

**NOMINATION OF KALPANA KOTAGAL
TO BE A MEMBER OF THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE NOMINATION OF KALPANA KOTAGAL, OF OHIO, TO BE
A MEMBER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

May 10, 2022

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C O N T E N T S

STATEMENTS

TUESDAY, MAY 10, 2022

Page

COMMITTEE MEMBERS

Murray, Hon. Patty, Chair, Committee on Health, Education, Labor, and Pensions	1
Braun, Hon. Mike, a U.S. Senator from the State of Indiana	3
Brown, Hon. Sherrod, a U.S. Senator from the State of Ohio, Introduction of Witness	4

WITNESS

Kotagal, Kalpana, Cincinnati, OH	5
Prepared statement	6

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.	
Murray, Hon. Patty: Letters in Support of the Kalpana Kotagal Nomination	22
Burr, Hon. Richard: Statement Opposing the Kalpana Kotagal Nomination	49

**NOMINATION OF KALPANA KOTAGAL
TO BE A MEMBER OF THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION**

Tuesday, May 10, 2022

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room 216, Hart Senate Office Building, Hon. Patty Murray, Chair of the Committee, presiding.

Present: Senators Murray [presiding], Casey, Murphy, Kaine, Hassan, Smith, Rosen, Hickenlooper, Braun, Marshall, and Scott. Also present Senator Brown.

OPENING STATEMENT OF SENATOR MURRAY

The CHAIR. Good morning. The Senate Health, Education, Labor, and Pensions Committee will please come to order. Today we are holding a hearing on the nomination of Kalpana Kotagal to be a member of the Equal Employment Opportunity Commission.

I will have an opening statement followed by Senator Braun, who is sitting in today for Ranking Member Burr, and then Senator Brown will introduce our witness. After the nominee gives her testimony, Senators will each have 5 minutes for a round of questions.

While we are unable to have this hearing fully open to the public or media for in-person attendance, live video, again, is available on our Committee website at *help.senate.gov*. And if anyone needs accommodations, including closed captioning, you can reach out to the Committee or the Office of Congressional Accessibility Services.

We received Ms. Kotagal's formal nomination on April 5th, her Office of Government Ethics paperwork on April 15th, and her Committee paperwork on April 14th. Ms. Kotagal, I am pleased to welcome you and all of your family here today. We are very glad that you are joined today by your husband, Wyatt, your parents, Shashi and Uma, your sister Mira, and your children, Narayan and Kishan. Very nice to see all of you today.

Thank you for coming. Now, while we have work to do to bring down prices and build an economy that works for working families, not just those at the top, we have made important strides recovering from the economic crisis this pandemic caused and getting people back to work safely.

We have added a record breaking 8.3 million jobs since President Biden took office, and as we continue to build on that historic jobs recovery, families in Washington State and across the country are

counting on us to make sure we are also building an economy that is stronger, fairer, and more inclusive, and the EEOC plays a critical role in doing just that.

The EEOC protects the rights of workers who are the backbone of our economy and enforces our Nation's workplace discrimination and harassment laws. It holds employers accountable when they discriminate against workers or allow harassment to fester in the workplace.

Workers deserve an EEOC that is ready to take on big challenges before it, from long standing issues like making sure women get the equal pay they deserve, combatting workplace sexual harassment, and ensuring all workers, including LGBTQ workers, workers with disabilities, pregnant workers, and workers of color are treated with dignity and respect in the workplace.

Two other issues the pandemic has put a harsh spotlight on, like the need to do more to protect workers of Asian descent from discrimination and harassment, which is unfortunately on the rise. Bottom line, the EEOC needs strong, experienced leaders who have proven they know what it takes to protect workers' rights and ensure companies follow our laws. Ms. Kotagal is just the person for the job.

As a leading civil rights and employment lawyer, Ms. Kotagal has gone to court again and again on behalf of workers who have been treated unfairly on the job. She has represented pregnant workers and new moms who were fired or disciplined because they had to miss work because of their pregnancy or because they were literally giving birth. She has gone to court on behalf of women wrongly denied the pay and promotions they earned.

She has taken on employers who failed to pay their workers minimum wage and returned \$10 million to thousands of poultry workers after they were cheated out of the pay they had earned. She quite literally put money back in workers' pockets where it belongs and has spent her career holding employers accountable and sticking up for workers when they need it most. She has also been a leading voice in the fight to stamp out discrimination and sexual harassment in the workplace at every turn in her career.

Ms. Kotagal has been a champion for workers denied the pay, dignity, and respect that are their right, and I have no doubt that as a member of the EEOC, she will continue fighting to create better, fairer workplaces and an economy that works for everyone. I am pleased President Biden has sent a nominee who is so clearly qualified and committed to fairly enforcing our laws and protecting workers' rights.

I look forward to supporting her nomination and working with my colleagues to confirm Ms. Kotagal, because with so much at stake for working families across the country, we need people like Ms. Kotagal on the EEOC to do the important work of closing the gender pay gap and ending other pay inequities, stamping out workplace harassment and discrimination, and protecting workers' rights.

People in Washington State and across the country are struggling right now, especially with high prices at the grocery store and gas pump. Everyone on this Committee understands that. We are all hearing from families back home about it.

We should all understand why supporting the EEOC's work, making sure people get the wages they have earned and deserve, and confirming Ms. Kotagal is so important because no one should lose wages or job opportunities to discrimination.

No one should have to put up with harassment at work just so they can put food on their table. So I hope everyone on this Committee will join me in supporting Ms. Kotagal and getting her confirmed to the EEOC without delay.

Now before I turn it over to Senator Braun for his opening remarks, I seek unanimous consent to put in the record 11 letters in support of Ms. Kotagal's nomination, including from more than 53 organizations representing workers and fighting for civil rights and equality in the workplace, and CEOs and opposing counsels from Ms. Kotagal's litigation that support her nomination because they respect her professionalism and her ability to see all sides of issues. So ordered.

[The information referred to can be found on page 22 in Additional Material:]

The CHAIR. With that, I will turn it over to Senator Braun for his opening remarks.

OPENING STATEMENT OF SENATOR BRAUN

Senator BRAUN. Thank you, Madam Chair. I think it is an important hearing today because I believe equality of opportunity is a bedrock of the American dream. However, I think there is now a movement that seeks to use the Federal Government to end equality of opportunity and maybe replace it with equality of outcome.

I think those are two totally different things, goals. Americans must be guaranteed a level playing field to succeed economically on their own merits. But it is not the job of the Federal Government to ensure economic outcomes. That gets to be very difficult. The Equal Employment Opportunity Commission is at the center of this conversation. If confirmed, Ms. Kotagal, you will be charged with enforcing our Nation's employment discrimination laws.

I hope that you will commit to ensuring all Americans have equal access to opportunity rather than supporting an agenda of discrimination under the banner of equity. The Trump administration made many changes to the EEOC aimed at unleashing economic opportunities for all Americans.

The Trump EEOC also enacted transparency and accountability measures for the Commission, and those two things transparency and accountability, have got to be part and parcel of anything we do here.

Some have called for these changes to be reversed. For example, ending provisions requiring the Commission to vote to approve litigation and to post these votes publicly online. This change gave the authority to commence litigation against employers back to the Commissioners, as Congress intended, instead of concentrating that power in the General Counsel.

To me, that is foreboding. There has also been talk of limiting the information provided to employers during conciliation and changing the updated compliance manual on religious discrimination. Finally, the Chair of the Commission has also made clear that

she will seek to reinstate burdensome collection of pay data from employers in an attempt to identify pay discrimination.

However, the reality is that this data provides no context for the wages such as job experience, education, or skill level. This collection will force employers to shoulder additional costs and require significant changes to their H.R. systems for data that has not even been proven to be useful.

As a lifelong business owner and one from Main Street, you have got to always keep in mind much of what we do here is aimed at large corporations, where that represents by a number of entities, a small percentage of the business community throughout the country. And you have got to be careful, whatever we do, that it doesn't put a heavy regulatory burden on the part of the economy for Main Street that functions pretty well.

It is like my business, treat their employees like family in general don't run into these issues. I do know that the vast majority of employers care deeply about their employees. Business owners have every incentive to do so.

If you want to build and grow long term, you have to create a safe and fair organization for all employees, regardless of their race, religion, sex, disability, or age. I look forward to learning more about your background, your thoughts on these issues, and the future of the EEOC. Thank you, Madam Chair.

The CHAIR. Thank you, Senator Braun. We now welcome Senator Brown to our Committee to introduce Ms. Kotagal. Welcome.

STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Madam Chair, Senator Braun. Thank you—thanks for holding this hearing, allowing me the opportunity to introduce Ms. Kalpana Kotagal, native daughter of Cincinnati, Ohio.

Ms. Kotagal is President Biden's nominee, as we know, to be a member of the Equal Employment Opportunity Commission. She is a partner at Cohen Milstein for the past 15 years. She has served as a plaintiff's attorney, bringing class action cases on behalf of workers, many of whom have faced discrimination on the job. She earned her B.S. and A.B. with honors from Stanford and her J.D. cum laude from the University of Pennsylvania Law School.

I understand she is most, perhaps most famous in certain circles for helping to make the entertainment industry a more diverse place to her work on inclusion writers. That is important, admirable, and necessary work.

But as The Washington Post recently put it, most of the people she fights for don't wear ball gowns and diamonds. They are banana pickers, chicken blockers, hourly wage workers, disabled postal carriers, and nurses. Ms. Kotagal spent her career fighting for overtime pay for poultry plant workers. Higher wages for nurses.

Pay equity and fair opportunities for career advancement for women working at Wal-Mart. It is a career that embodies the dignity of work, the idea that hard work should pay off for everyone, that all workers, all workers should have the opportunity to sup-

port their families and build careers no matter who they are, no matter their background, no matter what kind of work they do.

When I asked Ms. Kotagal a few days ago in my office why workers, she told me how her Indian immigrant parents who raised her in Cincinnati and who work with some of the most vulnerable people in our health system in Ohio.

She talked about how, despite working to make our communities healthier, they were sometimes—they were sometimes, her family, on the receiving end of discrimination themselves. They raised her to both embody the American dream and to work to make our Country a better place for all Americans.

I am thankful personally that the Kotagal family chose to come to Ohio and thankful that Kalpana chose a career fighting on behalf of American workers. I urge this Committee to give her nomination full consideration and a vote to move her nomination forward to the EEOC.

Thank you, Madam Chair.

The CHAIR. Thank you, Senator Brown. Ms. Kotagal, thank you for being here today. You may proceed with your testimony.

**STATEMENT OF KALPANA KOTAGAL TO BE A MEMBER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Ms. KOTAGAL. Chair Murray, Ranking Member Burr, Members of the Committee, it is an honor to appear before you today as you consider my nomination to be a Commissioner of the Equal Employment Opportunity Commission. I would sincerely like to thank President Biden and Vice President Harris for the nomination.

I am joined here today by my parents, Dr. Shashi Kant and Uma Kotagal, my sister, Dr. Meera Kotagal, my husband of 12 years, Wyatt King, and our two children, Kishan and Narayan. I want to express my deepest gratitude to each of them. I carry their love and support with me every single day. I have long felt that my life and my family's story are quintessentially the American story.

My parents both immigrated to the United States in the early 1970's. Each came to this country from India with just \$8 in their pockets to pursue professional opportunities in their own chosen fields of medicine. After completing their training in Detroit and Chicago, they settled in Cincinnati, Ohio, where they raised my sister and me and set out to capitalize on the opportunities that America has provided so many new arrivals through the generations.

Through their hard work and dedication, they have had a tremendous positive impact on their adopted community. And in the process, they have provided enduring examples of what it means to live lives devoted to service.

I will always be grateful to my parents for giving my sister and me every opportunity, and for teaching us what can be achieved through persistence and a commitment to helping others. I strive to live up to their example every day. As the child of immigrants in a family that has truly lived the American dream, I am blessed.

