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REGULATORY IMPEDIMENTS TO JOB CREATION: THE COST OF DOING BUSINESS IN THE CONSTRUCTION INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MARCH 16, 2011

Serial No. 112–18

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

67–566 PDF WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
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REGULATORY IMPEDIMENTS TO JOB CREATION: THE COST OF DOING BUSINESS IN THE CONSTRUCTION INDUSTRY

WEDNESDAY, MARCH 16, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:30 p.m. in room 2154, Rayburn House Office Building, the Honorable Jim Jordan (chairman of the subcommittee), presiding.

Present: Representatives Jordan, Buerkle, Mack, Guinta, Kelly, Kucinich, Cooper, Speier, Braley.

Also present: Representatives Issa, Cummings.

Staff present: Ali Ahmad, deputy press secretary; Michael R. Bebeau, assistant clerk; Molly Boyl, parliamentarian; Daniel Epstein, counsel; Adam P. Fromm, director of Member liaison and floor operations; Linda Good, chief clerk; Christopher Hixon, deputy chief counsel, oversight; Justin LoFranco, press assistant; Mark D. Marin, senior professional staff member; Kristina M. Moore, senior counsel; Kristin L. Nelson, professional staff member; Sharon Meredith Utz, research analyst; Walker Hanson, legal intern; Sean Sullivan, intern; Carla Hultberg, minority chief clerk; Donald Sherman, minority counsel; Mark Stephenson, minority senior policy advisor/legislative director; Cecelia Thomas, minority counsel/deputy clerk; and Alex Wolf, minority professional staff member.

Mr. JORDAN. The subcommittee will come to order. We will do opening statements from the chair and the from ranking member, and then get right to our great panels.

Today's hearing continues this committee's efforts to expose cumbersome regulations that are stifling private sector job creation and a full economic recovery. For more than 2 years, the administration has told the American people that $1 trillion of Government spending was needed to put people back to work. The signature effort of the American Recovery and Reinvestment Act was supposed to keep unemployment below 8 percent, but obviously it is not there.

Two years later, and $1 trillion later, unemployment is hovering just above 9 percent, and has reached as high as 10.1 percent since the President took office. In the State that both I and the ranking member come from, it is even, frankly, slightly higher.

The situation looks even bleaker when you start looking at the economy sector by sector. Perhaps most telling are the statistics

from the construction sector, which is of course our focus today. This important part of our economy encompasses excavators, pavers, plumbers, bricklayers, roofers and a host of other contractors and subcontractors on both residential and commercial projects. It includes architects, engineers, surveyors and skilled craftsmen of every sort who design and construct America's infrastructure.

For these millions of Americans, the unemployment rate is currently 21.8 percent, nearly two and a half times the total U.S. unemployment rate. No other sector of the economy has been hit harder by the economic downturn, and no other sector was supposed to benefit more from the so-called stimulus.

Last December, when Chairman Issa requested direct feedback from job creators across the entire economy, many employers in the construction industry were candid with the committee about the Federal rules that keep them from growing their businesses, hiring new workers and competing in a fair and open market. Among the many responses the committee received, two specific areas stand out.

First, every day in the United States, job creators in the construction industry are faced with the reality of project labor agreements. These agreements tip the scale of an open bid process in favor of organized labor and shut out non-union shops, many of which are minority-owned and women-owned small businesses. In fact, the vast majority of U.S. construction work force, nearly 87 percent is non-unionized.

Moreover, the cost of business increases dramatically because of PLAs. Several recent studies have found that these agreements add as much as 18 percent to the cost of construction. It was not surprising that when the President issued an executive order barely 2 weeks into his administration, encouraging a preference for PLAs in Government contracts, when you calculate the total amount of dollars in stimulus spending that is going to construction projects, and tack on 18 percent for the cost of PLAs. The extra cash that went into the pockets of these organizations is just not what the taxpayers want.

Second, the committee has heard from job creators that proposed workplace rules by the Occupational Safety and Health Administration threaten to impede economic growth in the construction industry. Fortunately, and I want to compliment OSHA, they withdrew the proposed rule regarding occupational noise and work-related physical disorders, after input from people who would have been most burdened by these rules. Meanwhile, other rules like OSHA's Injury and Illness Prevention program indicate that the administration has yet to comprehend how new layers of regulation can slow and even stop a full-scale revitalization of our Nation's construction industry.

Make no mistake about it, workplace safety is a priority concern. America has built the most successful, robust and profitable market economy in the world. And we have done so with an unapologetic commitment to worker safety. Safety and success are not mutually exclusive in the United States.

But job creators are concerned about the trend at the Federal regulatory agencies that seem to be moving away from compliance

assistance model toward an enforcement and penalization model. This is critical as we move forward.

Effective regulation does not require a threatening adversarial relationship between the Government and the industries that it monitors. This hearing will continue the important dialog between private sector job creators, Congress and the administration about the steps necessary to foster economic recovery that puts America back to work. The testimony we hear today from the front line of a major sector of our domestic work force will help us toward that goal. The Oversight Committee is one place in Washington where the Government listens to the people and tells the truth about policies that are not working.

I welcome our witnesses, and would now be happy to yield to the ranking member for his opening statement.

[The prepared statement of Hon. Jim Jordan follows:]

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Chairman Jim Jordan's Opening Statement

Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

"Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry"

March 16, 2011

(As Prepared for Delivery)

Today's hearing continues the Committee's effort to expose cumbersome regulations that are stifling private-sector job creation and a full economic recovery. For more than two years, the Administration has told the American people that a trillion dollars of government spending was needed to put people back to work. The President's signature effort, the American Recovery and Reinvestment Act, was supposed to keep unemployment below eight percent.

But two years and a trillion dollars later, unemployment is hovering just under nine percent and has reached as high as 10.1 percent since the President took office. The situation looks even bleaker when you start looking at the economy sector by sector. Perhaps most telling are the statistics from the construction sector, which is our primary focus today. This important part of our economy encompasses excavators, pavers, plumbers, bricklayers, roofers, and a host of other contractors and sub-contractors on both residential and commercial projects. It includes architects, engineers, surveyors, inspectors, and skilled craftsmen of every sort who design and construct America's infrastructure.

For these millions of Americans, the unemployment rate is currently 21.8% -- nearly 2 ½ times the total U.S. unemployment rate. No other sector of our economy has been hit harder by the economic downturn, and no other sector was supposed to benefit more from the President's economic recovery efforts. But no amount of government spending can overcome an onerous regulatory scheme.

Last December, when Chairman Issa requested direct feedback from job creators across the entire economy, many employers in the construction industry were candid with the Committee about the federal rules that keep them from growing their businesses, hiring new workers, and competing in a fair and open market. Among the many responses the Committee received, two specific areas stand out.

First, every day in the United States, job creators in the construction industry are faced with the reality of Project Labor Agreements. These collective bargaining agreements tip the scale of an open-bid process in favor of organized labor and shut out non-union shops – many of which are minority-owned and women-owned small businesses. In fact, the vast majority of the U.S. construction workforce – nearly 87 percent -- is not unionized. Moreover, the cost of business increases dramatically because of Project Labor Agreements. Several recent studies have found that PLAs add as much as 18 percent to the cost of construction.

It wasn't surprising when the President issued an Executive Order barely two weeks into his administration encouraging a strong preference for PLAs in government contracts. When you calculate the total amount of billions of dollars in stimulus spending that has gone to construction projects and tack on 18% for the cost of Project Labor Agreement, the extra cash that went into the pockets of Big Labor and its allies is appalling.

Second, the Committee has heard from job creators that proposed workplace rules by the Occupational Safety and Health Administration threaten to impede economic growth in the construction industry. Fortunately, OSHA withdrew proposed rules regarding occupational noise and work-related physical disorders after input from the people who would have been most burdened by these rules. Meanwhile, other rules like OSHA's Injury & Illness Prevention Program indicate that the Administration has yet to comprehend how new layers of regulation can slow – and even stop – a full-scale revitalization of our nation's construction industry.

Make no mistake about it. Workplace safety is a priority concern. America has built the most successful, robust, and profitable market economy in the world, and we have done so with an unapologetic commitment to worker safety. Safety and success are not mutually exclusive in the United States.

But job creators are concerned about the trend at federal regulatory agencies that seem to be moving away from a compliance assistance model toward an enforcement and penalization model. Effective regulation does not require a threatening adversarial relationship between the federal government and the industries it monitors.

This hearing will continue the important dialogue between private-sector job creators, Congress, and the Administration about the steps necessary to foster an economic recovery that puts Americans back to work. The testimony we hear today from the front lines of a major sector of our domestic workforce will help us toward that goal. The Oversight Committee is one place in Washington where the government listens to the people, and tells the truth about failed government policy.

I welcome our witnesses, and yield to the Ranking Member for an opening statement.

###

Mr. KUCINICH. Thank you very much, Mr. Chairman.

I listened with great interest to your opening statement. I had some misgivings about the Recovery Act, but mine were on the other side. I felt it wasn't enough. I felt that especially in a way you proved it by citing the 21.8 percent of unemployment among these various trades people. I saw the battle going on on our side of the aisle, where people like Jim Oberstar tried to get highway funds for these shovel-ready projects that could have put people back to work. And the administration wasn't particularly sympathetic to his point of view.

So I think that we have to remember that only a quarter of the money that was spent, rather, a fraction of the money that went for the Recovery Act went actually for infrastructure and the kind of jobs that we are talking about here.

As far as PLAs, where I come from they equate to higher safety standards, higher craftsmanship, reliability. In short, you don't want public projects built by fly by-night contractors who aren't into craftsmanship and safety, so you don't have bridges falling down and schools falling apart. I have a prepared statement, I will just read a couple notes from it.

I hope that like other meetings we have, today's discussion doesn't focus simply on the cost of regulation of industry. Because in order to have a truly productive conversation about regulations that yield real results, costs have to be weighed against benefits. When we hear industry's concern about PLA, let's not ignore the evidence that shows PLAs not only facilitate a timely and efficient construction project, but they can also reinvigorate a community by employing local craftsmen, educating young apprentices and paying competitive wages.

The arguments against PLAs that I have been hearing, that PLAs are exclusionary and costly, are not convincing. So I am looking forward to addressing these concerns with the witnesses. I think it is very timely that we are talking about OSHA as well, because we are going to mark the 100th anniversary next week of the Triangle Shirtwaist Factory Fire. That was the workplace disaster that took the lives of 146 workers, because the factory failed to provide workers with any kind of basic workplace safety plan or provisions.

So I am going to ask unanimous consent to have the rest of my statement go into the record. But I think, Mr. Chairman, that the whole idea about PLAs, project labor agreements, it actually brings together people who, management and labor, so you can actually have a successful project. I think that is a model that we ought to be supporting. When we look at those who want to attack it because they are concerned about higher wages, it is interesting. But I bet you more often than not, that is never reflected in a lower cost of the project. What they really end up arguing about is trying to get a bigger share of their profits for the corporation and not for the workers.

So, thank you, Mr. Chairman.

Mr. JORDAN. I thank the ranking member. And without objection, the rest of his statement will be submitted into the record.

Members have 7 days to submit opening statements. I would just in response to my good friend from Ohio, I think he is right, we

are going to have a debate about PLAs and the impact. I get that. But I would make two points. Non-union construction companies aren't fly by-night companies. They are good companies as well. And we don't want to disparage either one.

Mr. KUCINICH. I would agree with that. I would agree with that.

Mr. JORDAN. And then second, I would say, the Member makes a good point. The stimulus was way too much of spending everywhere and not enough focused spending on infrastructure. I would agree. I was against it, and was against it for a variety of reasons. But I would agree with the gentleman that certainly, if you were going to spend that money, it would have been better spent had it been put more into infrastructure than all the other things it was spent on.

I thank the gentleman.

We will ask now for our witnesses to come forward, and we will get started.

Our first panel, we have first of all, Mr. John Ennis is the CEO of Ennis Electric Co. Welcome to the committee. Ms. Linda Figg is the CEO of Figg Engineering. Dr. Dale Belman is a professor at the School of Labor and Industrial Relations at Michigan State University. Mr. John Biagas is the CEO of Bay Electric Co., and Mr. Maurice Baskin is partner at the law firm of Venable LLP.

Pursuant to committee rules, all witnesses will be sworn in before testimony. If you would please rise and raise your right hands. It is the standard practice of the committee.

[Witnesses sworn.]

Mr. JORDAN. Let the record show that each witness answered in the affirmative. And we will start right down the line with Mr. Ennis. You have about 5 minutes. You have the lighting system in front of your name tag, which we can't see, but you can see. We have a clock up here, too. So you have 5 minutes, if you can keep your testimony close to that, that would be great.

And you are recognized.

STATEMENTS OF JOHN ENNIS, JR., CEO, ENNIS ELECTRIC, INC.; LINDA FIGG, PRESIDENT AND CEO, FIGG ENGINEERING GROUP; DALE BELMAN, PROFESSOR, MICHIGAN STATE UNIVERSITY, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS; JOHN F. BIAGAS, PRESIDENT AND CEO, BAY ELECTRIC CO., INC.; AND MAURICE BASKIN, ESQ., PARTNER, VENABLE LLC

STATEMENT OF JOHN ENNIS, JR.

Mr. ENNIS. Good afternoon, Chairman Jordan, members of the subcommittee. On behalf of the National Federation of Independent Business, I would like to thank you for giving me the opportunity to speak with you today regarding the impact that project labor agreements have on small businesses.

I am the owner and CEO of Ennis Electric Co., located in Manassas, Virginia. Ennis Electric was incorporated in 1974, and for the last 37 years has performed projects in and around the Washington Beltway from $10,000 to $27 million. Many of these projects are with local, State and Federal Governments. We complete most projects as a subcontractor.

Our experience encompasses many special use facilities for both Federal and local governments with a special emphasis on historic renovations and public education facilities. We employ over 120 individuals, many of which have been in our employ for years. We strive to foster a loyal work force by providing a safe, fair and enjoyable workplace, while maintaining the highest possible quality and craftsmanship on our projects, to exceed the expectations of our customers.

