

**Testimony
of
Jocelyn Frye
Senior Fellow, Center for American Progress**

before the

**Subcommittee on Civil Rights and Human Services
U.S. House Committee on Education and Labor**

***“On the Basis of Sex: Examining the Administration’s Attacks on Gender-Based Protections”
September 10, 2020***

Chair Bonamici, Ranking Member Cline, and members of the subcommittee, thank you for the invitation to be here today to participate in this timely and very important hearing.

My name is Jocelyn Frye and I am a Senior Fellow with the Women’s Initiative at the Center for American Progress (CAP or the Center). The Center is a non-partisan think tank committed to improving the lives of all Americans through bold and progressive ideas, strong leadership, and intentional action. CAP’s Women’s Initiative is focused on the development of comprehensive public policy solutions to expand and advance women’s opportunities to be full participants in our society by ensuring women’s economic security and promoting fair and equitable workplaces.

To accomplish this work, we are deeply committed to advancing equal employment opportunity for women, combatting workplace discrimination, and improving women’s overall economic standing. We believe that it is essential to create work environments where women workers—across sex, race, ethnicity, gender identity, sexual orientation, economic status, disability, and age—are treated fairly, paid equally, and can access meaningful opportunities to progress as far as they want up the career ladder. Women are integral to the economic success of our nation and they must be at the center of any discussion about what policies are needed to jumpstart a much-needed economic recovery, propel our economy, and sustain it into the future.

This hearing comes at a critical moment in the midst of a global pandemic that has wreaked havoc domestically on the economic stability of families and a national conversation about entrenched systemic racism and other forms of bias that infect institutions, infrastructures, and the administration of justice. Both concerns are relevant to today’s conversation. It is essential to prioritize creating equitable workplaces to better protect workers from discrimination, including intersectional forms of discrimination that affect women of color, and challenge longstanding systemic practices that have depressed women’s wages and employment opportunities. And, it is equally important to pursue concrete policies to support women’s labor force attachment, because women are increasingly economic engines for their families and help grow the economy.

It is precisely because the CAP Women’s Initiative believes in the value of women as workers and as contributors to their families and communities that we have opposed Trump administration actions that we believe undermine women’s employment and broader workplace protections. Specifically, the administration has:

- **Weakened enforcement by rolling back key areas of progress.** The administration has eroded important procedural and investigatory mechanisms that could help ensure robust enforcement of the law and bolster the tools available to root out different forms of sex discrimination in the workplace.
- **Limited scrutiny of employer practices and diluted the ability of individuals to vindicate their rights.** The administration has loosened standards to create loopholes that shield employer practices from scrutiny and curbed the scope of protections available for workers to challenge adverse actions and unfair conduct.
- **Ignored the need to target discriminatory practices facing women, particularly women of color.** The administration has said little about undertaking concrete, affirmative efforts to target discriminatory practices in specific jobs or industries, address intersectional discrimination affecting women of color, or combat systemic racism, sexism and other biases that shape institutional practices.
- **Pushed an affirmative agenda to rollback inclusive interpretations of sex discrimination protections.** The administration has been particularly focused on weakening or eliminating altogether workplace protections for LGBTQI+ workers.

These actions have eroded hard won gains for women, erected new workplace obstacles, and revealed a lack of commitment to making the promise of equality and equal opportunity a concrete reality in women’s daily lives.

I. Bolstering women’s employment is essential to achieving economic stability for women and their families and must be backed by a consistent, robust investment in enforcement

It is important to put the administration’s record into the broader context of understanding the economic role that women play in their families and how that connects to women’s employment. Having a meaningful opportunity to participate fully in the nation’s economy, specifically by joining the paid workforce and seeking to build a career, has been vital to women’s progress and the nation’s economic growth as a whole. The past 50 years have seen women move rapidly into more and more occupations, move up the career ladder in growing numbers, and gain a firmer foothold in the marketplace. The rise in women’s labor force participation has bolstered the economy – the increase in women’s work hours from 1979 to 2012 resulted in an 11 percent increase in the nation’s gross domestic product (GDP), a key indicator of the nation’s economic health.¹

Women’s full participation in the economy has also been critical for families as women increasingly play a significant role in ensuring families’ economic security, especially in communities of color. More than two-thirds of mothers are breadwinners for their families, with Black and Latina mothers having the highest percentages of sole or primary breadwinners among mothers.² CAP analysis of 2018 data from the Current Population Survey found that 67.5 percent

of Black mothers and 41.4 percent of Latina mothers are breadwinners for their families compared to 37 percent of white mothers.³ Other researchers, studying American Community Survey data from 2014, found that 67.1 percent of Native American mother and 44.2 percent of Asian/Pacific Islander mothers are responsible for providing at least 40 percent of their families' income.⁴ These data mirror the experiences of families more broadly. An analysis of data from the Current Population Survey's Annual Social and Economic Supplement shows that many women of color, in particular, play an outsized economic role in their families – in 2018, households headed by Black women constituted 41.2 percent of Black family households and households headed by Hispanic women constituted 24.4 percent of Hispanic family households compared to white women heading 12.7 percent of white family households and Asian American women heading 11.7 percent of Asian American family households.⁵

