirmed by the Senate for a fixed four-year term. She was the first General Counsel in the history of the EEOC to be fired.

1. Do you believe the President has the power to remove the EEOC General Counsel? Do you believe the President has this power even without cause?

If I am confirmed, I would not have authority over this issue. I have not studied this issue in any depth to form an independent opinion on the matter.

2. Do you believe the President has the power to remove EEOC commissioners? Do you believe the President has this power even without cause?

If I am confirmed, I would not have authority over this issue. I have not studied this issue in any depth to form an independent opinion on the matter.

EEOC Technical Assistance on Bathrooms, Locker Rooms, and Showers:

According to a June 2021 technical assistance document issued by Chair Burrows, "Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity."

1. Do you believe that this interpretation extends to requiring companies to permit biological males who do not identify as male (and instead identify as female, non-binary, gender fluid, pan gender, or with any other transgender identity) to staff dressing rooms for girls in children's clothing sections of stores?

While I recognize and appreciate the concerns and complexities for employers to provide equal access to shared, intimate spaces in the workplace, I support the Commission's position that employees should have equal access to facilities in the

workplace regardless of their gender identity. Access to facilities at work is a term and condition of employment, and all workers should be free from unlawful discrimination in the terms and conditions of their employment.

Climate Activism and Objectivity:

You have a record of litigation and activism against companies in the energy space. At one point you were a spokesperson and lobbyist for the Illinois U.S. Public Interest Research Group (PIRG). PIRG wants to "retire coal-fired power plants and oil-based transportation systems, and stop investing in fossil fuel infrastructure." You are also currently a Board Member at Public Justice. Public Justice is a group that, among other things, goes after "reckless polluters." A frequent tactic of Public Justice is to sue entities, such as American Electrical Power in West Virginia and Exxon. The EEOC regularly considers cases that have to do with energy companies.

1. Given this activism, how can energy companies that don't align with your views expect a fair process at the EEOC should you be confirmed? Will you recuse yourself from these cases?

My personal views from over 20 years ago related to fossil fuels will not impact my ability to treat employers in the fossil fuel industry fairly. In the event I were so fortunate as to be confirmed as a Commissioner, my personal views on climate issues would not impact my enforcement of federal workplace non-discrimination laws. If I am confirmed, I will look at every case and decision that comes before me as a Commissioner and evaluate the merits impartially before taking a position. Were I to be confirmed, my professional and ethical obligation would be to follow and uphold the law, and I would do so. The letters submitted in support of my nomination from my opposing counsel and those from different political and professional backgrounds underscores my ability to approach the work of being a Commissioner in a thoughtful, open-minded, and unbiased way.

I will follow the guidance of the Agency's ethics counsel on these and other issues.

Collaboration for Gender-Transition Procedures:

Feelings of dissociation between one's self-image and one's body is a serious mental health problem, and anyone experiencing this deserves compassionate, quality care. Unfortunately, political support for junk science has led the Biden Administration's advocacy for dangerous and radical measures like irreversible gender transition surgery for young people. You stated during your hearing that you are interested in "creative opportunities" and "opportunities for collaborative outcomes" "to secure equal access to transition related healthcare." You have collaborated with Transgender Legal Defense & Education Fund to pressure Aetna to expand insurance coverage of surgery on healthy body parts of males for breast augmentation in order to appear more like females. Sadly, current law enables National Institutes for Health (NIH) funding for gender-transition studies on children and youth starting as young as 8-years-old. Children who undergo gender-transition procedures may experience arrested bone and brain development, impaired sexual function, and even sterilization.

1. In your role as commissioner, would “collaboration” include working with the U.S. Department of Health and Human Services and NIH to force employers to pay for gender-transition procedures for employees or for their children?

In my capacity as a private litigator, the Transgender Legal Defense & Education Fund and I worked collaboratively with Aetna to redesign its clinical policies around adult access to certain gender-affirming surgical care such that they are now in compliance with the requirements of the Affordable Care Act. Under the adjusted policies, the adult member must meet several requirements to receive consideration of the medical necessity of the procedure they seek. They must have a letter of referral from a mental healthcare provider. The member must also offer evidence of their history with gender dysphoria, demonstrating that it has been a prolonged condition. Additionally, members should have already completed a year’s worth of hormonal therapies before they receive the surgery. Our shared goal with Aetna in adjusting its policies was to help Aetna serve as an industry leader to better serve the needs of the LGBTQ+ community. The EEOC does not have authority over enforcement of the Affordable Care Act’s Section 1557, nor does it issue guidance on best practices related to gender affirming care.

