

CONCILIATION OBFUSCATION

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Before the U.S. Equal Employment Opportunity Commission may sue an employer for violating federal antidiscrimination law, it must first seek to engage the employer in conciliation. Conciliation offers employers an opportunity to resolve discrimination charges voluntarily in a setting analogous to settlement negotiations. In January 2021, EEOC promulgated a rule mandating that, as part of conciliation, employers be given certain information about the underlying charge. Congress subsequently rescinded the rule, however, citing its ostensible pro-employer/anti-worker bias.

Congress's nullification of the conciliation rule has generated considerable uncertainty not only for employers and workers but also for the Commission itself. That is because the rule was rescinded using the Congressional Review Act (CRA), which prohibits a rule from being issued "in substantially the same form" as one previously disapproved. Yet, the Act does not define "in substantially the same form" or otherwise specify what criteria should be used in assessing rules' similarity. Nor has any court interpreted the phrase in the specific context of CRA.

This article examines three possible methodologies for how the Commission might go about issuing a conciliation rule consistent with CRA—based on proposals from the academic literature, other agencies' experience in reissuing disapproved rules, and procedures specified in CRA's post-enactment legislative history—and demonstrates that while EEOC retains the discretion to issue a new conciliation rule, it is effectively barred from doing so absent further action by Congress.

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INTRODUCTION

The U.S. Chamber of Commerce strongly supports the Equal Employment Opportunity Commission regulations, "Update of Commission's Conciliation Procedures," and strongly opposes Senate Joint Resolution 13, a resolution under the Congressional Review Act which would reverse this regulation. . . . If the Conciliation Rule is invalidated under the CRA, the EEOC will be prohibited from adopting any new rules regarding conciliation that are "substantially the same" as the repealed rule. That means that the Commission, as a practical matter, will be unable to effect changes to improve its conciliation processes, or ensure transparency for all parties, and that the requirements that Congress imposed on the Commission . . . will be rendered meaningless.

- Letter to Senators from the U.S. Chamber, May 19, 2021

The last administration put in place a rule that makes it harder for those seeking redress for job discrimination to get justice. With this law, [Senate Joint Resolution 13,] we're going to move in the direction of greater accountability, fairness, and justice.

- Signing Ceremony Statement of President Biden, June 30, 2021

Before the Equal Employment Opportunity Commission (the EEOC or the Commission) may sue an employer for violating federal antidiscrimination law, it must first attempt to eliminate the alleged discriminatory practice by informal methods of conference, concilia-

tion, and persuasion.¹ Specifically, the EEOC must “tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.”² Beyond that, however, the Commission retains complete discretion “over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.”³ The EEOC is likewise free to decide “whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer’s counter-offers.”⁴ In theory, this procedural and substantive flexibility allows the EEOC to tailor its conciliation process to the facts of each case, increasing the likelihood that the EEOC will be successful in securing compliance through negotiation rather than litigation.⁵ In practice, though, the Commission’s conciliation efforts fail more often than they succeed, with many employers declining to participate in the conciliation process altogether.⁶

Seeking to reverse this trend, the EEOC amended its conciliation rule in January 2021.⁷ The rule required the EEOC to furnish certain information to employers as part of the conciliation process.⁸ Among the items to be disclosed were the legal and factual basis for the Commission’s initial reasonable cause determination, together with the calculations supporting the EEOC’s requested monetary relief.⁹ The EEOC warned that “without this basic information, the [employer]

1. 42 U.S.C. § 2000e-5(b).

2. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 488 (2015).

3. *Id.* at 492.

4. *Id.*

5. Brief for Respondent at *38 n.12, *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480 (2015) (No. 13-1019), 2014 WL 5464087 [hereinafter EEOC Brief].

6. Update of Commission’s Conciliation Procedures, 85 Fed. Reg. 64079, 64080 (proposed Oct. 9, 2020) [hereinafter Proposed Conciliation Rule] (observing that “between fiscal years 2016 and 2019, only 41.23% of the EEOC’s conciliations were successful” and estimating that one-third of employers decline to participate in conciliation altogether).

Employers may decline to participate in conciliation for any number of reasons, including but not limited to a lack of information about the EEOC’s case, disagreement with the EEOC’s reasonable cause determination, a rejection of the EEOC’s requested monetary relief, an unwillingness to change their current employment practices, or because they simply wish to “roll the dice” with the understanding that the EEOC litigates only a small percentage of the cases in which conciliation fails. *See infra* notes 179 and 181.

7. Update of Commission’s Conciliation Procedures, 86 Fed. Reg. 2974 (Jan. 14, 2021) (to be codified at 29 C.F.R. Parts 1601 and 1602) [hereinafter Final Conciliation Rule].

8. *Id.* at 2985–86.

9. *Id.*

may not be able to evaluate the merit of the Commission's . . . demand [and] weigh the demand against the risk and expense of possible litigation."¹⁰ These informational disparities ostensibly stood to leave the employer with an overly favorable impression of its case, thereby decreasing the prospects for successful conciliation.¹¹ Once in possession of the specified data, however, the EEOC believed employers would be more likely to engage in conciliation and voluntarily remedy the contested employment practice.¹² Hence, the rule was presented as furthering the EEOC's goal of eliminating employment discrimination through Congress's preferred means of compliance, i.e., conciliation.¹³

Yet, the rule was not without controversy, as reflected by the fact that two of the five Commissioners voted against its adoption.¹⁴ In her remarks immediately preceding the vote, Commissioner Jocelyn Samuels emphasized that conciliation is not a goal unto itself and averred that the EEOC's conciliation procedures "must always be judged, not by whether conciliation can be achieved at any cost, but by whether conciliation advances the ultimate goal of eliminat[ing] . . . workplace discrimination."¹⁵ Separately, Commissioner Charlotte Burrows argued that "the data doesn't support this assumption that's at the crux of our rulemaking[—]that if the EEOC provided more information, we would somehow have more" successful conciliations.¹⁶

Collectively, Commissioners Samuels and Burrows made three motions and offered sixteen amendments to table or otherwise revise the rule, all of which failed.¹⁷ Commissioner Burrows' final proposal was particularly noteworthy in that it was offered in response to an eleventh-hour revision made by the Chair.¹⁸ As originally proposed in October 2020, the rule devoted a single sentence to the Congressional Review Act (CRA): "While the Commission believes the proposed rule is a rule of agency procedure that does not substantially affect the

10. *Id.* at 2975.

11. *Id.*

12. *Id.* at 2976.

13. *Id.* at 2974–76.

14. Paige Smith, *EEOC to Give Employers More Data While Resolving Bias Claims*, BLOOMBERG LAW (Jan. 7, 2021, 4:39 PM), <https://news.bloomberglaw.com/crypto/eec-to-give-employers-more-data-while-resolving-bias-claims>.

15. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMMISSION MEETING TRANSCRIPT OF MEETING OF JANUARY 7, 2021 (Jan. 7, 2021), <https://www.eeoc.gov/meetings/meeting-january-7-2021/transcript> [<https://perma.cc/4QFB-TGWN>] [hereinafter JANUARY 7 MEETING].

16. *Id.*

17. *Id.*

18. *Id.*

rights or obligations of non-agency parties and, accordingly, is not a ‘rule’ as that term is used by the Congressional Review Act, it will still follow the [CRA’s] reporting requirement.”¹⁹ As submitted to Commissioners the day of the vote though, a second sentence had been added immediately after the first, stating, “This is not a ‘major rule’ as the term is defined in” the CRA.²⁰ Commissioner Burrows sought to strike the newly-added text on the grounds it represented a political calculation rather than a legal determination: “[T]he fact that the change was not explained, and the language was abruptly added to the rule less than 24 hours after the Georgia Senate election occurred”—in which two open Senate seats were won by Democratic candidates, giving Democrats a majority in the Senate and establishing unified Democratic control of the federal government—“suggests that it may not have been a legal conclusion, but rather an attempt to potentially shield this [rule] from scrutiny . . . under the Congressional Review Act.”²¹ Although Commissioner Burrows’ proposal was defeated, her statements regarding the CRA proved prescient.

In March 2021, resolutions of disapproval were introduced in both the House and Senate seeking to nullify the conciliation rule pursuant to the CRA.²² The resolutions’ text was identical: “Congress disapproves the rule submitted by the Equal Employment Opportunity Commission relating to ‘Update of Commission’s Conciliation Procedures,’ and such rule shall have no force or effect.”²³ Following passage in the Senate and House, respectively,²⁴ President Biden signed the resolution into law on June 30, 2021.²⁵ Thus, less than five months after taking effect, the EEOC’s conciliation rule was rescinded.

19. Proposed Conciliation Rule, *supra* note 6.

20. Final Conciliation Rule, *supra* note 7, at 2985.

21. JANUARY 7 MEETING, *supra* note 15.

For the purposes of CRA, a rule’s designation as “major” has two consequences. First, the U.S. Comptroller General must prepare a report assessing the agency’s compliance with certain procedural steps, including preparation of a cost-benefit analysis. 5 U.S.C. § 801(a)(2)(A). Second, the rule is delayed from taking effect due to the imposition of additional review periods. *Id.* § 801(a)(3). As discussed in greater detail in Part IV, the former was likely a concern given the anecdotal underpinnings of EEOC’s cost-benefit analysis whereas the latter stood to be problematic in that it would afford congressional Democrats additional time in which to invalidate the rule under CRA.

22. H.R.J. Res. 33, 117th Cong., 167 Cong. Rec. H1620 (2021); S.J. Res. 13, 117th Cong., 167 Cong. Rec. S1708 (2021).

23. H.R.J. Res. 33, 117th Cong. (2021); S.J. Res. 13, 117th Cong. (2021).

24. 167 S2745–54 (daily ed. May 19, 2021); 167 H3115–16 (daily ed. June 24, 2021).

25. Paige Smith, *Biden Signs Bill Nixing Trump-Era EEOC Conciliation Regulation*, BLOOMBERG LAW (June 30, 2021, 5:52 PM), <https://news.bloomberglaw.com/daily-labor-report/biden-signs-bill-nixing-trump-era-eeoc-conciliation-regulation>.

Rescission is not the only consequence of CRA disapproval, however. Once a rule has been nullified, the promulgating agency is barred from issuing a substantially similar rule absent further action by Congress. The CRA provides, in relevant part, that a rule “may not be reissued in substantially the same form [as one previously disapproved] . . . , unless the reissued . . . rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”²⁶ Sometimes referred to as the “salt-the-earth” provision,²⁷ this passage has generated considerable uncertainty as the statute does not define the phrase “substantially the same” or otherwise specify what criteria should be used in assessing rules’ similarity—nor has any court interpreted the phrase in the specific context of the CRA.²⁸

This Article examines whether and to what extent the EEOC may issue a new conciliation rule consistent with the CRA. Part I provides necessary background information, including an overview of the EEOC’s enforcement procedures and a synopsis of the Supreme Court’s 2015 decision in *Mach Mining v. EEOC*, where the Court held that the EEOC’s conciliation efforts are subject to judicial review. Part II describes the intervening procedural and political developments that in 2021 led the EEOC to promulgate a conciliation rule mandating the very disclosures it had so vigorously opposed only a few years earlier in *Mach Mining*. Part III details the process for disapproving a rule under the CRA generally and then applies that framework to the EEOC’s conciliation rule specifically. Part IV analyzes three possible methodologies for how the Commission might go about reissuing its conciliation rule in a manner consistent with the CRA—based on proposals from the academic literature, other agencies’ experience in reissuing disapproved rules, and the procedures outlined in the CRA’s post-enactment legislative history. Ultimately, this Article demonstrates that while the EEOC retains the discretion to issue a new rule, it is effectively precluded from doing so given the expansive effect of the CRA’s salt-the-earth provision.

I.

BACKGROUND

The EEOC’s conciliation obligation does not exist in a vacuum but is instead part of a complex statutory, regulatory, and judicial enforcement scheme. This Part provides a brief overview of the Com-

26. 5 U.S.C. § 801(b)(2).

27. David Zaring, *The Federal Deregulation of Insurance*, 97 TEX. L. REV. 125, 134 (2018).

28. See *infra* Part IV.

mission's enforcement procedures and then examines the circuit split over the reviewability of the EEOC's conciliation efforts that precipitated the Supreme Court's granting certiorari in *Mach Mining v. EEOC*. Because the debates surrounding the EEOC's conciliation rule were informed by and largely derivative of the arguments raised in *Mach Mining*, this Part also furnishes synopses of the litigants' briefs and the Court's decision.

A. *The Commission's Enforcement Regime*

The EEOC administers federal antidiscrimination law pursuant to “an integrated, multistep enforcement procedure” established by Congress.²⁹ That process begins when “a person claiming to be aggrieved” files a charge of employment discrimination with the EEOC.³⁰ The Commission then notifies the employer of the charge and conducts an investigation.³¹ If the Commission finds no reasonable cause to believe that the charge has merit, it dismisses the charge and notifies the parties accordingly.³² At that point, the worker has two options—either pursue his or her own lawsuit against the employer or decline to press the matter any further.³³

Conversely, if the Commission finds reasonable cause, it must “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”³⁴ Similar to settlement negotiations, statements made during conciliation enjoy privileged status: “Nothing said or done during and as a part of such informal endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the [participants'] written consent.”³⁵ If more than thirty days have elapsed since the charge was filed and “the Commission has been unable to secure from the [employer] a conciliation agreement acceptable to the Commission, the Commission may bring a civil action” in federal court.³⁶ Thus, “the ultimate decision whether to accept a settlement or instead to bring a lawsuit” is within the sole discretion of the EEOC.³⁷

Congress, moreover, has delegated limited rulemaking authority to the Commission, permitting it “to issue, amend, or rescind suitable

29. *Occidental Life Ins. v. E.E.O.C.*, 432 U.S. 355, 359 (1977).

30. 42 U.S.C. § 2000e-5(b).

31. *Id.*

32. *Id.*

33. *See id.* § 2000e-5(f)(1).

34. *Id.* § 2000e-5(b).

35. *Id.*

36. *Id.* § 2000e-5(f)(1).

37. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 483 (2015).

procedural regulations to carry out the provisions of’ federal antidiscrimination law.³⁸ With regard to conciliation specifically, EEOC regulations—both as originally promulgated in 1977 and as subsequently reinstated in 2021—provide that “the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the [employer] will eliminate the unlawful employment practice and provide appropriate affirmative relief.”³⁹

B. *Judicial Review of the Conciliation Process*

Whether the EEOC’s conciliation efforts are subject to judicial review remained an open question until 2015. Whereas seven circuits had held that the duty to conciliate is an enforceable precondition to suit, they disagreed on the applicable standard of review. The Fourth, Sixth, and Tenth Circuits applied a deferential standard that examined whether the EEOC made a good-faith effort to conciliate before commencing litigation.⁴⁰ The Second, Fifth, and Eleventh Circuits employed a more demanding test that assessed whether the Commission: (1) informed the employer of its rationale for believing that federal antidiscrimination law had been violated; (2) provided the employer a sufficient opportunity to comply voluntarily; and (3) “responded ‘in a reasonable and flexible manner to the reasonable attitudes of the employer.’”⁴¹ The Eighth Circuit, meanwhile, had not articulated a specific review standard.⁴²

This circuit split widened further still when the Seventh Circuit became the first court of appeals to hold that the EEOC’s conciliation efforts were not reviewable. In *EEOC v. Mach Mining*, the question before the court was “whether an alleged failure to conciliate [on the part of the EEOC] is subject to judicial review in the form of an implied affirmative defense to the [Commission]’s suit.”⁴³ The court began by observing that the statutory text entrusts conciliation “solely to the EEOC’s expert judgment,” thereby leaving courts without a work-

38. 42 U.S.C. § 2000e-12(a).