I know what is possible in this great Country, and I know that it is due in no small part to our Nation's deep commitment to equal opportunity. In the workplace, that means ensuring that all workers are judged on their merits and their ability to do the job.

This national commitment, which is made manifest in the work of the EEOC, is integral to ensuring that every American worker has the chance to realize their ultimate potential. As a civil rights and employment lawyer, I have devoted my professional life to these values. In my 16 years as a litigator, I have worked to uphold statutes that the EEOC is charged with enforcing.

I have filed charges, participated in investigations, and advocated on behalf of my clients before the EEOC, on behalf of veterans with disabilities, pregnant workers, survivors of workplace, race and gender harassment, and others. I have seen firsthand the Commission's commitment to excellence and to most effectively utilize resources. Throughout my career, I have found the business community to be an indispensable ally in the cause of realizing equal opportunity workplaces.

In my own practice, I have advised employers in internal investigations and negotiated with major organizations. The vast majority of American businesses comply with the law. Employers, with the help of their employees, are often the most knowledgeable about what their workplaces need to ensure equal opportunity. The goal of equal opportunity in the workplace is a lofty one, but an essential one.

Workplaces that are free from discrimination benefit more than just their employees. They also benefit those employees' families and communities and contribute directly to an innovative and dynamic American economy. In short, discrimination free workplaces benefit all of us. If confirmed, I plan on listening and working collaboratively and learning from all stakeholders, employers, the business community, and advocates for workers.

I would consider the views of my fellow Commissioners, EEOC staff, Members of Congress, practitioners, academics, and stakeholders alike. The American workplace is dynamic, complex, and multifaceted, and it takes a variety of perspectives to identify and pursue creative strategies as we work toward workplaces free from discrimination.

I have taken thoughtful approaches to cutting edge litigation and advised clients, finding common ground to forge collaborative outcomes. Throughout my career, I have represented people who have sought to make their workplaces more equitable, to be treated with dignity and respect, to be valued and assessed, to paraphrase Dr. King, by the content of their character and the quality of their work.

I have seen firsthand how critical the work of the EEOC is in realizing our national commitment to ensuring equal opportunity for everyone in this great country. It is truly an honor to be considered for the opportunity to be a part of the EEOC's important mission. I thank the Committee for your time, and I look forward to your questions.

[The prepared statement of Ms. Kotagal follows:]

PREPARED STATEMENT OF KALPANA KOTAGAL

Chair Murray, Ranking Member Burr, and Members of the Committee, it is an honor to appear before you today as you consider my nomination to be a Commissioner of the Equal Employment Opportunity Commission.

I would like to sincerely thank President Biden and Vice President Harris for this nomination.

I am joined here today by my parents—Drs. Shashi Kant and Uma Kotagal, my sister Dr. Meera Kotagal, my husband of 12 years, Wyatt King and our two children, Kishan and Narayan. I want to express my deepest gratitude to each of them. I carry their love and support with me every single day.

I have long felt that my life, and my family's story, are quintessentially the American story. My parents both immigrated to the United States in the early 1970's. Each came to this Country from India—arriving with just \$8 in their pockets—to pursue professional opportunities in their own chosen field of medicine. After completing their training in Detroit and Chicago, they settled in Cincinnati, Ohio, where they raised my sister and I and set out to capitalize on the opportunities that America has provided to so many new arrivals through the generations.

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If confirmed, I plan on listening and working collaboratively, and learning from all stakeholders, employers, the business community, and advocates for workers. I would consider the views of my fellow Commissioners, EEOC staff, Members of Congress, practitioners and academics, and stakeholders alike. The American workplace is dynamic, complex, and multifaceted, and it takes a variety of perspectives to identify and pursue creative strategies as we work toward workplaces free from discrimination. I have taken thoughtful approaches to cutting-edge litigation and advised clients, finding common ground to forge collaborative outcomes.

Throughout my career, I have represented people who have sought to make their workplaces more equitable, to be treated with dignity and respect, to be valued and assessed, to paraphrase Dr. King, by the content of their character and the quality of their work. I have seen firsthand how critical the work of the EEOC is in realizing our national commitment to ensuring equal opportunity for everyone in our great country. It is truly an honor to be considered for the opportunity to be part of the EEOC's important mission.

I thank the Committee for your time and welcome your questions.

The CHAIR. Thank you very much. We will now begin around a 5-minute questions. I ask my colleagues to please keep track of your clock, stay within those 5 minutes.

The EEOC was established by the Civil Rights Act in 1964 for a very important reason, to administer and enforce the laws that

protect against workplace discrimination and to ensure all workers have equal access to employment. Yet far too many workers still face discrimination in their workplace.

I hear from many women, workers of color, workers with disabilities, and others about the discrimination and retaliation they face in the workplace. And I know we can do more to ensure quality and opportunity for everyone.

You have worked on behalf of many workers who have fought against discrimination. Based on your experience, if you are confirmed, what will your top priorities be at the EEOC to help workers across the country?

Ms. KOTAGAL. Thank you, Senator. If I am so fortunate as to be confirmed, I would look forward to working with the Chair and other Commissioners to determine where my experience and my skills and my background could be most effectively deployed in service of the important mission of the EEOC.

Obviously, as a litigator, I have a great deal of background in those issues and I view litigation as a crucial part of what the EEOC does in enforcing our workplace nondiscrimination laws.

As you noted, I have worked on behalf of a number of different workers and different types of backgrounds and would bring that experience to bear with respect to pregnancy discrimination, discrimination on behalf of disabled people, discrimination with respect to the wage gap and pregnancy, and also discrimination on the basis of gender identity.

These are all areas that are tremendously important areas in which I have had personal experience. And I would look forward to bringing all of that experience to bear, that knowledge to bear to advance the work of the EEOC—to advance the work of the EEOC with respect to Title VII, the Equal Pay Act, Americans with Disabilities Act, etcetera.

The CHAIR. Thank you, Ms. Kotagal, it has been years since the Me Too movement first began, but we still have a lot of work ahead of us because workers continue to face harassment in their workplace. In December 2018, I actually released a report that showed the pervasiveness of harassment and related retaliation in the workplace, particularly for women.

I made a series of recommendations to better prevent and address harassment in the workplace. Since then, I introduced, and did so again this Congress actually, the Be Heard in the Workplace Act to expand protections for workers and ensure they get the accountability and justice that they deserve.

But I also believe there is much the EEOC can do under its existing authority to further protect workers from harassment. If you are confirmed, I hope you look carefully at the Be Heard report and our bill and work with your colleagues to take an aggressive stance so that we can finally make progress in rooting out harassment and discrimination. Will you work with me on that?

Ms. KOTAGAL. Absolutely will, Senator Murray.

The CHAIR. Thank you, Ms. Kotagal, the wage gap remains a huge issue, with too many women workers still earning less than they deserve, and many women of color and women with disabilities face especially stark wage gaps for doing the same work as other employees.

Those wage gaps actually mean that women lose thousands of dollars every year in their wages, and that means very real challenges for them saving for retirement, supporting their families, affording childcare, health care, and just being able to make ends meet. I am continuing, of course, to try and pass the Paycheck Fairness Act.

It is a commonsense bill to address the loopholes that allow pay discrimination and protect workers from retaliation when they talk about their pay. But can you tell us how addressing the wage gap would help workers, including the clients you have worked with throughout your career?

Ms. KOTAGAL. As you say, Senator Murray, despite the fact that it has been decades since Congress passed Title VII and the Equal Pay Act, the gender wage gap remains a pernicious problem, a stubborn problem. I think that is due in part to the fact that workers often aren't aware of what their pay is relative to others.

I think these are incredibly important issues and they have a disproportionate impact on women of color and their ability to support their families and their households, and a disproportionate effect on low wage workers.

Resolving issues and continuing to close the gender wage gap will put money into the pockets of families, of workers, and continue to advance the work of the recovery. I think that is incredibly important work. I see the EEOC's role there in enforcing Title VII and the Equal Pay Act as tremendously important.

The CHAIR. Thank you very much.

Senator Braun.

Senator BRAUN. Thank you, Madam Chair. In my opening statement, I stressed transparency and accountability. To me, those have to be the underpinnings of anything that works to where it is going to be responsible to someone.

I am worried that in what I have read in terms of what might happen, and I am referring to what occurred under the Trump administration, the EEOC created transparency and accountability by requiring Commissioners to vote on whether or not to commence litigation and by posting those votes online.

There is a new discussion out there that if you are confirmed, the EEOC will put the authority to commence litigation in the hands of the General Counsel. And more alarming than that, no longer require public voting. Simple question, will you commit to keeping the measures in place that require Commissioners to review and approve the majority of litigation and then post these votes online?

Ms. KOTAGAL. Senator, I think transparency is an incredibly important value, and I look forward to learning more from my fellow Commissioners, if I am so fortunate as to be confirmed.

I understand that the Commission has had a track record of delegating some litigation authority to the General Counsel, and that there are certain areas, including novel areas of law and areas that would involve substantial outlay of the Commission's resources with respect to litigation, where the Commissioners do play an important role in approving litigation.

Senator BRAUN. You said you definitely support transparency and I assume accountability as well. Are you willing now to say

that you would keep that? Because it is hard for me to imagine how there could be any benefit to taking that away.

It shouldn't be just because it occurred under a different administration, because I have never really observed much that works well in the long run that doesn't keep as much transparency at play as possible.

Ms. KOTAGAL. I agree transparency is an important value. It is an area that I would be absolutely willing to learn more about, if I am so fortunate as to be confirmed, including from your office and your staff, Senator.

Senator BRAUN. Very good. We will continue that conversation down the road. These measures, when it comes to small business especially, I am concerned that you need to keep in mind, and I said that in my opening statement as well, that whatever you do—I harken back to 2008, 2009 Dodd-Frank and the number of community banks and small banks that had none of the behavior that the largest banks had and they took us into that free-fall, but they ended up with the consequences.

In many cases not having the administrative staff or the ability to spread the overhead that rules and regulations came out of, and it was dispensed with kind of a one size fits all. I am concerned that whatever happens in terms of some of the things that are being talked about, that it will accentuate that burden on small business. Do you think it is valid to just differentiate between where most of these problems might be?

Similar to in the budget hearing that I was part of last week, when Amazon was being talked about, 150 percent turnover rate and accident rate way above the norm. That is one thing that is not typical of most small businesses, especially ones that have been run by families for a long time.

Is that a fair distinction to make? Or do you think whatever happens should be one size fits all, regardless of your size and your behavior?

Ms. KOTAGAL. It has certainly been my experience that most employers are working to get it right for their employees, that most employers are interested in following the law. I think that was certainly something you and I chatted about last week, and I think that is an incredibly important—certainly consistent with my experience.

I think it is important to ensure that all workers are protected from discrimination in the workplace and that the approach to those issues must be consistent across workplaces. Having said that, I think that there may be different tools that should be considered, and I would be very interested in hearing all perspectives with respect to any issues as they may relate to business and to workers.

Senator BRAUN. Thank you.

The CHAIR. Thank you.

Senator KAINE.

Senator KAINE. Thank you, Chair Murray. I am on four committees, and I have been to a lot of nomination hearings, but I am not sure that I have seen a nominee who is as well-suited for the position as you are, Ms. Katanga, and I just applaud the career that

you have built and how well it would lead to this particular post. Two questions.

First, I want to pick up a little bit on what the Chair asked about wage gap but come at it from a slightly different angle. Talk about low wage workers. I think we really need some strong enforcement in these areas and a lot of low wage workers are disproportionately women and people of color.

How would you plan, should you be confirmed, to ensure that the EEOC is devoting sufficient resources to addressing discrimination in industries where low wage workers predominate?

Ms. KOTAGAL. It is a tremendously important issue. As you note, that has a disproportionate impact, discrimination, in low wage worker areas—has a disproportionate impact on women of color. And the way that ripples through their families and their communities, I think, is an area that, if resolved, would pay tremendous dividends for those families and for our communities.