The majority of the work we obtain is through the bid process. Most of these solicitations are awarded to the lowest bidder with varying levels of pre-qualifications and/or technical proposals requiring previous work experience. In the past, these solicitations, which are funded by public dollars, have been free from project labor agreements, and therefore open to bidders who meet the technical requirements.

However, recent Federal policies have changed this practice, making it more and more difficult for small businesses to fairly compete for these contracts. The use of project labor agreements is a discriminatory tactic that prevents non-union construction companies from working on Government construction projects. The U.S. Department of Labor Bureau of Labor Statistics found in their annual report on union membership that from 2009 to 2010, membership fell from 14½ to 13.1 percent of the U.S. construction work force.

Consider the fact that the construction industry currently has an unemployment rate of over 20 percent, with one-fifth of the workers in the construction industry unemployed. How can Congress acknowledge that PLAs and other regulations only serve as an impediment to job creation?

In August 2010, Ennis Electric made offers to general contractors for three General Service Administration projects in Washington, DC. These projects were 1800 F Street modernization, the Lafayette Building modernization and the St. Elizabeth's adaptive reuse. Ennis Electric was fully qualified to execute these projects and our company had more experience than our competition did in performing these particular jobs.

Bidding on these types of jobs is a very intensive process for small business, and it can take hundreds of man-hours just to prepare an estimate prior to submitting the bid. My company spent 600 hours preparing our bids for these projects.

On all three of these projects our company was listed, as required by the solicitation, as the electrical contractor for the Offeror's non-PLA bid. It later came to our attention that all three of these projects were awarded on the basis that they adhered to project labor agreements.

So despite being fully qualified to do the work, Ennis Electric was not selected for the subcontract electrical work because of a project labor agreement. Further, because this change in the solicitation was made retroactive, we lost innumerable man-hours that were spent bidding these projects, for which we were qualified, but not considered because of our non-union status.

In this case, the impact of unfair PLA requirement will be felt by our company for years. The three aforementioned subcontracts represented over $30 million work over the next several years. As

a result, we have been forced to lay off approximately 15 percent of our work force. Unless we can find other opportunities, we could end up laying over 50 percent of our work force.

The decision to require discriminatory project labor agreements on these three subcontracts could not have come at a more unfavorable time for Ennis Electric and our employees, not to mention the American taxpayers who have to pay for the increased costs associated with these PLAs.

Thank you for the opportunity to testify on behalf of small business.

Mr. JORDAN. Thank you, Mr. Ennis.

Ms. Figg.

STATEMENT OF LINDA FIGG

Ms. FIGG. Mr. Chairman, distinguished members of the committee, my name is Linda Figg. I am very pleased to be here to represent the members of the Construction Industry Round Table, and to participate in this hearing on the critically important effort to identify the negative impact excessive regulations may have on job growth in our industry.

The Round Table is composed of slightly over 100 CEOs from the leading architectural, engineering and construction firms across the United States. Together, these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life for all Americans while directly employing nearly half a million Americans, easily double that when considering indirect jobs.

As such, as have extensive experience and first-hand knowledge of the challenges and complexities facing the design and construction industry when it comes to navigating the vast regulatory complex that has arisen with respect to our clients' projects.

Let me state on the onset that CIRT and its members are not opposed to regulations. What we oppose is the inefficiency, redundancy and overlapping jurisdictional mazes that have come to epitomize excessive regulations. America's can-do spirit, know-how and innovation still exist. It is just hard to find sometimes under the extensive laws, regulations and rules that the private sector faces while trying to create jobs that spur economic growth and expansion.

The uncertainty and unintended consequences of what seems like a never-ending expansion of Government's reach really damages the entrepreneurial spirit and desire to take risks which can help jump start a robust economy. When Government gives private businesses more freedom, not less, remarkable achievements can be accomplished to enhance prosperity for Americans.

In public works infrastructure projects, the Federal Government spends taxpayers' money to put people to work, create economic growth, improve America's global competitiveness and enhance the quality of life in communities. But oftentimes, these projects are subject to time-consuming and often redundant rules, which weigh down efficiencies and delivery time while increasing cost. These excessive procedures could be accomplished without unnecessary delays and costs.

A good example is the new I–35W bridge replacement. We will all remember the tragic day on August 1, 2007 when the interstate bridge carrying I–35W over the Mississippi River in Minneapolis suddenly collapsed during rush hour traffic, killing 13 and injuring many more. While rescue efforts proceeded, the Minnesota Department of Transportation immediately began a fast track process of building a new bridge.

Three days after the collapse, a request for qualifications was issued for design-build teams interested in the replacement contract, with five teams short-listed 4 days later. Technical and price proposals were received on September 14th, this is just over a month from the time of the collapse, and evaluated on a best value basis by 27 evaluators from 5 agencies considering both quality and overall price.

The design-build contract was awarded on October 8, 2007, just a little over 2 months after the accident. To allow construction to commence so quickly, the Minnesota Department of Transportation developed strong relationships with permitting agencies. With good will and a sense of common mission, the Minnesota Department of Transportation and the agencies agreed to make and keep reasonable commitments. Decisions that normally take months and years had to be made in hours and days.

Through this team effort, a project memorandum was issued, covering the environmental management issues and permitting the $234 million construction project to move forward. Construction of the new, 10-lane interstate bridge proceeded at an accelerated pace, utilizing a local work force, estimated at over 600 tradesmen and laborers, with a 504-foot main span over the Mississippi River erected in just 47 days.

On September 18th, the new bridge opened to traffic, more than 3 months early. The design and construction of the important interstate link that serves 141,000 vehicles per day was completed in just 11 months. This was only possible due to the spirit of cooperation and teamwork between the Minnesota DOT and the permitting agencies to eliminate road blocks often encountered in the environmental and permitting phase of the project, while still providing a sustainable, eco-friendly bridge that the community is proud of.

From notice to proceed with construction to opening to traffic was 339 days. The private sector was given the freedom to enhance the project quality, introduce innovations and engage the community in selecting some of the bridge's dominant visual features. The bridge highlights innovation with smart bridge technology, 323 sensors that provide long-term valuable information on the bridge. Landscaping provided better drainage. Nanotechnology concrete cleans pollution from the air, and LED lighting, a first for highway, cuts the cost of energy and maintenance.

But when it came to innovation, there was no regulation that told anyone that these things needed to be done. These were choices and benefits that were brought to the project through an open, streamlined process. It was a triumph of a recovery and our country can have the same recovery.

The experiences from the new I–35W bridge replacement could be left for just one project. Or we can take to heart the clear, un-

mistakable lessons we have learned and put them to work across the board on a whole myriad of public projects, so that America gets the benefit of efficient, science-based and cost-time sensitive regulations in a manner that gets important infrastructure built, while still protecting and caring for our important environment.

Private industry, when given more freedom, can achieve amazing results to build a stronger America. It is time to inspire the recharging of the American spirit to help us grow into a strong economy. CIRT and its members stand ready to assist the committee in whatever way it can to provide input into possible approaches and methodologies that will apply the streamlining lessons of successful work to a larger scope of Federal projects.

I want to close by thanking you, Mr. Chairman, and the other distinguished committee members, for your time and attention.

[The prepared statement of Ms. Figg follows:]

Testimony of

Ms. Linda Figg
President/CEO, Figg Engineering Group
Representing the
Construction Industry Round Table (CIRT)
to
U.S. House of Representatives
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Hearing on March 16, 2011
"Regulatory Impediments to Job Creation:
The Cost of Doing Business in the Construction Industry"

Time to Unleash America's Spirit and Innovation to Spur Economic Activity: The New I-35W Bridge Case Study

America's "can-do-spirit", "know-how" and "innovation" still exists, it's just hard to find sometimes under the extensive laws, regulations, and rules that the private sector faces when trying to create jobs that spur economic growth and expansion. The uncertainty and unintended consequences of what seems like a never ending expansion of government's reach damages the entrepreneurial spirit and desire to take risks – which can help jump start a robust recovery. When government gives private businesses more freedom, not less, remarkable achievements can be accomplished to enhance prosperity for Americans.

The American public has indicated, with an amazing 81 percent agreeing that the government "needs a basic overhaul" and should undertake "an annual 'spring cleaning' to eliminate unnecessary regulations and red tape;" according to a recent Clarus Research Group poll.

So let's begin with where the federal government spends taxpayer money to put people to work, create economic growth, improve America's global competitiveness and enhance community quality of life – namely, public works/infrastructure projects. Right now, dollars allocated to be spent on these projects are subject to time consuming and often redundant rules which weigh down efficiencies and delivery times, while increasing costs. [*See,* Attachments A & B for the affect "red tape" has on costs/time, and the resulting dilatory impact on jobs]. These excessive procedures could be accomplished without unnecessary delays and costs. A good example is the new I-35W Bridge replacement project.

Time of Tragedy/Time of Renewal – August 1, 2007, was the tragic day when the bridge carrying I-35W over the Mississippi River in Minneapolis suddenly collapsed during rush hour traffic, killing 13 and injuring many more. While rescue efforts proceeded, the Minnesota Department of Transportation (MnDOT) immediately began a fast-track process of building a new bridge. Three days after the collapse, a Request for Qualifications was issued for design/build teams interested in the replacement contract, with five teams shortlisted four days later. Technical and price proposals were received on September 14th and evaluated on a best-value basis by 27 evaluators from five agencies, considering both quality and overall price. The selected design/build team of Flatiron-

Manson with FIGG was awarded the contract on October 8, 2007, just a little over two months after the accident.

To allow construction to commence so quickly, MnDOT developed strong relationships with permitting agencies. With good will and a sense of common mission, MnDOT and the agencies agreed to make and keep reasonable commitments. Decisions that normally take months and years had to be made in hours and days. Through this team effort, a project memorandum was issued covering the environmental management issues and permitting the $234 million construction project to move forward.

Construction of the new 10-lane bridge proceeded at an accelerated pace utilizing a local workforce estimated at over 600 tradesman and laborers, with the 504' main span over the Mississippi River erected in just 47 days. On September 18, 2008, the new bridge opened to traffic more than three months early. The design and construction of this important interstate link serving 141,000 vehicles per day was completed in just 11 months. This was only possible due to the spirit of cooperation and teamwork between MnDOT and the permitting agencies to eliminate roadblocks often encountered in the environmental and permitting phase of the project, while still providing a sustainable eco-friendly bridge that the community is proud of.

From notice-to-proceed with construction to opening to traffic was 339 days. The private sector was given the freedom to enhance project quality, introduce innovations and engage the community in selecting some of the bridge's dominant visual features. The bridge highlights innovation with "smart bridge" technology – 323 sensors that provide long term valuable information on the bridge. Landscaping provided better drainage, nano-technology concrete cleans pollution from the air and LED highway lighting (a first) cuts the cost of energy and maintenance.

The full story of this project is found in the attached book "Bridging the Mississippi: The New I-35W Bridge, Minneapolis, Minnesota".

Lessons Learned – The experiences from the new I-35W Bridge replacement could be left to just one project, never to be repeated and studied. Or we can take to heart the clear unmistakable lessons we've learned and put them to work across the board on a whole myriad of public projects so that America gets the benefits of efficient, science-based and cost/time sensitive regulations in a manner that gets important infrastructure built while still protecting and caring for our environment.

To expect the U.S. economy to expand and become robust through government intervention and excessive regulations, is to expect something that "never was and never will be" – to borrow from a wise Thomas Jefferson comment about a nation that cannot be ignorant and free. Private industry when given more freedom can achieve amazing results to build a stronger America. It's time to inspire the recharging of the American spirit to help us grow into a strong economy.

Construction Industry
Round Table

Attachments:

A – CIRT Sentiment Index 1st Q 2011 Summary

B – Infrastructure Job Creation and Economic Activity

C – Linda Figg Bio

D – The New I-35W Bridge Book

FMI

CIRT SENTIMENT INDEX REPORT

FIRST QUARTER 2011

CURRENT CIRT SENTIMENT INDEX SUMMARY

Overall Economy	UP
Overall Economy Where We Do Business	UP
Our Construction Business	UP
Residential Building Construction Market Where We Do Business	UP
Nonresidential Building Construction Market Where We Do Business	UP
Our Expected Backlog	UP
Cost of Construction Materials	HIGHER
Cost of Labor	HIGHER
Productivity	HIGHER

CIRT SENTIMENT INDEX FIRST QUARTER 2011 EXECUTIVE SUMMARY

The CIRT sentiment index moved up solidly this quarter to 56.9 from 51.6 last quarter, still not above its high of 57.8 in the second quarter of 2010, but in positive territory for five quarters now. This signals a slow, somewhat uneven recovery, but a recovery nonetheless. For the first time in this report, we added a new section of our index to gauge the activity in the engineering and design sector of the industry, the "Design Index." Since many CIRT member companies engage in design and construction activities, this addition will give a more rounded representation of the membership serving as panelists and possibly a forecast of follow-on construction strength in particular areas. Our first reading for this section of the index is 55.2, or commensurate with the current CIRT Sentiment Index results. Strong components of the engineering and design index include consulting, planning and international work. At the same time, the strength in these particular design index components may also give some insight into why construction portions of the index, such as commercial, health care and education, are slow to recover. In short, the strong design components are not signaling strength in the aforementioned major construction segments as of yet.

For current issues this quarter, we look at some hot topics, regulatory "red tape," jobs and panelists' opinion of the election results. One of the hottest issues in government these days, after the budget and jobs debates, is the topic of addressing and reducing regulatory red tape. Contractors, especially those who do a lot of work in the public sector, have been dealing with these issues for a long time. We asked them to give us some idea how much red tape affects losses of time and money on projects, and most said they have experienced at least a 5% loss of time or costs due to delays caused by red tape. Their responses are detailed below, but to be sure, even those seemingly small delays cost the industry billions of dollars a year, and many panelists have experienced even greater delays.

On a positive note, even though the CIRT Sentiment Index has increased slowly this quarter, the consistent improvement is enough for more panelists to increase their hiring plans for 2011, as 54% plan to hire up to 5% more salaried staff. This is another good sign we are moving away from the recession and planning for better times.