39. Compare 29 C.F.R. § 1601.24(a) (2021), with 29 C.F.R. § 1601.24(a) (1977).

40. Brief for Respondent in Support of Petition for a Writ of Certiorari at *14, *Mach Mining, LLC v. E.E.O.C.*, 573 U.S. 944 (2014) (No. 13-1019), 2014 WL 2201045.

41. *Id.* at *15.

42. *Id.* at *16. For additional discussion of the circuits’ former standards, see Stephanie Greene & Christine Neylon O’Brien, *Judicial Review of the EEOC’s Duty to Conciliate*, 119 PENN. ST. L. REV. 837 (2015); Gregory Tsonis, *Irreconcilable Differences: Conflicting Court Approaches to Assessing the Duty to Conciliate*, 2014 UNIV. CHI. LEGAL F. 665 (2014).

43. *E.E.O.C. v. Mach Mining, LLC*, 738 F.3d 171, 172 (7th Cir. 2013).

able standard to evaluate the EEOC's conciliation processes.⁴⁴ Additionally, the Seventh Circuit was concerned that reading a failure-to-conciliate defense into the statute would undermine Congress's preferred means of remedying employment discrimination, i.e., conciliation: "If an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly . . . the employer's incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle."⁴⁵ Indeed, the court posited that "the stronger the EEOC's case on the merits, the stronger the [employer's] incentive to use a failure-to-conciliate defense."⁴⁶ Alternatively, the court dismissed employers' concerns that, in the absence of judicial review, the EEOC would forgo or subvert the conciliation process in favor of pursuing litigation, reasoning the Commission's litigation capabilities are limited by both budgetary and personnel constraints.⁴⁷

The Supreme Court subsequently granted certiorari to determine whether the EEOC's conciliation efforts are subject to judicial review and, if so, the appropriate level of scrutiny.⁴⁸

C. *Mach Mining at the Supreme Court*

When the reviewability of the EEOC's conciliation efforts reached the Supreme Court in 2015, the Court held that the EEOC's conciliation practices are reviewable but emphasized that the scope of such review is narrow. In rejecting Mach Mining's contention that the Commission must, in every case, disclose the legal and factual basis for its positions, the calculations underlying its requested monetary relief, and the smallest remedial award it would be prepared to accept, the Court effectively ensured that a future, employer-oriented EEOC would seek to mandate such disclosures via rulemaking.

1. *Mach Mining's Argument*

Mach Mining claimed that the Seventh Circuit erred in characterizing its inadequate-conciliation argument as an affirmative defense rather than a judicially reviewable precondition to suit and sought to

44. *Id.* at 174–77.

45. *Id.* at 179.

46. *Id.*

47. *Id.* at 179–80.

48. *See Mach Mining, LLC v. E.E.O.C.*, 573 U.S. 944 (2014).

rebut each of the court's proffered justifications for finding the conciliation duty unenforceable.⁴⁹

First, Mach Mining disputed the premise that judicial review would inevitably lead courts to blur the distinction between permissible review of the conciliation process and prohibited review of the communications' substance.⁵⁰ Mach Mining observed that the Seventh Circuit itself had "grudgingly acknowledged that other circuits have long recognized a distinction between enforcing the EEOC's procedural obligation to conciliate and its discretionary authority to decide the substance of an acceptable conciliation agreement," ostensibly confirming that such bifurcated analyses are not only possible but indeed plausible.⁵¹

Second, Mach Mining balked at the idea that federal antidiscrimination law does not provide a workable standard of review, contending this was a direct consequence of the EEOC's longstanding refusal to issue a conciliation rule.⁵² After noting that "Congress did not define in detail what counts as 'conciliation'" or "what constitutes a 'charge' or how a charge is 'filed,'" Mach Mining asserted, "that is no basis, however, to conclude that Congress intended to forbid the courts from considering whether a lawsuit was preceded by the timely filing of a proper charge or adequate conciliation."⁵³ Rather, in exercising its congressionally-delegated rulemaking authority, the EEOC had "defined in greater detail standards for complying with the [federal antidiscrimination] statute's various procedural requirements, including filing the initial charge, serving the charge on the employer, [and] investigating the charge."⁵⁴ Mach Mining argued there was no reason why the Commission could not or should not do the same with regard to conciliation and averred that the EEOC's inaction should not serve to insulate the Commission's conciliation practices from judicial review.⁵⁵

Relatedly, Mach Mining underscored that courts had been enforcing the conciliation obligation for decades using their own, independently-crafted standards.⁵⁶ These standards purportedly required that the Commission (1) "inform the [employer] what steps it believes are

49. Brief for Petitioner at *21–22, *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480 (2015) (No. 13-1019), 2014 WL 4380090 [hereinafter *Mach Mining Brief*].

50. *Id.* at *24–25.

51. *Id.* at *25.

52. *See id.* at *33–42.

53. *Id.* at *33.

54. *Id.* at *34 (internal citations omitted).

55. *Id.* at *35.

56. *Id.* at *35–37.

necessary to eliminate the alleged unlawful employment practice;” (2) “provide the [employer] with the basic information about the Commission’s claims and demands;” (3) “provide the employer a reasonable amount of time to review and respond to a conciliation offer;” and (4) “accept and consider [the employer’s] counter-offers.”⁵⁷ According to Mach Mining, these requirements ensured that employers had access to “the basic information any responsible litigant would need before acquiescing to the agency’s demands” while simultaneously assuring that courts did not become entangled in the substance of the parties’ negotiating positions.⁵⁸

Third, the notion that employers would come to view conciliation as an opportunity to “stockpile exhibits” for trial was criticized for its ostensible naiveté, as such claims purportedly underestimated employers’ incentives to conciliate.⁵⁹ Mach Mining noted that “successful conciliation avoids what can be enormous litigation costs,” “substantial distraction and disruption to the employer’s business,” and “harmful public allegations . . . of particularly odious illegal conduct.”⁶⁰ Instead, the Commission was alleged to be the party most likely to subvert conciliation in the absence of judicial review.⁶¹

2. *The Commission’s Argument*

The EEOC, meanwhile, asserted that the Seventh Circuit was correct in holding that conciliation is not subject to judicial review and sought to refute each of Mach Mining’s arguments to the contrary.⁶²

First, the Commission claimed the statutory text indicated that Congress did not intend for the EEOC’s conciliation efforts to be reviewable.⁶³ The Commission observed that Congress delineated the conciliation obligation using various “discretion-granting terms” and left to the EEOC the ultimate decision of whether to enter into a conciliation agreement or instead pursue litigation.⁶⁴ Likewise, the fact that federal antidiscrimination law does not identify any criteria against which prospective conciliation agreements are to be evaluated or specify a particular process the Commission must follow in fulfilling its conciliation duties was alleged to weigh against judicial re-

57. *Id.* at *38–40 (internal citations omitted).

58. *Id.* at *41–42.

59. *Id.* at *43–45.

60. *Id.* at *44.

61. *See id.* at *46–50 (cataloguing EEOC’s incentives to litigate).

62. Brief for Respondent at *8–12, *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480 (2015) (No. 13-1019), 2014 WL 5464087 [hereinafter EEOC Brief].

63. *Id.* at *12–19.

64. *Id.* at *16, *19.

view.⁶⁵ Thus, given the significant discretion entrusted to the EEOC by Congress, the Commission averred that its conciliation obligation was neither susceptible to nor suited for judicial enforcement.⁶⁶

Second, the EEOC argued that to satisfy its statutory mandate, it need only show “that it has attempted conciliation in an effort to obtain a resolution acceptable to the Commission.”⁶⁷ In particular, the EEOC contended that its practice of sending employers two letters—one at the outset inviting the employer to conciliate and another at the end of the process notifying the employer that conciliation had failed—was sufficient to demonstrate that the Commission had attempted conciliation, thereby obviating the need for the more searching inquiry advocated by Mach Mining.⁶⁸ Another purported benefit of this approach was that the letters could be filed in court as proof that conciliation was attempted without violating confidentiality because the letters merely confirmed the process’s commencement and termination without revealing any substantive communications.⁶⁹

Third, the Commission claimed that judicial review would impede the enforcement of federal antidiscrimination laws.⁷⁰ In addition to deterring parties from engaging in open and honest conversations for fear whatever they might say during conciliation would be used against them in a subsequent court proceeding, the EEOC cautioned that judicial oversight would lead employers to approach the process as a chance to prepare for trial rather than an opportunity to resolve claims informally and voluntarily.⁷¹ Moreover, the Commission asserted that “employers would have every incentive to raise an inadequate-conciliation argument once litigation [was underway],” citing the relatively minimal cost of doing so compared to the significant potential upside of delaying or even avoiding altogether a trial on the merits.⁷² The EEOC cited a litany of cases⁷³ in which employers had challenged the sufficiency of its conciliation practices as proof that “the inadequate-conciliation argument is a ‘potent weapon in the hands of employers who have no interest in complying voluntarily’” but only wish to delay as long as possible.⁷⁴

65. *Id.* at *16–19.

66. *Id.* at *19.

67. *Id.* at *20.

68. *Id.* at *20–21.

69. *Id.* at *21 n.5.

70. *Id.* at *39–48.

71. *Id.* at *40–42.

72. *Id.* at *41–42.

73. *Id.* at *44 n.14.

74. *Id.* at *43 (quoting *E.E.O.C. v. Shell Oil*, 466 U.S. 54, 66–67, 81 (1984)).

Fourth, the Commission criticized Mach Mining’s proffered review standard as “unworkable and unwise.”⁷⁵ The EEOC argued that the disclosures sought by Mach Mining—e.g., a summary of the legal and factual basis for the Commission’s claims, a detailed justification for its remedial requests, and the specific actions the employer would need to take in order to resolve the charge—were without parallel in civil litigation.⁷⁶ In particular, the Commission noted that courts generally do not require “civil litigants to provide all the information they have compiled about the case to the other party, or immediately tell the other party on what terms they will settle. . . . And still less do courts impose these constraints in service of a standard that is entirely indeterminate. . . .”⁷⁷ Nevertheless, the EEOC argued, Mach Mining sought to “place all of these burdens on the Commission—inviting manipulation by defendants, intrusion into the agency’s decision-making process, and uncertainty for all concerned.”⁷⁸

3. *The Supreme Court’s Decision*

In a unanimous opinion authored by Justice Kagan, the Supreme Court held that the EEOC’s conciliation efforts are subject to a “relatively barebones” form of judicial review.⁷⁹ Justice Kagan began by observing that judicial review of administrative action is generally presumed as “Congress rarely intends to prevent courts from enforcing its directives to federal agencies.”⁸⁰ Indeed, only where the language or structure of a statute confirms that “Congress wanted an agency to police its own conduct” will the strong presumption of reviewability be overcome.⁸¹ After underscoring the mandatory nature of the EEOC’s conciliation obligation and the fact that courts routinely enforce comparable conditions precedent to litigation, Justice Kagan noted the existence of “certain concrete [statutory] standards” rendering conciliation susceptible to judicial review.⁸² Specifically, the law requires that the EEOC “tell the employer about the claim—essentially, what practice has harmed which person or class—and . . . provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.”⁸³ According to Justice Ka-

75. *Id.* at *48–54.

76. *Id.* at *52–53.

77. *Id.* at *53.

78. *Id.*

79. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 494 (2015).

80. *Id.* at 486.

81. *Id.*

82. *Id.* at 486–88.

83. *Id.* at 488.

gan, these statutorily-prescribed duties furnish a manageable standard by which courts may evaluate the EEOC's actions while at the same time respecting the Commission's considerable discretion in administering conciliation.⁸⁴

Having found the conciliation obligation enforceable as a necessary precondition to suit, Justice Kagan next sought to determine the proper scope of review.⁸⁵ The EEOC contended that such review should be limited to assessing whether the Commission had complied with its practice of sending employers "bookend-letters."⁸⁶ Justice Kagan dismissed the EEOC's bookend-letter approach as "the most minimalist form of review imaginable" in that it would require courts to take the Commission at its word.⁸⁷ The purpose of judicial review, however, is to verify the EEOC's representations regarding conciliation, i.e., "to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge."⁸⁸

Justice Kagan found the "far more intrusive review" advocated by Mach Mining equally problematic.⁸⁹ She observed that in every case, the EEOC would be forced to disclose the legal and factual basis supporting its initial reasonable cause determination, including the calculations underlying its requested monetary relief, while also "let[ting] the employer know the minimum it would take to resolve the claim—that is, the smallest remedial award the EEOC would accept."⁹⁰ Furthermore, the EEOC would be barred from making take-it-or-leave-it offers and would instead be required to maintain an ongoing dialogue with the employer, whereby the Commission would have to consider and respond to each of the employer's counter-offers while also affording the employer time to review and respond to each of the EEOC's communications.⁹¹ Justice Kagan believed this "bargaining checklist" was inconsistent with the significant leeway afforded the Commission by federal law; "Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers."⁹² Likewise, "Congress granted the EEOC discretion over the

84. *Id.*

85. *Id.* at 489.

86. *Id.* at 489–90. For more information about this practice, see *supra* note 68 and accompanying text.

87. *Id.*

88. *Id.* at 490.

89. *Id.* at 489.

90. *Id.* at 490–91.

91. *Id.* at 491.

92. *Id.* at 492.

pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.”⁹³ Thus, Mach Mining’s approach was faulted for seeking to impose additional procedural requirements beyond those specified by Congress.⁹⁴

In light of their respective flaws, Justice Kagan declined to adopt either party’s approach and instead announced a review standard derived directly from the statutory text.⁹⁵ She held that judicial review of conciliation is limited to assessing (1) whether the EEOC adequately informed the employer about the specific allegation by describing “what the employer has done and which employees (or what class of employees) have suffered as a result;” and (2) whether the EEOC tried “to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.”⁹⁶ Limiting review to these two items would ensure that the Commission complied with its statutory mandate while still respecting the expansive discretion granted to the EEOC by Congress.⁹⁷

II.

POST-*MACH MINING* DEVELOPMENTS AT EEOC

Whereas the EEOC initially hailed the *Mach Mining* decision as “great news for victims of discrimination” and a “step forward for civil rights,”⁹⁸ by 2020, the Commission was seeking to implement many of the same disclosure requirements it had once derided as “unworkable and unwise.”⁹⁹ This reversal stemmed from a series of personnel changes at the EEOC and was preceded by the launch of two nonbinding initiatives impacting the Commission’s conciliation procedures.¹⁰⁰ The EEOC’s failure to incorporate the results of those initiatives in its subsequent rulemaking led two of the agency’s five

93. *Id.*

94. *Id.*

95. *Id.* at 494.

96. *Id.*

97. *Id.*

98. Press Release, U.S. Equal Emp. Opportunity Comm’n, Supreme Court Decision is Step Forward for Victims of Discrimination (Apr. 29, 2015), <https://www.eeoc.gov/newsroom/supreme-court-decision-step-forward-victims-discrimination> [<https://perma.cc/PW4L-L2A2>].