Despite the important economic role that women play, achieving progress in the workplace has not been easy, nor has it happened randomly or without intentional action. Women have faced obstacles at every corner, navigating longstanding biases and discriminatory practices, entrenched workplace cultures that confine women to limited roles, and the absence of adequate policies to address conflicting work and family responsibilities. These challenges have confronted all women but have been further complicated for women of color by the intersection of multiple factors such as race and ethnicity. Many women of color have experienced the added burden of overcoming demeaning narratives rooted in racial and ethnic bias – confronting caricatures used to marginalize and stereotype, for example, Black women as angry or Latinas as hypersexualized – that have devalued their work and worth, suggesting the need for a diverse range of workplace interventions to ensure progress for everyone.⁶

It is in this context that federal law enforcement agencies responsible for upholding and enforcing key workplace and antidiscrimination protections – the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), and Department of Justice (DOJ) – must work vigorously to ensure that women can enter the workforce without obstruction and work in equitable workplace environments that are free of discrimination. A snapshot of EEOC charge data offers a glimpse into the breadth of the need and the challenge: nearly one-third of the estimated 414,235 charges filed with the EEOC from fiscal year 2015 to fiscal year 2019 included charges alleging sex discrimination.⁷ These data mirror other research documenting the persistent employment barriers that women continue to face and should be prioritized for vigorous enforcement.

Women experience a stubborn pay gap: women working full-time, year-round earn 82 cents for every dollar earned by male full-time, year-round workers, with the gap most pronounced for women of color.⁸ Black women earn 62 cents, Latinas earn 54 cents, Native American women earn 57 cents, and Asian American women earn 90 cents for every dollar earned by white men.⁹ Researchers also have found pay disparities among transgender workers, with one study finding that the earnings of trans women workers surveyed fell by nearly one-third after their gender transition.¹⁰ Over the course of a lifetime, all of these gaps can add up to hundreds of thousands of dollars in lost earnings for women.¹¹ Not surprisingly and as demonstrated during the current pandemic, women disproportionately work in jobs that are often deemed essential yet pay low wages and offer too few benefits such as paid family leave.¹² Many of these jobs offer limited flexibility or telework options,¹³ creating added economic pressures for low-wage workers with competing family priorities, many of whom are disproportionately female and women of color.

Women also must combat discriminatory stereotypes and biases that exclude them from valuable job opportunities. Researchers have found that women generally are more likely to report facing discriminatory microaggressions in the workplace, especially women with disabilities and lesbian and bisexual women.¹⁴ Among transgender workers, trans women are more likely to report losing a job because of their gender identity or expression than trans men or nonbinary individuals.¹⁵ Women disproportionately work in low-paying jobs and industries where different forms of sex discrimination such as pregnancy discrimination¹⁶ and sexual harassment¹⁷ are more likely to occur. Women also are underrepresented in leadership and in the most senior jobs in Fortune 500 companies, with women of color experiencing the sharpest leadership disparities.¹⁸ Even with a record-high number of 37 women as Fortune 500 CEOs in 2020, the milestone still represents just 7.4 percent of the total number of CEOs – with only three women who are women of color, none of whom are African American or Latina.¹⁹

Federal enforcement agencies play a crucial role in the work to invigorate critical protections – indeed, much of women’s workplace progress has been rooted in groundbreaking legal protections such as the Equal Pay Act of 1963 to address longstanding pay disparities, Title VII of the Civil Rights Act of 1964 to challenge sex discrimination in employment more generally, the Pregnancy Discrimination Act of 1978 to prohibit sex discrimination aimed at individuals who are or might become pregnant, the Americans with Disabilities Act to combat discrimination targeting workers with disabilities, and the Family and Medical Leave Act to help workers address their work and family obligations.²⁰ These protections remain as vital today as they were at their inception, but they require vigorous enforcement to have real impact.

It is against this contextual backdrop that the administration’s actions must be measured. On close review, what becomes clear is that the administration has rolled back important workplace gains and made it harder to address the workplace obstacles that working women continue to encounter.

I. Trump administration actions have harmed efforts to address persistent employment barriers facing women and undermined enforcement of protections to ensure equal employment opportunity

The Trump administration has pursued a series of actions that collectively have weakened protections critical to women’s progress in the workplace, undertaking efforts to diminish enforcement resources and to systematically undo measures intended to strengthen equal pay enforcement, boost wages, promote greater accountability for discriminatory workplace practices, and strengthen overall equal employment opportunity enforcement efforts.

