



December 13, 2017

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Lamar Alexander
Chairman
Committee on Health, Education,
Labor & Pensions
428 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education,
Labor & Pensions
428 Dirksen Senate Office Building
Washington, D.C. 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: Senate hearings on sexual harassment and assault in the workplace

Dear Senators:

For nearly 100 years, the American Civil Liberties Union has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. Through our Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, our Washington Legislative Office, and LGBT Rights Project, the ACLU has long been a leader in the fight for women's equality and against discrimination and gender-based violence in the workplace.

On behalf of our almost 2 million members and the millions more workers who have endured sexual harassment and assault at work, the ACLU urges you to hold hearings early in 2018 that will shed more light on why this workplace scourge persists, despite legal prohibitions. The Senate should take this opportunity to shepherd the current national conversation about workplace harassment and assault, its causes and consequences — but even more urgently, the remedies that will set a course for lasting, systemic change. We hope to work with you in preparing for such hearings.

In recent months, we have witnessed an unprecedented reckoning over the prevalence of sexual harassment and assault in the workplace. We have been riveted, and pained, by each new revelation of abuse by prominent men. And we have been reminded, once again, that despite the longstanding prohibitions against sexual harassment and sexual assault, these reprehensible behaviors continue to infect our workplaces and deny workers equal employment opportunities, safety, and dignity. Indeed, harassment was the basis for nearly a third of the charges filed with the U.S. Equal Employment Opportunity

Commission (EEOC) alleging some form of discrimination.¹ In light of estimates that up to 90 percent of people who have been sexually harassed never report or take action,² we know that there are hundreds of thousands more untold stories.

Your committees must confront and address the reality that although the Civil Rights Act of 1964 prohibits discrimination because of sex, and legal developments have made sexual harassment actionable discrimination,³ legal liability, as currently constructed, has not stamped out sexual harassment and assault at work. Nor has the regime of reporting rules and the proliferation of anti-harassment training in the last two decades.

The Senate should convene experts to engage in a public discussion about how our laws could help sustain, strengthen, and guide the cultural shift we are witnessing. Currently, innumerable forces conspire to keep harassment's (mostly female) victims out of the public eye, and out of the courts, while favoring employers — which, as recent reports have shown, often ignore not just individual instances of abuse but prolonged, serial violations, without consequence. Plainly, the current enforcement regime is not sufficient to prompt employers to take meaningful action.

We especially urge the Senate to use this moment to shine a much-needed spotlight on the pervasive abuse faced by workers whose stories are absent from the headlines — those who labor in low wage jobs. According to a recent report,⁴ the vast majority of sexual harassment claims are brought by women working in restaurants and hotels (14 percent), retail stores (13 percent), health care (11 percent), and administrative support jobs (7 percent). And those are only the workers who have taken formal legal action; a widely-cited study⁵ found that 60 percent of female and transgender restaurant workers reported sexual harassment was “an uncomfortable aspect of work life,” while a recent survey in Chicago found that 58 percent of hotel workers, and 77 percent of casino workers, had been sexually harassed by a guest.⁶ The exceptionally vicious abuse faced by female agricultural workers, janitors, and domestic workers also is widespread, and well-documented,⁷ yet such workers face significant barriers to accessing

¹ U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

² *Id.* at 8.

³ See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); Gillian Thomas, *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work* (New York: St. Martin's Press 2016).

⁴ Jocelyn Frye, “Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers,” Center for American Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>.

⁵ Restaurant Opportunities Center, *The Glass Floor: Sexual Harassment in the Restaurant Industry* 2 (Oct. 7, 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

⁶ Unite HERE Local 1, *Hands Off Pants On: Sexual Harassment in Chicago's Hospitality Industry* 4 (July 2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf>.

⁷ See, e.g., Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment* (May 5, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual>; Bernice Young, “Rape on the Night Shift: Under Cover of Darkness, Female Janitors Face Rape and Assault,” REVEAL (June 23, 2015), <https://www.revealnews.org/article/under-cover-of-darkness-female-janitors-face-rape-and-assault/>; Janell Ross, “Sexual Assault Endured by Domestic Workers Overlooked in National Conversation,” WASH. POST (Nov. 29,

remedies, due to the isolated nature of their work, language barriers, immigration status, and lack of coverage by existing statutes. Although low-income workers, especially women of color, say the words “Me Too” as often if not more than many,⁸ their stories have not pierced the public consciousness, let alone spurred legislative solutions. As a result, their harassers remain undaunted. The Senate can change this.