99. EEOC Brief, *supra* note 62, at *48.

100. These initiatives were known as the conciliation project and the conciliation pilot and are discussed in detail below. *See* Section II.B., *infra* notes 136–46 and accompanying text.

commissioners to predict that the rule would “be struck down by Congress or the court[s] before the ink dries.”¹⁰¹

A. *A Changing of the Guard at EEOC*

Pursuant to the Civil Rights Act of 1964, the EEOC is led by a group of five individuals known as commissioners, no more than three of whom may be of the same political party.¹⁰² Commissioners serve staggered five-year terms and are eligible to serve multiple terms.¹⁰³ Each five-year term, however, requires appointment by the President and confirmation by the U.S. Senate,¹⁰⁴ with tradition dictating that the President not remove a commissioner before the end of his or her term.¹⁰⁵ Additionally, one commissioner is designated by the President to serve as the EEOC’s Chairperson, and that individual is responsible for managing the Commission’s administrative operations.¹⁰⁶

From the time the EEOC filed its original complaint against Mach Mining in 2011 through the issuance of the Supreme Court’s opinion in 2015, the Commission was comprised of three Democrats and two Republicans.¹⁰⁷ One of the two Republican commissioners then departed in 2016 after the Senate failed to confirm her for another term.¹⁰⁸ Thus, when President Obama left office in January 2017, the

101. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows).

102. 42 U.S.C. § 2000e-4(a).

103. EQUAL EMP. OPPORTUNITY COMM’N, FISCAL YEAR 2020 ANNUAL PERFORMANCE REPORT 6 (2020), https://www.eeoc.gov/fiscal-year-2020-annual-performance-report#h_6163797581431611083606513 [<https://perma.cc/6RN9-JF2A>].

104. 42 U.S.C. § 2000e-4(a).

105. Cf. Paige Smith, *Presidential Power Questioned After EEOC’s Top Lawyer Fired*, BLOOMBERG LAW (Mar. 9, 2021, 5:21 AM), <https://news.bloomberglaw.com/daily-labor-report/presidential-power-questioned-after-sacking-of-eeocs-top-lawyer> [<https://perma.cc/R3XR-KN4B>] (acknowledging EEOC’s “murky status in terms of whether it’s an independent agency or an executive agency, and therefore subject to the president’s whims” (quoting Ronald Cooper, EEOC General Counsel for the Bush Administration)).

106. 42 U.S.C. § 2000e-4(a).

107. *Compare The Commission*, EQUAL EMP. OPPORTUNITY COMM’N (Sept. 23, 2011), [<http://web.archive.org/web/20110923204223/http://www.eeoc.gov/eeoc/commission.cfm>] (listing three Democrats—Berrien, Ishimaru, and Feldblum—and two Republicans—Barker and Lipnic—as of September 23, 2011), *with The Commission*, EQUAL EMP. OPPORTUNITY COMM’N (Apr. 23, 2015), [<http://web.archive.org/web/20150423173559/http://eeoc.gov/eeoc/commission.cfm>] (listing three Democrats—Yang, Feldblum, and Burrows—and two Republicans—Barker and Lipnic—as of April 23, 2015).

108. Kevin McGowan, *Senate Fails to Confirm EEOC’s Barker for New Term*, BLOOMBERG LAW (Dec. 12, 2016, 1:39 PM), <https://news.bloomberglaw.com/daily-labor-report/senate-fails-to-confirm-eeocs-barker-for-new-term> [<https://perma.cc/QPR9-B9HA>].

Commission was comprised of three Democrats and one Republican, with one seat sitting vacant.¹⁰⁹

Within a few months of his inauguration, President Trump sought to fill that vacancy by nominating Janet Dhillon to serve as the Commission's next chairperson.¹¹⁰ Dhillon's résumé included stints as general counsel at three major corporations as well as thirteen years' experience working as a management-side employment attorney at a prominent U.S. law firm.¹¹¹ Dhillon was also a co-founder of the Retail Litigation Center (RLC),¹¹² a trade association billing itself as "the only organization dedicated to advocating for the [retail] industry's top priorities in the federal and state judiciary" while also "work[ing] with leading law firms and retail corporate counsel to develop forward-thinking strategies to combat meritless mass action litigation."¹¹³ Dhillon served as RLC's first chairperson and was still a member of the board in 2014¹¹⁴ when the organization authored an amicus brief in *Mach Mining v. EEOC* that was highly critical of the Commission's conciliation practices.¹¹⁵

In its brief, RLC argued that the Seventh Circuit erred in finding that the EEOC had strong incentives to conciliate.¹¹⁶ The organization asserted that "there are many reasons – institutional, personal, ideological, practical, strategic – why some EEOC officials, in some cases, might prefer to short-circuit or even wholly bypass conciliation in favor of bringing suit in court immediately."¹¹⁷ For one, EEOC per-

109. *The Commission*, EQUAL EMP. OPPORTUNITY COMM'N (Jan. 22, 2017), [<http://web.archive.org/web/20170122164739/https://www.eeoc.gov/eeoc/commission.cfm>] (listing three Democrats—Yang, Feldblum, and Burrows—one vacancy, and one Republican—Lipnic—as of January 22, 2017).

110. Kevin McGowan, *Trump Nominates Corporate Counsel as New EEOC Chair*, BLOOMBERG LAW (June 29, 2017, 8:30 AM), <https://news.bloomberglaw.com/daily-labor-report/trump-nominates-corporate-counsel-as-new-eeoc-chair> [<https://perma.cc/QYR5-NA6B>].

111. *Id.*

112. See Retail Indus. Leaders Ass'n, *Leading Retail Association Launches First Ever Retail Litigation Center*, PR NEWswire (Mar. 2, 2010, 10:51 AM), <https://www.prnewswire.com/news-releases/leading-retail-association-launches-first-ever-retail-litigation-center-85956802.html> [<https://perma.cc/TV86-9DJX>].

113. *Become a Member*, RETAIL LITIG. CTR., <https://www.rila.org/retail-litigation-center/join> (last visited Aug. 18, 2021) [<https://perma.cc/W92E-HKDG>].

114. *Board of Directors*, RETAIL LITIG. CTR., [<http://web.archive.org/web/20131025135401/http://www.rila.org/enterprise/retailitigationcenter/Pages/BoardofDirectors3.aspx>].

115. See generally Brief for Retail Lit. Ctr., Inc. et al. as Amici Curiae Supporting Petitioner, *Mach Mining, LLC v. Equal Emp. Opportunity Comm'n*, 575 U.S. 480 (2015) (No. 13-1019), 2014 WL 4537040.

116. *Id.* at *3, *7.

117. *Id.* at *3.

sonnel may prefer the publicity that comes with litigating a high-profile case to conducting confidential conciliation proceedings.¹¹⁸ Secondly, “investigators may allow their own biases to interfere with their statutory duties” to conciliate.¹¹⁹ Thirdly, internal administrative pressures—such as incentives to file a certain number of lawsuits before the end of the EEOC’s fiscal year—may lead EEOC staff to forego conciliation in favor of litigation.¹²⁰ Fourthly, the Commission may be hesitant to provide the employer with relevant information, “perhaps because the agency is expecting future litigation and does not want to give the employer any conceivable head start.”¹²¹ RLC cited case law ostensibly supporting each of the foregoing hypotheses as proof “that the EEOC too often prefers to sue first and negotiate later.”¹²² Accordingly, RLC contended that judicial review was needed to deter “zealous” EEOC investigators from “cut[ting] corners” and abdicating their conciliation responsibilities “in favor of an aggressive pursuit of the EEOC’s strategic agenda.”¹²³

Opponents of Dhillon’s nomination cited her work with RLC as their primary concern, with her management-side employment experience coming a close second.¹²⁴ More than forty of the nation’s leading civil rights organizations wrote a letter to the Senate committee charged with conducting Dhillon’s confirmation hearing wherein they urged the committee to “rigorously question” and “closely review” Dhillon’s record.¹²⁵ The letter detailed Dhillon’s involvement with RLC and noted that during her time on the organization’s board, RLC had filed numerous amicus briefs “advanc[ing] positions adverse to workers,” citing *Mach Mining v. EEOC* as one example.¹²⁶ The decisions in these cases ostensibly “impair[ed] workers’ ability to challenge and hold employers accountable for . . . discrimination [such that] Dhillon’s work in support of the[se] outcomes” was claimed to

118. *Id.* at *8.

119. *Id.* at *9.

120. *Id.* at *10.

121. *Id.*

122. *Id.* at *3, *8–12.

123. *Id.* at *6, *15. Other signatories to the brief included the U.S. Chamber of Commerce and the National Federation of Independent Businesses. *Id.* at *1–2.

124. *See, e.g.*, McGowan, *supra* note 110 (quoting Vicki Shabo, vice president of the National Partnership for Women & Families).

125. Jen Herrick, *Workplace Equality Advocates Express Concern over Janet Dhillon’s Nomination*, PEOPLE FOR THE AM. WAY (Sept. 15, 2017), <https://www.pfaw.org/blog-posts/letter-workplace-equality-advocates-express-concern-over-janet-dhillons-nomination/> [https://perma.cc/4PDG-R3L9].

126. *Id.*

be “at odds with the mission of the agency she is nominated to lead.”¹²⁷

Despite such criticism, the committee thereafter voted to advance Dhillon’s nomination to the full Senate,¹²⁸ with the chamber ultimately voting 50 to 43 in favor of confirmation.¹²⁹ Due to turnover in the two years since her initial nomination,¹³⁰ Dhillon assumed control of a Commission comprised of two Republicans (including herself) and one Democrat.¹³¹ Ten months later, Victoria Lipnic—Dhillon’s lone Republican colleague—announced that she, too, would be leaving, creating the prospect of a third vacancy and threatening to halt the Commission’s operations due to a lack of quorum.¹³² In response, President Trump nominated one Republican, Keith Sonderling, and one Democrat, Jocelyn Samuels, for the two vacant seats as well as another Republican, Andrea Lucas, to replace Commissioner Lipnic upon the expiration of her term.¹³³ By September 2020, all three nominees had been confirmed so that the Commission was once again fully staffed, with Republicans holding a 3-2 majority¹³⁴—the exact inverse of the Commission’s makeup at the time it initially chose to

127. *Id.*

128. Press Release, S. Comm. on Health, Educ., Lab. & Pensions, *Senate Education and Labor Committee Advances 11 Well-Qualified Nominees* (Feb. 27, 2019), <https://www.help.senate.gov/chaire/newsroom/press/senate-education-and-labor-committee-advances-11-well-qualified-nominees> [<https://perma.cc/NDL7-922V>].

129. Paige Smith, *Dhillon Confirmed as Civil Rights Agency Chair, Quorum Restored*, BLOOMBERG LAW (May 8, 2019, 2:53 PM), <https://news.bloomberglaw.com/social-justice/dhillon-confirmed-as-civil-rights-agency-chair-quorum-restored?context=Article-related> [<https://perma.cc/W2RA-9NMA>].

130. Chris Opfer, *LGBT Debate Shackles Trump Harassment Police*, BLOOMBERG LAW (Dec. 3, 2018, 6:33 AM), <https://news.bloomberglaw.com/daily-labor-report/lgbt-debate-shackles-trump-harassment-police> [<https://perma.cc/K3FH-X3EJ>] (reporting Senate Democrats’ refusal to advance Dhillon’s nomination in response to Senate Republicans’ embargo of Chai Feldblum’s nomination).

131. *Compare The Commission*, EQUAL EMP. OPPORTUNITY COMM’N (May 22, 2019), [<http://web.archive.org/web/20190522084438/https://www.eeoc.gov/eeoc/commission.cfm>] (listing two Republicans—Dhillon and Lipnic—two vacancies, and one Democrat—Burrows—as of May 22, 2019), *with The Commission*, EQUAL EMP. OPPORTUNITY COMM’N (June 27, 2017), [<http://web.archive.org/web/20170627174743/https://www.eeoc.gov/eeoc/commission.cfm>] (listing one Republican—Lipnic—one vacancy, and three Democrats—Feldblum, Yang, and Burrows—as of June 27, 2017).

132. *See* Paige Smith, *Republican Commissioner Departing EEOC Means Loss of Swing Vote*, BLOOMBERG LAW (Mar. 19, 2020, 11:24 AM), <https://news.bloomberglaw.com/social-justice/republican-commissioner-departing-eeoc-means-loss-of-swing-vote?context=Article-related> [<https://perma.cc/72SH-PL92>].

133. *Id.*

134. Daniel Wiessner, *EEOC Fully Staffed for First Time During Trump Administration, after Senate Vote*, REUTERS (Sept. 24, 2020, 2:43 PM), <https://www.reuters.com/article/employment-eeoc-confirmation/eeoc-fully-staffed-for-first-time-during-trump-administration-after-senate-vote-idUSL2N2GL1R3> [<https://perma.cc/PY68-984Z>].

pursue litigation against Mach Mining in district court, when it filed an interlocutory appeal in the Seventh Circuit, and when it argued in support of the Seventh Circuit's ruling at the Supreme Court. It was, therefore, expected that the Commission would seek to enact new policies or regulations clarifying the agency's obligations with respect to conciliation and mandating the disclosure of certain information as part of the conciliation process.¹³⁵ Indeed, such efforts were already underway.

B. Of Projects and Pilots: EEOC's Initial Attempts to Revise Conciliation

In February 2019, then-Acting Chairperson Victoria Lipnic announced the launch of the EEOC's conciliation project (the Project), a coordinated effort to collect and analyze data regarding the agency's conciliation practices.¹³⁶ According to Lipnic, the Project was "designed to meet Congressional and stakeholder interest and to provide the agency with valuable information about one of its most important statutory functions," i.e., conciliation.¹³⁷ The Commission's Office of Enterprise Data and Analytics began collecting data from the EEOC's fifty-three field offices in November 2019, concluded its collection efforts in summer 2020, and delivered an interim report to Chairperson Dhillon in September 2020.¹³⁸

Separately, in May 2020, Chairperson Dhillon announced the launch of a six-month conciliation pilot (the Pilot) that, according to an EEOC spokesperson, would "change how the agency conciliates discrimination . . . in an effort to provide greater structure and transparency."¹³⁹ The Pilot required that conciliation offers be approved by certain levels of EEOC management before being communicated to

135. See Gerald L. Maatman, Jr., Christopher DeGroff, Matthew J. Gagnon & Alex S. Oyer, *EEOC Chair Janet Dhillon's Announcement of Strategic Priorities: A New Era of Transparency for the Commission?*, WORKPLACE CLASS ACTION BLOG (Feb. 5, 2020), <https://www.workplaceclassaction.com/2020/02/eec-chair-janet-dhillons-announcement-of-strategic-priorities-a-new-era-of-transparency-for-the-commission/> [<https://perma.cc/ZT85-P5CR>] (observing EEOC's "2020 priorities appear to signal a shift away from the Commission's litigation efforts in favor of . . . meaningful and effective conciliation").

136. JANUARY 7 MEETING, *supra* note 15 (statement of Comm'r Burrows).

137. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2020 CONGRESSIONAL BUDGET JUSTIFICATION, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2019), https://www.eeoc.gov/fiscal-year-2020-congressional-budget-justification-us-equal-employment-opportunity-commission#_Toc2686383 [<https://perma.cc/3XB5-6J5J>].