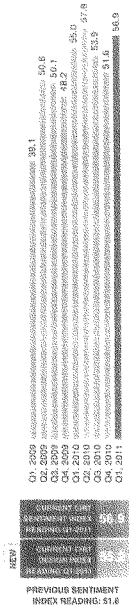


EXHIBIT 1

CIRT Sentiment Index
Scores Since Inception: Q1, 2009 to Q1, 2011

(Scores above 50 indicate expansion, below 50 indicate contraction)

CURRENT ISSUES

Delays and Costs Due to Regulatory "Red Tape"

The term "red tape," is considered derogatory and covers a broad array of regulations and paperwork usually required by a government regulatory agency. Checking Wikipedia, you will find the term has been used for centuries to describe the red ribbon or tape used to bind stacks of legal documents. Knowing the historic use of the term, we can be certain that it will not go away anytime soon. The current focus on red tape in Washington and by some state and local governments around the country is spurred on by growing deficits, growing bureaucracy and the need to assure small businesses and taxpayers that governments are doing all they can to reduce what is often referred to as the "hidden tax." Last quarter we asked panelists how the recession had changed their companies and operations. We heard how companies have worked to become leaner and more productive, often a painful but necessary undertaking. There now appears to be a growing awareness across the country that governments (federal, state and local) need to take the same steps that businesses have been forced to take to survive. Therefore, for the first quarter of the new year, we asked panelists to tell us of some of their experiences with respect to regulatory red tape on design and construction projects.

In a survey in 2006 on the topic of multiuse, urban-infill projects, we found that a developer or builder should expect to spend 2.5 to three years in the approval, zoning and permitting process when evaluating a high-density project. Therefore, notwithstanding a gradual recovery, it is not hard to see that there are some regulatory impediments to overcome before the industry is back to full speed, even if banks are ready to lend again. For our first quarter survey, 30% of panelists said they experienced a loss of 5.5% to 10% of time on projects due to regulatory red tape. Thirty-five percent said regulatory delays cost 5.5% to 10.0%, on average, for a typical project. While these numbers don't appear alarming at first — and a significant percentage of panelists reported higher numbers — when one considers that, if even half of that lost time and cost were unnecessary (although one may contend all of it was unnecessary), **the losses to the economy range in the billions of dollars each year.** That means not only fewer people working, but also displacements to potential end-users, such as: more overcrowded schools, road congestion, etc., as well as economic expenses from delayed infrastructure improvements that may result in higher costs to producers, merchants, owners, consumers and/or taxpayers.

To get more detail about the losses due to regulatory red tape delays on construction projects, we asked panelists to estimate the differences in costs and time lost in the design and construction phases. As might be expected, in the design phase, the loss is greater in time, according to 49% of panelists. On the other hand, according to 35% of panelists, the construction phase suffers greater financial costs. In both cases, of course, time always relates to costs; but when the concrete is poured, and the cranes are going up, unnecessary delays tend to get very expensive.

Is it possible that these problems could be fixed or delays and red tape reduced? We asked if panelists had ever had experience on projects that addressed red tape and found a way to streamline the process without sacrificing important underlying reasons for the regulations. Sixty percent said "no," but an encouraging 30% said "yes." Some of their comments and advice are reproduced below; but it is clear there are some good examples of collaborative team efforts among all the parties involved in the construction process to get things done better and reduce red tape.

EXHIBIT 3 In TIME and COST, what would you estimate are the losses (design through construction) due to delays caused by regulatory red tape? (Red tape includes redundancies, inefficiencies, overlapping jurisdictions.)

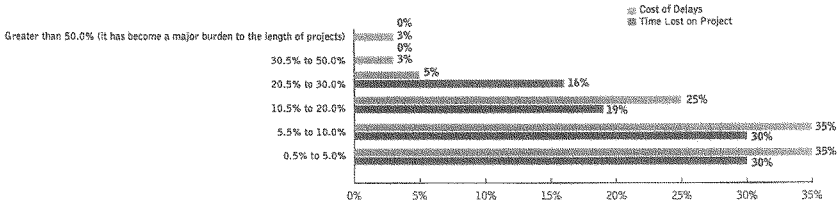


EXHIBIT 4 Related to TIME and COSTS, how do the regulatory impacts you identified above compare between the design phase vs. the construction phase of a project?

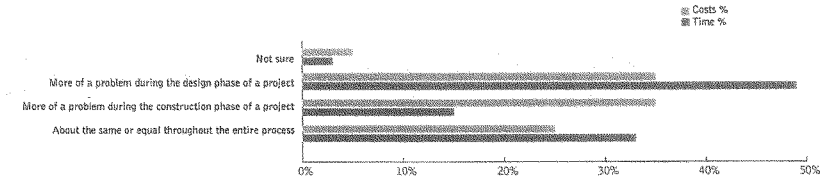
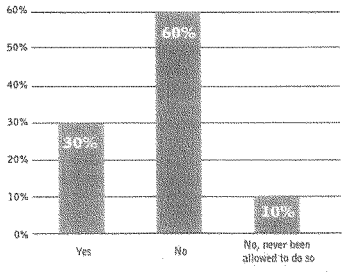


EXHIBIT 5 Are you aware of, or participated on, any significant projects that addressed "red tape" issues and found a way to streamline the process so as to bring the project in on time (or better) and on budget (or better) without sacrificing important underlying reasons for the regulatory process?



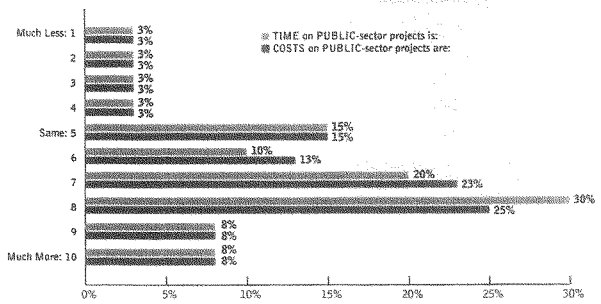
18

If "yes," please provide the project name and some brief details about the project(s) you are familiar with regarding streamlining.

Comments:

- On a project we have in Virgina that is private, we have shaved years off the usual schedule.
- The city of Pontiac went bankrupt. We didn't have a planning and engineering department to review plans and make inspections. We went to a neighboring town and paid it to do the reviews and inspections required. Downside, we paid twice for the work—the first time to Pontiac when we applied for the building permit and the second time when we had to pay the neighboring town. This is going to become a problem as the financially weak municipalities struggle with bankruptcy or receivership.
- Early engagement of public officials in ways that was new to the agency and design team. Staff reductions at many public agencies have necessitated new ways of approaching entitlement/approval processing.
- Flowermound Hospital, Flowermound,Texas. Integrated project delivery, lean design and lean construction techniques.
- Had a liaison with the city to work through all permit problems
- I-15 Salt Lake City, first highway design-build project for 2002 Olympics. I-405 widening in Los Angeles: first Caltrans design-build project (awarded by LAMTA, because it has the legal ability to do design-build). Project was awarded without full financing. I-35W bridge streamlined all processes because it was an emergency replacement, and all agencies agreed to work together with efficiency.
- I-35W reconstruction in Minneapolis, fast-track D/B best value. Canadian P3 projects in western Canada.
- New Orleans flood control projects. The USACE used various procurement methods to cut time, reduce costs and improve quality. D/B and ECI (early contractor involvement) were used fairly successfully.
- On the Tampa Bay History Center, in Tampa, Fla., the mayor's office was contacted by the construction and owner's team prior to the start of the project and asked to give the project an "expedited process" for overcoming problems that might be encountered.
- Projects that involve owner partnering and direct involvement.

EXHIBIT 6 In your estimation, how do public-sector projects compare in general with private-sector projects when it comes to issues concerning regulatory red tape?



Hiring Plans for 2011

When we asked panelists about their expectation for hiring in 2009, we were not too surprised to learn most expected to downsize at the height of the recession. Nonetheless, the amount of staff reduction was alarming. In 2010 we saw more of the same, as industry employment dropped by 20% or more since the beginning of the recession. In 2011 we can expect some pockets of downsizing to continue, but the downward trend for employment is beginning to show definite signs of reversal, as 54% of panelists expect to increase full-time, salaried staff by up to 5% in 2011, and 17% expect to add up to 10% more salaried staff.

The signs that the industry is hiring more than firing bode well for the turnaround. However, new hiring is by no means a move just to increase the number of warm bodies on staff, as it seemed to be back in the boom times. It also does not mean all those let go will just return to work; some may have found work elsewhere or stopped looking for work by now. Of planned new hires, only 17% are expected to be rehires. Even if business does not pick up as fast as some expect, 29% of our panelists said there is always room for exceptional individuals. New hiring will be for very specific positions, adding staff due to plans to enter new markets (24%), and only when the current staff is consistently at or above 100% capacity, according to (18%) of panelists, or assuring the right people are in place for management succession plans (12%).

Construction Industry Round Table

Infrastructure Job Creation and Economic Activity

Introduction
Contentions regarding the job creation and economic activity stimulated from infrastructure expenditures have been studied for some time by a number of independent and even government entities over the years. And while the findings are not always 100% consistent, they are all in agreement that some level of job creation and economic activity is "supported" by infrastructure expenditures.

Red Tape's Impact on Jobs
Applying the cost findings in Attachment A to the FHwA federal government study on the number of construction workers that are directly affected or "supported" by $1.0 billion in spending results in a rough approximation of the dilatory impact red tape has on jobs.

11,921 jobs per $1.0 billion in spending = ***941,759 jobs***
affected (or are lacking support) due to regulatory "red tape." [That is: 10% of $790 billion dollars in overall Jan.'11 construction spending, or 79 x 11,921].

Even if one assumes a very conservative estimate as to the exact number of jobs not being supported (or possibly created) it still amounts to potentially 100s of thousands of positions that could have been sustained in a more efficient atmosphere.

Unfortunately, the costs due to regulatory inefficiencies are not isolated to only public sector projects – but, have spread into even *private* sector work that has been burdened with similar "red tape" in order to meet the requirements of government. [*See*, Exhibit 6, Attachment A for details].

USDOT/FHwA Study
"*Employment Impacts of Highway Infrastructure Investment*" (Updated 4/2008) is a recent study in which the USDOT/FHwA revised earlier reports by using new computer simulation results from their internal 1997, 2005 and 2007 figures. The new release indicates that the latest estimate of job impacts is **34,779 per billion dollars** (not the earlier USDOT study's 47,500 figure).

Impacts of $1,000,000,000 Federal Expenditure with 20% State Share 1997, 2005 and 2007 (2007 dollars)			
	1997	**2005**	**2007**
Construction Oriented Employment Income	$736,704,000	$536,053,016	$493,517,797
Construction Oriented Employment Person-Years	**19,584**	**12,572**	**11,921**
Supporting Industries Employment Income	$278,221,000	$240,940,000	$218,834,879
Supporting Industries Employment Person-years	6,939	5,604	5,405

Induced Employment Income	$681,478,000	$685,193,000	$615,113,374
Induced Employment Person-years	21,052	18,311	17,453
Total Employment Income	$1,696,406,000	$1,462,188,000	$1,327,466,049
Total Person-years	**47,500**	**36,488**	**34,779**

* Preliminary

About the use of the job employment and income figures:

- The FHWA analysis refers to jobs *supported* by highway investments, not jobs *created*;
- The distinction needs to be made between jobs directly related to highway construction – about one-third of the total jobs – and the supporting industries' and induced employment jobs.

Mr. JORDAN. Thank you for giving us some positive news. That is good to hear. So often testimony is not that, but it is good to hear that it worked so well there. And you are exactly right, that is what we want to foster in the future.

Dr. Belman.

STATEMENT OF DALE BELMAN

Mr. BELMAN. Let me thank the distinguished members of the committee for this opportunity to talk about project labor agreements.

A project labor agreement is an agreement between a public or private owner, a building trades union or unions, and more frequently, construction employers. And the owner assures that the project will be built under union terms and conditions, but not necessarily by union workers, and receives in turn a number of benefits. One is an assurance against strikes or other disruptions of construction activity. And typically, very close labor-management cooperation, and an informal means of resolving disputes. An assurance of ready access to appropriately skilled labor, within 48 hours of the need.

They can and often do obtain concessions from building trade unions with regard to wages, benefits and working conditions. And PLAs can be used to achieve socially valued goals, such as advancing individuals from low income and disadvantaged groups into construction training programs and into good jobs in the construction industry.

Now, PLAs can provide value to owners of construction projects, but that requires choosing the right project, writing the right PLA. Owners need to know what they need from a PLA, and how to write the PLA they need. It is used extensively in the private sector because there is knowledge of this, because it is possible to do this. We find that Dow Chemical, Toyota, Pfizer pharmaceuticals, Donald Trump used PLAs to obtain value in their construction work.

Now, PLAs provide two forms of value. We need to distinguish these. First of all, there is construction value. This can be, with a well-written PLA on the right project, cheaper to complete, on-time completion, better quality construction, better safety and health outcomes, and reduced need for oversight by project managers.

There is also social value. And this can be provision of superior training and access to jobs, family supporting wages and benefits, adherance to labor and employment law, reduction in medical-social costs to local community, local hire. It can also have possibly negative consequences of excluding non-union employers. But we will talk about that.

Where do we expect to see value from PLAs? In terms of industrial and commercial projects, my interviews, I have interviewed more than 200 people, or my co-authors have, larger projects, $5 million to $10 million is the threshold for industrial and commercial. Projects where completion time is important, projects where skill levels and training are important, projects built under prevailing wage requirements.

How do PLAs create value? First of all, direct concessions. Change overtime and premium rates, modify apprentice ratios and

so on. There can also be harmonization of working time across trades, changing start times, holidays, flexible scheduling, a number of other steps that increase the efficiency of the utilization of labor. And I should say that these issues face non-union as well as union contractors in terms of the terms of the trade and how the employees actually expect to be treated.

Provision of skilled labor on an expedited basis. There was a big issue in obtaining skilled labor, and it delayed many projects from 2002 to 2007. In fact, it killed a number of private sector projects. And yet, a PLA was a good investment in making sure that if you were going ahead with a project, you would have the labor when you need it. Employers do not need to carry excess labor.