A. Efforts to limit critical agency resources undermine agencies’ enforcement capacity to combat sex discrimination in employment

The administration has shown little interest in making an affirmative case for strengthening investments to increase the resources that agencies have available to vigorously enforce employment discrimination laws. A review of the budget submissions put forward by the administration each year shows that it has repeatedly sought to reduce funding for key enforcement agencies such as the EEOC, proposing cuts that would further deplete staffing and impair the

ability of agencies to keep up with current caseloads and investigations.²¹ Indeed, in its first budget, the administration proposed combining the EEOC and the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), an action that would have further strained the ability of both agencies to fulfill their enforcement obligations.²² Denying enforcement agencies vital resources is the exact opposite of what is needed to ensure equal employment opportunity for women. The administration’s budgeting approach sends a clear message about its lack of interest in making robust investments in enforcement to strengthen – and not diminish – the impact of workplace protections that are so critical to women’s progress.

B. Eroding progress on equal pay harms women’s access to fair wages and equitable workplaces

For decades, women across all races and ethnicities have identified equal pay as a top concern. Research surveys consistently show that women report that they are paid unfairly in comparison to their male counterparts. But too often pay practices are shrouded in secrecy and women lack access to the information that they need to prove discrimination. Thus, it is essential to pursue concrete strategies specifically aimed at addressing the different obstacles used to undermine equal pay. Such strategies include strengthening the tools available to enforcement officials, creating more pay transparency, and improving the available legal protections so that women are better positioned to challenge discriminatory practices that erode their wages and relegate them to jobs where their work is undervalued and underpaid. There were concrete measures taken during the Obama administration to promote equal pay and the Trump administration has systematically sought to undo them.

1) Discontinuation of the EEO-1 pay data collection rule

In June 2020, the administration finalized a years-long push to discontinue a rule adopted during the Obama administration to collect compensation data from mid-size and large employers to provide enforcement officials with more expansive information about employer pay practices.²³ The requirement to collect pay data was among the most important equal pay reforms adopted during the Obama administration to strengthen equal pay enforcement and promote greater employer accountability. The rule addressed one major shortcoming in the equal pay enforcement toolbox—the availability of comprehensive employer pay data to help expand and refine enforcement efforts, strengthen investigations, better target resources, and deepen understanding of workforce patterns and trends.²⁴ To do so, the rule modified the Employer Information Report, a data collection tool often referred to as the EEO-1 form that employers with 100 or more employees are already required to file with the EEOC on an annual basis. The form is used to collect demographic workforce data broken down by race, sex, and ethnicity in 10 occupational categories – such data can help shed light on where workers are concentrated in the workforce and pinpoint where problems are occurring.

The Obama rule – adopted after years of comments, hearings, and public input – updated the EEO-1 form to add a new requirement for employers to also provide pay information by race, sex, and ethnicity across the form’s 10 occupational categories divided into 12 pay bands. This revision to the EEO-1 form effectively balanced the different interests at stake, ensuring that enforcement officials would have access to much-needed pay information while using a familiar form to

minimize potential burdens on employers.²⁵ The rule was finalized in September 2016 and was slated to become effective in March 2018.

The Trump administration, however, arbitrarily sought to undo the pay data rule before it could go into effect. In August 2017, the Office of Management and Budget (OMB) instructed the EEOC to halt implementation of the rule,²⁶ offering a flimsy rationale about the rule's purported burden that was quickly challenged by advocates in federal court.²⁷ The court rejected the administration's arguments and, instead, directed the EEOC to implement the data collection rule by collecting the pay data for fiscal years 2017 and 2018.²⁸ The EEOC ultimately complied with the court's order, but it continued its efforts to derail future pay data collection efforts.

In September 2019, the Commission published a notice indicating that it would not seek to renew the pay data collection requirement for future years.²⁹ The administration sought to justify its action by raising concerns about overburdening employers and questioning the utility of some EEO-1 data. But these criticisms are unpersuasive and fall far short of providing a sufficient rationale for halting the collection of pay data.³⁰ The EEOC's notice included new burden estimates that seemed to ignore the real-world experience of EEO-1 data collection for over 50 years to conclude that the burden of collecting the data was now too high. The notice also seemed to disregard the proven effectiveness of the EEO-1 form as an enforcement tool and to conclude prematurely that any pay data collected would not be useful. Further, while the notice focused extensively on potential burdens on employers, there was little meaningful discussion of or apparent interest in addressing the ongoing burden of persistent pay disparities on workers, especially women. Nonetheless, the EEOC moved forward, seeking and obtaining final approval from OMB to discontinue collecting pay data through the EEO-1 form.