138. JANUARY 7 MEETING, *supra* note 15 (statement of Comm'r Burrows).

139. Paige Smith, *EEOC Chair Alters Pre-Lawsuit Process for Resolving Bias Claims*, BLOOMBERG LAW (June 1, 2020, 8:44 PM), <https://news.bloomberglaw.com/>

employers.¹⁴⁰ As part of the Pilot, moreover, the EEOC “engaged in robust additional training across the agency concerning conciliation processes” and began providing employers with additional information regarding the underlying charge.¹⁴¹

Although supportive of the conciliation Project, Commissioner Charlotte Burrows—a Democrat—lambasted the procedural means by which the Pilot was implemented. She claimed that Chairperson Dhillon had “hast[il]y” and “unilateral[ly] . . . chose[n] to overhaul the agency’s conciliation process . . . without even a courtesy copy to Commissioners” and asserted that “this end-run around the Commission exceeded her authority.”¹⁴² Commissioner Burrows demanded that the Pilot be halted so that the full Commission could consider whether changes to the conciliation process were needed and, if so, what those changes should be.¹⁴³

An EEOC spokesperson, meanwhile, sought to defend the Pilot on the grounds it was within Dhillon’s administrative authority as Chair to develop and implement such programs unilaterally.¹⁴⁴ Although it is unlikely that justification would have placated the Pilot’s opponents, the ensuing revelation that the EEOC intended to revise its conciliation processes via formal rulemaking only emboldened Dhillon’s detractors. The timing was especially problematic as the EEOC’s plan to promulgate a conciliation rule first came to light on June 30, 2020,¹⁴⁵ only one month into the six-month conciliation Pilot and before the nationwide conciliation Project had even finished gathering data. As the next Section will show, commissioners’ conflicting perspectives on the Project, Pilot, and rulemaking marked an inflection

daily-labor-report/eec-chair-alters-pre-lawsuit-process-for-resolving-bias-claims [https://perma.cc/Z3WH-7WEC].

140. Press Release, Equal Emp. Opportunity Comm’n, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020), <https://www.eeoc.gov/newsroom/eec-announces-pilot-programs-increase-voluntary-resolutions> [https://perma.cc/3JDH-YB3L].

141. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows and Chair Dhillon).

142. Charlotte Burrows (@BurrowsCA), TWITTER (June 1, 2020, 7:29 PM), <https://twitter.com/BurrowsCA/status/1267599077547573248>; Charlotte Burrows (@BurrowsCA), TWITTER (June 1, 2020, 7:34 PM), <https://twitter.com/BurrowsCA/status/1267600496585564161>.

143. Charlotte Burrows (@BurrowsCA), TWITTER (June 1, 2020, 7:45 PM), <https://twitter.com/BurrowsCA/status/1267603124379934724>.

144. Smith, *supra* note 139.

145. Vin Gurrieri, *EEOC Rule to Revamp Conciliation Process is on Horizon*, LAW360 (June 30, 2020, 9:25 PM), <https://www.law360.com/articles/1288154?scroll=1&related=1>. For the actual text, see Update of Commission’s Conciliation Procedures, 85 Fed. Reg. 64079 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pt. 1601).

point for the EEOC, whereby an ostensibly bipartisan agency instead succumbed to raw, partisan politics.¹⁴⁶

C. *The Conciliation Rule*

The Commission held a virtual meeting on August 18, 2020 to consider a draft of the proposed conciliation rule.¹⁴⁷ Because Commissioners Sonderling, Lucas, and Samuels had not yet been confirmed by the Senate, the Commission consisted of three individuals: Chairperson Dhillon, Commissioner Lipnic, and Commissioner Burrows.¹⁴⁸ In her opening remarks, Dhillon observed that “since *Mach Mining*, the Commission has issued internal guidance describing what needs to be done in order to comply with that decision and has done training,” yet continued to “hear [of] instances in which conciliation has failed as a result of mistrust between the parties.”¹⁴⁹ Consequently, the rule was designed “to create greater accountability and transparency in the conciliation process and to bridge the communication gap that . . . has interfered with the success of [the EEOC’s] conciliation program.”¹⁵⁰

The rule sought to achieve that objective by mandating that the EEOC make certain additional disclosures to employers, including many items the EEOC had fought to withhold in *Mach Mining*.¹⁵¹ Specifically, the rule required the EEOC to (1) provide a written summary of the known facts and non-privileged information that the Commission relied on in making its initial reasonable cause determination, including the identities of the individuals or groups of individuals for whom relief was being sought—unless those individuals requested anonymity; (2) furnish a summary of the Commission’s legal basis for finding reasonable cause, including an explanation of how the law was applied to the facts; (3) disclose the basis for the monetary or other relief sought by the Commission, including the calculations underlying the initial conciliation proposal; and (4) inform the employer if the

146. See generally Bryce Covert, *The Trump Administration Guttled the EEOC*, NATION (Jan. 28, 2021), <https://www.thenation.com/article/society/janet-dhillon-eec/> [<https://perma.cc/RDD2-RPCK>].

147. Vin Gurrieri, *EEOC Edges Closer to Rule Revamping ‘Conciliation’ Process*, LAW360 (Aug. 19, 2020, 10:12 PM), <https://www.law360.com/articles/1302180/eec-edges-closer-to-rule-revamping-conciliation-process>.

148. *Id.*

149. U.S. EQUAL EMP. OPPORTUNITY COMM’N, TRANSCRIPT OF DISCUSSION OF NOTICE OF PROPOSED RULEMAKING ON CONCILIATION (Aug. 18, 2020), <https://www.eec.gov/meetings/meeting-august-18-2020-discussion-notice-proposed-rulemaking-conciliation/transcript> [hereinafter AUGUST 18 MEETING].

150. *Id.* (statement of Chair Dhillon).

151. Proposed Conciliation Rule, *supra* note 6.

case had been designated as systemic, class, or pattern or practice, together with the basis for that designation.¹⁵² Because this information was allegedly “foundational to any settlement discussions,” its disclosure would facilitate “a meeting of the minds to resolve the case without litigation.”¹⁵³

Commissioner Burrows, the lone Democrat, criticized the proposed rule on a number of grounds.¹⁵⁴ These included the rule’s purportedly treating conciliation as an end unto itself rather than one of several methods by which the Commission may pursue its goal of eliminating unlawful discrimination, the prospect that employers would seek to retaliate against aggrieved employees once their identities were revealed, and—from a procedural standpoint—the fact that the rule’s public comment period had been shortened from the usual sixty-day window to an abbreviated thirty-day period.¹⁵⁵ Furthermore, in seeking to impose “by regulation what the Supreme Court unanimately said we need not do in *Mach Mining*,” the rule threatened to leave the EEOC vulnerable to ancillary litigation over whether the Commission had complied with these new, self-imposed disclosure requirements.¹⁵⁶ Significantly, Commissioner Burrows observed that after *Mach Mining*, the number of successful conciliations had increased while legal challenges to the Commission’s conciliation procedures had decreased.¹⁵⁷ She therefore characterized the rule as “a solution in search of a problem” that stood to “break what the Supreme Court fixed for us in 2015.”¹⁵⁸

Despite these objections, the Commission voted to advance the rule by a margin of 2 to 1.¹⁵⁹ More than once though, Commissioner Lipnic—who had already announced that she would not seek a third term and whose departure from EEOC was imminent—expressed hope that the Commission would consider the results of the conciliation Project and Pilot, as well as whatever information was submitted during the public comment period, before voting to adopt the final rule.¹⁶⁰

Following the close of the public comment period and the confirmation of three new commissioners, the Commission met on January

152. *Id.*

153. AUGUST 18 MEETING, *supra* note 149 (statement of Mr. Maunz).

154. Gurrieri, *supra* note 147.

155. AUGUST 18 MEETING, *supra* note 149 (statement of Comm’r Burrows).

156. *Id.*

157. *Id.*

158. *Id.*

159. Gurrieri, *supra* note 147.

160. AUGUST 18 MEETING, *supra* note 149 (statement of Comm’r Lipnic).

7, 2021 to consider the final rule,¹⁶¹ which was largely unchanged from the original proposal.¹⁶² Chairperson Dhillon declined to address the rule's substance in her opening remarks, entrusting that task to her newly-confirmed Republican colleagues, Commissioners Sonderling and Lucas.¹⁶³ For his part, Commissioner Sonderling claimed that "the final rule will be a catalyst for better communication between the [C]ommission and the [employer], thereby helping the parties to narrow the issues, manage expectations, and ultimately reach a meeting of the [minds]."¹⁶⁴ Commissioner Lucas, meanwhile, reiterated many of these same points in her opening statement, albeit with a particular emphasis on the rule's purported benefits for workers.¹⁶⁵

Commission Democrats did not share their colleagues' optimism. Commissioner Burrows characterized the day's meeting as a "partisan voting blitz" convened to consider proposals that "are wrong morally and legally."¹⁶⁶ With respect to the conciliation rule specifically, Commissioner Burrows warned that in the rare instances where the Commission undertakes litigation, the rule would ensure that the EEOC's cases are "delayed by wasteful and collateral disputes unrelated to the merits of the discrimination."¹⁶⁷ Burrows' concerns were shared by Jocelyn Samuels, another newly-confirmed commissioner and fellow Democrat, whose opening remarks criticized the rule as premature, lacking in evidentiary support, and an impediment to the effective enforcement of antidiscrimination law.¹⁶⁸

Collectively, Commissioners Burrows and Samuels made three motions and offered sixteen amendments to table or otherwise revise the rule, each of which failed on a party-line vote.¹⁶⁹ Whereas analysis

161. Vin Gurrieri, *EEOC Finalizes New Rules on Conciliation, Union Work*, LAW360 (Jan. 7, 2021, 9:41 PM), <https://www.law360.com/employment-authority/articles/1342565/eec-finalizes-new-rules-on-conciliation-union-work>.

162. See Paige Smith, *EEOC Unveils Final Rule on 'Conciliating' Bias Claims*, BLOOMBERG LAW (Jan. 11, 2021, 4:06 PM), <https://news.bloomberglaw.com/daily-labor-report/eec-unveils-final-rule-on-conciliating-discrimination-claims> (discussing differences between the rule as originally proposed and as finalized, none of which are relevant for the purposes of this Article).

163. JANUARY 7 MEETING, *supra* note 15.

164. *Id.* (statement of Comm'r Sonderling).

165. See *id.* (statement of Comm'r Lucas) (asserting the rule "will especially benefit the most vulnerable victims of discrimination, those who do not have the means, knowledge, or ability to obtain a lawyer and that's for whom the risks and costs monetary and otherwise of litigation are significantly higher than for many employers").

166. *Id.* (statement of Comm'r Burrows).

167. *Id.*

168. *Id.* (statement of Comm'r Samuels).

169. *Id.*

of the various amendments is unnecessary for the purposes of this Article, the individual motions warrant further examination.

The first motion sought to postpone consideration of the rule so that the Commission could complete its conciliation Pilot—which had been extended for an additional six months at the discretion of the Chair—consider the results thereof, and incorporate any relevant findings into its rulemaking.¹⁷⁰ Commissioner Burrows began by observing that despite her repeated requests to the Chair, the Pilot had never been provided to the full Commission.¹⁷¹ Nevertheless, Burrows averred that based on “the limited information announced, . . . there’s no question that this [P]ilot is highly relevant to what we’re considering today and our failure to evaluate those results abdicates our responsibility to make reasoned, evidence-based decisions that take into account all available information.”¹⁷² She also reminded Chairperson Dhillon that in voting to advance the rule as originally proposed, then-Commissioner Lipnic had stressed that the Pilot results should inform any final rule.¹⁷³ Burrows noted that many of the public comments shared this view, urging the EEOC to suspend its rulemaking until the Pilot was concluded and its results analyzed.¹⁷⁴ In closing, Burrows noted that the Commission had devoted considerable time and resources to the Pilot such that failing to consider its results “would be the very definition of arbitrary and capricious rulemaking”¹⁷⁵ under the Administrative Procedure Act.¹⁷⁶

Immediately after the first motion’s defeat, Commissioner Burrows made a second motion to postpone consideration of the rule so that the Commission would have an opportunity to evaluate and dis-

170. *Id.* (statement of Comm’r Burrows). Ultimately, the Pilot was terminated on January 28, 2021 by the EEOC’s newly-designated chairperson, Charlotte Burrows. See Vin Gurrieri, *EEOC Cuts Short 2 Pre-Suit Dispute Resolution Test Programs*, LAW360 (Jan. 28, 2021, 9:54 PM), <https://www.law360.com/employment-authority/articles/1349427/eoc-cuts-short-2-pre-suit-dispute-resolution-test-programs>.

171. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows).

172. *Id.*

173. *Id.*

174. *Id.* See generally Nat’l Emp. Law. Ass’n, Comment Letter on Proposed Rule: Update of Commission’s Conciliation Procedures 4 (Nov. 9, 2020), <https://www.regulations.gov/comment/EEOC-2020-0006-0049> (“EEOC has instituted, but has not completed, studies of its conciliation process that could provide data that is not currently available to inform this rulemaking process.”).

175. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows). This view was shared by Commissioner Samuels. *Id.*

176. See 5 U.S.C. § 706(2)(A) (stating a court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

cuss the results of its recently completed conciliation Project.¹⁷⁷ Commissioner Burrows disclosed that she and Commissioner Samuels had requested a briefing on the Project in advance of that day's meeting only to have Chairperson Dhillon schedule the briefing for the week after the vote.¹⁷⁸ Nevertheless, she emphasized that the Project's written report indicated that there are primarily two reasons why conciliation fails: either employers decline to participate altogether, or the parties cannot agree on the appropriate monetary relief.¹⁷⁹ With respect to the former, Commissioner Burrows observed that the report did "not analyze the reasons why respondents decline to participate in conciliation," leading her to declare, "[i]n other words, the data doesn't support this assumption that's at the crux of our rulemaking, that if the EEOC provided more information [to employers], we would somehow have more" successful conciliations.¹⁸⁰ She then acknowledged that employers might refuse to participate in conciliation for any number of reasons, such as disagreement with EEOC's reasonable cause determination or an unwillingness to change their practices or because they simply wish to "roll the dice" with the understanding that EEOC litigates only a small percentage of the cases in which conciliation fails.¹⁸¹

The third and final motion sought to postpone consideration of the rule so that the Commission could perform "a more rigorous cost benefit analysis."¹⁸² Commissioner Burrows noted that Executive Order 12866 requires federal agencies to assess the costs and benefits of proposed regulations while stipulating that agencies may adopt a regulation "only upon a reasoned determination that the benefits of the intended regulation justify its costs."¹⁸³ Agencies, moreover, must base their decisions "on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."¹⁸⁴ Conversely, the cost-benefit analysis accompanying the conciliation rule was purportedly "based on a series of unsupported, one-sided assumptions and fuzzy numbers."¹⁸⁵ Indeed, Burrows observed that much of the analysis was

177. JANUARY 7 MEETING, *supra* note 15 (statement of Comm'r Burrows).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (quoting Exec. Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993)).

184. *Id.* (quoting Exec. Order No. 12,866 § 1(b)(7), 58 Fed. Reg. 51,735 (Oct. 4, 1993)).