We can also talk about how PLAs improve communication and cooperation on projects, and better coordination in a litigious and potentially chaotic industry. The management structures in many of the other parts of the construction industry today make it very hard for construction managers or DCs to actually control the project and get the results they want. PLAs become a tool to improve coordination.

The no strike provision has also allowed numerous PLA projects to continue during local contract disputes.

I don't have time right now to talk about whether, how PLAs affect project costs, but would be happy to answer questions on this. I will say that if one reviews studies that meet minimum standards of scholarly quality, the evidence isn't there that PLAs affect project costs. Indeed, most of the work that is cited is bad quality in the sense that it is quite inaccurate.

But I would like to speak to the issue of exclusion and this issue of whether it is a bad thing that non-union contractors are potentially excluded from project labor agreements. A first point is that the controversy, we should be clear, this is not about construction value, this is about social values. This is not about making a project cheaper, making a project come in on time. This is about social values and whether the potential exclusion of part of the labor force is an issue that we should respond to. And it may well be a public policy issue.

We need to understand that there are a series of other social values that PLAs advance, such as adherence to labor and employment law in an industry which has a very mixed record on following employment law, that PLAs encourage the provision of training through apprenticeship and pre-apprenticeship programs, that they assure the provision of family supporting wages and benefits, even for non-union workers on the job. That there is, PLAs generally encourage the use of a local labor force, so that wages and benefits stay in the local area. And they generally reduce social costs to an area when unbenefited construction workers use free community medical services.

Now, what I am arguing here is that if a social value is that we not exclude non-union workers from projects, these need to be weighed against the positive social values. That seems legitimate. A second is, it is not that hard to write a PLA that includes provisions which would make it more possible for non-union contractors to participate. The Toyota PLA only requires a letter of assent. It allows non-union contractors to bring current work force onto the

job, and paying union-level benefits into their own funds and a trust fund for employees. But they pay union rates, and indeed, Frank Mahomet, who is an ABC representative at a conference we had at Michigan State University, said that he could see a PLA which non-union contractors would not have an issue with.

I am clearly out of time. I thank you for your patience and look forward to answering your questions.

[The prepared statement of Mr. Belman follows:]

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB

The Voice of Small Business.

Testimony of John Ennis Jr.

House of Representatives Committee on Oversight & Government Reform

Subcommittee on Regulatory Affairs,
Stimulus Oversight and Government Spending

"Regulatory Impediments to Job Creation:
The Cost of Doing Business in the Construction Industry"

March 16, 2011

Good afternoon Chairman Jordan, and members of the Subcommittee. On behalf of the National Federation of Independent Business (NFIB), I would like to thank you for giving me the opportunity to speak with you today regarding the impact that Project Labor Agreements have on small businesses.

I am the owner and CEO of the Ennis Electric Company, located in Manassas, Virginia. Ennis Electric was incorporated in August of 1974 and for the last 37 years, has performed projects in and around the Washington beltway that range in size from $10,000.00 to $27,000,000.00. Many of these projects are with local, state and federal governments and we complete most projects as a subcontractor. We have the capacity to perform all aspects of electrical construction including but not limited to underground distribution systems, overhead distribution systems, site and sport lighting, normal and emergency power distribution systems, interior lighting and control systems, and specialty systems which include life safety, CCTV, security, sound and telecom. Our experience encompasses many special use facilities for both federal and local government agencies, with a special emphasis on historic renovations and public education facilities.

We employ over 120 individuals, many of whom have been in our employ for years. The benefits we provide are second to none and include, but are not limited to, top pay, medical, dental, life, disability, 401K, profit sharing, paid holidays and paid vacations. We strive to foster a loyal workforce by providing a safe, fair and enjoyable workplace while maintaining the highest possible quality and craftsmanship on our projects–to exceed the expectations of our customers. The longevity of employees, our minimal turnover, and our reputation with our customers is proof we are meeting these goals. With the simple philosophy of trying to be the best, and not the biggest, we have become an award-winning contractor and regularly receive accolades from our clients.

I'd like to talk a little about how we secure our contracts. The majority of the work we obtain is through the bid process. Most of these solicitations are awarded to the lowest bidder with varying levels of prequalification and/or technical proposals requiring previous work experience. I n the past, these solicitations, which are funded by public dollars, have been free from discriminatory requirements, such as Project Labor Agreements or PLAs, and therefore, open to bidders who meet the technical requirements. However, recent federal policies have changed this practice, making it more and more difficult for small businesses, like Ennis Electric to fairly compete for these contracts.

The use of Project Labor Agreements is a discriminatory tactic that prevents non-union construction companies from working on government construction projects. The federal government's insistence on PLAs makes it much more difficult for a business like mine to bid on projects. Typically, PLAs are pre-hire contracts that require projects to be awarded only to contractors and subcontractors that agree to:

- Recognize unions as the representatives of their employees on that job;
- Use the union hiring hall to obtain workers;
- Obtain apprentices exclusively from union apprenticeship programs;

- Pay into union benefit plans; and,
- Obey costly, restrictive and inefficient work rules.

The U.S. Department of Labor's Bureau of Labor Statistics found in their annual report on union membership, that from 2009 to 2010 union membership fell from 14.5 percent to 13.1 percent of the U.S. private construction work force. If 86.9 percent of construction workers are non-union, the vast majority of construction companies are shut out of the bidding process. In addition, these PLAs increase the cost of construction by unfairly reducing the number of companies which can competitively bid. Consider the fact that the construction industry currently has an unemployment rate of over 20 percent: with one-fifth of workers in the industry unemployed, how can this Congress not acknowledge that PLAs and other regulations only serve as impediments to job creation?

In August 2010, Ennis Electric made offers to general contractors for three General Services Administration (GSA) projects in Washington, D.C. The projects were for the 1800 F Street Modernization, The Lafayette Building Modernization and St. Elizabeth's Adaptive Re-use. Ennis Electric was fully qualified to execute these projects and our company had more experience than our competition did in performing these particular jobs. Bidding on these types of projects is a very intensive process for small businesses, and it can take hundreds of man hours just to prepare an estimate prior to submitting a bid. My company spent 600 hours preparing our bids. And although the original solicitations for these three federal projects did not include any PLA verbiage, they were eventually amended to include them for the final submission.

On all three projects our company was listed, as required by the solicitation, as the electrical subcontractor for the Offerors non-PLA bid. It later came to our attention that all three of these projects were awarded on the basis that they adhere to a Project Labor Agreement. So despite being fully qualified to do the work, Ennis Electric was not selected for the subcontract electrical work because of a Project Labor Agreement. Further, because this change to the solicitation was made retrospectively, we lost innumerable man hours that were spent preparing bids on projects for which we were qualified but not considered because of our non-union status.

In this case, the impact of the unfair PLA requirement will be felt by our company for years: the three aforementioned subcontracts represented over $30 million dollars of work over the next several years. As a result, we have been forced to layoff approximately 15% of our workforce and unless we can find some other opportunities we could end up laying off over 50% of our workforce. The decision to require discriminatory Project Labor Agreements on these three subcontracts could not have come at a more unfavorable time for Ennis Electric and our employees—not to mention the American taxpayers, who will have to pay for the increased costs associated with PLAs.

I want to be clear: I am not unsupportive of labor unions. They have played a meaningful role in our nation's history. However, the government's insistence that all government contracts of a certain size must use union labor – when a shrinking portion of the

workforce consists of union members – is nothing more than a payoff to union-organized companies, and a slap in the face of small businesses who are responsible for creating two-thirds of American jobs and keeping the market competitive.

The economic climate for small businesses is still very tough, especially in the construction industry. The national unemployment rate in the construction industry hovers around 20%, and we see few signs of things improving.

According to the NFIB Small Business Economic Trends report, small business optimism is on the rise, albeit in a very fragile state. In its latest report, NFIB found that small business hiring and future plans to hire were solid for the first time in months, and hopefully presage a string of steady job creation months this year. Still, only a net 9% of small business owners surveyed expect that business conditions will improve over the next six months, suggesting that the actions we take now will determine how our economy will fair in the next few years. For small business owners like me, it is the increased regulations and discriminatory hiring tactics like PLAs that make it impossible to have confidence to hire, make capital investments and grow my company. Congress must put a stop to practices that prevent small businesses from growing. Eliminating discriminatory PLAs is a good place to start.

Thank you for the opportunity to testify today on behalf of small business.

CORE VALUES

We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of the NFIB's endeavors, and each person has a valued contribution to make.

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The Voice of Small Business.

Mr. JORDAN. Thank you, Doctor.
Mr. Biagas.

STATEMENT OF JOHN BIAGAS

Mr. BIAGAS. Thank you, Mr. Chairman, ranking member, members of the committee. Thank you for allowing me to give testimony today.

Being the youngest of 14 children, 8 boys and 6 girls, from the great State of Louisiana, Lake Charles is where I was born, I have had the opportunity to work in the electrical and also join the construction field for many years. The trade is one that all the males in the family learned from our father, Alvin Biagas, who was a master electrician. Most of us learned both on the job and some later served as electrical apprentices, trained in the classroom through the IBEW, Local 861, in Lake Charles. I served in Local 26 here in Washington, DC, from 1987 to 1991.

I am a licensed master electrician in the State of Virginia, Maryland, Georgia, Louisiana, North Carolina, Washington, DC, and also several other States.

In the spirit of the American dream, I purchased Bay Electric Co., Inc., in 1997. Bay is a non-union merit shop and began in business over 47 years ago. The company had revenues of just over $1 million when I bought it, and over the years, our team has grown this enterprise to roughly over 85 times that size. We have grown the size of our work force from 18 when I purchased it to over 190 today.

Our work force has 155 field workers, which are licensed electricians, apprentices, which are registered in State and Federal programs, foremen, laborers, superintendents, office staff of 35 persons, project managers and so on.

Bay performs a large amount of work and service work with the Department of Defense, the Army, Navy, Air Force and all of the Defense groups, State and local governments, as well as private customers from Maine to Florida and as far west as Louisiana. The projects range in size from $31 million to as small as a $68 Service order. We perform large-scale, complex electrical projects which include low voltage fire alarms, lighting, high voltage, up to 35,000 volts, controls, motors and many electrical tasks.

Bay also is a full service general contractor. Over the last 5 years, we have performed in excess of $300 million worth of design-build and also renovation projects as both prime contractor and also subcontractor for numerous Federal clients, such as USDA, DOD and Homeland Security.

All of the projects that we have done were completed on time and under budget. Bay has a 99.9 on-time project completion rate, and has never been assessed LDs for late delivery by any Federal, State or local agency or any other private customer, for that matter. Bay Electric also has a 99.97 percent budget completion rate, on budget or below budget. Also on safety, Bay has an EMR rate of 0.91, and after our audit this year, we expect that rate is going to go down again. So we are a very safe contractor.

As you will find a listing of the projects we receive, there are a number of projects, and just in the interest of time, I am going to move on. But we have done projects as large as $31 million, we

have done for Braddock, we have done work at Belvoir, just about every State from Maine to Florida, and certainly continue to do so.

The issue I want to discuss with the committee is the executive order 13502, which encourages project labor agreements on Federal projects over $25 million, and effectively discriminates against over 85 percent of the construction industry. Unions account for less than 6 percent of the private work force in Virginia, and over 90 percent of the work, both public and private, is performed by non-union firms, such as Bay Electric Co. No merit shop contractor would sign a PLA because, among other things, the non-union workers would have wages taken out for health plans, welfare, retirement and also other deductions to which the worker will never see a benefit of, and will not be vested in these union plans.

Union-only agreements drive up costs by limiting competition and in Virginia, less than 5 percent of the construction firms are union. These agreements have a chilling effect on the number of firms which would undertake such bids. Unions also have a huge issue with unfunded pension liabilities, and merit shop contractors would be crazy to take on such massive liabilities with no benefits to the workers.

PLAs also drive up costs by enforcing inefficient work rules and limiting production, hurting morale and in most cases, add numerous man-hours to projects and drive up costs, both direct and indirect. With the tenuous state of our economy nationally and the difficult times we are in with real unemployment in construction, nearing over 23 percent, can any Government entity afford to waste precious funds? As a former union member, it troubles me that unions would want a special deal just for them when fair competition is a cornerstone of our total economic system.

The proponents of PLAs will say that labor work stoppages are a benefit to using them. The truth is that there has never been a man-hour lost to strikes, picketing, work stoppages, slowdowns or other disruptive activity on the non-union merit side, just the union side. As a former union member, I have witnessed first-hand the tactics used by unions to slow down work, drag out projects for the union benefit. PLA proponents also will say that they help to promote fair wages and higher pay. This is also a farce. We at Bay Electric pay on average more than unions in wages, benefits and offer paid vacations, holiday pay, health insurance and 401(k) plans.

I am going to close, because I have a little bit more to go in between there. But in closing, most of the folks that are actually affected by the PLAs are ethnic minorities who do not belong to a union and not have no hope of being employed by union shops as shown in the attached Washington National Stadium studies. Union minority membership rates are horrible. And the union leadership does not represent minorities in any fashion, except for a few token positions at union halls.

PLAs on the surface are racist and should not be used or allowed to be adopted in Federal projects. I thank you, Mr. Chairman.

[The prepared statement of Mr. Biagas follows:]

Testimony of John F. Biagas

President –CEO of Bay Electric Co.; Inc Newport News, Virginia 23607

To the subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Mr. Chairman, Ranking Minority Member and Members of the Committee, Thank you for allowing me to give testimony regarding Impediments to Job Creation and the cost of doing Business in the Construction Industry.

Being the youngest of 14 children (8 boys and 6 girls) originally from Lake Charles, Louisiana I have had the opportunity to work in the Electrical and General Construction Field for many years. The electrical trade is one that all of the males in the family learned from our Father, Alvin J. Biagas whom was a Master Electrician. Most of us learned both on the job and some later served as Electrical apprentices trained in the classroom through the IBEW Local 861 in Lake Charles and I served apprenticeship with IBEW Local 26 here in Washington DC. From 1987 to 1991. I am a licensed Master Electrician in the State of Virginia, Maryland, Georgia, Louisiana, North Carolina, Washington DC and several other states.