I think it is worth looking at the sectors where low wage workers are most heavily involved and considering how more enforcement could be brought to bear in those areas. I certainly would be interested in looking into that issue more closely, if I am so fortunate as to be confirmed.

As you know, I have represented low wage workers in different types of litigation, some of which is under the statutes that are enforced by the EEOC, some of which comes under the Wage and Hour statutes.

But I think the way in which they are disproportionately vulnerable, both from a pay perspective, but also to harassment and the way those different types of discrimination can build on one another, is something of significance for our economy.

Senator KAINE. Thank you for that. I want to ask a question about disability and in particular disability for the potentially millions of people who are dealing with long COVID. COVID-19 pandemic is being considered a mass disabling event. A recent white paper from a patient advocacy organization indicates that between 7 and 14 million Americans are expected to experience disabling long.

Those estimates still vary quite a bit because the research is still really digging into the severity of long COVID and the number of people that are affected. Another recent analysis found that 1.1 million Americans currently are out of work due to disabling long COVID.

The EEOC has issued guidance clarifying under what circumstances COVID-19 could be considered a disability under the A and also the Rehabilitation Act. If confirmed, how would you advance opportunity in the workplace for workers with disabilities, but particularly focusing on those who might be experiencing long COVID?

Ms. KOTAGAL. Senator, it seems to me that the evolving landscape of long COVID is something that we need to understand, both from the perspective of workers and ensure that we are providing clear guidance to employers as that landscape evolves.

I think the other thing that seems clear is that the mass disabling event that has been COVID has had a tremendous impact, both from a physical perspective, but also from a mental health

perspective. And understanding both physical disabilities and mental health disabilities as they arise from COVID I think is going to be really important to getting folks back to work.

I would want, if I am so fortunate as to be confirmed, to see where the EEOC is with respect to these issues, what work is being done, both on the enforcement side to ensure that workplaces are not discriminating against workers with disabilities, as well as providing guidance to employers about how to use the interactive process to get folks back to work.

Senator KAINE. Thank you. And just to conclude, one of the—one of the things that has happened during COVID is not only have people suffered by COVID and they still are, but also we have learned some things about our work environment that have expanded the ability, for example, to offer accommodations.

I didn't have any staffers teleworking until March 2020, and we ended up learning, wow, we can do a lot of great work via telework. Many people weren't accessing health care or education content via a tele-connection prior to March 2020, but now have learned that they can. So the problem is serious, but there has also been some learning in the last 2 years that may broaden our ability to offer accommodations to workers with disabilities, not just from long COVID, but other workers as well.

Ms. KOTAGAL. I could not agree more. I think our understanding of what constitutes a reasonable accommodation for certain types of workplaces has expanded, as you say. I have litigated from my home office for the last two and a half years arguing class cert hearings from my desk on my third floor in a way that we never would have dreamed of two and half years ago.

Senator KAINE. Thank you, Chair Murray.

The CHAIR. Thank you.

Senator CASEY.

Senator CASEY. Thank you, Chair Murray. I want to start by thanking Ms. Kotagal for her willingness to put herself forward for this nomination. And we are grateful for the work that you have done already in your time as a litigator, as an advocate to combat gender discrimination in workplaces and to bring those actions on behalf of people that often would not have a voice otherwise or would not have their day in court.

I am grateful for that and also grateful for your service with regard to the work that Penn Law School does, especially your work as Chair of the Office of Equity and Inclusion on the Alumni Advisory Board. And of course, being a graduate of Penn Law School is another noteworthy part of your record and I am grateful for that as well as a Senator representing Philadelphia and all of Pennsylvania.

I wanted to maybe raise three issues with you, if I can do so in the time I have. One is on sub-minimum wage. Another is a bill that I have worked on, on pregnancy discrimination. And third, to ask you about older workers.

But let me start with sub-minimum wage. We know now that in the Nation we have got just about 1,000 employers across the country that are permitted to pay their employees with disabilities a wage below the minimum wage. Fortunately, that number is down from where it was a number of years ago, but it is still too high.

There have been a lot of efforts to phaseout sub-minimum wage, and a lot of employers have done it on their own. It is an issue I have worked on for a lot of years. Some of these employees that are paid a sub-minimum wage are paid as little as \$1 an hour or \$0.50 an hour.

Many of these employees with disabilities work side by side with employees who don't have a disability and earn at least a minimum wage. But of course, the people with disabilities are below that in these work settings.

Now, the Biden administration has established the goal of eliminating the use of sub-minimum wage payments to people with disabilities. That is probably the first time that has been a goal of an administration, and that is good, but we still have a good bit of work to do.

Should our national policy permit employers to pay for people with disabilities less than a minimum wage or less than the prevailing wage?

Ms. KOTAGAL. It is important, from my perspective, for workers to be paid fairly for their work. People are entitled to be paid fairly. And if there are workers who are disabled, who are working alongside folks who are not disabled, and are receiving different wages, that strikes me as deeply problematic.

I think it is also important to work to bring disabled workers into the workplace and figure out creative strategies to ensure, as we are talking with Senator Kaine about, to ensure that disabled workers are at work or back at work. I understand that this is primarily an issue for the Department of Labor, but I think my primary perspective is that workers should be paid fairly for their work.

Senator CASEY. Well, I hope that, were you to be confirmed, that would be a priority for you. This is a matter that has been around way too long. We candidly, the U.S. Congress hasn't done enough.

Fortunately, now we have a bill in the Senate, imagine this it is bipartisan, that we are trying to pass. But I hope that the EEOC would be as concerned as I am about this issue. Let me move to the second issue, pregnancy discrimination. This has been rampant.

The 1978 legislation did not do nearly enough to prevent this kind of discrimination. Fortunately, we have a standard that came later than the pregnancy law of 1978, the Americans with Disabilities Act, which set a reasonable accommodation standard which should have been observed in the pregnancy context in worksites but hasn't.

We have got bipartisan legislation Senator Cassidy and I are leading with strong support and guidance and hard work from Chair Murray, along with Ranking Member Burr. So we have got a lot of good bipartisan support.

I guess I wanted to ask you about your work on behalf of pregnant workers and how it will inform your efforts to protect workers from this kind of workplace discrimination?

Ms. KOTAGAL. I have been so fortunate, so honored to represent workers who were terminated as a result of absences from work that they had to take because of their pregnancies.

They were not accommodated, or allegations are that they were not accommodated to the same extent as other workers without pregnancies who had to seek absences for whatever reason. And, it is my view certainly it has been true in my own personal life, my two beautiful kids behind me, that I have been able to have my children recover, bond with them, and return to work.

I don't think that workers should have to choose between their work and their families. I think addressing pregnancy discrimination in the workplace is of central importance and, overlaps with other issues that we have discussed, including the gender wage gap. I think it is a tremendously important issue.

Senator CASEY. Well, thanks very much. I will send you a question for the record on older workers—discrimination against older workers. Thanks, Chair Murray.

Ms. KOTAGAL. Thank you, Senator.

The CHAIR. Thank you.

Senator ROSEN.

Senator ROSEN. Thank you, Chair Murray, Ranking Member Braun. And thank you to Ms. Kotagal for being here today, for your willingness to serve. Appreciate that. I want to get right into it and talk about gender bias in STEM.

As a former computer programmer who began my career in a male dominated field and co-chair of the Women in STEM Caucus, I understand the challenges women face in pursuing and succeeding in STEM careers, particularly when women still make up only 28 percent of the STEM workforce.

According to a recent article published by students in the University of Nevada Reno's Women in Science and Engineering Cohort, nearly two-thirds of women and more than three-quarters of Black women in STEM reported experiencing what is known as the prove it again gender bias, where men are hired or offered advanced opportunities based on their potential, while women are hired or promoted based on their current performance or past experience, past success.

Ms. Kotagal, if confirmed, how will you address this issue, particularly as it impacts pay disparity and discrimination? And how will you—how might you approach cases before the EEOC where allegations of gender based pay and promotion disparities, particularly in these historically dominated—male dominated fields?

Ms. KOTAGAL. Thank you, Senator. I come from a family of physicians, of scientists. My mother and my sister are both physicians and so have learned about the challenges that women face in STEM in my family's own life. I think that many of the challenges for women in STEM come down to issues of stereotyping.

I think there are important opportunities to do education and outreach both to workers and to employers about what does it mean to identify the skills that it actually takes to do these jobs and to ensure that advancement is anchored in those actual skills, as opposed to, as you say, the sort of obligation to prove it again.

I think there is an important role for enforcement here as well to identify areas where women are facing challenges in STEM employers and to look for opportunities to address those discrimination issues through litigation or conciliation.

Senator ROSEN. I look forward to working with you on that. I want to move on to addressing anti-Asian hate and violence in the workplace. Another huge issue facing us, particularly over the course of the pandemic. We have seen a rise in crimes and reports of bias motivated harassment against Asian-American, Pacific Islanders, our AAPI communities, our AAPI owned businesses.

They have also been targeted for discrimination, including in Nevada, which is home to some of the—one of the fastest growing AAPI communities in the country and more than 21,000 Asian owned businesses. And so, if confirmed, how do you think you can help address this increase in anti-Asian workplace violence?

Ms. KOTAGAL. This is a tremendously serious issue. I think it requires attention to enforcement with respect to instances of workplace violence that impact Asian-American communities. I also think that there is a really important role for outreach in non-English languages here to ensure that the EEOC is able to reach the communities that are most impacted, whether they are English speaking or not.

I would want to, if I am so fortunate as to be confirmed, look closely at that issue and work with advocates in the AAPI community on what they believe they need to get at the root of these problems.

Senator ROSEN. Thank you. I appreciate that, too. And in the minute I have left, we will just move on. Speaking of the pandemic and how it relates to anti-Asian hate and other issues, we have long COVID related disabilities, again affecting people in the workplace. More than 81 million Americans have been diagnosed with COVID-19.

Many more cases, of course, not gone uncounted. And most estimates suggest that between 10 and 30 percent of confirmed COVID patients might experience long COVID symptoms after recovering, even if they really weren't very sick in the first place. So this problem is going to continue to threaten or impair many Americans' ability to work, and we are still trying to learn how to deal with this.

Does long COVID, will it be considered a disability under the ADA if they substantially limit somebody's physical ability? And so when we think about the ADA, how should we handle—how do you think we might handle the increase in cases as we begin to define long COVID?

Ms. KOTAGAL. It is an issue that I think is still evolving, as you say. I see there being sort of two areas that require, that would require—will require the Commission's attention. One is to ensure that workers returning to the workplace, facing long COVID, understand what their rights are to seek accommodations as needed.

Second, as I have said, I believe that most employers are working to get it right but ensuring that employers know how to engage with workers in the interactive process and what constitutes reasonable accommodations, I think are really important pieces of this. These are certainly, I would say, ongoing problems in need of creative strategies and need of creative solutions.

I think there are probably also opportunities to work across agencies on this issue, as I think this issue will, will bear on access to technology and a variety of other things.

Senator ROSEN. Yes. Thank you so much. My time is up, Madam Chair.

The CHAIR. Thank you.

Senator SMITH.

Senator SMITH. Thank you, Madam Chair, and welcome to the Committee and welcome to your family as well. It was nice to have a chance to meet all of you, and I am just very grateful for your willingness to serve our Country in this way. I would like to start out with a question about LGBTQ+ issues and discrimination.

The EEOC has correctly taken the position that Title VII of the Civil Rights Act prohibits employment discrimination on the basis of sexual orientation and gender identity. And the Supreme Court upheld this decision in *Bostock v. Clayton County* in 2020.

Ms. Kotagal, could you talk to us about how you will use your position to protect the rights of LGBTQ+ Americans in the workplace?

Ms. KOTAGAL. All American workers deserve to work in workplaces that are free from discrimination, and that includes LGBTQ+ workers. I think this is an important and evolving area of the law and important area for enforcement. I am eager to understand what the Commission's work in this area has been to this point.