185. *Id.*

based on sheer conjecture and sources of dubious credibility.¹⁸⁶ Burrows likewise faulted the analysis for emphasizing the rule's expected cost savings to employers while ignoring the costs that stood to be imposed on workers, the public, and the Commission.¹⁸⁷ Burrows found the analysis's silence regarding the potential cost implications for the Commission particularly striking: "The proposed rule invites litigation over whether [the EEOC] complied with these unnecessary rules . . . yet the cost-benefit analysis fails to consider this significant expense of ancillary litigation to the EEOC and accordingly the tax-paying public."¹⁸⁸ Nor did the analysis consider the additional labor costs the EEOC would incur in compiling, drafting, reviewing, and releasing the mandated disclosures or the associated impact on the Commission's charge-processing capabilities.¹⁸⁹

Following the defeat of Commissioner Burrows' and Commissioner Samuels' various amendments—one of which sought to recognize that of the fifty-eight comments the EEOC received in response to its notice of proposed rulemaking, forty-three were opposed—the Commission approved the rule by a vote of 3 to 2.¹⁹⁰ The rule took effect on February 16, 2021, and was the official policy of the EEOC for one hundred and thirty-four days before being invalidated under the Congressional Review Act.

III.

THE CONCILIATION RULE'S NULLIFICATION UNDER CRA

While Congress is always free to overturn agency action through regular legislative order, CRA provides for certain fast-track parliamentary procedures that greatly increase the likelihood of repeal, particularly when Congress and the White House are controlled by the same political party.¹⁹¹ This Part details the process for disapproving rules under CRA generally and then applies that framework to the EEOC's conciliation rule specifically.

186. *Id.* In terms of the latter, Commissioner Burrows noted that the estimated litigation expenses referenced in the rule's preamble relied on two sources: a 2013 blog post that "cites no data or other source for these approximations" and a 2019 post published by a law firm marketing company based on an informal survey of its readership. *See id.* (referencing workforce.com and lawyers.com websites).

187. *Id.* (statement of Comm'r Burrows).

188. *Id.*

189. *Id.* Commissioner Samuels agreed that the analysis was "based on an entirely speculative assessment" of the rule's anticipated costs and benefits. *Id.*

190. *Id.*

191. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2167–69 (2009).

A. Overview of the Congressional Review Act

Congress has neither the time, the expertise, nor the resources to devise legislative solutions to each of the nation's increasingly complex problems, so ultimately it has little choice but to delegate wide swaths of its authority to federal agencies.¹⁹² Yet, agencies sometimes act contrary to congressional intent or exceed the scope of their delegated authority, thus necessitating congressional intervention.¹⁹³ While the CRA reflects Congress's most recent attempt to resolve this dilemma, it is not the first. Rather, that distinction belongs to the now-defunct legislative veto.¹⁹⁴

The legislative veto was a procedural device included in certain statutes allowing a specified group of legislators to invalidate agency action authorized by those statutes.¹⁹⁵ In all, Congress enacted 196 federal statutes containing legislative veto provisions prior to the Supreme Court's 1983 decision in *INS v. Chadha*, wherein the legislative veto was found to violate constitutional separation of powers.¹⁹⁶ The Court held that overturning administrative action is itself a legislative act subject to the Article I requirements of bicameralism, i.e., passage by both chambers of Congress, and presentment, i.e., approval or veto by the President.¹⁹⁷

The Congressional Review Act seeks to salvage the legislative veto's streamlined disapproval process in a manner consistent with the Supreme Court's holding in *Chadha*.¹⁹⁸ Specifically, the CRA requires that invalidation of administrative action comply with the foundational requirements of bicameralism and presentment while simultaneously providing for expedited parliamentary procedures in the Senate, including avoidance of the filibuster.¹⁹⁹ These fast-track

192. *Id.* at 2164. See also Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 193 (2018) (describing federal agencies as "a necessary evil").

193. Larkin, *supra* note 192, at 193–94.

194. *The Mysteries of the Congressional Review Act*, *supra* note 191, at 2164–65.

195. David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 256 (1982). Although a majority vote within a single congressional chamber was often sufficient to nullify a disfavored regulation, some legislative veto provisions required disapproval by both chambers or, at the other extreme, permitted disapproval by a single committee of a single chamber. *Id.*

196. 462 U.S. 919, 944 (1983).

197. *Id.* at 952–58.

198. Larkin, *supra* note 192, at 197–98.

199. *Id.* at 198, 202.

procedures are only available for a short time, however, and require strict compliance with the Act's provisions.²⁰⁰

The CRA provides that before a new rule may take effect, the promulgating agency must submit a report to each house of Congress containing a copy of the rule, a summary of its provisions, and the rule's proposed effective date ("the Report").²⁰¹ Each house must then provide copies of the Report to the chair and ranking member of the committees exercising jurisdiction over the rule's subject matter.²⁰² If, within sixty days of the Report's submission to Congress, a joint resolution of disapproval is introduced in both houses, the resolutions must then be referred to the same aforementioned committees.²⁰³

Provided more than twenty days have passed since the initial filing of the Report, the resolution may be discharged from the relevant Senate committee at any time via a petition signed by at least thirty senators.²⁰⁴ Once the resolution has advanced to the Senate floor, either after being voted out of or discharged from the relevant committee, any senator may make a non-debatable, non-amendable motion to proceed to consideration of the joint resolution.²⁰⁵ If the motion garners the support of a simple majority of the senators present,²⁰⁶ the joint resolution will then be subject to no more than ten hours of debate.²⁰⁷ Upon the expiration or yielding back of the allotted debate time, the Senate must then immediately hold a final vote on the resolu-

200. See generally MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL i (2021) ("The CRA fast-track procedures are available in the Senate for a period of 60 days of Senate session after a final rule is received and published," unless Congress's adjournment interrupts the review period in which case a new 60-day period will begin on the fifteenth meeting day of the next Senate session).

201. 5 U.S.C. § 801(a)(1)(A).

202. *Id.* § 801(a)(1)(C).

203. *Id.* § 802(a)–(b). See also MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43922, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 17 (2020) ([a]lthough resolutions technically need not be filed in both chambers, "doing so may be procedurally or politically desirable" to the extent it allows proponents to decide which chamber should act first and increases the issue's visibility within Congress).

204. 5 U.S.C. § 802(c).

205. *Id.* § 802(d)(1).

206. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., THE CONGRESSIONAL REVIEW ACT (CRA) 2 (2018) ("All votes under the CRA are simple majority votes.").

207. 5 U.S.C. § 802(d)(2). See also CAREY & DAVIS, *supra* note 203, at 16 ("Because the measure is debate-limited" it cannot be filibustered, meaning the resolution may advance with the support of a simple majority rather than the supermajority necessary to invoke cloture and end debate under the standing rules of the Senate).

tion.²⁰⁸ If a simple majority of the senators present vote in favor of passage, the joint resolution will be adopted.²⁰⁹

If the resolution is adopted by the Senate before a vote on its counterpart is held in the House, the Senate resolution will be held at the desk in the House without being referred to a committee.²¹⁰ While the House would remain free to take up and debate its own version of the resolution, the final vote would have to be held on the previously approved Senate version.²¹¹

Conversely, if the House approves its resolution before the Senate has had an opportunity to act on its measure, the House resolution will be placed on the Senate's calendar without being referred to a committee.²¹² Although the Senate would be free to take up and debate its own version of the resolution, the final vote would have to be held on the House version pursuant to the same fast-track floor procedures previously discussed.²¹³

Whichever path it follows, as long as a resolution is adopted by both chambers and signed into law by the President, the disfavored rule will either be precluded from taking effect *ab initio* or treated *ex post facto* as if it never existed.²¹⁴ Unlike the legislative veto, though, a rule invalidated under the CRA "may not be reissued in substantially the same form . . . unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."²¹⁵ Furthermore, whereas none of the legislative veto's various iterations sought to insulate themselves from judicial oversight,²¹⁶ actions taken pursuant to the CRA are generally

208. 5 U.S.C. § 802(d)(3).

209. CAREY & DAVIS, *supra* note 206, at 2.

210. 5 U.S.C. § 802(f)(1).

211. 5 U.S.C. § 802(f)(2). *See also* CAREY & DAVIS, *supra* note 203, at 17 ("This automatic 'hookup' provision guarantees that both chambers are acting on the same joint resolution" such that "it can be sent directly to the President following second-chamber passage" without Congress first having to hold a conference committee "to resolve legislative differences.").

212. 5 U.S.C. § 802(f)(1); CAREY & DAVIS, *supra* note 203, at 17.

213. 5 U.S.C. § 802(f)(2); CAREY & DAVIS, *supra* note 203, at 17.

214. 5 U.S.C. § 801(b)(1) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval."); 5 U.S.C. § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution . . . shall be treated as though such rule had never taken effect.").

215. 5 U.S.C. § 801(b)(2).

216. *See generally* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

exempt from judicial review.²¹⁷ While these latter two provisions will be the focus of Part IV, the next Section will apply the CRA's framework to the conciliation rule.

B. *The Conciliation Rule Gets "CRA'ed"*

On January 11, 2021, the White House Office of Management and Budget signed off on the EEOC's new conciliation rule,²¹⁸ and the rule was published in the Federal Register on January 14.²¹⁹ Approximately two weeks later, the Commission submitted its CRA-mandated report on the rule to Congress.²²⁰ The report was then referred to the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) and the House Committee on Education and Labor on February 3 and 25, respectively.²²¹

Joint resolutions of disapproval were introduced in both chambers on March 23—well within the sixty-day window specified by the CRA—and were immediately referred to the aforementioned committees.²²² The resolutions were identical, stating in their entirety that “Congress disapproves the rule submitted by the Equal Employment Opportunity Commission relating to ‘Update of Commission’s Conciliation Procedures’ (86 Fed. Reg. 2974; published January 14, 2021), and such rule shall have no force or effect.”²²³

Two days later, on March 25, the resolution was discharged from the Senate HELP Committee using the CRA's expedited parliamentary procedures and placed on the Senate's legislative calendar.²²⁴ A motion to proceed was thereafter made by the HELP Committee's Chairperson, Senator Patty Murray, on May 18.²²⁵ By a vote of 50 to 49, the motion to proceed was agreed to, and a final vote on the resolution was scheduled for the next day, with any debate to last no

217. 5 U.S.C. § 805 (“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”).

218. Vin Gurrieri, *EEOC's Final Conciliation Regulations Cleared for Liftoff*, LAW360 (Jan. 11, 2021, 4:26 PM), <https://www.law360.com/articles/1343711/eoc-s-final-conciliation-regulations-cleared-for-liftoff>.

219. Final Conciliation Rule, *supra* note 7, at 2974.

220. 167 CONG. REC. H724 (daily ed. Feb. 25, 2021) (executive communication 402); 167 CONG. REC. S316 (daily ed. Feb. 3, 2021) (executive communication 232).

221. 167 CONG. REC. H724 (daily ed. Feb. 25, 2021) (executive communication 402); 167 CONG. REC. S316 (daily ed. Feb. 3, 2021) (executive communication 232).

222. H.R.J. Res. 33, 117th Cong., 167 Cong. Rec. H1620 (2021); S.J. Res. 13, 117th Cong., 167 Cong. Rec. S1708 (2021).

223. H.R.J. Res. 33, 117th Cong. (2021); S.J. Res. 13, 117th Cong. (2021).

224. 167 CONG. REC. S1812 (daily ed. Mar. 25, 2021).

225. 167 CONG. REC. S2569 (daily ed. May 18, 2021) (statement of Sen. Murray).

longer than ninety minutes.²²⁶ No debate occurred though, and on May 19 the Senate adopted the resolution by a vote of 50 to 48.²²⁷ The resolution was sent to the House the following day, where it was held at the desk pending further action by the full chamber.²²⁸

The House took up the Senate resolution approximately one month later on June 24, pursuant to a closed rule limiting debate to one hour.²²⁹ During that time, the only individuals to offer remarks were the Chair of the House Committee on Education and Labor, Democrat Robert Scott, and the Committee's Ranking Member, Republican Virginia Foxx.²³⁰ Representative Scott described the EEOC's conciliation rule as "put[ting] a thumb on the scale in favor of employers" via its one-sided disclosure requirements.²³¹ He likewise observed that "under the new rule, a rigid conciliation process will apply across the board, one-size-fits-all, in every case of workplace discrimination," thus undermining the EEOC's otherwise expansive discretion as to how best resolve a particular claim.²³² Representative Scott also warned that the rule would "allow unscrupulous employers to drag out the conciliation process, possibly for years—and even avoid accountability altogether—by just litigating over whether the EEOC complied with the conciliation rule rather than correcting the discriminatory practice."²³³

Representative Foxx, meanwhile, defended the conciliation rule as an "eminently reasonable regulation" while at the same time condemning the disapproval resolution as a purely partisan matter.²³⁴ In response to criticism that the rule was biased in favor of employers, Representative Foxx sought to highlight the rule's potential benefits to workers. She claimed that the rule stood to increase the number of successful conciliations, which "provide immediate relief to employees who suffered discrimination," whereas litigation is expensive, time-consuming, and uncertain.²³⁵ She then described the EEOC's historical conciliation process as "opaque and ineffective" and posited that "employers are not asking too much when they request basic in-

226. 167 CONG. REC. S2744 (daily ed. May 18, 2021) (statement of Sen. Schumer).

227. 167 CONG. REC. S2745-52 (daily ed. May 19, 2021).

228. 167 CONG. REC. H2657 (daily ed. May 21, 2021).

229. 167 CONG. REC. H3110 (daily ed. June 24, 2021) (statement of Rep. Scott).

230. 167 CONG. REC. H3110-13 (daily ed. June 24, 2021).

231. 167 CONG. REC. H3110 (daily ed. June 24, 2021) (statement of Rep. Scott).

232. 167 CONG. REC. H3110-11 (daily ed. June 24, 2021).

233. 167 CONG. REC. H3110 (daily ed. June 24, 2021).

234. 167 CONG. REC. H3112 (daily ed. June 24, 2021) (statement of Rep. Foxx).

235. 167 CONG. REC. H3111 (daily ed. June 24, 2021).

formation about the EEOC's findings."²³⁶ Representative Foxx ended her remarks by cautioning that the resolution's adoption would deliver "a partisan victory for the Democrats' technocrat base."²³⁷

Following the conclusion of debate, the resolution was read a third time, and the question on final passage was put to a voice vote in which the ayes were held to prevail.²³⁸ Representative Foxx then requested that a roll call vote be held and that the yeas and nays be recorded.²³⁹ The House subsequently adopted the resolution by a vote of 219 to 210.²⁴⁰

Six days later, Senate Joint Resolution 13 was signed into law by President Biden.²⁴¹ In his brief signing statement, President Biden averred that "the last administration put in place a rule that makes it harder for those seeking redress for job discrimination to get justice. With this law, we're going to move in the direction of greater accountability, fairness, and justice."²⁴²

IV.