In the spirit of the American Dream, I purchased Bay Electric Co., Inc. in 1997. Bay Electric is a Non-Union (Merit) shop and began in business over 47 years ago. The Company had revenues of just over $1MM when I brought it and over the years our Team has grown this enterprise over 85 times that size. We have grown the size of our workforce from 18 when I purchased it to 190 today. Our work force has 155 field workers which are Licensed Electricians (95), Apprentices (30 registered in a Federal - State approved program), Forman, Laborers and Superintendents. Our office staff of 35 persons consists of Project Managers (GC and Electrical), Estimators, Project Manager Assistants, Accounting staff, HR, Administration, Executive managers and warehouse workers.

Bay performs a substantial amount of construction and service work with the Department of Defense, Army, Navy, Air force and other defense support groups along with State and Local Governments and private customers from Maine to Florida and as far west as Louisiana. These projects range in size from $31,000,000 to as small as a $68.00 service order. We perform large scale complex Electrical projects which include, low voltage, fire alarms, lighting, high voltage up to 35KV, controls, motors and many other electrical tasks. Bay also is a full service General Contractor which over the last 5 years has performed over $300MM of Design Build and renovations projects as both Prime contractor and Sub Contractor for numerous Federal Clients

such as USDA, DOD, and Homeland Security along with many others. All of the projects were completed on time and on or under budget. Bay has a 99.98% on time project completion rate and has **never** been assessed liquidated damages for late delivery by Federal or any other customer. Bay Electric has a 99.97% on Budget completion rate. On Safety Bay has an EMR of .91 which is very good for our industry and we fully expect this rate to decrease again this year after the insurance safety audit is performed.

Attached you will find a listing of projects received since 2008 and I will point out a couple as examples: Bay has completed several projects as a part of BRAC in our region and throughout the south such as the 16th CAV General Instruction Complex Battalion Headquarters at Fort Benning Georgia valued at $9,253,845. This General Construction project consisted of designing and building Three Army HQ buildings; a small (16,000 Sq. ft.), medium (17,000 Sq. Ft.), and large (18,000 Sq. Ft.) HQ building. This project was designed in 6 months and construction completed in one year which is a huge task. We had no accidents and were below budget on the task from the U. S. Army Corps of Engineers in Time for the solders moving on base from other closed bases. Bay received an above average rating for this project from the Corps.

Bay also completed a Grow the Force-Unit Maintenance HQ Facility at Fort Campbell, KY valued at $5,466,072 and completed in 16 months on time and on budget, design time was four months and the 31,000 square foot facility was completed on time even with numerous unforeseen site issues. This also was a project managed by the U.S. Corps of Engineers Louisville District, and Bay also received an above average rating on this project.

The issue I wish to discuss with the Committee is Executive Order 13502 which encourages Project Labor Agreements on Federal projects over $25MM and effectively discriminates against over 85% of the construction industry. Unions account for less than 6% of the private work force in Virginia and over 90% of the work both Public and Private is performed by Non Union firms such as Bay Electric. No merit shop contractor would sign a PLA because among other things the non-union workers would have wages taken out for Health plans, welfare, retirement and other deductions to which the worker will never see a benefit paid back as they would not be vested and part of the union plans. Union Only agreements drive up costs by limiting competition and in Virginia less than 5% of the construction firms are union; these agreements have a chilling effect on the number of firms which would participate in such bids. Unions also have a huge issue with the unfunded pension liabilities and Merit shop contractors would be crazy to take on these massive liabilities with no benefit to the workers.

PLA's also drive up costs by enforcing inefficient work rules and severely limit production which hurt moral and in most cases add numerous man-hours to projects and drive up costs both

direct and indirect. With the tenuous state of our economy nationally and the difficult times we are in with real construction unemployment over 23% can any Government entity afford to waste precious funds? As a former Union member it troubles me that Unions would want a special deal **"just for them"** when fair competition is a cornerstone of our economic system. The proponents of PLA's will say that labor work stoppages are a benefit of using them. The truth is that there has never been a man-hour lost to strikes, picketing, work stoppages, slowdowns or other disruptive activity on the non-union merit side, just the union side. As a former union member I witnessed firsthand the tactics used by unions to slow down work and drag out projects for the unions benefit. PLA proponents will also say that they help promote fair wages and higher pay. This also is a farce we at Bay Electric pay on average more than the unions in wages, benefits and offer paid vacations, Holiday pay, Health insurance, and Retirement 401K plan along with profit sharing paid two times per year based on merit and our workers are employed year round and are rarely laid off as normally happens on the union side.

Seven states have recently passed Non-PLA legislation because they realize that the political union payback is much too expensive and will subject the states to wasteful spending and also would hamper job creation and encourage waste.

In closing the folks also affected by PLA's are the ethnic minorities whom do not belong to a union and would have no hope of being employed by these union shops as shown in the attached Washington Nationals Stadium study. Union minority membership rates are horrible and Union leadership does not represent minorities in any fashion except a few token positions at most union halls. PLA's on the surface are racist and should not be allowed to be adopted in federal projects.

Thank you Mr. Chairman and Committee

Mr. JORDAN. Thank you, Mr. Biagas.
Mr. Baskin.

STATEMENT OF MAURICE BASKIN

Mr. BASKIN. Mr. Chairman and members of the subcommittee, [remarks off microphone] of Venable. I appear before you today on behalf of the Associated Builders and Contractors. It is a national construction industry trade association, representing 23,000 merit shop contractors employing 2 million workers.

ABC's members believe that construction contracts should be awarded to the lowest responsible bidder through full and open competition based on merit, with no discrimination based on labor affiliation. These same principles have been written into Federal law. The Competition in Contracting Act requires Federal agencies to award procurement contracts on the basis of full and open competition to the maximum extent practicable. Those are direct quotes from the law.

Unfortunately, the administration's efforts to impose project labor agreements as part of the Federal procurement process threaten to violate the Competition Act at the expense of taxpayers. As we have already heard, according to official Government statistics, 87 percent of construction workers currently choose not to belong to any labor unions. I must respond to something said a couple of speakers ago, that exclusion of non-union contractors is a mere social value, I would think that inclusion of 87 percent of the construction work force is not only a social value and a construction value, it is a fundamental right in our country.

Government-mandated PLAs result in the award of Federal construction contracts primarily to the much smaller group of unionized contractors and their union employees. This is special interest favoritism. It is not full and open competition. It is not what the law requires.

That is why in 2001, President Bush issued an executive order, which was upheld in the courts, that prohibited the Federal Government from requiring contractors to enter into project labor agreements. During the 8 years of that executive order, there were no significant labor-related problems on any Federal contracts. The buildings did not fall down. Indeed, it was on project labor agreements, some of the most notorious ones, such as the Big Dig, the Iowa Events Center, Miller Park, all project labor agreements that were Government-mandated, those did fall down causing fatalities and untold damage.

Open competition on the Federal sector under the Bush Executive order obviously worked. Nevertheless, with no evidence of any labor-related problems on Federal construction projects, President Obama signed his own executive order in February 2009 which revoked the Bush order that was working, and instead encouraged Federal agencies to mandate PLAs on Federal construction projects exceeding $25 million in costs.

But the President does not have the authority to override the Competition Act's requirement of full and open competition. There has been no factual justification for the change in policy offered up by any of the Government agencies, including those who are in attendance today. We have heard a couple of rationales for it, that

it is to avoid strikes. Well, there were no strikes going on on Federal projects. To gain access to a larger pool of labor? Tell us how that is possible when you exclude 87 percent of the work force, just to name a few of the false rationales that have been offered up.

That is why ABC members have filed a series of bid protests with the Government Accountability Office to stop unjustified PLA mandates from being imposed by Federal agencies. Through these protests, we have forced a number of agencies to withdraw those mandates. Yet, we continue to see threatened PLA requirements showing up on agency procurement around the country, as was confirmed again in Mr. Peck's testimony today, that we are going to hear, but that we saw on the subcommittee's Web site.

We intend to file a protest against the GSA's new preference policy in favor of PLAs on an upcoming project. That policy has already resulted in a multi-million dollar increase in the cost of construction on a project awarded here in the District of Columbia that Mr. Ennis' company was excluded from. And GSA should be required to make public the price comparisons between PLA and non-PLA bids on each of the projects listed in Mr. Peck's testimony.

Many independent studies, scholarly ones, I might add, have found that PLAs increase the cost of construction by as much as 18 percent. In fact, studies commissioned by the Federal Government have found that. Studies commissioned by State governments have found cost increases from PLAs. The Government mandates of PLAs will therefore result in reduced job creation within the construction industry at a time when we have this staggering 22 percent unemployment figure.

They hurt small businesses, particularly subcontractors. They discriminate against minorities and women-owned businesses, which are overwhelmingly non-union. They do nothing to increase or stabilize construction employee wages, which I also heard referred to today, because the Davis-Bacon Act already protects construction industry wages at a very high rate.

I will refer the rest of my remarks, given I have run out of time, that is in my written testimony. But I appreciate the opportunity to speak to you today.

[The prepared statement of Mr. Baskin follows:]

Statement for the Record for Associated Builders and Contractors

Testimony of
Maurice Baskin, Esq.

Before the
House Oversight and Government Reform Committee
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

On
"Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry"

March 16, 2010

The Voice of the Merit Shop®

TESTIMONY OF MAURICE BASKIN, ESQ.
BEFORE THE HOUSE SUBCOMMITTEE ON REGULATORY AFFAIRS,
STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

MARCH 16, 2011

Chairman Jordan, Ranking Member Kucinich, and members of the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending:

Good afternoon and thank you for the opportunity to testify before you today on "Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry." In the interest of time, I request that my full written statement be included in the hearing record.

My name is Maurice Baskin. I am a partner in the Washington, D.C. law firm of Venable LLP. I have written widely about project labor agreements, known as PLAs, and I have been involved in many of the lawsuits and bid protests filed against government-mandated PLAs in recent years. I appear before you today on behalf of Associated Builders and Contractors (ABC). ABC is a national construction industry trade association representing 23,000 merit shop contractors, employing 2 million workers. ABC's membership is bound by a shared commitment to the *merit shop philosophy.* This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts to the lowest responsible bidder through an open and competitive bidding process.

These same principles have been written into federal law. The Competition in Contracting Act (CICA) requires federal agencies to award procurement contracts on the basis of "full and open competition" and to draft all specifications and bid requirements so as to promote competition to the "maximum extent practicable." [1]

Unfortunately, recent efforts of the Administration to make PLAs part of the federal

[1] 40 U.S.C. § 253(a)(1).

procurement process threaten to violate the longstanding Congressional mandate of full and open competition in federal procurement, at the expense of taxpayers. These actions are adding to the nation's budget deficits and should be fully investigated and brought before the House through this Subcommittee's oversight.

Government-Mandated Project Labor Agreements (PLAs)

Typically, a PLA is a contract awarded only to contractors and subcontractors that agree to recognize unions as the representatives of their employees on that job.[2] Other common features of PLAs are requirements that nonunion contractors use a union hiring hall to obtain workers; obtain apprentices exclusively through union apprenticeship programs; pay fringe benefits into union-managed benefit and pension programs; and obey unions' restrictive and inefficient work rules and job classifications.

Government-mandated PLAs discourage competition from the majority of our nation's contractors and subcontractors who are not unionized. According to official government statistics, 87 percent of construction workers currently choose NOT to belong to any labor unions.[3] Rather than promoting full and open competition and maximizing the overwhelmingly non-union labor pool for government construction projects, government-mandated PLAs result in the award of federal construction contracts primarily to the much smaller group of unionized contractors and their union employees. Government-mandated PLAs are a corrupt form of favoritism in government contracting, having nothing to do with getting the best performance for the best price.

President Bush recognized the discriminatory and costly impact of government-mandated PLAs in 2001, and so he issued an Executive Order prohibiting the federal government from requiring or prohibiting contractors from entering into labor agreements.[4] During the eight years of that Executive Order, there were no significant labor–related problems

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[2] As defined in FAR 52.222-34, a "PLA" is "a collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project."

[3] *See* bls.gov "*Union Members Summary*" (Jan. 2011).

[4] Executive Order No. 13202 (2001).

or delays on any federal contracts.[5] Nevertheless, in February 2009, President Obama signed his own Executive Order 13502 which revoked the Bush order and instead "encouraged" federal agencies to mandate PLAs on any federal construction projects exceeding $25 million in costs. The FAR Council issued a rule to implement the Executive Order in April 2010.[6] Since then, the Administration and its union allies have exerted constant pressure on federal agency officials to impose PLAs on federal projects.

ABC members and their employees have serious concerns regarding the legality of Executive Order 13502 and the subsequent Federal Acquisition Regulatory (FAR) Council rulemaking implementing it. Neither the President nor the FAR Council has the authority to override the statutory mandate of full and open competition in all federal procurements. No fact-based justification for the change in policy has ever been shown, leading to the widespread belief that the Administration's policy is simply a political payback to organized labor. It is this kind of political favoritism that CICA was enacted to prevent.

Therefore, since 2009, ABC members have filed a series of bid protests with the Government Accountability Office (GAO) to stop unjustified PLA mandates from being imposed by federal agencies. In each case, the federal agency has withdrawn the PLA mandate rather than risk a finding of a procurement law violation. As a result of this process, we have learned that the government's own market research has shown repeatedly that PLAs will not serve the interests of the taxpayers, will discourage competitive bidding and will increase costs. Yet, we continue to see threatened PLA requirements popping up on agency procurements around the country.

Most recently, the General Services Administration (GSA) has adopted a new procurement policy creating a completely unjustified "preference" in favor of PLAs.[7] The GSA adopted its new policy without advance public notice or comment in violation

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[5] *See* Tuerck, Glassman and Bachmann, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem* (August 2009), available at http//abc.org/plastudies.

[6] FAR Case No. 2009-005 (Apr. 13, 2010).

[7] *See* GSA Public Buildings Service Procurement Instructional Bulletin 10-04 (Sept. 24, 2010).

of federal law. The GSA preference policy discriminates against non-union contractors and subcontractors without any justification. Public information on the government's own procurement website reveals that GSA authorized a multi-million dollar increase in the cost of construction on a project awarded last year, known as the Lafayette Building in Washington, D.C., specifically in order to implement a PLA on the project.[8]

Many reputable and independent studies have found that PLAs increase the cost of construction by as much as 18 percent when compared to similar projects in the same construction market not subject to a government-mandated PLA.[9] Given that there is a finite amount of public construction spending that can be paid for by taxpayer dollars, then government mandates of PLAs will obviously result in reduced job creation within the construction industry. All this comes at a time when the U.S. Department of Labor's Bureau of Labor Statistics reports that the construction industry is suffering from an unemployment rate of 22 percent.