Obviously, Vice Chair Samuels has done a lot of work on these issues, and I am interested to learn how I can be most supportive of continued efforts to enforce the law. I have, as you may know, worked on behalf of transgender people to secure equal access to transition related health care.

I think there are creative opportunities here, opportunities for collaborative outcomes, and I have been part of some of that work. I would look forward to bringing all of that to bear if I am so fortunate as to be confirmed.

Senator SMITH. Thank you. I appreciate that. Last year, as a result of an EEOC lawsuit, the food processing company JBS Swift, which has a plant in Worthington, Minnesota, settled a lawsuit with a claim of up to \$5.5 million for 300 workers based on religious discrimination.

The EEOC asserted that JBS's Greeley, Colorado plant, and at that plant the company discriminated against employees because they were Muslim, Somali immigrants, and Black. Some of the incidents included denying Muslim employees the ability to pray and harassment when they tried to pray during their schedule breaks or bathroom breaks, among other serious discrimination.

Ms. Kotagal, the JBS Foods Company is valued at approximately \$16.7 billion. And so while significant in some ways, a \$5.5 million settlement to workers is a drop in the bucket compared to what the company brings in, in its overall valuation.

I wonder if you could just talk a bit about how you would approach this type of litigation around religious discrimination and how you see establishing settlement amounts.

Ms. KOTAGAL. Yes, thank you for that. I am not tremendously familiar with the JBS case, although I have certainly heard of it. So I don't know the details in the facts. I do—I will say this. I think that protection for workers of faith is established profoundly in Title VII, and it is an important set of rights to protect.

I think that the process, in my experience as a litigator, of valuing cases turns on data, it turns on analysis, it turns on an understanding of the workforce and the harms that they suffer. And undertaking that analysis, as you might imagine, is a very case specific and fact specific process.

I think it is important—it has been my experience that it is important to bring those various resources to bear, to do that kind of analysis, to establish what the worth of the cases and the harm to the workers who suffer discrimination, if in fact there has been a cause finding to that effect. I think it is important to undertake that analysis.

I don't know enough about how the EEOC undertakes that process, as I am obviously not there yet, but if I am so fortunate as to be confirmed, as a litigator, that is an area that I would be interested in looking into.

Senator SMITH. Thank you very much. But would you agree that these settlements are—they have a role in—it is like trying to get the company to not do it again.

Ms. KOTAGAL. Yes, yes. Settlement can be very important to deterring behavior. I think it plays a number of different roles, right. That dollar amount, one, is to address the harm done to workers in that situation.

It is also to deter future behavior both on the part of that employer and, in particular in sort of major industries that are closely watched on the part of other potential leaders, in that industry. A settlement and settlement amounts, resolution of litigation, can be watched closely by others.

Senator SMITH. It is both correcting a wrong as well as deterring behavior, not only from the company that has committed the offense, but other companies who are watching, and particularly in food processing and this particular meat processing. I mean, whether it is a high level of concentration in this field and the companies, I think, watch each other very closely. Right. Thank you very much. Thank you, Madam Chair.

The CHAIR. Thank you.

Senator Hickenlooper.

Senator HICKENLOOPER. Thank you, Madam Chair. And thank you, Ms. Kotagal, for your public service already and for being willing to step into this oven of challenges, but also opportunities. Let me start small businesses, obviously. I come from a small business background. They are the background of our economy.

Often times, though, they don't have the human resources staff or the labor attorneys that could provide real assistance. How can the EEOC help small businesses comply with their obligations under the various anti-discrimination laws?

Ms. KOTAGAL. It has been my experience that the overwhelming number of businesses, including small businesses, are working to get it right for their employers. I think that the role, one of the central roles of the EEOC with respect to employers like that, is to ensure that they have clear guidance.

As you say, they may not have the kind of robust infrastructure of counsel and H.R. to help them navigate the landscape of the equal employment laws. And in those circumstances, it is really important for the EEOC to provide clarity for employers so that those

who are working to get it right for their workers have the information they need to do so.

Senator HICKENLOOPER. Great. As someone who is on that side, I think most small businesses do struggle to get it right. And sometimes the layer upon layer which Congress has created of regulatory framework makes that difficult.

As you said in your testimony, employers and employees often know best what they should do or what really will work in a workplace to ensure equal opportunity. How can the EEOC, and you and the EEOC, build better trust with the business community, and that I think what—I think it is fair to say a common fight against discrimination.

Ms. KOTAGAL. I think that is right. I think that listening, willingness to listen, to hear all perspectives, to solicit input from all perspectives is really important.

Ultimately the path to discrimination free workplaces, if it is to be enduring, must benefit from the input of all stakeholders. That includes businesses as well as employers and workers, academics and practitioners, others who understand the way that the law works.

I think to get it right, we need to really be collaborative in service of that shared goal. That is a perspective that I have adopted in my own practice so far and would absolutely bring that commitment, if I am so fortunate to be confirmed.

Senator HICKENLOOPER. I love that answer. I think one of the people I appointed in different life when I was Governor, that we appointed a woman to the Public Utilities Commission who said in her interview that she never changed—she never changed the mind of anyone about something important by telling them why they were wrong and why she was right, that it was only through listening.

I think that is the powerful truth. My staff has been reaching out to the Denver field office. Their caseloads are, I think like around the country, are growing larger, really becoming overwhelming just because of lack of staff, it is hard to hire, but also budget constraints. Government doesn't have the flexibility to offer raises in the timelines needed sometimes.

How important is the field staff to helping the EEOC stop unlawful employment discrimination? I know what the answer is going to be to that. But then on top of that, how can we address the staffing issues and reducing the amount of time it takes to process these complaints?

Ms. KOTAGAL. Field staff are important. They are the frontline. They are in direct contact with workers who are in need of the services of the Commission. I think having adequate staff in the field, having adequate resources, is directly connected to the Commission's ability to enforce the workplace nondiscrimination laws.

I think those are tremendously important issues. What can be done? Certainly this is something I would want to look much more closely at, learn from staff in the field offices, learn from my fellow Commissioners and the Chair, and hear what is being done.

Again, a challenge in search of creative solutions. I think we have to bring all of that creativity to bear, to most effectively uti-

lize the budget, the resources that are given to the Commission to do its work and to ensure that staff have what they need.

Senator HICKENLOOPER. I think creative solutions and innovations come from listening to staff by the listening occurring by good leaders. So I am looking forward to seeing you as one of those good. And I fully expect great leaders in EEOC. I yield back to the Chair.

The CHAIR. Thank you.

Senator Braun.

Senator BRAUN. Thank you, Madam Chair. In earlier conversation, we talked about accountability and transparency. Also, I think being impartial and objective would be important as well. And I think a lot of what you can expect out of someone would be based upon, what organizations you have been a part of, in this day and age of social media where you might have put an opinion out there.

I have got a question on when you were part of the Advisory Council for the People's Parity Project, this group led some campaigns against former Trump officials and against law firms that represented the Trump campaign or any Republican allies.

Do you think those businesses, anybody associated with them, or anything similar to that, that might have been part of your point of view or your membership organizations prior to this, can they expect a fair process at the EEOC given that track record?

Ms. KOTAGAL. They absolutely can expect a fair process from me, Senator. My work, my involvement with the People's Parity Project has been with respect to creating equal opportunity in the legal profession to ensure that folks have an opportunity from underrepresented backgrounds to have the same kind of opportunity that I have been so fortunate to have.

That has been the extent of my involvement with the People's Parity Project. I think the letters of support that are in the record and my reputation as a lawyer and a litigator are that I hear from all sides. I am interested in learning and will bring—absolutely bring that commitment to bear.

I recognize that if I am so fortunate as to be confirmed, my role will be different as a Commissioner of the Equal Employment Opportunity. My responsibility will be to enforce the law. And I value that opportunity.

Senator BRAUN. That is one thing. And then the other thing in this day and age, you can make your point of view heard. Now, all of us do it now and then, and sometimes it works, sometimes it doesn't. I want to read a couple retweets and then tell me how engaging in that manner would, again, give us confidence that you are not pushing a certain agenda and once you get, on this new task.

Terry Gerstein, Director of the State and Local Enforcement Project in Harvard Law School, she was previously Labor Bureau Chief in the New York State Attorney's Office, she criticized employers who advocate against unionization and characterized the judge who struck down CDC's mask mandate as unqualified. You retweeted her.

Melissa Harris Perry, a podcaster who linked to a story that contained misinformation on a Border Patrol Agent incident when there was that picture we have all seen where it looked like he was

whipping folks coming across the border. That was proven not to be true, yet you did retweet it.

Did you ever make a statement that countered that? And regardless, we all have our point of view. Do you think that puts in peril that objectivity and impartiality?

Ms. KOTAGAL. I would say as an initial matter, I retweet things for lots of different reasons. It doesn't necessarily mean that I agree with the position.

I go back to what I said initially, which is that I bring a full commitment to this opportunity to enforce the law, to hear from all sides, from all perspectives. I bring a commitment to collaboration, to hearing the point of view of those I may have previously disagreed with in service of enforcing the law. I am flexible and open to learning.

Senator BRAUN. Transparency, accountability, objectivity and impartiality, I am glad you believe in all that. Thank you.

The CHAIR. Senator Casey.

Senator CASEY. Thanks very much. Ms. Kotagal, let me go back to the question of discrimination in the workplace. I mentioned that is an ongoing problem, as you know. The good news is we also, on this issue, have some bipartisan agreement. It all centers around making changes that will provide a remedy for a Supreme Court case that goes back a ways on the burden of proof.

We now know that because of that decision, that older adults face a higher burden of proof when making a discrimination claim. And because of that decision, it undermined, weakened the age discrimination in employment or the so-called ADEA, and sent what I think is a damaging and negative message with regard to employees by sending a message to employers that says basically that some discrimination based upon age is okay.

That is the reason why we have bipartisan support. Senator Grassley and I introduced the Protecting Older Workers Against Discrimination Act. We have bipartisan support from Democrats and Republicans on this bill. And so my question is, how would you ensure that older adults are not facing discrimination in the workplace and in hiring decisions?

Ms. KOTAGAL. Senator Casey, I think the trends in our economy make clear that this issue of age discrimination is one that is increased in importance and increasing in importance. And I think it is an important part of our recovery from the COVID pandemic. I think these issues are tremendously important.

I also think that they show up in complicated and different ways, including discrimination against older women in a way that may be different than discrimination against older men. And then I think also the sort of the emphasis on the role of technology in our economy and the way in which older workers may fare worse in technological workforces from a discrimination perspective.

Certainly, if I am so fortunate as to be confirmed, I would welcome any enforcement tools that Congress sees fit to provide to the Commission. I think these are important areas for enforcement, looking for trends in areas that these issues are showing up most substantially is something that I would be very interested in working on, if I am so fortunate to make it to the Commission.

Senator CASEY. Great. Thanks very much. Thanks, Chair Murray.

Ms. KOTAGAL. Thanks, Senator.

The CHAIR. Thank you. That will conclude our hearing. And I want to thank all of our fellow Committee Members, Ms. Kotagal, for today's thoughtful discussion about the importance of this nomination and the EEOC's critical role in protecting workers' rights and in building an economy that is stronger and fairer and more inclusive.

For any Senators who wish to ask additional questions, questions for the record will be due to my staff by May 11th, 5 p.m. The Committee will next meet at 10 a.m. on Wednesday, May 18th in Hart room 216 for a hearing on cybersecurity in the health and education sectors.

The Committee is adjourned.

ADDITIONAL MATERIAL

LETTERS IN SUPPORT OF THE KALPANA KOTAGAL NOMINATION

PAUL
HASTINGS

kennethgage@paulhastings.com

May 2, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C. 20510

Re: Nomination of Kalpana Kotagal

Dear Senator Murray:

I am writing to share my personal views on President Biden's recent nominee to the Equal Employment Opportunity Commission, Kalpana Kotagal. In my view, the United States Senate should confirm her to this position.