The EEOC recently commissioned the National Academies of Sciences, Engineering, and Medicine's Committee on National Statistics to undertake an independent review of the pay data that was collected for fiscal years 2017 and 2018; the results are to be completed by December 2021.³¹ But, the damage to efforts to strengthen equal pay enforcement has already been done. The administration's aggressive push to stop pay data collection – even before using or analyzing the data – has made clear their determination to roll back important equal pay reforms at a time when stepped up enforcement is sorely needed to combat pay discrimination.

2) Weakening pay transparency protections

Another action taken by the administration was to rescind the Fair Pay and Safe Workplaces executive order (Fair Pay EO) issued during the Obama administration to promote greater compliance with labor laws among federal contractors.³² One important provision of the Fair Pay EO focused on improving pay transparency for workers, requiring federal contractors to provide workers with a document showing the number of hours worked, overtime hours, total pay, and any deductions from pay for the pay period. Giving workers this type of information helps them ensure that they are being paid for the correct number of hours and are not being shortchanged for work that they performed. Despite the importance of providing workers with more transparency, the Trump administration quickly moved to rescind the Fair Pay EO, offering no alternative to ensure that workers receive accurate information about their pay. This move eliminated a valuable tool for workers and, instead, made it harder for employees to track their pay.

3) *Undermining equitable workplaces and protections for individuals with claims involving discrimination or torts for sexual assault or harassment*

The Fair Pay EO also included an important provision prohibiting pre-dispute arbitration agreements for contractors regarding discrimination claims and torts for sexual harassment and assault. The provision required federal contractors with contracts for supplies and services of \$1 million or more to include in the contract, or subcontracts of a similar amount, language that limits arbitration agreements to those that are signed voluntarily after a dispute has arisen. An estimated 60 million private sector workers are subject to a mandatory arbitration requirement, meaning that they may be unable to enforce their legal employment rights under critical laws such as Title VII of the Civil Rights Act of 1964. The arbitration prohibition in the Fair Pay EO is particularly useful for women workers, who are more likely to work for employers which require employees to sign mandatory arbitration agreements.³³ The rollback of the Fair Pay EO means that women may be limited in their ability to file certain discrimination claims, such as sexual harassment claims which are overwhelmingly filed by women, and have their Title VII rights vindicated. Further, requiring potential claimants to have their cases considered through a private arbitration process only exacerbates the imbalance of power that often discourages women from coming forward about discriminatory conduct.

4) *Narrowing tools used to analyze compensation practices*

The administration took action to replace existing guidance on how OFCCP analyzes compensation discrimination cases with a new directive that effectively gives the agency less freedom to determine how best to analyze pay. Adopted in 2013 and known as Directive 307, this previous guidance sought to ensure that enforcement officials could pursue pay discrimination investigations fully, using all tools at their disposal and utilizing their enforcement expertise to inform analyses of a contractor's pay information.³⁴ Further, it recognized the importance of giving enforcement officials sufficient latitude to undertake investigations on a case-by-case and utilize the analysis that they determined was best to analyze the facts and data gathered. The Trump administration, however, sought to limit how pay analyses could be conducted. In particular, the new guidance stresses the need to mirror the pay groupings already used by employers to analyze their pay, rather than deploying other potential groupings – such as EEO-1 categories – to examine potential pay disparities. Undercutting the discretion of investigators to adjust to the individual needs of a particular case and use the data analysis that is most useful will make it harder to root out potential pay discrimination and ensure that every case receives the close scrutiny that it deserves.

C. *Narrowing interpretations of what constitutes sex discrimination to exclude workers and weaken protections*

One important area of focus to improve women's employment opportunities has been to ensure that federal contractors – who benefit from millions of dollars in contracts with the federal government – adhere to anti-discrimination and equal employment opportunity principles. Executive Order 11246 (EO 11246), issued by President Lyndon Johnson in 1965, directs the Secretary of Labor to ensure that federal contractors do not discriminate in their hiring and

contracting practices.³⁵ EO 11246 has broad reach, covering an estimated one-fifth of the entire workforce through the federal contractors under its jurisdiction. Thus, the decisions about the scope of its available worker protections and how they should be enforced can have a significant impact on workers. In 2014, President Obama signed a new executive order, Executive 13762,³⁶ amending EO 11246 to add sexual orientation and gender identity to the list of protected categories covered by its prohibitions against discrimination. This action to extend workplace protections to LGBTQI+ employees of federal contractors was the largest expansion of employment protections to this specific group of employees in history.³⁷ It also aligned with other legal developments and precedent in the courts and advanced by the EEOC interpreting existing sex discrimination protections under Title VII, which EO 11246 often tracks, as encompassing LGBTQI+ workers.