Government-mandated PLAs serve as a regulatory barrier to the growth of small businesses. They discriminate against minority- and women-owned businesses which are overwhelmingly non-union. They do nothing to increase construction employee wages on government contracts, because such wages are already set at high levels by the Davis-Bacon Act on all federal construction projects.[10] Finally, in a disturbing number of cases, government-mandated PLAs have failed to deliver any of the benefits promised by their special interest supporters, and have instead become "problem" projects. I have personally monitored the public reports on the performance of government-mandated PLA projects for the last ten years.[11] The subtitle of my monograph on this subject - "The

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[8] *See* www.usaspending.gov.

[9] *See, e.g.*, *Annual Report to the Governor and Legislature, use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008* (NJDOL Oct. 2010), available at www.thetruthaboutplas.com; *Project labor Agreements – Impact Study for the Department of Veterans Affairs*, Rider Levett Bucknall (June 2009), available at www.thetruthaboutplas.com; Beacon Hill Institute, *An Economic Anlaysis of Government-Mandated PLAs: A Reply to Professor Kotler* (2009), www.beaconhill.org/BHIStudies.

[10] 41 U.S.C. § 3141.

[11] Baskin, *Government-Mandated Project Labor Agreements: The Public Record of Poor Performance* (2011 Ed.).

Public Record of Poor Performance" - should tell you what the record has been. Over and over again, where government-mandated PLAs have been imposed, there have been increased costs to taxpayers, reduced numbers of bidders, delays and defects in construction, worker safety problems, discrimination against minorities and women, and other law violations. An updated edition of this publication is about to be issued, and I will be happy to forward a copy to the Subcommittee.

ABC applauds the efforts of this Subcommittee to exercise oversight over the Administration's wasteful and, we believe, unlawful push for PLAs on federal and federally assisted construction projects. We also ask that the members of this subcommittee support the Government Neutrality in Contracting Act (H.R. 735), introduced by Congressman John Sullivan (R-OK), which will prohibit the federal government once and for all from requiring contractors to execute a PLA as a condition of winning federal or federally-assisted construction projects. This legislation will result in more construction jobs, more infrastructure renewal, and a more accountable federal government.

Concerns with the Occupational Safety and Health Administration

ABC and its members understand that exceptional jobsite safety and health practices are inherently good for business. ABC contractors strive for zero-accident work sites. They believe in the importance of common-sense regulations that are based on solid evidence and sound scientific analysis, with appropriate consideration paid to implementation costs and input from employers. Unfortunately, recent regulatory proposals from the Occupational Safety and Health Administration (OSHA) have threatened to increase costs that could cripple job creation and stifle growth in the construction industry, while offering little in return in terms of worker safety.

ABC has expressed concerns about several recent OSHA proposals, some of which circumvent existing checks and balances within the federal regulatory framework. In 2010, OSHA proposals regarding noise standards as well as injury and illness reporting threatened to impose exorbitant costs on businesses large and small. For months, OSHA remained unable to explain publicly why such costly proposals were necessary, and in January, the agency withdrew the proposals to obtain more information from businesses.

While ABC appreciates that OSHA has agreed to reevaluate these proposals in light of business' concerns, it is worth reiterating that both proposals will impose substantial burdens on employers and impact job creation in the construction industry. Recent economic research found that the costs associated with OSHA's noise proposal alone could total in the billions.

In addition to its rulemaking agenda over the last two years, OSHA's emphasis on enforcement and de-emphasis on its long-successful cooperative efforts with employers has been a growing concern. ABC strongly believes that employers should be viewed as partners in achieving safer workplaces, and that OSHA's cooperative programs, including the Voluntary Protection Program (VPP), should not be de-funded or diminished.

Need for Federal Regulatory Reform

In general, ABC supports federal regulatory reform, including across-the-board requirements for departments and agencies to evaluate the risks, weigh the costs and assess the benefits of their regulations. Existing regulations should be reviewed periodically to ensure they are necessary, current and cost-effective. Furthermore, federal agencies must be held accountable for full compliance with existing rulemaking statutes and requirements when promulgating regulations.

ABC applauds the Oversight and Government Reform Committee for its continued interest in the issue of burdensome federal regulation. We appreciate this Subcommittee's attention to these important matters, and look forward to working with you on reforming burdensome regulations placed on the business community. Mr. Chairman, this concludes my formal remarks. I look forward to answering any questions that you may have.

Mr. JORDAN. Thank you, Mr. Baskin.

We appreciate all our witnesses' testimony.

Mr. Biagas, you just want to compete, right, on a fair—what did you say, you had 13 siblings?

Mr. BIAGAS. Yes, sir. I learned a young age, being the youngest, that I needed to compete.

Mr. JORDAN. The youngest of 14, so you definitely know how to compete. You just want to compete.

Now, Mr. Belman and Mr. Baskin, Dr. Belman had talked about PLAs and the advantage there. But you don't have a problem with your workers striking, is that right?

Mr. BIAGAS. No, sir.

Mr. JORDAN. No work stoppages, no picketing?

Mr. BIAGAS. Never have.

Mr. JORDAN. Mr. Ennis, have you ever had that problem?

Mr. ENNIS. No, sir.

Mr. JORDAN. No. So the idea that is in the PLA agreement is not really a point. You have training programs and apprentice programs for your employees, I assume?

Mr. BIAGAS. Yes, sir, full-fledged. Thirty apprentices are trained in our 4-year program, 788 hours in the classroom, over 8,000 on the job training.

Mr. JORDAN. Recognized and given a thumbs-up by the regulatory agency?

Mr. BIAGAS. Yes, sir.

Mr. JORDAN. Imagine that. Mr. Ennis, is that the same with you?

Mr. ENNIS. Yes, sir, full 4-year apprenticeship, and it is registered by the State of Virginia.

Mr. JORDAN. Yes. The way we do it in Ohio is we work closely with our vocational schools. It is a big element in our joint vocational schools and programs. I have been out to see it. I have actually spoken at many of their banquets. They do a great job. And these kids, they all get placed. They do a great job for several of the companies that I have the privilege of representing in Ohio. So we appreciate that.

I want to get right to the agreement and I want to try to yield some time, we have some Members who have really been on this issue, like Mr. Guinta from New Hampshire, I want to give some time to him. But let me just ask you this. I want to understand how this works.

We under GSA, and they are going to be on the next panel, they give a kind of a 10 percent bonus criteria to PLA agreements. So is it this simple, if you do a bid, Mr. Ennis, on a public project, and let's say your bid is $91, and the union shop with the PLA agreement comes in at $100, thereby they get that 10 percent bonus, so they are really at $90, do they get the bid on that basis alone, or do we not know that?

Mr. ENNIS. We do not know that.

Mr. JORDAN. And this is to your point, Mr. Baskin, we want to know why exactly.

Mr. BASKIN. Yes. It is actually worse than that, because they say it is not based on price. One price could be lower than the other. The non-union price could be lower, but they are just going to give this extra bump on the technical phase of the PLA.

Mr. JORDAN. That is my point. Mr. Ennis' bid comes in at $91, let's say their bid comes in at $100, but it gets some 10 percent bonus, we don't know how that is applied, so they could apply it just on the dollars and say 10 percent less, well, they are actually $90, so now we are going to award the bid based on that. It is actually costing the taxpayers more money then, because it is still $100?

Mr. BASKIN. Correct.

Mr. JORDAN. I wanted to make sure I understand.

I want to yield time to first the chairman of the committee, then we have 2½ minutes, if we have time, I want to get Mr. Guinta rolling too, because he had the amendment.

Chairman ISSA. Thank you, Mr. Chairman. I am not going to take any time, except to thank you for looking into what is undoubtedly costing the American taxpayers an opportunity to have better roads, better bridges, or at least more of them. I have nothing else at this time, but I truly appreciate your attention and yield back.

Mr. JORDAN. I am going to yield 2 minutes and 15 seconds to the gentleman from New Hampshire, who has been working on this issue very hard.

Mr. GUINTA. Thank you, Mr. Chairman.

In full disclosure, I support and proposed an amendment to ban PLAs. I want the witnesses to know that before we start this commentary. I personally feel that PLAs, based on the estimates that I have seen, in 2008 alone, have cost taxpayers somewhere around $2.6 billion, to $2.8 billion.

In an era when we have to find and do more with less, and in an era where we have a budget crisis, and I believe it is a crisis, where we have a $1.6 trillion deficit, and a $14 trillion debt, I think it is incumbent upon us, and the country expects it is incumbent upon us to really navigate through these issues and find a better way to invest in our country and improve on our country. I find it disheartening that we would, as a PLA does, give greater access to one group and not another.

That is really the substance of the frustration I have with this issue. I wouldn't say that asking for equality is anti-union or pro-small business. I think it is an equity and fairness issue. I have heard from every small business owner who is non-union that they would like to do nothing but compete. And I heard you, Mr. Biagas, say that.

I think that would be better for the market, better for the project, better for the consumer, better for the taxpayer. And I would argue, better for both the union and non-union shop.

So with that in mind, I can certainly stay for some questioning later. I would like to get to the crux of why there is this assumption that a union must have an advantage over a non-union shop. That is a question that I think deserves to be answered, and the American public deserves recognition and understanding of that and its correlation to the costs of PLAs in this country.

I yield back. Thank you, sir.

Mr. JORDAN. I thank the gentleman.

We now recognize the distinguished ranking member from Ohio, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

One of the witnesses claimed that PLAs were racist. That is a pretty serious charge, so I asked staff to look at Federal cases to see if there are any cases that have been filed on this question that relates to whether or not people's 14th Amendment protections are being violated. And I didn't intend to bring this up, but I just asked staff to come back with it. What they came back with was a case out of the U.S. Court of Appeals for the Ninth District that, where the defendants included the IBEW Local 441, the Construction Trades Council of Los Angeles and Orange Counties, Building and Construction Trade Council.

And the findings, substantive and procedural due process claims, here is what the court said, this is the court of appeals: "The plaintiffs contend that the PSA," they call them PSAs there, "violated their rights to substantive and procedural due process by depriving them of liberty and property interests protected by the 14th Amendment." And the court says "We conclude that plaintiffs cannot make this threshold showing."

So I just wanted to submit this for the record.

Mr. JORDAN. Without objection.

[The information referred to follows:]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATT JOHNSON; MICHAEL SPIERING; JAMES BIRMINGHAM,
Plaintiffs,

and

KEVIN CHAVEZ; JOSEPH NIGBOR; TRAVIS BARRETT; WES BERTALAN; ASSOCIATED BUILDERS AND CONTRACTORS OF SAN DIEGO, INC. ELECTRICAL UNILATERAL APPRENTICESHIP COMMITTEE; SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC. ELECTRICAL UNILATERAL APPRENTICESHIP COMMITTEE,
Plaintiffs-Appellants,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT; THE LOS ANGELES AND ORANGE COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL,
Defendants-Appellees,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION LOCAL 441, ELECTRICAL APPRENTICESHIP PROGRAM,
Defendant.

No. 08-56963

D.C. No. 8:04-cv-00280-JVS-MLG

OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
May 4, 2010—Pasadena, California

Filed October 8, 2010

Before: Betty B. Fletcher and Richard A. Paez,
Circuit Judges, and Donald E. Walter, District Judge.*

Opinion by Judge Paez

*The Honorable Donald E. Walter, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

COUNSEL

Carole M. Ross and Richard M. Freeman (argued), Sheppard, Mullin Richter & Hampton LLP, San Diego, California, for plaintiffs-appellants Kevin Chavez; Joseph Nigbor; Travis Barrett; Wes Bertalan; Associated Builders and Contractors of San Diego, Inc., Electrical Unilateral Apprenticeship Committee; and Southern California Chapter of the Associated Builders and Contractors, Inc., Electrical Unilateral Apprenticeship Committee.

Ray Van der Nat (argued), Los Angeles, California, for defendant-appellee Los Angeles and Orange Counties Building and Construction Trades Council and Glenn S. Goldby and Gregory A. Wille (argued), Declues, Burkett & Thompson LLP, Huntington Beach, California, for defendant-appellee Rancho Santiago Community College District.

OPINION

PAEZ, Circuit Judge:

In 2003, Rancho Santiago Community College District ("the District") entered into a project labor agreement with the Los Angeles and Orange Counties Building and Construction Trades Council ("the Council") and its affiliated construction unions that governed labor relations for many District construction projects over a three-to-five-year period. The agreement required, among other things, that contractors use union "hiring halls" to obtain workers, that all workers on covered

projects become union members within seven days of their employment, and that all contractors and subcontractors working on covered projects agree to the project labor agreement and to the master labor agreement negotiated by the union for each craft. Seven individual non-union apprentices and two non-union apprenticeship committees filed suit challenging the agreement as preempted by the National Labor Relations Act ("NLRA") and the Employee Retirement Income Security Act ("ERISA") and as violative of their rights to substantive and procedural due process and to equal protection. The district court granted the defendants summary judgment on all claims.

Reviewing de novo, we hold that entering into the agreement constitutes market participation not subject to preemption by the NLRA or ERISA, and that the agreement did not violate the plaintiffs' rights to substantive or procedural due process or to equal protection. As a preliminary matter, we also reject the District's mootness and Eleventh Amendment sovereign immunity defenses. Specifically, we conclude that this appeal falls within the "capable of repetition, yet evading review" exception to mootness, and that the District waived any sovereign immunity defense by failing to pursue it while extensively litigating this suit on the merits. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2002, voters in the Rancho Santiago Community College District approved Ballot Measure E, which authorized the District to issue $337 million in general obligation bonds to fund improvements to the District's facilities. After voters approved the Measure, unions that had supported the Measure E campaign encouraged the District to enter into a project labor agreement,[1] which would govern labor conditions for

[1]A project labor agreement is a pre-hire agreement between a construction project owner and a union or unions that a contractor must agree to

the subsequent construction. The District agreed and entered into a "Project Stabilization Agreement" ("PSA" or "the Agreement") with the Council and affiliated craft unions. Before entering into the Agreement, the District did not conduct any formal studies to determine its costs and benefits, but the District's Board of Directors heard testimony from many people in the community. According to the District's former construction manager, Robert Brown, the Board heard estimates that the PSA could increase costs by zero to thirty percent.