For approximately thirty years, I have represented employers in a wide variety of matters across this country, most of which have involved disputes concerning antidiscrimination laws. My opponents have been private attorneys as well as government attorneys, at the federal, state and local level. The cases have involved the full spectrum of claims for sex, race, ethnic origin, age, disability and sexual orientation discrimination. Many have been single plaintiff disputes, and many have been putative class actions or class actions. Because of the nature of the issues presented, these matters involve hotly contested factual disputes that can stir strong emotions for clients on both sides. Some cases present novel legal issues concerning interpretation of our nation's laws that can have widespread impact on employers and employees, depending upon how they are resolved by the courts. The EEOC plays an important role in this area, as you know. Therefore, it is critical that we have effective leaders at the EEOC. From my experience with her, Kalpana Kotagal would be an effective member of the Commission, and she should be confirmed.

I first came to know Ms. Kotagal as an opponent. Over time, our conversations have covered a wide variety of topics, not all related to the litigation at hand. I have therefore also been fortunate to get to know her on a personal level. From the very beginning of our interactions, she has proven to be a zealous advocate for her clients' positions on the facts and the law, something we expect from every attorney. She has also proven herself to be fair, thoughtful, and open-minded. She knows how to solve problems. She does not create them where they do not otherwise exist.


Not every disagreement in litigation needs to be a dispute. With truly effective counsel on both sides, parties in litigation can focus on the issues, both factual and legal, that truly matter without being distracted by unnecessary squabbles that can waste the parties' and the court's resources. Kalpana is such an attorney. She understands the law well. She is always well prepared. She is open-minded and willing to not only recognize opposing points of view but capable of changing her own. She is unfailingly professional and polite and, in my experience, always treats everyone with dignity and respect. It has been a great pleasure getting to know her over these years.

PAUL
HASTINGS

The Honorable Patty Murray
May 2, 2022

As the agency responsible for enforcement of our federal antidiscrimination laws, the EEOC plays a critical role. Commissioners need to have not only a depth of knowledge concerning those laws but an appreciation for how disputes under these laws get resolved and a sensitivity to the perspectives of both employees and employers. Kalpana has all of these qualities, and I am confident that, if confirmed, she will work tirelessly for the American people.

Very truly yours,



Kenneth W. Gage
of PAUL HASTINGS LLP

KWG



David Brown, Legal Director
Transgender Legal Defense and Education Fund
New York, NY 10036
dbrown@transgenderlegal.org

The Honorable Patty Murray
Chair
Committee on Health, Education, Labor and Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, D.C. 20510

By email and FedEx

May 9, 2022

Dear Chair Murray:

The Transgender Legal Defense and Education Fund (TLDEF) wholeheartedly supports the nomination of Kalpana Kotagal to serve as a Commissioner on the U.S. Equal Employment Opportunity Commission (EEOC). TLDEF is a 501(c)(3) organization committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services, and public policy efforts. We have co-signed the letter which you have no doubt already received from the National Women's Law Center, the Leadership Conference, and numerous other organizations. We write here to provide two additional reasons why Ms. Kotagal is doubtlessly the best choice to serve our nation in this capacity.

First, Ms. Kotagal is a consensus builder. One of TLDEF's signature projects our Trans Health Project, in which we, along with co-counsel, approach health insurers and employers to negotiate a mutually-acceptable removal of exclusions for gender-affirming care from health plans, consistent with federal law, while avoiding litigation. Ms. Kotagal has been repeatedly instrumental in achieving an acceptable outcome for all parties in these matters. For example, the health insurance firm Aetna recently amended its policies to cover augmentation mammoplasty when medically necessary as a treatment for gender dysphoria, after TLDEF and a





team lead by Ms. Kotagal approached them together.¹ During our negotiation with Aetna, Ms. Kotagal approached what could have been an adversarial process in a collaborative and consensus-building manner that was key to our success. She is a fair-minded problem-solver, able to not just hear people with differing points of view but come to solutions that leave everyone better than before the interaction.

Second, she is uniquely well-qualified to ensure the EEOC fairly and correctly applies the Supreme Court's recent holding in *Bostock v. Clayton County, Ga.*, 590 U.S. ___, 140 S. Ct. 1731 (2020). That seminal case is the Supreme Court's first opinion regarding the application of the civil rights statutes the EEOC enforces. Her representation of numerous transgender clients in partnership with us and others gives her unique and valuable insight into how discrimination impacts the transgender and non-binary community, and how the EEOC should further interpret and apply the Supreme Court's holding to ensure transgender people are protected against discrimination. Now more than ever, it is critical that the EEOC ensure that the plain text of federal law is properly and even-handedly applied to transgender and non-binary people, as *Bostock* commands.

We offer our unreserved support of Ms. Kotagal's nomination to become a Commissioner of the EEOC and urge you to expeditiously approve her nomination. For any questions, please do not hesitate to contact me at the email address or telephone number above.

Sincerely,

A handwritten signature in blue ink, appearing to read 'David Brown', enclosed within a circular blue ink scribble.

David Brown
Legal Director

¹ Reed Abelson, *Aetna Agrees to Expand Coverage for Gender-Affirming Surgeries*, New York Times (Jan. 26, 2021), available at <https://www.nytimes.com/2021/01/26/health/transgender-aetna-health-insurance.html>.



May 2, 2022

To: Honorable Patty Murray, Chair
Honorable Richard Burr, Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C. 20510

Via Email c/o: Greg_Carter@help.senate.gov
Jeremy_Boshwit@help.senate.gov
Kristin_Spiridon@help.senate.gov
Matt_Mimnaugh@help.senate.gov

Re: Nomination of Ms. Kalpana Kotagal to the Board of Commissioners for the Equal Employment Opportunity Commission

Dear Honorable Chair Murray, Honorable Ranking Member Burr, and Committee Members:

We, the Sikh Coalition¹, the North American Pacific American Bar Association (“NAPABA”)², the South Asian Bar Association of Washington D.C. (“SABA-DC”)³, and the South Asian Bar Association of North America (“SABA-NA”)⁴ are a coalition of organizations focused on the promotion of diversity, inclusion and equity within the United States and the protection of civil rights of all Americans. Collectively, our organizations serve constituencies spanning tens of thousands of individuals from the Asian American and Pacific Islander (“AAPI”), South Asian, and Sikh communities. As a result, we write to express our unequivocal support for President Biden’s nomination of Ms. Kalpana Kotagal to serve on the Board of Commissioners for the Equal Employment Opportunity Commission (“EEOC”). Ms. Kotagal is a prominent member of the Asian American Pacific Islander legal community who has consistently demonstrated her commitment to issues that directly fall under the purview of the EEOC. As detailed in this letter, she is immensely qualified to serve in this position and we respectfully urge the Committee on Health, Education, Labor and Pensions (“the Committee”) to approve her nomination and release it to the Senate floor for confirmation. Notably, Ms. Kotagal’s appointment would be historic as she would be the EEOC’s first South Asian American Commissioner.

Before expressing our support for Ms. Kotagal, our organizations conducted a thorough evaluation of her background and history as an advocate against workplace discrimination. Ms. Kotagal’s diverse legal experience, excellent reputation, and commitment to public interest make her an excellent candidate for Commissioner. Since her undergraduate days, Ms. Kotagal has dedicated herself to supporting vulnerable communities by co-founding and leading various groups that foster civil engagement among AAPIs and other communities of color. In her professional life,

¹ The Sikh Coalition is a community-based organization that protects and defends civil rights and civil liberties in the U.S., educates the broader community about Sikhs and diversity, and fosters civic engagement amongst Sikh-Americans. The Sikh Coalition originated to combat uninformed discrimination against Sikh-Americans following the events of September 11, 2011. Since its inception, the Sikh Coalition has litigated numerous high impact discrimination matters and worked with government agencies and the private sector to achieve mutually acceptable solutions to the accommodation of Sikh religious practices in the workplace.

² The National Asian Pacific American Bar Association (NAPABA) represents the interests of over 60,000 Asian Pacific American legal professionals and nearly 90 national, state, and local APA bar associations. NAPABA is a leader in addressing civil rights issues confronting APA communities. Through its national network, NAPABA provides a strong voice for increased diversity of the federal and state judiciaries, advocates for equal opportunity in the workplace, works to eliminate hate crimes and anti-immigrant sentiment, and promotes the professional development of people of all backgrounds in the legal profession.

³ SABA-DC is a voluntary bar association dedicated to the needs, concerns, and interests of the South Asian American legal community in the Washington, D.C. area. Our organization reaches approximately 1,000 attorneys and jurists of South Asian origin in the D.C. metropolitan area. SABA-DC’s key objectives are to advance the professional development of South Asian American lawyers, increase awareness and dialogue regarding legal issues concerning South Asian Americans, and improve access to legal services for the South Asian American community. In making our endorsements, we consider a candidate’s experience, past accomplishments, demonstrated interest in or commitment to the South Asian community, and broader efforts to improve diversity, equity, and inclusion in the legal profession.

⁴ The South Asian Bar Association of North America represents the rapidly growing South Asian legal community in North America. We promote the professional growth and advancement of attorneys of South Asian descent and strive to protect the rights and liberties of the South Asian community across North America. SABA North America also recognizes a critical need for, and strives to achieve, greater participation by South Asian-Americans in the judiciary.

Ms. Kotagal's work centers on addressing discrimination and stereotyping in the workplace through litigation and advocacy. She is a recognized expert in matters involving Title VII, the ADA, FMLA, the FLSA, and the EPA. Additionally, she has been a crucial advocate for diversity, equity, inclusion, and accessibility—including spearheading development of the renowned "Inclusion Rider" to advance more equitable hiring practices in film, television, and music. Throughout her career, Ms. Kotagal's work has been about tearing down barriers, addressing workplace inequity, and creating pathways for workplace opportunity. Her work has had a meaningful impact on all communities by challenging structures that have made it difficult for people from under-represented backgrounds to thrive and by creating new pathways for access and success.

Since 2006, Ms. Kotagal has been an attorney in private practice with the law firm Cohen Milstein Sellers & Toll PLLC, where she is currently a Partner in their Civil Rights and Employment Practice Group. She is a nationally recognized expert in representing workers by litigating complex cases and advocating on issues that are directly relevant to serving as a Commissioner of the EEOC—the agency charged with enforcing Title VII and other laws focused on advancing workplace equality. Ms. Kotagal has also dedicated her personal time to promoting and advancing equity within the legal profession as her firm's Diversity & Inclusion Chair and has engaged in numerous pro bono activities in efforts to further even the playing field for students of all backgrounds through her committee and board activities.

Ms. Kotagal's advocacy also has had a profound influence on our work. For example, the Sikh Coalition represents numerous clients who have been discriminated against in the workplace based on their religious practices and Sikh articles of faith. Many of these matters are adjudicated under Title VII of the Civil Rights Act and involve a nuanced understanding of the intersectionality of race, religion and caste-based discrimination, which is still a developing area of legal precedent in the United States. Ms. Kotagal's groundbreaking work has helped to promote better understanding of the intersectionality between workplace practice and discrimination—paving the way for improved policies and enforcement measures geared towards more equitable and accessible workplaces. Her work also has aligned well with our organizations' efforts to combat employment discrimination including segregation, failure to hire, hostile or retaliatory environments, and failure to accommodate.

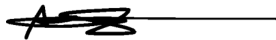
Ms. Kotagal's experience litigating across a range of statutes and different types of discrimination falling under the EEOC's purview -- including gender, race, disability, gender identity and sexual orientation -- combined with her understanding of both individual and systemic civil rights and employment matters, give her the requisite background and exposure necessary to successfully represent all communities' interests as an EEOC Commissioner. Indeed, this work is central to the EEOC's mission and provides her with an advantage in being able to effectively hit the ground running as a newly appointed Commissioner.