1) *Narrowing sex discrimination protections to eliminate coverage for transgender workers and other workers on the basis of gender identity and sexual orientation undermines workplace equality*

The Trump Administration has sought to weaken protections for LGBTQI+ workers at every turn. It has taken a sweeping approach to curtail, if not eliminate, protections based on gender identity and sexual orientation across multiple agencies in the administration – limiting protections providing access to health care, education, housing, and employment.³⁸ In October 2017, former Attorney General Jeff Sessions issued a memorandum to United States Attorneys stating that the Administration would no longer interpret Title VII’s protections against sex discrimination as extending to discrimination based on gender identity, targeting transgender workers in particular.³⁹ In adopting this position, the administration moved in the opposite direction of recent legal trends and staked out a narrow legal interpretation to exclude workers in need of protection against discrimination. The memorandum misreads existing precedent to justify a narrow interpretation of sex discrimination. This approach runs counter to the approach historically taken by the Supreme Court, for example, to read Title VII’s protections against sex discrimination broadly to reach different types of sex-based conduct such as sexual harassment. The memorandum also signaled a broader effort to limit the rights of LGBTQI+ individuals across different sectors of society, completely contrary to the expected role of the nation’s chief law enforcement officer and the nation’s largest civil rights law firm.

The Supreme Court’s most recent decision in *Bostock v. Clayton County*, ruling that Title VII’s sex discrimination protections should be interpreted to include discrimination based on sexual orientation and gender identity, only highlights the inherent flaws in the administration’s efforts.⁴⁰ The *Bostock* ruling makes clear that decisions to deny employment opportunities to workers because of their LGBTQI+ status are intentional acts to make distinctions at least in part based on sex. The Court affirmed the broad reach of Title VII’s protections and dismissed arguments suggesting that such protections should be limited to what the statute’s authors might have expected in 1964.⁴¹ Although the Court’s decision is expressly limited to its interpretation of Title VII,⁴² other courts have already followed the lead of the *Bostock* court in ruling against other Trump administration rules.⁴³ At a minimum, the decision offers valuable insights into how prohibitions against sex discrimination should be interpreted going forward. In response, the administration should be taking immediate steps to ensure that its policy positions are aligned with the Court’s ruling, including reversing course on its ongoing efforts to deny protections to LGBTQI+ individuals.

2) *Deploying the guise of religious freedom to facilitate different forms of sex discrimination in employment*

One question left unresolved by the Court in *Bostock* is the potential scope of religious liberty interests and how they might apply in future cases when determining compliance with antidiscrimination protections. The administration, however, has been pushing for some time to give employers greater latitude to make employment decisions, even if discriminatory, under the guise of religious freedom. In August 2019, the OFCCP published a proposed rule to expand the religious exemption language contained the equal opportunity clause of EO 11246, making it easier for contractors to claim protection of their religious tenets and beliefs to justify discrimination.⁴⁴ The proposal would adopt overbroad language that would give many contractors – non-profit and for-profit – much more room simply to identify as a religious employer and assert a religious purpose or rationale to shield their employment decisions from scrutiny. Firing a woman because she gave birth outside of marriage, or refusing to hire a woman because of a belief that mothers should stay home with children, or demoting an individual who marries a same-sex partner are all potential examples of how such language could be misused to legitimize discrimination. Further, by significantly expanding who could claim protection as a religious employer, the rule would vastly expand the number of workers who could face discrimination because they do not adhere to certain religious views. The proposal also seeks to shift the causation standard needed to prove that an employment action is discriminatory, making it harder to establish a violation and hold bad actors accountable. Rather than having to show that a protected characteristic – such as LGBTQI+ status or sex – was a motivating factor for a decision, the new proposal would require a claimant to establish that a protected characteristic was the but-for reason for the decision. All of these changes send a clear signal that anti-discrimination efforts will take a back seat to religious preferences, however loosely defined.

3) *Opposing efforts to extend employment discrimination protections to LGBTQI+ workers*

The administration has made clear that it opposes broader efforts to extend employment discrimination protections to LGBTQI+ workers. The administration is on record opposing the Equality Act which would amend the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation and gender identity in housing, employment, education, public accommodations, and other areas. Further, DOJ has been assertive in filing briefs in cases such as *Bostock* to argue against extending employment protections to LGBTQI+ workers.