The PSA that the District ultimately executed covered all of the District's construction projects funded with Measure E funds that cost over $200,000. The Agreement applied to all covered projects initiated in a three-year period and would remain in effect for two additional years if neither party terminated it. According to the District, the PSA applied to twenty-seven projects, but the plaintiffs contend that these twenty-seven projects actually represent twenty-seven categories covering many more discrete projects.

Among other things, the PSA made the signatory unions the exclusive bargaining agents for all employees; established dispute-resolution mechanisms; required use of union "hiring halls" to obtain workers; required all workers on covered projects to start paying union dues within seven days of their employment; and prohibited strikes, picketing, and other disruptions. The Agreement further required all contractors and subcontractors working on a covered project to agree to the PSA and to the craft unions' master labor agreements, which required contractors to use the unions' apprenticeship pro-

before accepting work on the project and that establishes the terms and conditions of employment for the project. 51 Corpus Juris Secundum, Labor Relations § 311. Such agreements are common in the construction industry, where the short-term nature of employment impedes post-hire collective bargaining, and where contractors need predictable costs and a steady supply of skilled labor. *Id.*

grams and to contribute to union vacation, pension, and health plans. Finally, the PSA established a Work Opportunities Program that required the unions to establish an apprenticeship program for District residents, to encourage the referral and utilization of District residents as workers on covered projects, and to maximize opportunities for minority- and women-owned businesses.

In response to the District's approval of the PSA, seven individual apprentices not affiliated with a union ("the individual apprentices" or "the named apprentices") and two non-union apprenticeship committees (collectively, "the plaintiffs") filed suit in March 2004 against the District, the Council, and the International Brotherhood of Electrical Workers Union 441's Electrical Apprenticeship Program ("Local 441") (collectively, "the defendants") in the federal district court for the Central District of California. The suit challenged the PSA on the grounds that it violated various state laws, that it was preempted by ERISA and the NLRA, and that it violated the named apprentices' rights to substantive and procedural due process and to equal protection as guaranteed by the U.S. Constitution. The original complaint sought declaratory and injunctive relief and attorney's fees and costs.

On the defendants' motion, the district court dismissed the state law claims against all defendants and dismissed all but the NLRA preemption claim against Local 441. The parties later agreed to dismiss Local 441 completely.

The defendants later moved for summary judgment on the merits or, in the alternative, partial summary judgment against five of the named apprentices whose claims were allegedly moot because they had graduated from their apprenticeship programs. In response, the plaintiffs amended their complaint to include a request for nominal damages to prevent the graduated apprentices' claims from becoming moot. Three of the named apprentices, however, agreed to dismiss all of their claims from the action.

The district court held that the prayer for nominal damages prevented the graduated apprentices' due process and equal protection claims from becoming moot, but granted the defendants' motion for summary judgment on those claims. After additional briefing, the district court also granted the defendants summary judgment on the ERISA and NLRA preemption claims, concluding that the PSA was exempt from preemption because it constituted state market participation, not regulation. The plaintiffs appealed.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment. *Mortimer v. Baca*, 594 F.3d 714, 721 (9th Cir. 2010). Summary judgment is warranted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In deciding whether to affirm the grant of summary judgment, we must determine whether, "viewing the evidence in the light most favorable to the nonmoving party, . . . there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Mortimer*, 594 F.3d at 721 (internal quotations and citation omitted).

III. DISCUSSION

Before reaching the merits of the plaintiffs' claims, we must first address the defendants' contentions that this appeal is moot and that the District is entitled to sovereign immunity.

A. Mootness

The District contends that this appeal is moot because the PSA has expired and the District is not likely to enter into a

new PSA, and because all the named apprentices have graduated. In general, a case is moot if there is no longer any "present controversy as to which effective relief can be granted." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (internal quotations and citation omitted). A case is not moot, however, if the challenged action is "capable of repetition, yet evading review." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). We conclude that the plaintiffs' challenge to the PSA falls within this exception to mootness.

As an initial matter, we note that the plaintiffs' prayer for nominal damages for their substantive due process, procedural due process, and equal protection claims prevents those claims from becoming moot.[2] *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."). We therefore need only consider whether the expiration of the PSA or the graduation of the named apprentices renders moot the ERISA and NLRA preemption claims for injunctive and declaratory relief.

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[2]The District contends that our decision in *Seven Words LLC v. Network Solutions*, 260 F.3d 1089 (9th Cir. 2001), prevents the prayer for nominal damages from saving the constitutional claims from mootness because the plaintiffs did not amend their complaint to request those damages until *after* the District moved to dismiss based on mootness. The District reads *Seven Words* too expansively. In *Seven Words*, we dismissed the plaintiff's appeal as moot where the plaintiff "never sought damages . . . (until a few days before argument in [the appeals] court)," "never [made] an effort to amend the complaint to include a damages claim," and had "effectively disavowed damages for tactical reasons." *Id.* at 1095, 1097. Here, by contrast, the plaintiffs amended their complaint to include a request for damages and never made any tactical decision not to request damages. Their failure to seek nominal damages in their original complaint therefore does not preclude the nominal damages request from preserving a live controversy over their constitutional claims.

1. Expiration of the PSA

[1] Despite the expiration of the PSA, we conclude that this appeal is not moot because the challenged conduct is "capable of repetition yet evading review." The "capable of repetition, yet evading review" exception to mootness applies "only where '(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.' " *Biodiversity Legal Found.*, 309 F.3d at 1173 (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993)). The challenged PSA satisfies both of these criteria.

[2] First, the duration of the challenged PSA was "too short" to permit full litigation. The duration of a challenged action is "too short" where it is "almost certain to run its course before either this court or the Supreme Court can give the case full consideration." *Id.* The PSA had a term of three years, but remained in force for two additional years because neither party exercised its right to terminate it after the first three years. For purposes of determining whether the PSA's duration was so short as to evade review, we consider only the Agreement's mandatory three-year term. We have applied "the evading-review doctrine where the 'duration of the controversy is solely within the control of the defendant.' " *Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004) (quoting *Biodiversity Legal Found.*, 309 F.3d at 1174). Similarly, here, because the PSA's extension for an additional two years was solely within the District's control, we will apply the evading-review doctrine if the duration *not* within its sole control—three years—would be too short to allow for full judicial review.

[3] We have acknowledged that three years is generally too short to allow a case "seeking a declaratory judgment regarding the legality of [an agreement's] provisions [to] proceed beyond district court review." *Int'l Ass'n of Machinists &*

Aerospace Workers, Local Lodge 964 v. B.F. Goodrich Aerospace Aerostructures Grp., 387 F.3d 1046, 1050 (9th Cir. 2004). Indeed, the course of this litigation demonstrates that three years is too short for us or the Supreme Court to give the case full consideration; it has already been pending for nearly six and a half years. Even without counting the three years in which the district court stayed the case pending Ninth Circuit and Supreme Court decisions, this litigation has taken over three years to reach us, and the Supreme Court has not yet had a chance to consider it. This case therefore satisfies the "evading review" portion of the "capable of repetition, yet evading review" doctrine.

[4] Second, this case also satisfies the "capable of repetition" requirement. The defendants have not met their burden to show that there is no reasonable expectation that the plaintiffs will be subjected to a PSA again. *See Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992) ("It is the defendant, not the plaintiff, who must demonstrate that the alleged wrong will not recur."). In support of its claim that it will never enter into a PSA again, the District offers only a declaration by its Vice Chancellor attesting that seventy-five percent of Measure E funds have been expended, that the remaining funds have been committed to projects that cannot be completed because of insufficient funds, that the District does not anticipate entering into a new PSA due to "present economic conditions," and that the passage of Measure E was "unprecedented" and, in his opinion, a "once in a lifetime event."[3] This declaration does not adequately demonstrate that

[3]The defendants moved to supplement the record on appeal to include a declaration attesting to these facts, which were not before the district court. Although the court denied the motion in a clerk's order, we reconsider that decision sua sponte and grant the motion. Because the new facts that the defendants seek to establish bear on whether the controversy before us is moot, we exercise our discretion to supplement the record on appeal so that we may determine whether we have jurisdiction over the ERISA and NLRA claims for declaratory and injunctive relief. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (explaining that we may supplement the record on appeal where "developments [might] render a controversy moot and thus divest us of jurisdiction").

the District will not enter into a PSA again. Indeed, twenty-five percent of Measure E funds remain, and it would be unreasonable to assume that the District will never use those funds just because they currently lack sufficient funding to complete the projects to which those funds have been committed. Moreover, the Vice Chancellor's assertion that the District does not anticipate entering into a new PSA "[b]ecause of present economic conditions" implies that it may resume construction, and accordingly enter into a new PSA, once the economic situation improves.

[5] Because the District has not shown that it will not enter into another PSA in the future, and because the duration of the PSA is too short to allow for full judicial review, the expiration of the PSA does not render the plaintiffs' claims for declaratory and injunctive relief moot.

2. Graduation of the Named Apprentices

We next consider whether the fact that the individual apprentices have graduated from their apprenticeship programs renders the ERISA and NLRA preemption claims moot as to them. At the outset, however, we note that whether the apprentices remain in this suit will not affect our analysis of the preemption issues or any relief we grant or deny. The plaintiff apprenticeship committees' claims of ERISA and NLRA preemption are identical to the individual apprentices' claims, and the apprentices' identities and particular circumstances are irrelevant to our analysis.

[6] A case is moot when the "parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The apprentices retain a cognizable interest in the outcome of their NLRA preemption claim because that claim does not depend on their status as apprentices. The plaintiffs contend that sections 7 and 8 of the NLRA preempt the PSA under *San Diego Build-*

ing Trades Council v. Garmon, 359 U.S. 236 (1959). Sections 7 and 8 protect all employees, not just apprentices. *See* 29 U.S.C. §§ 157, 158 (NLRA §§ 7, 8). Because the named apprentices continue to work in the construction industry, they continue to enjoy the NLRA's protections and continue to have a cognizable interest in whether the NLRA preempts the PSA. Their NLRA preemption claim therefore is not moot as to them.

[7] The individual apprentices' ERISA preemption claim, by contrast, does depend on their status as apprentices. They therefore lack a cognizable interest in the outcome of that claim, and the claim is accordingly moot as to them, unless their claim falls within the "capable of repetition, yet evading review" exception to mootness. To establish that their claim falls within that exception, however, the plaintiffs must demonstrate that there is a "reasonable expectation" that they will be subject to a PSA again in their capacity as apprentices. *See Murphy v. Hunt,* 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). While the defendants have the burden to show they will not engage in the challenged conduct again, the plaintiffs have the burden to show that they will be subject to the complained-of conduct in the future. *See Sample v. Johnson*, 771 F.2d 1335, 1342 (9th Cir. 1985). The plaintiffs have not met that burden. They do not allege that they intend to go through another apprenticeship program for another craft, but only that they "may" do so. Because this alleged possibility does not demonstrate a "reasonable expectation" that they will be subject to a PSA as apprentices again, we conclude that the named apprentices' ERISA preemption claim does not fall within the "capable of repetition, yet evading review" exception to mootness, and we accordingly dismiss that claim as to them.

B. Sovereign Immunity

The District contends that the Eleventh Amendment entitles it to sovereign immunity from the plaintiffs' claims seeking

nominal damages. We conclude that the District has waived its sovereign immunity and therefore reject its Eleventh Amendment defense.[4]

[8] A state waives its Eleventh Amendment immunity if it "unequivocally evidence[s its] intention to subject itself to the jurisdiction of the federal court." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999). A state may waive its sovereign immunity through "conduct that is incompatible with an intent to preserve that immunity." *Id.* We have found that state defendants engaged in conduct "incompatible with" an intent to preserve sovereign immunity when they raised a sovereign immunity defense only belatedly, after extensive proceedings on the merits. For example, in *Hill*, we determined that the state waived sovereign immunity when the state did not raise the defense until the opening day of trial, after it had filed two motions to dismiss and an answer that did not assert the defense, consented to have a magistrate judge try the case, conducted discovery, moved to compel discovery and for sanctions, participated in a pre-trial conference, and filed trial materials. *Id.* at 756. Similarly, in *In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002), we found that the state waived immunity when it filed a limited response, an answer, and a motion for summary judgment; attended an oral hearing and argued the merits; and heard the court announce its preliminary leanings, all without raising the sovereign immunity defense. *Id.* at 862.

[9] Like the defendants in *Hill* and *Bliemeister*, the District engaged in extensive proceedings in the district court without seeking dismissal on sovereign immunity grounds. Although it baldly asserted in its Answer that it was "immune from liability pursuant to the provisions of the Eleventh Amendment

[4]Absent a waiver, the District would be entitled to sovereign immunity because California community college districts constitute arms of the state entitled to sovereign immunity under the Eleventh Amendment. *See Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 972 (9th Cir. 1994).

of the United States Constitution," the District litigated the suit on the merits, participated in discovery, and filed a motion to dismiss and a summary judgment motion without pressing a sovereign immunity defense. Although the District asserted its sovereign immunity in its opposition to the plaintiffs' application to file an amended complaint to include a prayer for nominal damages, it did not assert a sovereign immunity defense in the summary judgment briefing filed after the plaintiffs amended their complaint.[5] In circumstances like these, we deem the defendant to have made a tactical decision to delay asserting the sovereign immunity defense. *See Bliemeister*, 296 F.3d at 862. Such tactical delay "undermines the integrity of the judicial system[,] . . . wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants." *Hill*, 179 F.3d at 756. Having chosen "to defend on the merits in federal court," the District will "be held to that choice." *See id.* at 758. We accordingly hold that the District has waived its sovereign immunity defense.