There is no doubt that Ms. Kotagal's commitment to the public interest and advancing equity in the workplace makes her an excellent candidate for nomination and appointment to the EEOC's Board of Commissioners. The fact that her appointment would also make her the first South Asian American appointee in the Commission's history is par for the course for Ms. Kotagal, a consummate trailblazer who regularly represents clients on issues of imminent concern to our

respective communities. She has already demonstrated her commitment to issues that our organizations care deeply about, and we have no doubt Ms. Kotagal would continue recognizing and uplifting the interests of all communities which face discrimination in the workplace.

Based on her experience, reputation, and commitment to advancing and promoting the communities we serve, the Sikh Coalition, the NAPABA, SABA-DC, and SABA-NA believe Ms. Kotagal would make an excellent Commissioner. We enthusiastically support her for this position and respectfully request that the Committee extend her every possible consideration during its deliberations and release her nomination to the full Senate for confirmation.

Sincerely,



Mark Reading-Smith
Program Director
The Sikh Coalition



Priya Purandare
Executive Director
NAPABA



Amandeep S. Sidhu
Chairman, Endorsements Committee
SABA-DC



Samir Mehta
President
SABA-NA

cc: Tara Mythri Raghavan, President-Elect, SABA-NA
Anisha Singh, Executive Director, The Sikh Coalition
Nandu Machiraju, President, SABA-DC
Deborahnyaa Sengupta, President-Elect, SABA-DC



May 6, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education, Labor &
Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education, Labor &
Pensions
United States Senate
428 Senate Dirksen Office Building
Washington, DC 20510

Re: Nomination of Kalpana Kotagal to the U.S. Equal Employment Opportunity Commission

Dear Chair Murray and Ranking Member Burr:

The undersigned 53 civil rights, workers' rights, and gender equality organizations write to express our strong support for the nomination of Kalpana Kotagal to serve as a Commissioner on the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Kotagal is an exceptionally qualified civil rights lawyer who has dedicated the bulk of her career to helping everyday working people enforce their rights under federal employment and anti-discrimination laws. Her deep knowledge of the law and her experience addressing systemic discrimination make her an outstanding choice to help lead the EEOC in its work to prevent and remedy unlawful employment discrimination and promote equal opportunity for all in workplaces that are respectful and inclusive.

The EEOC enforces employment anti-discrimination laws in the private workforce and federal sector, including Title VII of the Civil Rights Act of 1964 (which includes the Pregnancy Discrimination Act), the Equal Pay Act, the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act. The EEOC not only pursues charges of discrimination, litigating when appropriate, but it also plays a key role in helping to prevent discrimination through outreach, education, data collection, and technical assistance programs. Laws interpreted and enforced by the EEOC are critical to workplace fairness and opportunity for women, people of color, LGBTQ individuals, and people with disabilities.

For over 15 years, Ms. Kotagal has practiced law at Cohen Milstein Sellers & Toll PLLC, where she is now a partner in the Civil Rights and Employment Group and specializes in representing groups of workers in complex class action litigation focused on systemic discrimination. Ms. Kotagal's extensive experience will complement and strengthen the EEOC, which has long focused its enforcement efforts on individual and systemic cases that address significant legal issues with substantial impact.

Among the cases where Ms. Kotagal has played a leading role are:

- *Jock v. Sterling Jewelers Inc.*: In this arbitration class action, Ms. Kotagal represents thousands of current and former women sales employees who allege that they experienced discrimination in pay and promotion in violation of the Equal Pay Act and Title VII's prohibition on sex discrimination. Originally filed in 2008, the class contains more than 69,000 employees and has

uncovered allegations of widespread sexual harassment and abuse at the company.¹ The case is currently scheduled to proceed to trial before an arbitrator later this year.²

- *Allen v. AT&T Mobility*: Ms. Kotagal partnered with the ACLU Women’s Rights Project to represent current and former AT&T Mobility retail representatives who allege that they were penalized for their pregnancy-related absences under their employer’s attendance policy in violation of the Pregnancy Discrimination Act.³ The case is ongoing.
- *Complainant v. Donohue, United States Postal Service*: Ms. Kotagal successfully settled this case brought under the Rehabilitation Act of 1973 before an EEOC administrative judge alleging that USPS had subjected a class of disabled veterans to improper pre-employment medical inquiries. Under the settlement agreement, class members received more than \$9 million and USPS agreed to make changes to its hiring practices to prevent future violations.⁴

Ms. Kotagal has also represented clients in other employment class actions, including a lawsuit alleging unpaid wages to people living in an adult rehabilitation center, in violation of the Fair Labor Standards Act;⁵ failure to pay overtime wages to employees of a poultry plant;⁶ and conspiracy to artificially suppress nurses’ wages in violation of federal antitrust laws.⁷ Beyond employment issues, Ms. Kotagal’s work has encompassed access to housing and healthcare, and demonstrates her broad commitment to ensuring that all people are treated with dignity, free from pernicious discrimination.

Throughout her career, Ms. Kotagal has consistently focused on protecting the most vulnerable workers from abusive practices, including sexual harassment and abuse. Ms. Kotagal was a part of the legal team to settle a shareholder derivative suit against certain officers and directors of Wynn Resorts, Ltd. resulting from allegations that they had failed to hold the CEO accountable for a pattern of sexual misconduct and harassment of employees.⁸ The settlement agreement contained several policy changes aimed at increasing board diversity and establishing a workplace free from abuse.⁹ In her advocacy, Ms. Kotagal has also demonstrated deep understanding of the connection between sexual harassment and assault and

¹ Drew Harwell, “Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company,” *Washington Post*, Feb. 27, 2017, https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dce9574-f6b7-11e6-bf01-d478cf9b643_story.html.

² Cohen Milstein Sellers & Toll PLLC, Sterling Jewelers, <https://www.cohenmilstein.com/case-study/sterling-jewelers> (last visited Apr. 27, 2022).

³ Cohen Milstein Sellers & Toll PLLC, Cynthia Allen, et al. v. AT&T Mobility Services LLC, <https://www.cohenmilstein.com/case-study/katia-hills-et-al-v-att-mobility-services-llc> (last visited Apr. 27, 2022).

⁴ See 2014 WL 2206508 (May 16, 2014) (describing the monetary terms of the settlement agreement); *USPS Settles Class Action Discrimination Lawsuit Filed for Disabled Veterans*, *Postal-Reporter* (June 12, 2011), <https://www.postal-reporter.com/blog/usps-settles-class-action-discrimination-lawsuit-filed-for-disabled-veterans/>.

⁵ Cohen Milstein Sellers & Toll PLLC, Press Release, The Salvation Army Accused of Illegally Underpaying Vulnerable Thrift Store Workers (Mar. 9, 2022), <https://www.cohenmilstein.com/update/salvation-army-accused-illegally-underpaying-vulnerable-thrift-store-workers> (last visited Apr. 27, 2022).

⁶ Cohen Milstein Sellers & Toll PLLC, Pilgrim’s Pride Corporation, <https://www.cohenmilstein.com/case-study/pilgrims-pride-corporation> (last visited Apr. 27, 2022).

⁷ Cohen Milstein Sellers & Toll PLLC, Nurses Wages, <https://www.cohenmilstein.com/case-study/nurse-wages> (last visited Apr. 27, 2022).

⁸ Cohen Milstein Sellers & Toll PLLC, Wynn Resorts, Ltd. Derivative Litigation, <https://www.cohenmilstein.com/case-study/wynn-resorts-ltd-derivative-litigation> (last visited Apr. 27, 2022).

⁹ *Id.*

other forms of discrimination in the workplace and has continuously highlighted the importance of accountability, transparency, and survivor-centered resources.¹⁰

Ms. Kotagal is also an innovative and creative thinker who has demonstrated experience developing relationships and working with diverse stakeholders to promote affirmative strategies to advance equality. These qualities are critical to the work of leading the commission and ensuring the development of robust enforcement strategies. For example, Ms. Kotagal has spearheaded efforts to proactively advance opportunities for working people from underrepresented and marginalized communities. Together with Pearl Street Films and the University of Southern California Annenberg Inclusion Initiative, Ms. Kotagal developed the Inclusion Rider,¹¹ a contractual clause that creates flexible benchmarks for hiring diverse candidates for Hollywood projects.¹² In 2021, building off of the success of the Inclusion Rider, Ms. Kotagal joined with racial justice groups and industry leaders to release an Inclusion Rider template and a set of policy guidelines and resources for companies looking to implement an Inclusion Rider as part of their hiring practices. The Inclusion Rider has since been used in several Hollywood studios and production companies,¹³ as well as in the music¹⁴ and fashion¹⁵ industries.

The child of immigrants from India, Ms. Kotagal grew up in Cincinnati, Ohio. She earned her undergraduate degree from Stanford University and her J.D., *cum laude*, from the University of Pennsylvania Law School before serving as a law clerk for Judge Betty Binns Fletcher of the U.S. Court of Appeals for the Ninth Circuit. Ms. Kotagal has received numerous awards for her work as a civil rights and employment lawyer and is a leading national voice on diversity, equity, and inclusion.¹⁶

Ms. Kotagal's deep legal expertise and experience identifying and challenging systemic discrimination, coupled with her unwavering commitment to ensuring justice for the most vulnerable working people, make her exceptionally qualified to serve as an EEOC Commissioner. We offer our strong support of Kalpana Kotagal to be a Commissioner of the EEOC and urge you to expeditiously approve her nomination. For any questions, please contact Gaylynn Burroughs, director of workplace equality at the

¹⁰ See, e.g., Kalpana Kotagal, "How I Helped Create Hollywood's Inclusion Rider," TEDx, Feb. 2022, https://www.ted.com/talks/kalpana_kotagal_want_to_build_a_successful_organization_here_s_why_diversity_is_key. (discussing the connection between sexual harassment and assault and other forms of workplace discrimination, in particular for the most isolated and vulnerable workers, and highlighting the need for accountability); Kalpana Kotagal and Stacy Cammarano, Cohen Milstein Sellers & Toll PLLC, Written Submission to the U.S. Commission on Civil Rights Public Briefing on Federal Me Too: Examining Sexual Harassment in Government Workplaces, available at <https://www.usccr.gov/meetings/2019/05-09-federal-metoo-examining-sexual-harassment-government-workplaces> (outlining recommendations to address sexual harassment in government and private workplaces)

¹¹ Cohen Milstein Sellers & Toll PLLC, Inclusion Rider, <https://www.cohenmilstein.com/case-study/inclusion-rider> (last visited Apr. 27, 2022).

¹² Maura Judkis and Stephanie Merry, "What Is an Inclusion Rider? Michael B. Jordan Is Taking on Frances McDormand's Oscars Proposal," *Washington Post*, Mar. 8, 2018, <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/05/what-is-an-inclusion-rider-explaining-frances-mcdormands-call-to-action-at-the-oscars/>.

¹³ See Kristen Chuba, "Endeavor Content, #ChangeHollywood Launch New Inclusion Rider," *Hollywood Reporter*, Apr. 28, 2021, <https://www.hollywoodreporter.com/business/business-news/amc-studios-new-inclusion-rider-endeavor-content-change-hollywood-4174246/>.

¹⁴ Jem Aswad, "Recording Academy Unveils Grammy Awards Inclusion Rider," *Variety*, Oct. 19, 2021, <https://variety.com/2021/music/news/recording-academy-grammy-inclusion-rider-1235092198/>.

¹⁵ Jessica Testa, "Fashion Is Getting an Inclusion Rider," *New York Times*, Feb. 10, 2022, <https://www.nytimes.com/2022/02/10/style/diversity-fashion.html>.

¹⁶ The White House, Press Release, President Biden Announces Key Nominees (Apr. 1, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/01/president-biden-announces-key-nominees-9/>

National Women's Law Center (gburroughs@nwlc.org) or Josh Boxerman, policy analyst, at The Leadership Conference on Civil and Human Rights (boxerman@civilrights.org).