Senator Marshall

1. A client of yours who you've chosen to represent, Liyah Brown, Legal Director of the Texas Civil Rights Project, has expressed her belief that police and prisons are institutions of white supremacy – do you believe police departments are institutions of white supremacy or police officers are tools of white supremacy?

No.

2. Are you in any way sympathetic to the belief that police or prisons are institutions rooted in chattel slavery?

Whether police or prisons are institutions with their roots in chattel slavery is not an issue that will come up in my work at the EEOC if I am confirmed. If I am so fortunate as to be confirmed, I will treat every individual and every employer fairly, regardless of their background. Were I to be confirmed, my professional and ethical obligation would be to follow and uphold the law, and I would do so.

Senator Tuberville

1. You represented Liyah Brown.¹ Ms. Brown has commented that, “Police and prisons are institutions of White supremacy rooted in chattel slavery. This grave historical truth warrants total abolition instead of mere tweaks for ‘better’ plantations and overseers.”²
 - a. Do you agree with Ms. Brown’s incendiary comments related to law enforcement?

I do not favor abolishing or defunding the police.

- b. If not, do you denounce those statements and regret representing someone who is so hostile to law enforcement?

It is important to know that I have represented clients who do not share all the same political or social viewpoints as me. I choose to represent clients based on my assessment of whether they have suffered workplace discrimination in accordance with the relevant non-discrimination laws because I believe every worker is entitled to a workplace free from unlawful discrimination – regardless of their social or political views.

2. You are on the advisory committee of the People’s Parity Project. You said during your hearing that all attorneys would receive a fair hearing before you at the EEOC, but the People’s Parity Project said that “The Federalist Society’s official silence, in the face of evidence that the organization’s leadership planned a coup, illustrates what the Federalist Society has become: an anti-democratic organization.” and “the Federalist Society—an organization that sits at the heart of the conservative legal movement—actively aided insurrectionists.”³ They have further commented, “attorneys from Jones Day, Porter Wright, King & Spalding, and Consovoy McCarthy are leading the charge. They are not just complicit – they are enabling despotic attempts to threaten our election integrity and the future of our nation.”⁴
 - a. Do you agree with the statements made by the Peoples Parity Project smearing conservative advocates?

I did not play any role in PPP’s statements regarding conservative advocates.

- b. How can you guarantee that those who disagree with you politically would receive a fair hearing?

As I testified at the hearing, I am committed to hearing from stakeholders from varying political positions. I recognize that, if I am so fortunate as to be confirmed, I will be shifting into a different role than a private litigator and

¹ https://drive.google.com/file/d/1TRBGT20bad3kHu5jxSjjZ5E_xplpmaYW/view

² <https://news.txcivilrights.org/2020/07/30/how-were-fighting-texas-racist-criminal-system/>

³ <https://www.peoplesparity.org/quitfedsoc/>

⁴ <https://www.peoplesparity.org/trumpfirmspledge/>

commit to be thoughtful and unbiased in approaching all issues that come before the Commission. The letters submitted in support of my nomination from my opposing counsel and those from different political and professional backgrounds underscores my ability to approach the work of being a Commissioner in a thoughtful, open-minded, and unbiased way.

3. During your testimony you discussed pregnancy-related discrimination claims being an area you would focus on at the EEOC.
 - a. Since the underlying fact pattern of these cases is important, do you believe men can get pregnant?

Pregnancy discrimination is a type of sex discrimination. See 42 U.S.C. § 2000e(k). Title VII bans discrimination on the basis of *anyone's* sex or gender identity, regardless of what that gender identity is, as affirmed by the Supreme Court in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020). Discrimination against a pregnant person, regardless of sex or gender identity, due to their pregnancy is prohibited under Title VII.