IMPLICATIONS FOR THE COMMISSION'S FUTURE RULEMAKING

The CRA's prohibition against issuance or reissuance of a rule in substantially the same form as one previously disapproved—together with its explicit preclusion of judicial review²⁴³—stands to have significant, albeit ambiguous implications for the EEOC's future regulatory endeavors. This uncertainty is attributable to two factors. First, the statute does not define the phrase "in substantially the same form," and to date, no court has interpreted the phrase in the specific context of the CRA.²⁴⁴ Second, courts are divided over the scope of the judicial review proscription, specifically, whether the ban applies only to congressional actions taken pursuant to the CRA or whether it extends to federal agencies' post-disapproval rulemaking activities as well.²⁴⁵

236. 167 CONG. REC. H3112 (daily ed. June 24, 2021).

237. *Id.*

238. 167 CONG. REC. H3113-14 (daily ed. June 24, 2021).

239. 167 CONG. REC. H3114 (daily ed. June 24, 2021).

240. 167 CONG. REC. H3115-16 (daily ed. June 24, 2021).

241. Remarks on Signing Legislation Regarding Methane Pollution, Predatory Lending, and Employment Discrimination, 2021 DAILY COMP. PRES. DOC. 551 (June 30, 2021).

242. *Id.*

243. 5 U.S.C. § 805.

244. CAREY & DAVIS, *supra* note 203, at 19–20.

245. *Id.* at 23–26. *See also* Michael J. Cole, *Interpreting the Congressional Review Act*, 70 ADMIN. L. REV. 53, 65–76 (2018) (contending judicial review of agency action is consistent with CRA's text, "its legislative history, and the presumption in

Because the resolution of the second issue may render the first issue irrelevant, Part IV begins by examining the EEOC's options on the assumption that any future conciliation rule will be exempt from judicial review and then proceeds to analyze the Commission's comparatively limited alternatives should its future rulemaking be subject to judicial oversight.

In the absence of judicial review, the only check against the EEOC's promulgating a new rule that is substantially similar or even identical to the one invalidated would be the prospect of another disapproval resolution being enacted.²⁴⁶ Admittedly, this takes a decidedly cynical view of the EEOC in which a majority of its commissioners are indifferent to, if not openly hostile toward, CRA's preclusion against issuing a rule substantially similar to one previously disapproved. Such a scenario appears plausible, even if not probable, however, given the Commission's increasing polarization²⁴⁷ and the lengths to which the Republican majority was prepared to go to adopt the now invalidated rule—e.g., declining to wait for the conclusion of the conciliation Pilot, declining to consider and incorporate the results of the conciliation Project, declining to conduct a rigorous cost-benefit analysis, declining to afford the public a full 60-day comment period, and seeking to accelerate the rule's implementation by declaring it non-major for the purposes of the CRA.²⁴⁸ Under these conditions, the EEOC may choose to reissue the conciliation rule in a form verbatim,

favor of judicial review of agency action"); Stephen Santulli, *Use of the Congressional Review Act at the Start of the Trump Administration*, 86 GEO. WASH. L. REV. 1373, 1390 (2018) ("Courts have not examined whether the bar on judicial review applies to the law's prohibition against agencies issuing regulations in 'substantially the same form' as vetoed ones."); Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act*, 63 ADMIN. L. REV. 707, 732–33 (2011) ("Although the text of the CRA significantly limits judicial review of a congressional veto . . . the statute does not prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto."); Larkin, *supra* note 192, at 217–32 ("The best reading of [CRA] is that it precludes judicial review of any decisions or actions taken by Congress . . . or the President but does not foreclose judicial review of an agency's compliance with the Act.").

246. While such action might ordinarily qualify as arbitrary and capricious for the purposes of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), if CRA's judicial review prohibition is understood to encompass post-disapproval agency action, invalidation on these grounds is not possible. *See* 5 U.S.C. § 701(a)(1) ("This chapter applies, according to the provisions thereof, except to the extent that statutes preclude judicial review."). *See also* Larkin, *supra* note 192, at 217 n.94 (collecting cases).

247. *See* Covert, *supra* note 146 (asserting that whereas EEOC "historically remained above the fray" of partisan politics, that is no longer the case).

248. *See supra* Section II.C.

or at least substantially similar to the former rule, on the calculation that Congress is unlikely to nullify the rule twice.

To illustrate this point, consider the following hypothetical: a Republican wins the 2024 presidential election and is in a position to make nominations to the Commission as vacancies arise. By 2025 or 2026 at the latest, depending on which party controls the Senate and how quickly individuals are nominated and confirmed, the EEOC would once again have a Republican majority. If, over the objection of their two Democratic colleagues, the three Republican commissioners chose to promulgate a new conciliation rule substantially similar to the one disapproved, the CRA-mandated reports would then be sent to both houses of Congress and referred to the chairperson and ranking member of the relevant committees. Should a lawsuit be filed challenging the rule as a violation of the CRA's substantially similar provision, a judge would have no choice but to dismiss the case given that judicial review is expressly precluded by the statutory text.

Meanwhile, any disapproval resolution seeking to nullify the rule would almost certainly fail—again, on the admittedly cynical assumption that Republicans would be prepared to discount or overlook the CRA's substantially similar provision in order to secure a partisan victory. Indeed, Democrats would need to control both houses of Congress for the resolution to advance over the objections of their Republican colleagues. Upon the resolution's presentment to the Republican President, however, it would almost certainly be vetoed, meaning Democrats would need not just majorities but two-thirds supermajorities in both the House and Senate to enact the resolution into law.²⁴⁹ Given that a single political party has held a two-thirds supermajority in both houses of Congress only once in the past sixty years,²⁵⁰ it is highly likely that the EEOC would be able to reissue the conciliation rule with impunity—not counting the immediate reputational harm and longstanding institutional damage that may result

249. U.S. CONST. art. I, § 7, cl. 2. Conversely, if the rule was issued in the waning months of a Republican President's term and the President-Elect was a Democrat or, alternatively, if the rule was issued by a majority Republican EEOC under a Democratic President, Democrats would need only simple majorities in both houses to disapprove the rule for a second time.

250. *Congress Profiles*, U.S. HOUSE OF REP., <https://history.house.gov/Congressional-Overview/Profiles/89th/> [<https://perma.cc/6VJQ-AWK3>] (Democrats held two-thirds majorities in both houses of Congress from 1965 to 1967, during which time they enacted large swaths of President Johnson's "Great Society" agenda.).

from such a brazen, overtly partisan violation of the CRA's substantially similar provision.²⁵¹

Conversely, if the Commission's future regulatory endeavors are subject to judicial review—or if it is assumed that our nation's politicians are prepared to act in good faith to protect, preserve, and defend the Constitution so that fidelity to law trumps loyalty to party—compliance with the CRA's substantially similar provision is of paramount importance. Yet, the statute does not define the phrase “in substantially the same form,” and to date, no court has interpreted the phrase in the specific context of the CRA.²⁵² The resulting uncertainty has been described aptly by the nonpartisan Congressional Research Service:

Sameness could be determined by a number of factors and would likely depend on the rule in question. While the most obvious standard might be comparing the text of the new rule to the disapproved rule, this could in some circumstances result in outcomes that seem contrary to legislative intent—particularly in light of the fact that under the CRA, Congress must disapprove of rules in their entirety. For example, if the legislative history of the joint resolution of disapproval suggests that Congress objected to a specific section of a rule that was ultimately disapproved, would a rule that removed only that language be considered “substantially the same” as the original, even if the text is otherwise the same? If the agency reissued a rule in which it changed one standard listed in the original regulation, would that be “substantially the same”? If it changed the number of categories to which a standard applied, would the rule still be “substantially the same”? These questions, for which no definitive answers are available, highlight the ambiguity in the meaning of *substantially the same*.²⁵³

The following sections analyze three possible methodologies for how the Commission might go about reissuing its conciliation rule in a manner consistent with the CRA—based on proposals from the academic literature, other agencies' experience in reissuing disapproved rules, and procedures outlined in the CRA's post-enactment legislative history—and demonstrates that while the EEOC retains the discretion to issue a new rule, it is effectively precluded from doing so given the expansive effect of the CRA's “substantially similar” provision.

251. Of course, the reputational harm/institutional damage would be equally severe if the roles were reversed and Democrats were prepared to support a previously disapproved rule's verbatim reissuance.

252. CAREY & DAVIS, *supra* note 203, at 19–20.

253. *Id.* at 19.

A. *The Academic Literature*

Of the few scholars to address the issue, Finkel and Sullivan arguably have been the most influential.²⁵⁴ In their 2011 article, they argue that so long as a reissued rule “makes enough changes to alter the cost-benefit ratio in a significant and favorable way . . . , the purposes of the CRA will be served, and the new rule should not be barred as ‘substantially the same.’”²⁵⁵ To support their contention that cost-benefit analysis and risk assessment “were the intended emphases” of the CRA, Finkel and Sullivan provide a detailed history of the anti-regulatory fervor that dominated national politics for much of the 1990s and ultimately led to the CRA’s enactment in 1996 as part of House Republicans’ “Contract with America” proposal.²⁵⁶ They then identify a contemporaneously prepared Senate report finding that “too few regulations are subjected to stringent cost-benefit analysis or risk assessment based on sound science” as the catalyst for the CRA’s requirement that, before a rule may take effect, the promulgating agency must first submit a cost-benefit analysis to the Government Accountability Office (GAO), and for GAO’s ensuing duty—at least for rules deemed “major”—to evaluate the analysis’s rigor.²⁵⁷ After exploring various other indicators of congressional intent, Finkel and Sullivan conclude that “the overall political history of the CRA sends a clear sign that [cost-benefit analysis] and risk assessment were key” concerns of Congress so that “the way to reissue something distinctly different is to craft a rule whose benefit-cost balance is much more favorable” than the disapproved rule.²⁵⁸

Although Finkel and Sullivan’s proposal has been found “persuasive” such that its application would seem “proper in the vast majority of cases,”²⁵⁹ the EEOC’s conciliation rule appears to be one instance where the application of the cost-benefit interpretation would be decidedly improper, considering the purported deficiencies of the original cost-benefit analysis. Recall that during the EEOC’s January 7, 2021 meeting, Commissioner Burrows moved to postpone consideration of the rule so that the Commission could perform “a more rigor-

254. Indeed, theirs is the only work to be cited by the Congressional Research Service. See CAREY & DAVIS, *supra* note 203, at 19 n.107. *But see* Santulli, *supra* note 245, at 1390 (arguing a rule is “substantially the same” if it is issued with an intent to frustrate the will of Congress); Larkin, *supra* note 192, at 250 (same).

255. Finkel & Sullivan, *supra* note 245, at 740.

256. *Id.* at 711–21, 740.

257. *Id.* at 742 (referencing 5 U.S.C. §§ 801(a)(1)(B), (a)(2)(A)).

258. Finkel & Sullivan, *supra* note 245, at 742, 762.

259. Cole, *supra* note 245, at 89, 91.

ous cost-benefit analysis.”²⁶⁰ Whereas Executive Order 12866 stipulates that agencies may adopt a regulation “only upon a reasoned determination that the benefits of the intended regulation justify its costs” and only after consulting “the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation,”²⁶¹ the conciliation rule’s cost-benefit analysis was purportedly “based on a series of unsupported, one-sided assumptions and fuzzy numbers.”²⁶² In particular, Commissioner Burrows observed that much of the analysis was predicated on sheer conjecture while the few pieces of ostensible data were derived from sources of dubious credibility.²⁶³

Burrows likewise faulted the analysis for emphasizing the rule’s projected cost savings to employers while ignoring the costs that stood to be imposed on workers, the public, and the Commission.²⁶⁴ Burrows found the analysis’s silence regarding the potential cost implications for the Commission particularly striking: “The proposed rule invites litigation over whether [the EEOC] complied with these unnecessary rules . . . yet the cost-benefit analysis fails to consider this significant expense of ancillary litigation to the EEOC and accordingly the tax-paying public.”²⁶⁵ Nor did the analysis consider the additional labor costs the EEOC would incur in compiling, drafting, reviewing, and releasing the mandated disclosures or the associated impact on the Commission’s charge-processing capabilities.²⁶⁶ Given these alleged shortcomings,²⁶⁷ the Commission’s original cost-benefit analysis cannot serve as a baseline against which any future conciliation rule’s costs and benefits might be compared to determine if they are significantly more favorable.

Furthermore, Finkel and Sullivan’s approach appears better-suited for regulations that are themselves inherently quantitative rather

260. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows).

261. Exec. Order No. 12,866 § 1(b)(6)-(7), 3 C.F.R. § 638 (1993).

262. JANUARY 7 MEETING, *supra* note 15 (statement of Comm’r Burrows).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. These deficiencies likely explain, at least in part, Chairperson Dhillon’s eleventh-hour revision declaring the conciliation rule not to be “major” for the purposes of CRA—she was concerned that the analysis’s various faults would be exposed in GAO’s report to Congress. *See supra* notes 19 and 20. Chair Dhillon presumably also wanted the rule to take effect as soon as possible so as to limit its vulnerability to invalidation under CRA, which would not be served by the rule’s being declared “major.” 5 U.S.C. § 801(a)(3)(A) (postponing major rules from taking effect for an additional sixty days).

than regulations of a more qualitative nature, such as the EEOC's conciliation rule. In advocating for a cost-benefit interpretation of the CRA's substantially similar provision, Finkel and Sullivan aver that "when, as is often the case, [a] regulation hinges on a single quantitative judgment about stringency,"—e.g., "How many miles per gallon must each automobile manufacturer's fleet achieve? What trace amount of fat per serving can a product contain and still be labeled fat-free?"—a reissued "rule can be made substantially different with a single change in the regulatory text to change the stringency," as the resulting costs and benefits would be markedly different.²⁶⁸ Similarly, they contend that if Congress disapproved a toxic substance rule "mandating engineering controls, exposure monitoring, recordkeeping, [and] training, . . . all triggered when the concentration of the contaminant exceeded some numerical limit," the rule's reissuance "with one single word changed (the number setting the limit)" would cause the overall costs to decrease significantly, thus rendering the rule substantially dissimilar from its disapproved predecessor.²⁶⁹

Yet, the conciliation rule's focus is almost entirely qualitative to the extent it mandates that the EEOC provide employers with a summary of the known facts, the legal basis for its reasonable cause determination, the grounds for its requested monetary relief, and so on.²⁷⁰ Indeed, the closest the rule comes to imposing any sort of quantitative standard is the requirement that employers be given at least fourteen days to respond to the Commission's conciliation proposal,²⁷¹ and it seems unlikely that the rule's costs and benefits could be improved "in a significant and favorable way" simply by decreasing that timeframe to seven days or increasing it to twenty-one days.

Thus, while Finkel and Sullivan's approach may be appropriate or even ideal for quantitative rules or rules for which a rigorous cost-benefit analysis was prepared, it is ill-suited for the EEOC's conciliation rule. Moreover, the notion that a cost-benefit interpretation would be appropriate in "the vast majority of cases"²⁷² seems doubtful given that of the two rules to have been disapproved and reissued to date, neither sought to justify its reissuance on the basis of an improved cost-benefit ratio.

268. Finkel & Sullivan, *supra* note 245, at 764.

269. *Id.* at 735.

270. Final Conciliation Rule, *supra* note 7.

271. *Id.* at 2985.