Sincerely,

National Women's Law Center
The Leadership Conference on Civil and Human Rights
A Better Balance
Alianza Nacional de Campesinas, Inc.
Alliance for Justice
American Association of University Women
Americans United for Separation of Church and State
Asian Pacific American Labor Alliance, AFL-CIO
Bazelon Center for Mental Health Law
Center for American Progress
Clearinghouse on Women's Issues
Cntr for Advancement of Public Policy
Coalition on Human Needs
Economic Policy Institute
Equal Pay Today
Equal Rights Advocates
Equality Federation
Feminist Majority Foundation
Futures Without Violence
Gender Equality Law Center
Human Rights Campaign
Institute for Women's Policy Research
Ipas Partners for Reproductive Justice
KWH Law Center for Social Justice and Change
Lawyers' Committee for Civil Rights Under Law
Methodist Federation for Social Action
Mississippi Black Women's Roundtable
Movement Advancement Project
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Law and Economic Justice
National Center for Transgender Equality
National Employment Law Project
National Employment Lawyers Association
National Immigration Law Center
National Partnership for Women & Families
National Urban League
One Fair Wage
PCUN
Pride at Work
Public Citizen

Public Justice
ROC United
Rural Coalition
Service Employees International Union
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
The Trevor Project
The Women's Economic Institute, Inc
Transgender Legal Defense and Education Fund
Women Employed
Women's Law Project
Workplace Justice Project at Loyola Law Clinic
Worksafe

Abbi L. Cohen, Esquire
Philadelphia, PA 19103

May 2, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education, Labor and
Pensions
United States Senate
Washington, D.C. 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education, Labor and
Pensions
United States Senate
Washington, D.C. 20510

Dear Senators Murray and Burr:

I am writing you to offer my strong support for confirmation of Kalpana Kotagal's nomination for appointment to the federal Equal Employment Opportunity Commission. It has been my honor and a distinct pleasure to serve with Ms. Kotagal on the Penn Carey Law School Alumni Advisory Board on Diversity, Equity and Inclusion ("AAB"). Since its inception, she has been one of five talented Penn Law alumni who have co-chaired the AAB. The AAB itself is comprised of a cross-section of Penn Carey Law School alumni who represent different sectors of the legal profession, including private practice, pro bono organizations and government, and who have quite different views on diversity, equity and inclusion as it applies to the Law School. I am a long term partner at Dechert LLP and partner in charge of Dechert's global Diversity, Equity and Inclusion Initiative.

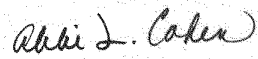
Ms. Kotagal effectively serves as the primary chairperson of the AAB. The members of the AAB look to her to lead the AAB's efforts to establish its mission, priorities, and messaging. Although not appointed as such, because of her ability to listen in a non-judgmental manner and ensure that all voices are heard she has naturally ascended to the key chairperson role on the AAB. Her obvious knowledge and experience with the tough issues that the AAB is tasked with addressing are especially valuable. However, Ms. Kotagal does not simply impose her views with respect to the important topics of diversity, equity and inclusion. She invites the AAB members to share their differing perspectives and then works hard to seek a consensus. It is because of Ms. Kotagal's obvious intelligence, leadership abilities and, most importantly, collaborative style that I believe she would be an outstanding member of the Equal Employment Opportunity Commission.

The Honorable Patty Murray
The Honorable Richard Burr
May 2, 2022

Please do not hesitate to contact me if you have questions or there is additional information that I may be able to provide.

Thank you for your consideration.

Best regards,



Abbi Cohen



Seyfarth Shaw LLP

Chicago, Illinois 60605-6448

gmaatman@seyfarth.com

www.seyfarth.com

April 22, 2022

Via E-Mail

The Honorable Patty Murray
 Chair
 Committee on Health, Education, Labor and Pensions
 United States Senate
 Washington, D.C. 20510

The Honorable Richard Burr
 Ranking Member
 Committee on Health, Education, Labor and Pensions
 United States Senate
 Washington, D.C. 20510

Re: *Letter Of Support For Kalpana Kotagal - Nomination For Commissioner Of The U.S. Equal Employment Opportunity Commission*

Dear Senator Murray and Senator Burr:

I write this letter in support of Kalpana Kotagal, a nominee for Commissioner of the U.S. Equal Employment Opportunity Commission.

By way of background, I am a senior partner at the law firm of Seyfarth Shaw LLP in Chicago, Illinois. I defend companies sued in class action litigation throughout the United States. I have been a practicing lawyer for 41 years, and I co-chair my firm's class action defense group. I am also an adjunct professor of law at Northwestern University School of Law in Chicago, Illinois.

I know Kalpana Kotagal by virtue of working as a defense lawyer on various class actions and EEOC cases where Ms. Kotagal served as plaintiffs' counsel. I have known Ms. Kotagal for over ten (10) years.

I fully support Ms. Kotagal in terms of her nomination to serve as a Commissioner of the U.S. Equal Employment Opportunity Commission. I do so for multiple reasons.

First, Ms. Kotagal is an ethical, honest, and responsible lawyer who advocates tirelessly and professionally on behalf of her clients. She is among the "best of the best" in terms of lawyers with whom I have practiced law in the last 41 years. Indeed, she is one of the most talented members of the plaintiffs' employment and civil rights bar in the United States.



The Honorable Patty Murray
The Honorable Richard Burr
April 22, 2022

Second, Ms. Kotagal is passionate in her pursuit of justice on behalf of her clients, and in specializing in plaintiffs' cases as a class action and civil rights lawyer at the Cohen Milstein law firm in Washington, D.C. I respect Ms. Kotagal's positions on employment-related issues, which I have found to be well reasoned, sincerely held, and zealously presented for her clients.

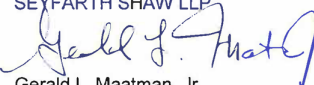
Third, Ms. Kotagal is a consummate professional. She is uniformly liked by lawyers and litigants and the bench alike. I have never heard her say a harsh word about a litigant or a lawyer, and she has conducted herself responsibly and professionally at all times relative to all matters with which I have dealt with her over the years. Her reputation is beyond reproach.

Fourth, and perhaps most important, Ms. Kotagal is unique in her capacity to see all sides of issues, and to listen and respect the perspectives from others. In this regard, I believe that she is exceedingly fair-minded, and open to hearing diverse viewpoints and considering all issues in reaching the best results for all concerned. This perspective is important to decision-making at the Commission, and something that Ms. Kotagal would bring to the EEOC.

In sum, I wholeheartedly recommend and support Ms. Kotagal in terms of her nomination to become a Commissioner of the U.S. Equal Employment Opportunity Commission. I believe that she will make an outstanding Commissioner.

Should you have any questions or comments with respect my letter of support, please let me know.

Very truly yours,

SEYFARTH SHAW LLP

Gerald L. Maatman, Jr.
GLM:hla



Theodore W. Ruger
Dean and Bernard G. Segal Professor of
Law
Philadelphia, PA 19104-6204
truger@law.upenn.edu

April 28, 2022

The Honorable Patty Murray
United States Senate
154 Russell Senate Office Building
Washington, D.C. 20510

Re: Letter of Support for [Kalpana Kotagal](#) for EEOC Commissioner

Dear Senator Murray:

I am delighted that President Biden has nominated Kalpana Kotagal for to serve as a commissioner on the Equal Employment Opportunity Commission (EEOC). I write to express my unequivocal support for Ms. Kotagal as exceedingly qualified to serve in this important position. The University of Pennsylvania Carey Law School takes great pride in Ms. Kotagal's extraordinary accomplishments since she graduated from this law school in 2005 – not only her professional excellence, but also her commitment to ensuring that the rule of law is applied fairly and equitably to all. Ms. Kotagal would be an exceptional contributor to the work of the Commission.

A Partner at Cohen Milstein, member of the firm's Civil Rights & Employment practice group, and Chair of the firm's Hiring and Diversity Committee, Ms. Kotagal is at the pinnacle of her career – and chooses that platform to bring her vision, creativity, and determination to ensure the law's role as a mechanism to safeguard equity and justice, particularly for those who most need its protection. She is best known for utilizing contract law to devise the "inclusion rider" - a tool that utilizes the power of the highest paid in a workplace to secure equity and fair treatment for others. Ms. Kotagal has a keen understanding of how the law is both a shield and sword to protect and advance civil rights, particularly in the employment context. As an unequivocal expert in the laws protecting equity in the workplace, she is well-positioned to be a strong addition to the Commission.

Ms. Kotagal is also a seasoned and savvy leader. She has served this institution in numerous capacities over the years. She was our graduation speaker in 2019 – an invitation we extended because she represents the ideals to which all law students can aspire. We also asked her to serve as an alumni leader of our equity and inclusion initiatives, and she has taken part in this highly nuanced work as an intentional, collaborative partner who can readily bring consensus no matter how complex or controversial a matter may be. Ms. Kotagal is an empathetic strategic thinker who can simultaneously appreciate the large policy implications of decisions while understanding their impact on individuals. Her

passion, compassion, and expertise would afford the EEOC the thoughtful deliberation entrusted to it. Furthermore, in her work leading a board whose members represent a wide range of diverse backgrounds and views, Ms. Kotagal has demonstrated her ability to bring diverging viewpoints to consensus with patience, empathy, and an ability to maintain focus on shared objectives.

I recommend Ms. Kotagal without reservation, and I respectfully request that you offer your enthusiastic support for her nomination.

Sincerely, Sincerely,

A handwritten signature in cursive script, appearing to read "Theodore Ruger".

Theodore Ruger
Dean, University of Pennsylvania Carey Law School
Bernard G. Segal Professor of Law

May 7, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

Re: Nomination of Kalpana Kotagal to the U.S. Equal Employment Opportunity Commission

Dear Chair Murray and Ranking Member Burr:

I write to express my strong support for the nomination of Kalpana Kotagal to serve as a Commissioner on the U.S. Equal Employment Opportunity Commission (EEOC).

Kalpana and I come from very different corners of the legal profession. After clerking for Justice Scalia during October Term 1993, I have since spent my career as a tax professional, the last 13 years as Chief Tax Counsel for Standard Industries, a privately-held global industrial company operating in more than 80 countries with over 20,000 employees. Kalpana has followed a different path. As one of the preeminent Employment & Civil Rights plaintiffs' litigators in the country, she specializes in the representation of employees and others who have been victims of discrimination.

I have known Kalpana since we both were asked by Ted Ruger, Dean of the University of Pennsylvania Carey Law School, to serve as inaugural Co-Chairs of the Alumni Advisory Board for Equity and Inclusion. It has been my privilege to work alongside Kalpana and our fellow Co-Chairs and other Board members to help foster a welcoming and inclusive atmosphere at Penn Law for all members of the law school community, regardless of background.

Our Board often wrestles with matters where concerns about biased or discriminatory rhetoric come into potential conflict with the values of expressive and academic freedom. While these incidents can provoke strong emotions, Kalpana always abjures stridency and endeavors to identify creative action plans that manifest sensitivity to all stakeholders, while adhering to any relevant governing codes. Importantly, Kalpana takes care not to let any predispositions she may have bias her approach to these sometimes contentious issues.

Kalpana's deep expertise in and mastery of the matters within the EEOC's purview are widely known and well documented. What I can speak to from personal experience is that Kalpana is among the most level-headed, fair-minded and insightful legal professionals I have ever encountered. She is exceptionally qualified to serve as a Commissioner on the EEOC.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lou Feldman', with a long, sweeping horizontal line extending to the right.

Lou Feldman
Chief Tax Counsel
Standard Industries

New York, NY 10019

lou.feldman@standardindustries.com

May 7, 2022

The Honorable Patty Murray
 Chair
 Committee on Health, Education,
 Labor and Pensions
 United States Senate
 Washington, DC 20510

The Honorable Richard Burr
 Ranking Member
 Committee on Health, Education,
 Labor and Pensions
 United States Senate
 Washington, DC 20510

Re: Nomination of Kalpana Kotagal to the U.S. Equal Employment Opportunity Commission

Dear Chair Murray and Ranking Member Burr:

I write to express my strong support for the nomination of Kalpana Kotagal to serve as a Commissioner on the U.S. Equal Employment Opportunity Commission (EEOC).