4. This past academic year, the University of Pennsylvania (UPenn) allowed a biological male, Lia Thomas, to compete in the women's swimming team alongside biological females. UPenn has also allowed Thomas, who still has all male body parts, to use sex-specific locker rooms with female athletes present. I am deeply concerned that allowing biological males to compete in women's athletics undermines decades-long efforts for women's equality in athletics. I am outraged by the report of forced sharing of sex-specific facilities that creates apprehension for female athletes. Ultimately, I believe further congressional action is necessary in order to fight back against this tide against young women from fully participating in sports, which is why I cosponsored the Protection of Women and Girls in Sports Act.
 - a. Do you agree with the decision by the University of Pennsylvania to allow a biological male to compete on the women's swimming team with biological women?

Because the EEOC does not have jurisdiction over the application of civil rights statutes to students attending institutions of higher education, these issues are not likely to bear on my work as a Commissioner if I am confirmed.

- b. Do you agree that a biological male should be able to use sex-specific locker rooms with biological females present?

Because the EEOC does not have jurisdiction over the application of civil rights statutes to students attending institutions of higher education, these issues are not likely to bear on my work as a Commissioner if I am confirmed.

5. A complaint⁵ filed by Concerned Women for America against UPenn alleges Title IX violations by the school against its female students on the school's swimming team.
- a. Will you commit to working with the U.S. Department of Education so that it can provide a timely and thorough response to this complaint and others like?

Because the EEOC does not have jurisdiction over Title IX enforcement, this complaint or others similar are not likely to bear on my work as a Commissioner if I am confirmed. However, should the U.S. Department of Education seek input from the EEOC, I would commit to working with the Department within the confines of my role as Commissioner.

6. Other women's rights groups—Women's Declaration International, USA, and Keep Prisons Single Sex—have called⁶ for an investigation into UPenn's actions on the ground that they may constitute a violate of UPenn's own school policy and state law.
- a. Are you aware of this call for an investigation?

No.

- b. Would you commit to responding to calls for investigation like these as a commissioner on the EEOC?

Investigations into UPenn's policy related to student-athletes is not an issue that would come before the EEOC. I support calls for investigation of unlawful employment discrimination.

7. Sixteen law organizations at the University of Pennsylvania Law School issued a statement⁷ in support of Thomas's position on the women's swimming team. As an alumni of the University of Pennsylvania Law School and a co-chair of its alumni advisory board on equity and inclusion, it is important to understand your views in matters like this. There must be a way to include biological males in sports without trampling biological women's achievements. Failure to do so unfairly strips female athletes of championships, scholarships, and other athletic opportunities.
- a. Do you believe that actions by UPenn against its female athletes constitute discrimination under Title IX?

As a member of the University of Pennsylvania Law School Advisory Board on Equity and Inclusion, I have not worked on these issues. I have not litigated under Title IX so I am unable to provide a legal opinion on the issue. Whether the actions of UPenn constitute a violation of Title IX is a highly factually specific inquiry, based in the caselaw in each circuit and the facts of the case. Because the EEOC does not enforce Title IX, this issue is unlikely to bear on my work as a Commissioner if I am confirmed.

⁵ <https://concernedwomen.org/cwa-files-civil-rights-complaint-filed-against-upenn/>

⁶ <https://womensdeclarationusa.com/letter-regarding-upenn-womens-swim-team/>

⁷ <https://www.thedp.com/article/2022/01/supporting-lia-thomas>

- b. Is it fair to continue to deny female athletes access to funding, facilities, and athletic scholarships?

Because the EEOC does not have jurisdiction over Title IX enforcement, this complaint or others similar are not likely to bear on my work as a Commissioner if I am confirmed.

8. Under Title VII and Supreme Court precedent, in what situations, if any, is affirmative action appropriate?

Title VII and Supreme Court precedent permit affirmative action in very narrow circumstances. The statute itself does not require formal affirmative action programs; such programs are permitted in very narrow circumstances. For example, affirmative action can be required as a condition of doing business with the federal government, which comes under the jurisdiction of the OFCCP. Also, a court may require an affirmative action program as a remedy for discrimination within the confines of prevailing legal authority. Voluntary affirmative action programs may be implemented by a private employer only if consistent with Title VII and the prevailing legal standards, including those articulated by the Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

9. Should the EEOC revisit its 1982 policy guidance on affirmative action (EEOC-CVG-1982-1, CM-607 Affirmative Action) to alter or expand the situations in which the EEOC deems race, sex, and national origin conscious decisions to be permissible (that is, lawful under Title VII)?