D. *Lack of a strong, demonstrated commitment to prioritizing enforcement and resources to combat sex discrimination, particularly intersectional discrimination*

Unfortunately, the administration has done little affirmatively to demonstrate how or if it has prioritized enforcement of sex discrimination protections that have been essential to achieving progress for women in the workplace. Outside of occasional tweets of support for equal pay on key anniversaries, the administration has failed to put forward any concrete proposal to strengthen equal pay laws. Nor has the administration identified any specific efforts to address the persistent

pay gap experienced by women of color. There are also other administration efforts on the horizon that raise concerns about potentially harsh impacts on women:

- The EEOC is considering a joint employer rule that could make it harder for individuals to hold employers accountable for illegal conduct. The Department of Labor has already revised its rule under the Fair Labor Standards Act, disproportionately affecting women and especially women of color who are more likely to work in minimum wage jobs covered by the FLSA.
- The EEOC recently moved to limit data sharing with state and local fair employment practices agencies, making it more difficult for these local agencies to pursue discrimination claims. This action unfairly hampers enforcement efforts at the state level and could have deleterious effects on discrimination claims filed by women.
- The EEOC recently held a hearing to consider a notice of proposed rulemaking on conciliation, purportedly to increase employer participation in its conciliation processes. But the proposed rule could be misused to block or significantly delay the EEOC's ability to file lawsuits against employers found to have engaged in discrimination. In *Mach Mining LLC v. EEOC*, the Supreme Court rejected an employer's argument that the EEOC could not file suit alleging discrimination against women seeking mining and coal production jobs because the agency had not done enough to conciliate the case.⁴⁵ The Court refused to impose a specific conciliation process or code of conduct on the agency that could have led to substantial delay by employers seeking to slow down potential resolutions.

All of these developments, in light of the other rollbacks already undertaken, raise even more concerns about further erosions of procedural protections and investigatory tools that are critical to vindicating women's workplace rights.

E. Recommendations for future action to reverse harmful policies: A forward looking agenda

Contrary to the approach taken by the administration, there are substantial action steps that could be taken to demonstrate a robust commitment to women's equal employment opportunity. These include:

- Moving to reinstate the EEO-1 pay data collection for 2019 and future years.
- Issuing a new executive order to promote greater pay transparency and eliminate pre-dispute arbitration for harassment and other discrimination matters.
- Exploring new opportunities for pay data disclosure such as the model used in the United Kingdom requiring large employers (with 250 or more employees) to publicly disclose their gender pay gap, with the addition of data on race and ethnicity to show pay gap breakdowns by race and gender.
- Using consistent interpretations of sex discrimination across agencies to incorporate a broad, expansive, inclusive interpretation of protections consistent with recent Supreme Court rulings such as *Bostock v. Clayton County, Georgia*.
- Rescinding pending guidance and halting litigation to curtail the rights of LBTQI+ individuals.

- Undertaking new, intentional efforts to combat intersectional discrimination facing women of color, including improving data collection, analyzing industry and occupational trends in charges and violations, and pursuing research, education, and outreach efforts to elevate and address unique barriers and challenges.
- Supporting substantial increases in enforcement budgets for agency enforcement of employment discrimination laws to ensure that agencies have all the supports that the need.

Women’s success in the workplace requires these types of concrete interventions to help ensure that workplaces operate fairly and that women have a meaningful opportunity to succeed.

CONCLUSION

Robust enforcement of anti-discrimination laws must be a top priority to ensure women’s equal employment opportunity and economic stability. Abandoning the progress that has been made to strengthen women’s employment is step backwards that women, men, and their families can ill afford. The Trump Administration has fallen woefully short in ensuring strong workplace protections and addressing longstanding workplace problems such as pay disparities and sexual harassment. The time for concrete action is long overdue.

Thank you for the invitation to join this important discussion and for your consideration of these comments.

¹ Sarah Jane Glynn, “Breadwinning Mothers Continue to be the U.S. Norm” (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>.

² Id.

³ These calculations are an update to those featured in an earlier CAP product. See Sarah Jane Glynn, “Breadwinning Mothers Continue To Be the U.S. Norm” (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-motherscontinue-u-s-norm/>; Center for American Progress and Jeff Chapman’s analysis of Steven Ruggles and others, “Integrated Public Use Microdata Series, 2018 Current Population Survey Data for Social, Economic, and Health Research: Version 6.0” (Minneapolis: Minnesota Population Center, 2018), available at <http://cps.ipmus.org/cps>. Additional data about breadwinners of other races are collected in the aggregate and are not calculated by distinct racial or ethnic groups to, for example, show rates for Asian American and Native women. Furthermore, the calculations are limited to different-sex couples due to limitations with the available data.

⁴ Julie Anderson, “Breadwinner Mothers by Race/Ethnicity and State” (Washington: Institute for Women’s Policy Research, 2016), available at <https://iwpr.org/publications/breadwinner-mothers-by-raceethnicity-and-state/>.

⁵ U.S. Census Bureau, “POV14: Families by Householder’s Work Experience and Family Structure” Current Population Survey (CPS) Annual Social & Economic Supplement (ASEC) 2018, available at

<https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pov/pov-14.html> (last accessed September 2020).