272. Cole, *supra* note 245, at 91.

B. SEC and DOL's Experience Reissuing Disapproved Rules

Of the twenty rules that have been invalidated under the CRA to date,²⁷³ only two have been reissued, and—unlike the EEOC—the Department of Labor (DOL) and Securities and Exchange Commission (SEC)'s rules are statutorily mandated.²⁷⁴ The EEOC's issuance of a conciliation rule, meanwhile, was entirely discretionary.²⁷⁵ Together, these facts suggest that the EEOC is unlikely to reissue its conciliation rule, in which case *Mach Mining* will provide the exclusive basis for evaluating the EEOC's conciliation efforts.²⁷⁶ Nevertheless, if the EEOC were to reissue its conciliation rule, the experience of these two entities stands to provide insight into how the EEOC might go about complying with the CRA's substantially similar provision.

1. DOL Rule: Drug Testing Applicants for Unemployment Benefits

In 2012, Congress passed a law permitting states to condition receipt of unemployment benefits on an applicant's successfully passing a drug test, provided "such applicant . . . is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor)."²⁷⁷ The mandated regulations were finalized four years later by the Obama Administration and provided that only occupations "specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances" were subject to the statute's drug testing provision.²⁷⁸ Ten

273. See CAREY & DAVIS, *supra* note 203, at 25–26 (listing the seventeen rules that had been invalidated as of January 9, 2020); Courtney Bubl , *Senate Has Passed Three Resolutions to Undo 'Midnight' Trump Regulations*, GOV'T EXEC. (May 27, 2021), <https://www.govexec.com/management/2021/05/senate-has-passed-three-resolutions-undo-midnight-trump-regulations/174366/> [<https://perma.cc/4EKC-U22M>] (identifying the three rules that would ultimately be invalidated by President Biden).

274. See *infra* notes 327 and 349–55.

275. *Id.*

276. Press Release, Equal Emp. Opportunity Comm'n, Congress Acts to Restore Flexibility to EEOC's Conciliation Process (June 24, 2021), <https://content.govdelivery.com/accounts/USEEOC/bulletins/2e5649e> [<https://perma.cc/K5JW-CVXA>] ("Following Congress's decision to overturn the rigid conciliation rule, EEOC's conciliation process will again be governed by the standards set forth by the Supreme Court in *Mach Mining*.").

277. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 126 Stat. 156, 162–63 (2012) (codified at 42 U.S.C. § 503(l) (2012)).

278. Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50,298 (Aug. 1, 2016) (repealed 2017).

days after Donald Trump's 2017 inauguration, however, a joint resolution of disapproval was introduced in the House seeking to invalidate the DOL's drug-testing rule, and by March 31 the rule had been nullified.²⁷⁹ The DOL issued a press release later that same day lauding the rule's invalidation on the grounds it "contradicted clear congressional intent" to the extent it "narrowly limited the circumstances under which drug testing may be carried out by states in administering their unemployment insurance systems."²⁸⁰ Separately, the Acting Secretary of Labor stated that the DOL was "look[ing] forward to examining additional flexibilities for states relative to the drug testing of persons seeking unemployment benefits."²⁸¹

As reflected by the preceding quote, the DOL recognized that the disapproval resolution did not obviate its duty to issue the mandated regulations. Yet, the DOL was also aware that whatever regulations it ultimately issued could not be substantially similar to the disapproved rule. Consequently, in issuing its new rule in 2019, the DOL went to great lengths to distinguish the rule from its predecessor:

In this final rule, the Department takes a fundamentally different approach to identifying these occupations than it did in the previous final rule that Congress later rescinded. The list of occupations in the 2016 final rule that "regularly" conduct drug testing was limited to certain specifically listed occupations and those in which drug testing is required by Federal or State law. In this final rule, the Department has expanded that list in light of the congressional disapproval of the 2016 final rule. It expands the consideration of what occupations regularly conduct drug testing by accounting for significant variations in State practices with respect to drug testing. An occupation that regularly drug tests in one State may not regularly test in another, making a national one-size-fits-all list impractical and infeasible, and therefore inappropriate. Thus the Secretary has determined in this rule to include in the list of occupations that regularly conduct drug testing those occupations for which each State has a factual basis for finding that employers in that State conduct drug testing as a standard eligibility requirement for employing or retaining employees in the occupation. This new addition provides substantially more flexibility to States and recognizes that, in some States, drug testing is regularly conducted in more occupations than were initially included in the 2016 final rule.²⁸²

279. H.R.J. Res. 42, 115th Cong., 131 Stat. 81 (2017).

280. News Release, U.S. Dep't of Labor, President Trump Nullifies Drug Testing Rule (Mar. 31, 2017), <https://www.dol.gov/newsroom/releases/eta/eta20170331>.

281. *Id.*

282. Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the

The DOL averred that the new rule’s “substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the [statutory] requirement [that the DOL] . . . issue regulations addressing what occupations regularly conduct drug testing.”²⁸³

Apparently believing that repetition shapes reality, the DOL described its new rule as “substantially different,” “fundamentally different,” and “more flexible” on nine occasions over the span of two pages.²⁸⁴ This was not the rule’s only discussion of the CRA though.

In discussing the feedback the DOL received in response to its notice of proposed rulemaking, the Department acknowledged receiving one comment pertaining to the CRA. Specifically, the new rule was alleged to be inconsistent with the CRA’s statutory text, which the commenter described as “forbid[ding] the executive branch from re-regulating the same matter without additional legislation.”²⁸⁵ The DOL responded that the CRA “does not prohibit re-regulating ‘the same matter;’ rather, it prohibits issuing a regulation on the same matter that is ‘substantially the same’ as the rescinded regulation.”²⁸⁶ Furthermore, the disapproval resolution’s legislative history ostensibly demonstrated an unequivocal congressional intent “that the Department issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted.”²⁸⁷ The DOL then proceeded to catalog the various differences between the invalidated rule and the new rule, after which the Department declared, “[a] rule that substantially broadens the list of occupations that ‘regularly conduct drug testing’ clearly is not ‘in substantially the same form’ as the much more restrictive final rule that Congress rescinded.”²⁸⁸

The new rule took effect on November 4, 2019,²⁸⁹ and to date, there have been no legal challenges to the rule on the theory that it is “substantially the same” as its disapproved predecessor.²⁹⁰

The DOL’s experience suggests that the EEOC may be able to issue a conciliation rule consistent with the CRA if it is substantially

Middle Class Tax Relief and Job Creation Act of 2012, 84 Fed. Reg. 53037, 53037–38 (Oct. 4, 2019) [hereinafter Reissued DOL Rule].

283. *Id.* at 53037.

284. *Id.* at 53037–38.

285. *Id.* at 53038.

286. *Id.*

287. *Id.* Significantly, there was no discussion of the “substantially similar” provision or its implications for the drug-testing rule during the congressional debates on the disapproval resolution. Santulli, *supra* note 245, at 1385.

288. Reissued DOL Rule, *supra* note 282, at 53038.

289. *Id.* at 53037.

290. CAREY & DAVIS, *supra* note 200, at 11.

different in scope from, and takes a fundamentally different approach than, its 2021 antecedent. Much like the DOL's former rule was criticized for imposing "a national, one-size-fits-all" drug-testing standard that failed to account for significant variations between states, so too was the EEOC's rule faulted for mandating a "rigid conciliation process" that "appl[ie]d across the board, one-size-fits-all, in every case of workplace discrimination" without accounting for the nuances and subtleties of individual discrimination charges. Consequently, if a future conciliation rule granted the EEOC "substantially more flexibility" to determine what, if any, information should be furnished to employers in connection with a particular charge, a court may find the rule distinctly dissimilar from its predecessor and therefore valid under the CRA.

The Commission is unlikely to issue such a rule, however, as post-disapproval, it already enjoys significant flexibility with regard to its conciliation procedures.²⁹¹ Indeed, the EEOC's press release hailing the rule's repeal was titled "Congress Acts to Restore Flexibility to EEOC's Conciliation Process."²⁹² The release quoted the EEOC's newly designated Chairperson, Charlotte Burrows, as stating, "[t]his action by Congress restores the Commission's flexibility to tailor the conciliation process to the facts and circumstances of each case."²⁹³ In particular, the release noted that the EEOC's conciliation procedures would again be governed by the standards set forth in *Mach Mining v. EEOC*,²⁹⁴ wherein the Court held that the EEOC enjoys "expansive discretion" with respect to conciliation.²⁹⁵ Thus, the Commission is unlikely to issue a conciliation rule that simply confirms the existing state of the law as drafted by Congress and interpreted by the Court.

2. *SEC Rule: Disclosure of Payments by Resource Extraction Issuers*

In 2010, Congress passed a law directing the SEC to issue rules requiring that resource extraction issuers disclose payments to foreign governments for the purpose of developing oil, natural gas, or minerals.²⁹⁶ The rule was finalized six years later on July 27, 2016.²⁹⁷ Nev-

291. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 492 (2015).

292. Press Release, *supra* note 276.

293. *Id.*

294. *Id.*

295. *Mach Mining*, 575 U.S. at 494.

296. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220-22 (codified at 15 U.S.C. § 78m(q)(2)(A)).

297. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016).

ertheless, ten days after Donald Trump's 2017 inauguration, a joint resolution of disapproval was introduced in the House of Representatives seeking to invalidate the SEC's disclosure rule, and by February 14, the rule had been nullified.²⁹⁸ In anticipation of the rule's reissuance, six Republican senators wrote a letter to Michael Piwowar, the SEC's Acting Chair, explaining their rationale for voting to disapprove the rule and encouraging the SEC to address their concerns in its subsequent rulemaking.²⁹⁹ Meanwhile, Piwowar responded to the rule's invalidation by asking the SEC "staff to take a fresh look at the rule mandate to determine how we can comply with our statutory obligations in a manner that better aligns with our core mission."³⁰⁰

It was therefore understood that the disapproval resolution did not rescind the SEC's obligation to issue the specified regulation. Yet, the SEC was also aware that whatever rule it ultimately issued could not be substantially similar to its disapproved predecessor. The agency described its charge as follows: "We believe our task is to exercise our discretion to craft and issue a new rule that reasonably achieves the objectives of Section 13(q) [– the statutory provision mandating the rulemaking –] within the narrower range of available approaches imposed by the CRA."³⁰¹

The new rule was published on January 15, 2021, and much of its preamble was spent addressing competing theories for how the SEC might have complied with the CRA's substantially similar provision.³⁰² Whereas some commenters had "expressed the view that [the SEC] could readopt the 2016 Rules with only minor modifications," such as by changing the rule's stated rationale or altering its economic analysis, the SEC held that such an approach would be "inconsistent with the plain language of the CRA, which instructs that the 'new rule' itself may not be substantially the same."³⁰³ Rather, the SEC believed it was required "to make sufficient changes to the substantive operation of (including the requirements imposed by) the rule itself to

298. H.R.J. Res. 41, 115th Cong., 131 Stat. 9 (2017).

299. Letter from Senator Bob Corker et al., to Michael Piwowar, Acting Chairman, SEC (Feb. 2, 2017), <http://www.pwypusa.org/wp-content/uploads/2017/02/Letter-to-SEC-on-Resource-Extraction-Rule.pdf>.

300. Michael S. Piwowar, Acting Chairman, Sec. & Exch. Comm'n, Remarks at the "SEC Speaks" Conference 2017: Remembering the Forgotten Investor (Feb. 24, 2017), <https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html>.

301. Disclosure of Payments by Resource Extraction Issuers, 86 Fed. Reg. 4662, 4665 (Jan. 15, 2021) [hereinafter Reissued SEC Rule].

302. *Id.*

303. *Id.*

meet the CRA mandate.”³⁰⁴ Based on that understanding, the SEC concluded “that an appropriate and reasonable way to assess the CRA’s not ‘substantially the same’ requirement in the context of a disclosure-oriented provision such as Section 13(q) is primarily by comparing the extent to which the disclosures under the disapproved rule would differ from the disclosures under the new rule.”³⁰⁵ Alternatively, other commenters argued that compliance with the CRA could be achieved by making “adjustments to a significant number of the ancillary or secondary components of the rule” while leaving the “core discretionary components of the 2016 rulemaking” unaltered.³⁰⁶ The SEC was unpersuaded, however, finding that “changes to the ancillary or secondary components of the 2016 Rules, alone and in combination, generally would yield a very similar disclosure model and thus result in payment disclosures substantially the same as those required by the 2016 Rules.”³⁰⁷

Having found the various commenters’ proposals lacking, the SEC relied on an approach of its own devising—one informed by the agency’s reasoned judgment, the administrative record, the relevant statutory provision, and the requirements of the CRA.³⁰⁸ The agency articulated its approach as follows:

[W]e believe that, in the context of Section 13(q), producing a rule that is not “substantially the same” as the disapproved rule is reasonably achieved by changing at least one of the two central discretionary determinations at the heart of the Section 13(q) disclosure system that the Commission made when it issued the 2016 Rules. Based on the administrative record and our understanding of Section 13(q), we believe that the two central determinations over which the Commission has discretionary authority are (1) publication of issuers’ payment disclosures versus anonymization and (2) the relative granularity of the definition of “project.” Modifying the other discretionary determinations available in this particular rulemaking, in our view, likely would fail to produce a rule that is not substantially the same as the disapproved rule given the level of similarity that would remain between the disclosures under the new rule and those that would have resulted under the disapproved rule. Moreover, given our obligations under the CRA and based on our review of the administrative record, we believe that the final rules reasonably satisfy the statutory requirements of Section 13(q).

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 4664.

[W]e believe that, of these two core discretionary determinations, the change that more effectively achieves Section 13(q)'s goal of increasing transparency with respect to extractive payments by resource extraction issuers while adhering to the requirements of the CRA, is to modify the project definition so that it requires less granularity in the payment disclosures than in the disapproved rule. In choosing to make this change, we are mindful of Section 13(q)'s goal, which could be significantly limited by anonymization.

Finally, we believe that the form and manner of the revision to the project definition is not just a reasonable change within our discretion to implement Section 13(q), but also one that alone is sufficient to comply with the CRA's requirements Accordingly, while we are making various other changes to more ancillary or secondary matters that could further support our efforts to comply with the CRA's requirements, these changes are motivated by policy considerations and the administrative record.³⁰⁹

The rule's other, less significant changes included adding three new exemptions, modifying a definition, imposing limits on issuers' liability, providing relief to new issuers, and extending the disclosure deadline.³¹⁰

The new rule took effect on March 16, 2021,³¹¹ and to date, there have been no legal challenges to the rule on the theory that it is "substantially the same" as its disapproved predecessor.³¹²

The SEC's experience suggests that the EEOC may be able to issue a conciliation rule consistent with the CRA if its mandated disclosures are significantly different than those of its antecedent. As noted by the SEC, "an appropriate and reasonable way to assess the CRA's not 'substantially the same' requirement in the context of a disclosure-oriented provision . . . is primarily by comparing the extent to which the disclosures under the disapproved rule would differ from the disclosures under the new rule."³¹³ Unlike the SEC though, the EEOC would not be limited to selecting among a few "central determinations over which the Commission has discretionary authority,"³¹⁴ as issuance of a conciliation rule would itself be an entirely voluntary act.³¹⁵ Accordingly, to achieve maximum dissimilarity, the four dis-

309. *Id.* at 4665–66.

310. *Id.* at 4666.

311. *Id.* at 4662.