The EEOC should provide policy guidance to the public that conforms with the current state of the law and revisit guidance when necessary. In the event I am so fortunate as to be confirmed and the matter comes before the EEOC while I am a Commissioner, I commit to fully understanding the history of and context for this guidance and giving a full hearing to all points of view on the relevant issues.

10. Please define the term “woman” for purposes of sex discrimination.

Title VII bans discrimination on the basis of *anyone’s* sex or gender identity, regardless of what that gender identity is, which means that it is not necessary to define “woman” in order to identify and remedy sex discrimination. Title VII prohibits changing the terms or conditions of an individual’s employment because of their sex or gender identity.

11. According to a June 2021 technical assistance document issued by Chair Burrows, “Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an

employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.”

- a. Do you believe that this interpretation extends to requiring companies to permit biological males who do not identify as male (and instead identify as female, non-binary, gender fluid, pan gender, or with any other transgender identity) to staff dressing rooms for girls in children's clothing sections of stores?

While I recognize and appreciate the concerns and complexities for employers to provide equal access to shared, intimate spaces in the workplace, I support the Commission's position that employees should have equal access to facilities in the workplace regardless of their gender identity. Access to facilities at work is a term and condition of employment, and all workers should be free from discrimination in the terms and conditions of their employment.

Senator Moran

1. In January 2021, the EEOC passed a resolution to require the Commission to vote on certain categories of litigation brought to Commission by the General Counsel before litigation could be pursued. These categories notably include cases expected to involve a significant expenditure of agency resources and litigation on which the Commission has taken a position contrary to the circuit in which the case is filed, among others. Assuming you are confirmed and control of the Commission flips, the EEOC could very well rescind the Commission's current approval of litigation policy, meant to provide accountability, and instead rely on widespread delegation of litigation authority to a career attorney at the EEOC who has not been Senate-confirmed. President Biden has not yet nominated an EEOC General Counsel.

Question: If you are confirmed, will you support keeping the requirement for EEOC Commissioners to approve in advance litigation brought before the Commission by the General Counsel?

For the Commissioners to be responsible stewards of public resources, it is important for them to have a role in oversight of the EEOC's litigation. Litigation is an important aspect of the EEOC's work to enforce the workplace non-discrimination laws. As a litigator myself, I would want to be involved with the litigation program at the Commission, if I am so fortunate as to be confirmed. I understand that the Commissioners have for many years – on a bipartisan basis – delegated some authority for litigation determinations to the EEOC's General Counsel, which is itself a Senate-confirmed position. I would want to consider this issue for myself – hearing from a wide range of perspectives before identifying what I believe is the right amount of involvement from Commissioners and what is the correct role for others at the Commission vis a vis litigation decisions.

2. Under the leadership of former EEOC Chair Dhillon the Commission publicly posted Commission votes on policy, litigation and other topics. As you may be aware, Chair Burrows previously attempted to rescind publicly disclosing Commission votes, but then reserved course once that move was criticized.

Question: Do you believe transparency benefits the American public, which you have been nominated to serve?

Transparency is an important value for government agencies charged with being responsible stewards of public resources and doing business in the public's name. If I am confirmed, I will bring a commitment to focusing on finding that balance in all my dealings at the EEOC.

Follow up question: If confirmed, will you commit to supporting the public posting of Commission votes on policy and litigation?

Yes.

3. There are a variety of well-founded concerns surrounding the collection of EEO-1 component 2 data pay, namely that component 2 data collection would be costly and burdensome for employers, particularly small and mid-sized employers, while not providing practical utility to identify systemic pay discrimination. The National Academies of Sciences is currently evaluating component 2 data's quality and utility.