Kalpana and I come from very different corners of the legal profession. After clerking for Justice Scalia during October Term 1993, I have since spent my career as a tax professional, the last 13 years as Chief Tax Counsel for Standard Industries, a privately-held global industrial company operating in more than 80 countries with over 20,000 employees. Kalpana has followed a different path. As one of the preeminent Employment & Civil Rights plaintiffs' litigators in the country, she specializes in the representation of employees and others who have been victims of discrimination.

I have known Kalpana since we both were asked by Ted Ruger, Dean of the University of Pennsylvania Carey Law School, to serve as inaugural Co-Chairs of the Alumni Advisory Board for Equity and Inclusion. It has been my privilege to work alongside Kalpana and our fellow Co-Chairs and other Board members to help foster a welcoming and inclusive atmosphere at Penn Law for all members of the law school community, regardless of background.

Our Board often wrestles with matters where concerns about biased or discriminatory rhetoric come into potential conflict with the values of expressive and academic freedom. While these incidents can provoke strong emotions, Kalpana always abjures stridency and endeavors to identify creative action plans that manifest sensitivity to all stakeholders, while adhering to any relevant governing codes. Importantly, Kalpana takes care not to let any predispositions she may have bias her approach to these sometimes contentious issues.

Kalpana's deep expertise in and mastery of the matters within the EEOC's purview are widely known and well documented. What I can speak to from personal experience is that Kalpana is among the most level-headed, fair-minded and insightful legal professionals I have ever encountered. She is exceptionally qualified to serve as a Commissioner on the EEOC.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lou Feldman', with a long, sweeping horizontal flourish extending to the right.

Lou Feldman
Chief Tax Counsel
Standard Industries

New York, NY 10019

lou.feldman@standardindustries.com



The Honorable Patty Murray
Chair
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C. 20510

Dear Chair Murray,

Color Of Change, the country's largest online racial organization with a membership of 7 million, strongly supports President Biden's nomination of Kalpana Kotagal to be a Commissioner on the Equal Employment Opportunity Commission (EEOC).

While there is increased public interest and momentum around addressing legacies of racism in our country, the skill of translating that intention into effective, strategic and transformative action is often hard to find. As a highly celebrated partner at the Cohen Milstein law firm, Ms. Kotagal has become one of the country's preeminent leaders fighting for workers rights, across a wide-range of platforms, in order to move our nation from values statements to systemic action. For more than 15 years Ms. Kotagal has pushed the envelope to make our country more equitable for all working people while working on vanguard issues related to the Equal Pay Act, Family Medical Leave, Title VII and the Americans with Disabilities Act. We have also been impressed by her experience as a litigator where she has led complex cases on discrimination in employment, housing, and public accommodations in cases including *Jock v. Sterling Jewelers*, *Allen v. AT&T Mobility*, and *Dukes v. Walmart*.

Out of court, Ms. Kotagal has used her skills to become a national leader in diversity hiring practices. She co-authored the [Inclusion Rider](#), a policy template and contract provision that allows companies and productions to implement widely applicable best practices for building workplace diversity at every level. These incredibly technical and legally complex documents are designed to address generations of discrimination and exclusion that have kept people of color, LGBTQ people, women, people with disabilities and other disenfranchised communities from fully profiting and advancing in cultural industries where they are undeniable contributors. With Ms. Kotagal's stewardship, the tool has been adopted as policy by more than a dozen production companies in the film and tv industries, it has been adapted for fashion shows and just last month, it set the example to follow for cultural awards shows when it was used at the 2022 GRAMMY Awards.

Color Of Change has been proud to work closely with Ms. Kotagal to adapt inclusion riders for new cultural production industries and ensure adoption of the tool through our [#ChangeIndustries](#) initiative, which offer

roadmaps to racial justice change and partnerships to support cultural production companies in creating systemic racial justice across the music, fashion, and Hollywood industries. Our most recent research partnership led by Ms. Kotagal is a first-of-its-kind research study to investigate Hollywood companies' diversity reporting and hiring practices. Once complete, the project will establish an industry-wide baseline for data collection, analyzing and demographics reporting for the cast and crew of major Hollywood studios.

At every level, Ms. Kotagal is an innovative and powerful leader in the national movement for equity, safety and fair treatment for all workers in our country. Beyond diversity, equity and inclusion she has shown a persistent commitment to doing the hard work of finding real systemic solutions to the racial and civil rights challenges within American workplaces. We can't think of a better nominee for the EEOC, and we would be excited to see the progress she would be able to create for our nation. Color Of Change is proud to give its full backing and support to Kalpana Kotagal.

Sincerely,
Amity Paye

Amity Paye

Winding Way
Advisors & Investors

April 20, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education, Labor, and Pensions
United States Senate
Washington, DC 20510

Dear Senator Murray,

I am honored to add my recommendation of Ms. Kalpana Kotagal for commissioner of the EEOC.

I have known Ms. Kotagal and her family for nearly 20 years, having worked alongside her mother, Dr. Uma Kotagal, at Cincinnati Children's Hospital Medical Center, where I served as the CEO for 12 years and as a member of the Board of Trustees for 6 years before that.

Cincinnati Children's is consistently ranked as one of the top five children's hospitals and one of the top three pediatric research institutions in the nation. We serve patients from all 50 states and over 50 countries. Our 16,000-person workforce includes front line staff and elite faculty from every state and over 60 countries. And so, the issues of fairness, respect, inclusiveness, diversity, equity, and more are essential tenets to attracting, retaining, and developing the best talent and organizational culture so that we can deliver the best, most compassionate patient care, and advance the most innovative treatments and cures.

I spent the formative part of my career for well over a decade as an entrepreneur transforming a startup company into a global supplier of manufacturing support services to the automotive assembly industry with 3,000 employees and 2,500 managed service partners in 12 countries.

I also served as CEO of the Cincinnati USA Regional Chamber of Commerce and as an affiliate partner of a sizeable private equity investment firm based in New York.

I share this window into my professional background because I think it provides me with a well-rounded employer perspective on why I believe Ms. Kotagal would make a thoughtful and effective EEOC Commissioner.

Of course, Ms. Kotagal's stellar track record of education, judicial clerkship, successful and trailblazing cases, honors, publications and more, are beyond impressive and suggest she is eminently qualified for this exceptionally important leadership role for the economy and culture of our country.

Winding Way

Advisors & Investors

And yet, it is Ms. Kotagal's human qualities that I believe make her uniquely well suited to help lead the EEOC in the years ahead – especially in these times of great change in the “workplace.” In addition to her obvious intellect, curiosity, empathy, positivity and more, let me highlight three of her attributes that I believe will enhance the EEOC and make it an even more valuable resource for employers, workers, and our communities.

Ms. Kotagal is balanced and fair minded. She asks questions. She listens. She does her homework. She invites people in. This will be particularly important, as I believe she will consistently seek and thoughtfully consider the perspectives, needs, and implications for businesses on the range of issues that come before the EEOC.

Ms. Kotagal brings great expertise and is deeply committed to the values and principles of diversity, equity, and inclusion. She also has worked and spoken with companies and organizations of all sizes and in a range of industries who increasingly see the opportunity and impact of deepening diversity to enhance talent attraction and retention, grow sales and market share, increase profitability, elevate their brands, and make richer and better decisions. Her history of results and her collaborative and practical style suggest she will approach these matters by encouraging creativity, innovation, partnership, and progress... not in rigid or inflexible ways.

Ms. Kotagal knows her roots and her heritage. She brings a genuine appreciation and love for our country that many first-generation Americans do. As the daughter of two physicians, she exudes a deep sense of compassion, service to others, and care for community. As a woman raised in, and recently returned to, the Midwest, she possesses a humility and authenticity that naturally looks for common ground and progress.

In short, Ms. Kotagal has the expertise, experience, temperament, judgement, and leadership to become an exemplary member of the EEOC. I sincerely hope you and the Senate will confirm her candidacy.

With appreciation and respect,

Michael Fisher

Managing Director, Winding Way
Executive Advisor, Cincinnati Children's
Advisor, Lindsay Goldberg
Email: michael.fisher@windingway.com

STATEMENT OF SENATOR RICHARD BURR IN OPPOSITION TO THE KALPANA KOTAGAL
NOMINATION

Since its inception in 1965, the Equal Employment Opportunity Commission has been integral to this country's fight against discrimination in the workplace. For nearly sixty years, the EEOC has used its resources to improve or in many cases eliminate discrimination and impediments to equal opportunity in the workplace. To ensure public trust, it is essential that the EEOC strive to be above politics and partisanship and enforce our Nation's laws. Ensuring equal opportunity for all within the workplace—regardless of race, sex, gender, and numerous other protected categories—is a fundamentally guaranteed American trait.

However, Ms. Kalpana Kotagal's nomination undermines those fundamental notions of fairness and would bring partisanship and political interpretation to the EEOC. For this overriding reason, I oppose Ms. Kotagal's nomination and urge my colleagues to do the same.

As a public institution, the EEOC must be accountable and responsive to the public. Under the previous Chair Janet Dhillon, the EEOC has reformed itself to be more transparent. Commission votes, public meetings, and hearings are posted on the EEOC's website and easily accessible to the public. The General Counsel was required to submit certain classes of proposed litigation to the Commission for a vote by every Commissioner. These basic measures of transparency and accountability allowed for greater confidence among the public, employers, and workers in the Commission's decisions.

Yet Ms. Kotagal refused to commit to any of these reforms during her interview with my staff. The EEOC has not held any public meetings since January 7, 2021, and has held only one public hearing since that date. Basic measures of transparency, as well as Commission deliberations on whether to proceed on certain classes of litigation, particularly litigation that raises novel areas of law or issues upon which the Commission has not released guidance, is integral to due process and fairness. Ms. Kotagal's refusal to continue these common-sense measures speaks volumes of her lack of commitment to due process and transparency.

I am concerned Ms. Kotagal lacks impartiality to interpret the law, and I will oppose her nomination. The nominee testified as an expert in favor of banning the use of pre-dispute arbitration agreements in the workplace, or in the least only permitting unions to reap arbitration's benefits. The nominee has also failed to explain why it is permissible to uphold the bargaining power of unions but limit that of individual workers. Ms. Kotagal has criticized the Supreme Court for upholding the plain language of the Federal Arbitration Act, and wishes to curtail employees' ability to enter into arbitration proceedings. To Ms. Kotagal, class-action litigation seems to be the only effective means of obtaining relief for discrimination. However, Ms. Kotagal failed to note that class-action plaintiffs often get less monetary relief as a result of courts liberally certifying large classes of plaintiffs with uncommon interests. The process for class certification is itself often costly, requiring the hiring of attorneys at great expense to the average person. All of these are factors Ms. Kotagal failed to consider, or even acknowledge, in her submitted congressional testimony.

Ms. Kotagal, has a history of political activism whose policy judgments would bring partisanship to the EEOC. As a class-action lawyer in the private sector, Ms. Kotagal served as a Board Advisory Member to the People's Parity Project, an affiliation she initially failed to disclose. The People's Parity Project has become notorious for launching intimidation campaigns against law firms and law schools to prevent the hiring of public servants who previously served in the Trump administration. In an open letter, the People's Parity Project proudly asserts their intention to criminalize policy differences by naming a number of esteemed public servants and demanding employers refuse to hire any of those distinguished individuals "to show there are consequences" for serving a disfavored administration. Instead of condemning the leak of a draft, pre-decisional Supreme Court opinion, the People's Parity Project instead urged more intimidation against the Court through their rhetoric, referring to the Supreme Court as an "illegitimate political actor" and urging its followers to allow the leaking of the opinion to "radicalize us."

Additionally, Ms. Kotagal has not been transparent with this Committee regarding her social media presence, having admitted to deleting thousands of Tweets. For these reasons, I oppose Ms. Kotagal's nomination, and I urge all of my colleagues to do the same.

[Whereupon, at 11:06 a.m., the hearing was adjourned.]

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