312. CAREY & DAVIS, *supra* note 200, at 11.

313. Reissued SEC Rule, *supra* note 301, at 4665.

314. *Id.*

315. *See infra* notes 349–55.

closures compelled by the former rule would need to be omitted from any future conciliation rule.

The problem with mandating an entirely new set of disclosures, however, is that there are not many left from which to choose, at least on the employer side. Of the various requirements the Supreme Court was asked to impose on the EEOC's conciliation process, all but one was included in the former rule: "Inform the defendant what steps [the EEOC] believes are necessary to eliminate the alleged unlawful employment practice."³¹⁶ While employers would likely prefer this one disclosure to none at all, it stands to be considerably less meaningful than its rescinded counterparts.

On the other hand, the EEOC might seek to differentiate a future conciliation rule by mandating various disclosures benefiting workers. For example, the EEOC might require employers to disclose whether an alleged harasser has been the subject of similar complaints in the past and, if so, the steps taken by the employer in response. Alternatively, the Commission might mandate the production of any non-privileged information that led the employer to doubt the EEOC's initial reasonable cause determination. Or perhaps employers could be ordered to provide written justification for any monetary relief included in a counter-offer, together with the underlying calculations. Because the former rule was disparaged for giving "employers access to information about a worker's case but not the other way around,"³¹⁷ a rule that gives workers access to information about an employer's case would likely be permissible under the CRA.

C. CRA's Post-Enactment Legislative History

Apart from being statutorily-compelled to reissue their rules, the DOL and the SEC share another similarity: they both relied on the CRA's post-enactment legislative history to inform their subsequent rulemaking. Because the CRA was the product of eleventh-hour negotiations between the House and Senate, it was never considered in committee or debated in either chamber, leaving a dearth of legislative history as to its purpose, operation, and interpretation.³¹⁸ The CRA's sponsors sought to remedy this deficiency *ex post facto* by publishing a joint explanatory statement in the Congressional Record.³¹⁹ The statement was "intended to provide guidance to the agencies, the

316. Compare Mach Mining Brief, *supra* note 49, at *38–40 (internal quotations omitted), with Final Conciliation Rule, *supra* note 7, at 2985–86.

317. 167 CONG. REC. S2569 (daily ed. May 18, 2021) (statement of Sen. Murray).

318. 142 CONG. REC. S3683 (daily ed. Apr. 18, 1996) (statement of Sen. Nickles).

319. *Id.* at S3683–87 (statement for the record by Sens. Nickles, Reid, and Stevens).

courts, and other interested parties when interpreting the act's terms."³²⁰ The statement addressed a number of topics, including the rationale for delaying implementation of major rules, the procedure for calculating the sixty-day window in which the CRA's fast-track parliamentary procedures are available, and the effect of enacting a disapproval resolution.³²¹

With respect to the prohibition against issuing or reissuing a rule "in substantially the same form" as one previously disapproved, the statement explained the ban was necessary to ensure that agencies did not circumvent the will of Congress.³²² At the same time though, the statement acknowledged that the provision's preclusive effect stood to vary based on the discretion afforded an agency by the relevant statute.³²³ Thus, "if the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion" in one of two ways: the agency may decline to issue a new rule altogether, or it may elect to issue a substantially different rule.³²⁴ Conversely, "if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."³²⁵ The statement indicated that debate on any disapproval resolution should "focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval."³²⁶

Although the joint explanatory statement is not referenced explicitly in their reissued rules, the SEC and the DOL appear to have followed its prescribed methodology. Specifically, both entities recognized that their rules' invalidation under the CRA did not repeal the underlying statutory provisions mandating that they promulgate regulations on the specified topics.³²⁷ They then concluded that their discretion in issuing the rules was not so narrowly circumscribed as to preclude the rules' reissuance altogether.³²⁸ For example, the SEC

320. *Id.* at S3683 (statement of Sen. Nickles).

321. *Id.* at S3685–86.

322. *Id.* at S3686.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. Reissued DOL Rule, *supra* note 282, at 53037; Reissued SEC Rule, *supra* note 301, at 4664.

328. Reissued DOL Rule, *supra* note 282, at 53037; Reissued SEC Rule, *supra* note 301, at 4664.

found that its discretionary authority encompassed two determinations and elected to modify the one it believed would best achieve the statute's overall objectives.³²⁹ Relatedly, the DOL recognized that its discretionary authority was limited to a single determination, albeit one over which the Department enjoyed near-complete autonomy.³³⁰

The entities also considered the debates preceding the rules' invalidation to gauge how they might go about reissuing their rules consistent with the CRA. The DOL, for instance, described the relevant legislative history as directing the Department to "issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted."³³¹ The Department cited a speech by Representative Kevin Brady, the disapproval resolution's sponsor, in which he disparaged "the eventually-rescinded rule as 'incredibly narrow'" and accused it of "ignor[ing] the intent of Congress."³³² Consequently, the DOL contended that by revising the rule to permit drug testing of additional occupations, it had "substantially broaden[ed]" the rule's scope so that it was not "in substantially the same form as the much more restrictive final rule that Congress rescinded."³³³

The SEC, meanwhile, was mindful of the concerns that led Congress to disapprove its former rule but declined to address them in promulgating its new rule. The agency observed that its new rule had been criticized by several commenters for "unduly rel[y]ing on various floor statements made by members of Congress during the [prior] CRA votes."³³⁴ These commenters advanced three arguments for why the SEC's consideration of the statements was inappropriate.³³⁵ First, the statements were "not necessarily consistent with the views of most members of Congress."³³⁶ Second, the statements gave "no clear indication of how the [SEC] should modify the rules."³³⁷ Third, the statements relied on estimated cost data that had since "been called into question by actual cost data."³³⁸ Whereas the SEC did not respond to the first and second arguments, it acknowledged that earlier data indicating the "potentially high costs and significant risk of competitive

329. Reissued SEC Rule, *supra* note 301, at 4665.

330. Reissued DOL Rule, *supra* note 282, at 53038.

331. *Id.*

332. *Id.* For Representative Brady's full remarks, see 163 CONG. REC. H1200-01 (daily ed. Feb. 15, 2017).

333. Reissued DOL Rule, *supra* note 282, at 53038.

334. Reissued SEC Rule, *supra* note 301, at 4668.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

harm” posed by the prior rule “may have informed the views subsequently expressed by members of Congress” who opposed the rule on economic grounds.³³⁹ Yet, in the interim between the prior rule’s invalidation and the new rule’s finalization, new data had become available indicating that “the cost and anti-competitive effects” of the rule, “while still relevant considerations,” stood to be less than previously projected.³⁴⁰ Hence, in formulating its new rule, the SEC conceded that “we have not based our discretionary determinations . . . on previously expressed concerns, including from various members of Congress, about the economic effects of the [prior] rules.”³⁴¹ The agency instead relied on its own assessment of the new rule’s likely effects after considering all of the available data.³⁴²

That neither entity’s rule has been challenged for being “substantially the same” as its disapproved predecessor suggests that the EEOC, in promulgating any future conciliation rule, would do well to follow the SEC and the DOL’s example and utilize the methodology prescribed in the CRA’s joint explanatory statement. Unlike the SEC and the DOL though, if the EEOC were to issue a new conciliation rule, it would not be regulating on a blank slate. Rather, the rule disapproved by Congress was an amendment to the EEOC’s existing conciliation procedures such that its invalidation effectively restored the Commission’s pre-2021 conciliation regulations.³⁴³ Complicating matters further, the EEOC has not one but two conciliation regulations currently in effect. The first, 29 C.F.R. § 1601.24,³⁴⁴ applies to violations of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Genetic Information Nondiscrimination Act of 2008 (GINA),³⁴⁵ whereas the second, 29 C.F.R.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *See* 5 U.S.C. § 801(f) (“Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution . . . shall be treated as though such rule had never taken effect.”).

344. 29 C.F.R. § 1601.24 (“Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion.”).

345. 29 C.F.R. § 1601.1 (“The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008.”).

§ 1626.12,³⁴⁶ applies to violations of the Age Discrimination in Employment Act of 1967 (ADEA).³⁴⁷ Because the Commission’s recently disapproved rule amended both § 1601.24 and § 1626.12,³⁴⁸ the EEOC would need to assess its discretion under each of these four statutes to determine whether and to what extent it may amend its conciliation rules consistent with the CRA.

In terms of delegated rulemaking authority, two of the four statutes are permissive, and two are compulsory. Title VII, for example, provides that “the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations.”³⁴⁹ Similarly, the ADEA states that the Commission “may issue such rules and regulations as it may consider necessary or appropriate.”³⁵⁰ Conversely, the ADA and GINA stipulate that “the Commission shall issue” regulations to carry out the statutes’ provisions.³⁵¹ Nevertheless, the four statutes are uniform in mandating that the Commission attempt to eliminate discrimination through conciliation before commencing litigation.³⁵²

The fact that the EEOC is statutorily compelled to issue regulations under the ADA and GINA may, at first glance, appear to place the Commission in a position similar to that of the SEC and DOL. Meaning the question is not whether the EEOC may reissue its conciliation rule but whether it can do so consistent with the discretion af-

346. 29 C.F.R. § 1626.12 (“Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.”).

347. 29 C.F.R. § 1626.1 (“The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.”).

348. Specifically, the rule added paragraphs (d), (e), and (f) to § 1601.24 and paragraphs (b), (c), and (d) to § 1626.12. *See* Final Conciliation Rule, *supra* note 7, at 2985–86.

349. 42 U.S.C. § 2000e-12.

350. 29 U.S.C. § 628.

351. 42 U.S.C. § 12116 (“The Commission shall issue regulations in an accessible format to carry out this subchapter [of ADA].”); 42 U.S.C. § 2000ff-10 (“The Commission shall issue final regulations to carry out this chapter [of GINA].”).

352. In relevant part, Title VII provides that “the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5. ADA and GINA adopt Title VII’s conciliation provision verbatim. *See* The Americans with Disabilities Act, 42 U.S.C. § 12117; The Genetic Information Non-Discrimination Act, 42 U.S.C. § 2000ff-6. ADEA, meanwhile, provides that EEOC “shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [ADEA] . . . through informal methods of conciliation, conference, and persuasion.” 29 U.S.C. § 626.

forded it under the applicable statutes—in which case it must. Upon closer examination, however, this analogy proves inapt. The EEOC has already promulgated conciliation regulations for the ADA and GINA, i.e., the pre-2021 version of § 1601.24.³⁵³ Unlike the SEC and DOL, moreover, the EEOC’s required rulemaking is not subject to a specific topical mandate such as payments by resource extraction issuers or occupations requiring drug testing. Rather, the ADA and GINA merely provide that the Commission “shall issue” regulations to carry out the statutes’ provisions without referencing conciliation specifically.³⁵⁴ Thus, having already satisfied its statutory obligations under the ADA and GINA, the Commission appears to have two options with respect to § 1601.24: it may decline to amend the regulation further, or it may propose new amendments, provided they are substantially dissimilar from those invalidated.

The statutory differences in delegated rulemaking authority are therefore irrelevant for the purposes of this Article as all four statutes afford the EEOC similar discretion with regard to its conciliation procedures. Indeed, while not required to do so, the EEOC has already exercised its permissive authority under Title VII and the ADEA to promulgate conciliation regulations for discrimination based on race, color, religion, sex, national origin, or age, and these regulations remain in effect notwithstanding the 2021 rule’s nullification.³⁵⁵ Consequently, the EEOC appears to have the same options with respect to § 1626.12 as it does § 1601.24—leave the recently restored, pre-2021 regulation in place, or propose amendments bearing little or no relation to those previously disapproved.

Should the Commission elect to amend the rule, the CRA’s post-enactment legislative history recommends that the EEOC review the debates preceding the disapproval resolution’s enactment in order to determine its “options or lack thereof” moving forward.³⁵⁶ A review of the *Congressional Record* reveals four primary justifications for the rule’s nullification. First, the rule was criticized for impairing the EEOC’s ability to tailor its conciliation procedures to the facts of each case by imposing a “rigid,” “one-size-fits-all” standard on the Commission’s conciliation efforts.³⁵⁷ Second, compliance with the rule’s

353. See 29 C.F.R. § 1601.24 (version effective November 16, 2020 to February 15, 2021).

354. See *supra* note 351.

355. See 29 C.F.R. § 1601.24 (version effective November 16, 2020 to February 15, 2021); 29 C.F.R. § 1626.12 (version effective December 17, 2003 to February 15, 2021).

356. 142 CONG. REC. S3686 (daily ed. Apr. 18, 1996).

357. 167 CONG. REC. H3111 (daily ed. June 24, 2021) (statement of Rep. Scott).

“onerous” disclosure provisions stood to divert the EEOC’s already limited resources away from investigating and litigating discrimination claims.³⁵⁸ Third, the rule threatened to “saddle the [Commission] with wasteful collateral litigation.”³⁵⁹ Fourth, the rule required that the EEOC reveal complainants’ identities to employers, ostensibly increasing the risk of retaliation.³⁶⁰

Because three of these four criticisms could be leveled against almost any employer-side disclosure requirement the Commission may wish to impose in the future, the EEOC’s options for reissuing its conciliation rule appear limited. As long as the EEOC is subject to budgetary constraints, for example, any additional costs incurred in connection with conciliation will necessarily leave fewer resources for fulfilling the Commission’s other responsibilities, including its investigation and litigation functions. Likewise, any rule mandating that the EEOC follow certain procedures or furnish specific information as part of the conciliation process would be vulnerable to accusations that it seeks to impose a rigid, one-size-fits-all framework on what Congress intended to be an inherently flexible, individualized process. Similarly, the prospect of collateral litigation over the EEOC’s compliance with any new conciliation rule would continue to be a concern, particularly if the rule did not clearly define the Commission’s duties. Yet, the more detailed any such rule becomes, the less likely it is to comply with *Mach Mining*, suggesting that these two items are in tension with one another. Consequently, the concerns that led Congress to nullify the EEOC’s conciliation rule appear difficult, if not altogether impossible, to alleviate through future rulemaking³⁶¹ as they would seem to be implicated by virtually any disclosure-oriented conciliation regime the Commission may devise.

CONCLUSION

The Commission’s experimentation with conciliation is likely at an end. In promulgating its now-disapproved rule, the EEOC seemingly elected to go “all in” and issue a rule incorporating every conceivable change sought by the agency’s Republican majority over the

358. *Id.* (statement of administration policy). *See also id.* at H3102 (statement of Rep. Pelosi); H3113 (statement of Rep. Jackson Lee).

359. *Id.* at H3102 (statement of Rep. Pelosi). *See also id.* at H3112 (statement of Rep. Scott); H3113 (statement of Rep. Jackson Lee).

360. *Id.* at H3111 (statement of administration policy). *See also id.* at H3112 (statement of Rep. Scott); H3113 (statement of Rep. Jackson Lee).

361. Excluding the risk of increased retaliation, which could be addressed by simply omitting the prior rule’s requirement that aggrieved individuals’ identities be revealed to their employers.

objections of its Democratic minority. Such overt partisanship from an ostensibly bipartisan agency all but ensured that the rule would become one of only three Trump-era regulations to be invalidated under the Congressional Review Act. Whereas the Commission retains its statutory discretion to issue appropriate procedural regulations, including regulations pertaining to conciliation, the EEOC is, for all intents and purposes, barred from revisiting the issue absent further action by Congress.