Question: In your confirmation hearing you expressed your support for engagement with stakeholders on issues that may come before the Commission. Given the widespread interest in this issue from across the spectrum of stakeholders and the importance of a more fulsome understanding how to combat systemic pay discrimination, will you commit to a notice and comment period and a public hearing prior to the Commission establishing any new EEO-1 component 2 data collection mandate for employers, if you are confirmed?

Yes, I believe that a public hearing and receiving public comment on this issue would be valuable.

4. **Question:** Please explain your involvement in *Dukes v. Wal-Mart Stores*.

My firm's Civil Rights & Employment practice group, of which I am a member, served as counsel, along with other organizations and firms, on behalf of the plaintiff-class. The case proceeded to the Supreme Court. I personally became involved in the case after the petition for *certiorari* was granted in late 2010 and contributed to work on the merits brief as well as supporting my colleagues in preparation for the oral argument in 2011. After the Supreme Court de-certified the class, I worked with our co-counsel to advise and notify members of the de-certified class about their options, including filing individual charges with the EEOC. My firm has continued to represent women who were members of the de-certified the class. I have not been actively involved in the day-to-day of the *Wal-Mart* matter for many years.

In your confirmation hearing you mentioned that small and mid-sized businesses, who often lack a robust compliance infrastructure, would benefit from more regular and clear guidance from the Commission.

5. **Question:** Do you think small and mid-sized businesses would benefit from the Commission holding public hearings?

Yes. The utility of public hearings for small and mid-sized businesses would depend on the issue to be covered in the hearing – whether it is an issue that impacts or is relevant to small and mid-sized businesses. Employers of all sizes benefit from clear guidance. It has been my experience that most employers want to comply with the law and to foster discrimination-free workplaces. Having clear guidance helps employers to do that, and certainly hearings are part of an overall strategy to provide clear guidance and direction to employers of all sizes.

6. **Question:** If confirmed, how would you address the friction between the Commission's commitment to enforcing federal antidiscrimination laws and the National Labor Relations

Board's current approach of forcing employers to tolerate harassing and discriminatory language in the workplace so long as the harassing party is conducting union activity?

If I am so fortunate as to be confirmed as a Commissioner of the EEOC, I would see my obligation as being to enforce the workplace non-discrimination laws under the EEOC's jurisdiction. Title VII prohibits conduct that is so severe or pervasive that it creates a hostile work environment for people in protected classes. These are highly factually specific questions, determined by the caselaw in each circuit and the facts in each case. Comments may – if they meet the legal standards – rise to the level of conduct that is severe or pervasive.

An analysis of whether conduct prohibited under Title VII and protected under the NLRA would turn on the particular facts of that situation and whether those facts rise to the legal standard provided by the law in that circuit.

All workers deserve to work in workplaces free from unlawful discrimination. I would encourage workers from any covered workplace who feels she has been subject to harassment or other discrimination to reach out to the EEOC.

Follow up question: How do you think the Commission can work with the NLRB to inject some common-sense into this circumstance so workers are better protected from harassment in the workplace and employers have improved regulatory certainty?

I am committed to working with other agencies, including the NLRB, to advise on any issues that intersect with the enforcement priorities of the EEOC. It is important for workers to be protected from workplace harassment and other types of unlawful discrimination. I share your commitment to the value of clarity for employers about their obligations to their workforce.

7. **Question:** Please explain, in detail, your duties as a member of the Advisory Council at the People's Parity Project.

I have no formal duties as a member of the Advisory Council, and my engagement is limited. I periodically speak with the organization's Executive Director, Molly Coleman, to advise People's Parity Project's work on specific issues. I have worked with PPP primarily on two issues: (1) relating to the organization's work to make the legal profession more accessible to qualified people from all backgrounds and (2) relating to mandatory arbitration in employment. Last fall I spoke on a PPP-organized panel about how I work with my clients to tell their stories through litigation. If confirmed I would resign from the Advisory Council.

8. **Question:** Please explain, in detail, your duties as a member of the Board of Directors for the advocacy organization A Better Balance.

As a member of the Board of Directors, I attend regular meetings to provide strategic oversight and guidance, including on the organization's financial stability and future;

make financial donations; and support the organization's work in public forums. I am in my second three-year term as a member of the Board. If confirmed, I would resign from my position as a member of the Board.