When the Senate does hold hearings, it should consider the following non-exhaustive list of issues:

- Access to information about legal rights, responsibilities, and remedies: Too many employers and other stakeholders (such as labor unions) remain uninformed about the laws governing them, and too many employees remain uninformed about their right to seek redress. Government has a huge role to play in filling this gap, through widely disseminated training materials and public service announcements to educate individuals, at all levels of a workplace hierarchy, about legal standards and best practices.
- Pre-dispute mandatory arbitration provisions: One study found that since 2010, between 50-80 percent of companies in the Fortune 100 have used arbitration agreements in connection with workplace-related disputes.⁹ The proliferation of pre-dispute, mandatory, and binding arbitration provisions in employment contracts has forced employees to sign away their rights to pursue employment discrimination claims, like sexual harassment, and denied them access to federal and state courts. Too often the balance of power is weighted against the employee and none of the safeguards of our civil justice system are guaranteed. These arbitration clauses shield employers from accountability for wrongdoing and should be prohibited.
- Nondisclosure agreements: Nondisclosure agreements (NDAs) in employment contracts that silence workers and prevent them from discussing civil rights and other workplace violations should be disallowed or disfavored because they enable predators. One innovative state model that is deserving of further study prohibits NDAs in settlement agreements if the conduct covered by the NDA could be prosecuted as a felony sex offense.¹⁰
- Supervisor liability: In *Vance v. Ball State University*,¹¹ the Supreme Court offered a cramped interpretation of Title VII of the Civil Rights Act of 1964 and held that an employer could be insulated from liability for the discriminatory actions, like harassment, of a supervisor if the supervisor directed the daily work of the subordinate but did not have authority to fire, demote, promote, or transfer the subordinate. This decision narrowed protections for employees who face harassment in the workplace. Congress has the ability to

2017), https://www.washingtonpost.com/news/post-nation/wp/2017/11/29/sexual-assault-endured-by-domestic-workers-overlooked-in-national-conversation/?utm_term=.0826173c35df.

⁸ LatinoUSA, “The Open Letter That Latina Farmworkers Wrote About Hollywood and Sexual Assault (Nov. 15, 2017), <http://latinousa.org/2017/11/15/open-letter-latina-farmworkers-wrote-hollywood-sexual-assault/>.

⁹ Imre S. Szalai, The Employee Rights Advocacy Institute for Law & Policy, The Widespread Use of Workplace Arbitration Among America’s Top 100 Companies (September 27, 2017), <http://employeeightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf>.

¹⁰ Cal. Civ. Proc. Code §1002(a).

¹¹ *Vance v. Ball State University*, 133 S.Ct. 2434 (2013).

reverse it by clarifying that in hostile work environment cases, the employer is vicariously liable for a supervisor's harassment even if he does not have the power to decide the subordinate's fate.¹² Senate hearings would present the opportunity to review not only the impact of the *Vance* case but also other Supreme Court rulings that have undermined an employee's ability to attain justice in sexual harassment cases.¹³

- **Gender-biased policing:** Far too often, survivors of sexual violence face disbelief, victim-blaming, shaming, and hostility. That attitude frequently results in law enforcement's refusal to accept complaints, conduct investigations, or make arrests, even when the abuse clearly qualifies as criminal. Indeed, reports regularly surface of law enforcement agencies failing to investigate or adequately respond to sexual violence perpetrated by private individuals, refusing to enforce established laws, misclassifying or dismissing sexual violence complaints, and providing inadequate training and supervision. This is impermissible discriminatory policing and it contributes to the prevalence of sexual harassment and assault by discouraging victims from coming forward and by allowing perpetrators to continue to commit crimes with impunity. We must ensure that law enforcement policies and practices are free of gender stereotypes and gender bias. The Violence Against Women Act and other federal laws and programs have built criminal justice capacity and expertise, trained thousands of officers, and resulted in more effective law enforcement in many communities. These efforts must be expanded.

This moment in our history calls for thoughtful, bold, bipartisan action. We urge members of the Committees to heed that call and chart a path that leads to the end of sexual harassment and assault in our workplaces. Additionally, we strongly encourage Senators not to stop there, but to also give much needed attention to the prevalence of workplace harassment that burdens and harms individuals because of their race, ethnicity, age, disability, religion, or gender identity. The civil rights and dignity of every person deserve protection.

Thank you for considering our request and we look forward to working with you.

Sincerely,

Faiz Shakir



Director
National Political Advocacy Department

Vania Leveille



Senior Legislative Counsel
Washington Legislative Office

¹² See Fair Employment Protection Act of 2017, S.2019/H.R. 4152, 115th Cong. (2017-2018).

¹³ See e.g., Mark Joseph Stern, "Who's to Blame for America's Sexual Harassment Nightmare?," SLATE (Oct. 17, 2017),

http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/blame_the_supreme_court_for_america_s_sexual_harassment_nightmare.html