⁶ Jocelyn Frye, “Centering Equity in the Future of Work Conversation is Critical for Women’s Progress” (Washington: Center for American Progress, 2020), available at <https://www.americanprogress.org/issues/women/reports/2020/07/24/488047/centering-equity-future-work-conversation-critical-womens-progress/>; see also Jocelyn Frye, “Racism and Sexism Combine to Shortchange Working Black Women” (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/women/news/2019/08/22/473775/racism-sexism-combine-shortchange-working-black-women/>.

⁷ U.S. Equal Employment Opportunity Commission, “Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2019,” available at <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2019> (last accessed September 2020).

⁸ Robin Bleiweis, “Quick Facts About the Gender Wage Gap” (Washington: Center for American Progress, 2020), available at <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.

⁹ Ibid.

¹⁰ Crosby Burns, “The Gay and Transgender Wage Gap: Many Workers Receive Less Pay Due to Sexual Orientation and Gender Identity Discrimination” (Washington: Center for American Progress, 2012), available at <https://www.americanprogress.org/issues/lgbtq-rights/news/2012/04/16/11494/the-gay-and-transgender-wage-gap/>.

¹¹ Jasmine Tucker, “Women and the Lifetime Wage Gap: How Many Woman Years Does It Take to Equal 40 Man Years?” (Washington: National Women’s Law Center, 2019), available at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/Women-and-the-Lifetime-Wage-Gap-v1.pdf>.

¹² Campbell Robertson and Robert Gebeloff, “How Millions of Women Became the Most Essential Workers in America,” *The New York Times*, April 12, 2020, available at <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>.

¹³ Elise Gould and Heidi Shierholz, “Not Everybody Can Work From Home: Black and Hispanic Workers Are Much Less Likely to be Able to Telework” (Washington: Economic Policy Institute, 2020), available at <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>.

¹⁴ Rachel Thomas and others, “Women in the Workplace: 2019” (New York: McKinsey & Company and Palo Alto, CA: Lean In, 2019), available at https://wiw-eport.s3.amazonaws.com/Women_in_the_Workplace_2019_print.pdf.

¹⁵ Sandy E. James and others, “The Report of the 2015 U.S. Transgender Survey” (Washington: National Center for Transgender Equality, 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁶ Brigid Schulte, “New Statistics: Pregnancy Discrimination Claims Hit Low-wage Workers Hardest,” *The Washington Post*, August 5, 2014, available at <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/08/05/new-statistics-pregnancy-discrimination-claims-hit-low-wage-workers-hardest/>.

¹⁷ Jocelyn Frye, “Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers” (Washington: Center for American Progress, 2017), available at <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>.

¹⁸ Judith Warner, Nora Ellmann, and Diana Boesch, “The Women’s Leadership Gap: Women’s Leadership by the Numbers” (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/>.

¹⁹ Emma Hinchliffe, “The number of female CEOs in the Fortune 500 hits an all-time record,” *Fortune*, May 18, 2020, available at <https://fortune.com/2020/05/18/women-ceos-fortune-500-2020/>.

²⁰ U.S. Equal Employment Opportunity Commission, “The Equal Pay Act of 1963,” available at <https://www.eeoc.gov/laws/statutes/epa.cfm> (last accessed September 2020); U.S. Equal Employment Opportunity Commission, “Title VII of the Civil Rights Act of 1964,” available at <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last accessed September 2020); U.S. Equal Employment Opportunity Commission, “The Pregnancy Discrimination Act of 1978,” available

at <https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978> (last accessed September 2020); U.S. Equal Employment Opportunity Commission, “Titles I and V of the Americans with Disabilities Act of 1990 (ADA),” available at <https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada> (last accessed September 2020); 29 U.S.C. Section 28, Family and Medical Leave, available at <https://uscode.house.gov/view.xhtml?path=/prelim@title29/chapter28&edition=prelim> (last accessed September 2020).

²¹ Paige Smith and Jaclyn Diaz, “White House’s EEOC Staff Cut Plan Highlights Dwindling Workforce,” *Bloomberg Law*, February 27, 2020, available at <https://news.bloomberglaw.com/daily-labor-report/white-houses-eeoc-staff-cut-plan-highlights-dwindling-workforce>.

²² Shirley Wilcher, “Trump Administration Proposes Merger of EEOC and OFCCP Under Guise of Efficiency,” *Insight Into Diversity*, August 15, 2017, available at <https://www.insightintodiversity.com/trump-administration-proposes-merger-of-eeoc-and-ofccp-under-guise-of-efficiency/>.

²³ U.S. Equal Employment Opportunity Commission, “What You Should Know About the 2019 EEO-1 Survey: Update,” available at <https://www.eeoc.gov/wysk/what-you-should-know-about-2019-eeo-1-survey>.

²⁴ U.S. Equal Employment Opportunity Commission, “Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1),” *Federal Register*, 81 FR 45479, July 14, 2016, available at <https://www.federalregister.gov/documents/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request>.

²⁵ *Id.*

²⁶ Letter from Neomi Rao to Victoria Lipnic, “EEO-1 Form; Review and Stay,” August 29, 2017, available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

²⁷ *National Women’s Law Center v. Office of Management and Budget*, Civil Action No. 17-cv-2458 (TSC) (March 4, 2019), available at <https://nwlcciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/EEO-1-Opinion.pdf>.

²⁸ *Id.*

²⁹ U.S. Equal Employment Opportunity Commission, “Agency Information Collection Activities: Existing Collection,” *Federal Register*, 84 FR 48138, September 12, 2019, at <https://www.federalregister.gov/documents/2019/09/12/2019-19767/agency-information-collection-activities-existing-collection>.

³⁰ U.S. Equal Employment Opportunity Commission, Public Hearing, “Written Testimony of Jocelyn Frye, November 20, 2019,” available at <https://www.eeoc.gov/meetings/hearing-november-20-2019-public-hearing-proposed-revisions-employer-information-report-eeo/frye>.

³¹ U.S. Equal Employment Opportunity Commission, “EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection,” available at <https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection>.

³² U.S. Department of Labor, Office of Federal Contract Compliance Programs, “Fair Pay and Safe Workplaces,” Executive Order, *Federal Register*, 79 FR 45309, available at <https://www.federalregister.gov/documents/2014/08/05/2014-18561/fair-pay-and-safe-workplaces>.

³³ Alexander Colvin, “The Growing Use of Mandatory Arbitration” (Washington: Economic Policy Institute, 2018) available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

³⁴ U.S. Department of Labor, Office of Federal Contract Compliance Programs, “Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination,” *Federal Register*, 78 FR 13508, available at <https://www.federalregister.gov/documents/2013/02/28/2013-04675/interpreting-nondiscrimination-requirements-of-executive-order-11246-with-respect-to-systemic>; see also Ben Penn and Porter Wells, “Labor Dept. to Relax Obama Pay Bias Policy, Hand Reins to Businesses,” *Bloomberg Law*, April 19, 2018, available at

<https://news.bloomberglaw.com/daily-labor-report/labor-dept-to-relax-obama-pay-bias-policy-hand-reins-to-businesses>.

³⁵ Equal Employment Opportunity Executive Order 11246, as amended, (Washington: U.S. Department of Labor, Office of Federal Contract Compliance Programs) available at <https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended>.

³⁶ Executive Order 13762, July 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen>.

³⁷ Center for American Progress, Comments, “Re: Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption, 84 Fed. Reg. 41677 (Aug. 15, 2019) [RIN 1250-AA09] [Docket No. OFCCP-2019-0003],” September 13, 2019 (on file with author).

³⁸ See Ariana Eunjung Cha, “Trump Administration Removes Non-Discrimination Protections for Transgender People in Healthcare,” *The Washington Post*, June 12, 2020, available at <https://www.washingtonpost.com/health/2020/06/12/trump-transgender-protections/>; Anya Kamenetz and Cory Turner, “Trump and Transgender Rights: What Just Happened?” *NPR*, February 23, 2017, available at <https://www.npr.org/sections/ed/2017/02/23/516837258/5-questions-about-the-trump-administrations-new-transgender-student-guidance>; Chris Cameron, “Trump Presses Limits on Transgender Rights Over Supreme Court Ruling,” *The New York Times*, July 24, 2020, available at <https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html>; Ian Kullgren, “Trump Rule to Protect Contractors Who Discriminate Against LGBT Workers,” *Politico*, August 14, 2019, available at <https://www.politico.com/story/2019/08/14/trump-rule-contractors-lgbt-discrimination-1661311>.

³⁹ Charlie Savage, “In Shift, Justice Dept. Says Law Doesn’t Bar Transgender Discrimination,” *The New York Times*, October 5, 2017, available at <https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html>.

⁴⁰ *Bostock v. Clayton County, Georgia*, 590 U.S. ____ (June 15, 2020), available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Margot Sanger-Katz and Noah Weiland, “Judge Blocks Trump Officials’ Attempt to Block Transgender Health Protections,” *The New York Times*, August 17, 2020, available at <https://www.nytimes.com/2020/08/17/us/politics/trump-court-transgender-rights.html>.

⁴⁴ U.S. Department of Labor, Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking, “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption,” *Federal Register*, 84 FR 41677, available at <https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption>.

⁴⁵ *Mach Mining v. EEOC*, 738 F. 3d 171 (2015), available at <https://www.law.cornell.edu/supremecourt/text/13-1019>; see also David Lopez, “EEOC Proposed Regulation Would Impede Its Ability to Combat Workplace Discrimination,” *The Hill*, August 20, 2020, available at <https://thehill.com/blogs/congress-blog/politics/513015-eeoc-proposed-regulation-would-impede-its-ability-to-combat>.