C. Merits

Having concluded that this appeal is not moot, and that the District has waived its sovereign immunity, we proceed to consider the merits of the plaintiffs' claims.

[5]The District contends that it was "not required" to raise its Eleventh Amendment defense until the plaintiffs sought retrospective damages relief, and that the proceedings on the merits before the plaintiffs sought that relief therefore were not inconsistent with an intent to preserve its sovereign immunity. This argument appears to stem from an erroneous belief that the District could not have asserted immunity from the plaintiffs' claims for prospective relief. Although state *officers* sued in their official capacities are immune only from suits for retrospective relief, *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (explaining the doctrine of *Ex parte Young*, 209 U.S. 123 (1908)), state *entities* are immune from suit "regardless of the nature of the relief sought," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). As a state entity, the District thus could and should have asserted sovereign immunity before the plaintiffs amended their complaint to request nominal damages.

1. ERISA and NLRA Preemption Claims

[10] Whether federal law preempts a particular state action is fundamentally a question of congressional intent. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1039-40 (9th Cir. 2007). Federal law will preempt state laws that "interfere with, or are contrary to, federal law" only if "that was the clear and manifest purpose of Congress." *Id.* at 1039-40 (internal quotations and citation omitted). The so-called "market participant doctrine" offers us a presumption about Congress's purposes. In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant. *See Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc.* ("*Boston Harbor*"), 507 U.S. 218, 227 (1993); *Engine Mfrs.*, 498 F.3d at 1042. This doctrine applies to claims of NLRA and ERISA preemption. *See Boston Harbor*, 507 U.S. at 227 (NLRA); *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.* ("*MWD*"), 159 F.3d 1178, 1182 (9th Cir. 1998) (ERISA). In assessing the plaintiffs' preemption claims, we therefore must first determine whether the District acted as a regulator or as a market participant when it entered into the PSA. Because we conclude that the District acted as a market participant, the plaintiffs' ERISA and NLRA preemption claims fail at the threshold.[6]

[11] In general, state action falls within the market participant exception to preemption when the state entity directly participates in the market by purchasing goods or services. *See Engine Mfrs.*, 498 F.3d at 1040 (describing the "single inquiry" in market participant cases as "whether the challenged program constituted direct state participation in the market"). But the line between non-preempted market participation and preempted regulation is not always so clear, and a state's direct participation in the market will not always

[6]We therefore need not decide whether the NLRA or ERISA would preempt the PSA if it were regulation.

escape preemption. If a state's direct participation in the market is "tantamount to regulation," the market participant doctrine will not exempt the state's action from preemption. *Wis. Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 289 (1986). Thus, in *Gould*, the Supreme Court held that the NLRA preempted a state law forbidding state procurement agents from using state funds to do business with companies that had repeatedly violated the NLRA, even though the law constrained only the state's own participation in the market. *Id.* at 283-84, 287. The Court explained that the state law "on its face . . . serves plainly as a means of enforcing the NLRA," and that "[n]o other purpose could credibly be ascribed." *Id.* at 287. Because the law imposed a "supplemental sanction" on NLRA violations, it contravened Congress's intent to bar states from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286-89 (describing the preemption rule of *Garmon*, 359 U.S. 236).

[12] In light of *Gould*, to determine whether a state entity's direct participation in the market falls within the market participant exception to preemption, we must determine whether the state action is simply proprietary or "tantamount to regulation." As a guide to making this determination, we have adopted the two-prong test that the Fifth Circuit established in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999). *See Engine Mfrs.*, 498 F.3d at 1041; *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006). The *Cardinal Towing* test offers two questions to help determine whether state action constitutes market participation not subject to preemption:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference

> that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Id. As the Fifth Circuit explained, these questions "seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Id.*

[13] In applying this test, we have not yet conclusively settled whether a state action must satisfy both prongs, or only one, to qualify as market participation exempt from preemption. We held in *Lockyer* that "a state need not satisfy both questions," but we subsequently vacated that opinion after the Supreme Court reversed it on other grounds. *See Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006) (en banc), *rev'd on other grounds sub nom. Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008) and *vacated by* 543 F.3d 1117 (2008). Although we are not bound by our vacated decision in *Lockyer*, we find its reasoning persuasive and accordingly hold that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption. As we pointed out in *Lockyer*, the first *Cardinal Towing* question "looks to the *nature* of the expenditure" and "protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary." *Id.* at 1084 (emphasis added). The second question looks to the "*scope* of the expenditure" and "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation." *Id.* (emphasis added). The *Cardinal Towing* test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a

negative—that the action is *not* regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action *is* proprietary and that the action is *not* regulatory.

In any event, we conclude that the PSA challenged here satisfies both prongs of the *Cardinal Towing* test and accordingly is not subject to preemption by the NLRA and ERISA.

a. Efficient procurement of goods and services, as measured by comparison to private market behavior

The plaintiffs contend that the PSA does not meet the first *Cardinal Towing* prong both because it does not reflect the District's interest in "efficient procurement" of goods and services and because it is not comparable to private market behavior. In particular, they first contend that a state entity can have no interest in "efficient procurement" when it spends federal funds and that the Agreement as a whole simply pays off political supporters without actually providing the District with any benefits in terms of "efficient procurement." Second, they contend that no private party would have entered into an agreement providing so few benefits and that no private party in the District's position could have lawfully entered into such an agreement.

These contentions rely on too narrow an understanding of what counts as an interest in "efficient procurement" and of how similar a challenged state action must be to private market behavior to qualify as non-preempted market participation under *Cardinal Towing*'s first prong. Even if the plaintiffs' contentions were true, they would not render the District's direct participation in the market essentially regulatory. Under a proper understanding of *Cardinal Towing*'s first prong, we conclude that the PSA reflects the District's interest in the efficient procurement of goods and services, as measured by comparison to typical private market behavior.

i. Efficient procurement

[14] At the outset, we reject the plaintiffs' suggestion that the PSA cannot reflect the District's interest in "efficient procurement" to the extent it applies to a construction project funded in part by federal monies. In support of this contention, the plaintiffs point to the Second Circuit's decision in *Healthcare Association of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006), which held that a state regulation barring the use of state-appropriated funds to encourage or discourage union organizing was preempted to the extent it applied to federal funds that merely passed through the state. *Id.* at 90-91, 109. Contrary to the plaintiffs' reading, however, *Pataki* does not suggest that a state can never have a proprietary interest in the efficient procurement of goods and services when it uses federal money. Rather, *Pataki* holds that, although a state has a proprietary interest in "sav[ing] money" and "getting what [it] paid for" with its own funds, it does not have a similar interest in saving another government entity's money. *Id.* at 109. Here, the District does not claim a proprietary interest in "getting what [it] paid for," but rather in completing construction projects without labor disruptions. We have no doubt that this is a legitimate interest in "efficient procurement" whether the state agency expends its own funds or funds that the federal government has given it.

The plaintiffs further contend that the PSA does not advance an interest in efficient procurement because it presents several downside risks while offering no benefits in terms of costs, labor availability, or timeliness for the construction. Whether the PSA's benefits outweighed its costs, however, bears only on whether the District made a good business decision, not on whether it was pursuing regulatory, as opposed to proprietary, goals. We must keep in mind that congressional intent is the touchstone of our preemption analysis, *Engine Mfrs.*, 498 F.3d at 1040, and we have no reason to think that Congress intended to allow beneficial state con-

tracts while preempting similar contracts in which the state got a bad deal.

Moreover, we have made clear that "efficient procurement" under *Cardinal Towing*'s first prong does not necessarily mean "cheap" procurement, but rather "procurement that serves the state's purposes." *Engine Mfrs.*, 498 F.3d at 1046. Thus, in *Engine Manufacturers*, we upheld as lawful market participation a state rule requiring state and local government entities to ensure that any new street sweepers, garbage trucks, and other vehicles that they procured met specified emissions standards. *Id.* at 1035, 1048. Even though the state entity pursued environmental, as opposed to economic, goals through its participation in the market, the market participant doctrine still applied.

Gould, however, necessarily places limits on what can qualify as an interest in "efficient procurement" under *Cardinal Towing*'s first prong. Although "efficient procurement" means "procurement that serves the state's purposes," *id.*, pursuit of some purposes will make a state's participation in the market "tantamount to regulation." *Gould*, 475 U.S. at 289. In *Gould*, the state enacted a statute forbidding government procurement agencies from doing any business with labor law violators. *Id.* at 283-84. Despite the state's assertion that it was acting as a market participant, the Supreme Court concluded that the law "unambiguously" acted as a "supplemental sanction" for violations of the NLRA, and was preempted. *Id.* at 288. *Gould* establishes that, where the state seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the state, the state's direct participation in the market does not reflect its interest in "efficient procurement" of goods and services. *See id.* at 189 (explaining that "[i]t is the conduct being regulated . . . that is the proper focus of concern" (internal quotations and citation omitted)); *see also Boston Harbor*, 507 U.S. 228-29 (describing the statute in *Gould* as "address[ing] employer conduct unrelated to the employer's performance of contrac-

tual obligations to the state"); *see also Bldg. and Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002) ("A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].' " (alterations in original) (quoting *Boston Harbor*, 507 U.S. at 228-29)).

[15] Unlike the regulation in *Gould*, nothing on the face of the PSA indicates that it serves purely regulatory purposes unrelated to the performance of contractual obligations to the state. The PSA does not reward or sanction private parties for their conduct in the private market, but rather addresses only how construction contractors and subcontractors will perform work on the District's projects. Plaintiffs contend that the PSA's primary purpose was to reward the unions that supported the Measure E campaign. Yet, the District intended for the PSA to serve legitimate proprietary goals, including containing costs, optimizing productivity, and boosting the economy. Private parties undertaking large construction projects commonly enter into pre-hire project labor agreements like the PSA challenged here. Whether or not plaintiffs are correct that the District had ulterior motives in adopting the PSA, we are quite certain that Congress did not intend for the NLRA's or ERISA's preemptive scope to turn on state officials' subjective reasons for adopting a regulation or agreement. *Cf. N. Ill. Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." (emphasis in original)).

ii. Comparison to private market behavior

The plaintiffs next contend that the PSA cannot satisfy *Cardinal Towing*'s first prong because it is not sufficiently

comparable to private market behavior. In particular, they contend that no private party would have entered into a project labor agreement providing so few benefits and that no private party in the District's position could have lawfully entered into such an agreement. However, even if true, those considerations would not preclude the PSA from being sufficiently analogous to private market behavior to satisfy *Cardinal Towing*'s first prong.

First, the plaintiffs' contention that no private party would have entered into a deal with so few benefits again reflects its misunderstanding that Congress intended to allow state market participation to escape preemption only where the state gets a good deal. As explained above, whether the PSA was a good deal for the District does not bear on whether the Agreement is regulatory or proprietary. Indeed, we cannot credibly ascribe to Congress an intent to use preemption to impose economic rationality on state contracting decisions.

Second, the plaintiffs also miss the mark in contending that a private purchaser in the District's position could not have lawfully entered into the PSA because the NLRA bars such pre-hire agreements unless the contracting party is an "employer engaged primarily in the building and construction industry," which a school district is not.[7] *See* 29 U.S.C. § 158(f). This provision of the NLRA does not mean that the District's entry into the PSA is not market participation; it simply means that the District can participate in the market in a way in which private parties cannot. The NLRA itself creates this disparity by explicitly excluding states and their political subdivisions from the NLRA's prohibitions. *See id.* § 152(2) ("the term 'employer' . . . shall not include . . . any State or political subdivision thereof"); § 158(a) (providing

[7]The parties dispute whether a private owner-developer could lawfully enter into an agreement like the PSA here. Because we conclude that the legality of analogous private party conduct is not relevant to the question before us, we need not resolve this dispute.

that "[i]t shall be an unfair labor practice for *an employer*" to engage in certain enumerated actions (emphasis added)). Were we to hold, as the plaintiffs urge, that a state's direct participation in the market becomes "regulation" subject to preemption whenever a private party could not lawfully participate in the market in the same way, we would effectively subject state employers to the NLRA's proscriptions. This would conflict with the clear congressional intent to exempt state employers from the NLRA's reach.

Contrary to the plaintiffs' suggestion, the Supreme Court's statement in *Boston Harbor* that Congress does not preempt state proprietary action "where analogous private conduct would be permitted" does not suggest otherwise. *See Boston Harbor*, 507 U.S. at 231-32. In *Boston Harbor*, the Court upheld as lawful market participation a state agency's requirement that all contractors working on the cleanup of Boston Harbor agree to a project labor agreement that the agency's construction management company had negotiated with a labor union. *Id.* at 221-22, 232. The agreement in *Boston Harbor*, unlike the PSA here, fell squarely within NLRA provisions exempting construction industry employers from the prohibition of pre-hire agreements because the state agency's project management company, rather than the agency itself, entered into the agreement with the union. *Id.* at 221-22. But the Court in no way suggested that the fact that the project manager, rather than the agency, entered into the agreement was dispositive. To the contrary, the basis for the Court's holding was Congress's clear intent to "accommodate conditions specific to [the construction] industry," including the short-term nature of employment that impeded post-hire collective bargaining and the contractor's need for predictable costs and a steady labor supply. *Id.* at 231. In light of the "general goals behind the passage of [these provisions]," the Court concluded that Congress did not intend to preempt state entities from adopting such agreements for state construction projects, while allowing such agreements in the construction industry generally. *Id.* at 231-32.

Indeed, the identity of the parties who signed the project labor agreement in *Boston Harbor* only formally distinguishes that agreement from the PSA here. The agreements' practical effects are the same. Here, as in *Boston Harbor*, a pre-hire agreement binds all contractors and subcontractors working on covered projects. Moreover, the agency in *Boston Harbor* "approved and adopted" the labor agreement, which the project manager had entered into "on [the agency's] behalf," and, like the District, required all bidders to submit to the agreement as a condition of accepting work on the project. *Id.* at 222. *Boston Harbor* makes clear that congressional intent controls our preemption analysis, *see id.* at 224, 231, and we find no indication in the NLRA that Congress intended to allow state entities to adopt project labor agreements only if they use a construction-industry middleman exempt from the NLRA's proscriptions.

[16] In sum, we hold that the District's PSA reflects its interest in the efficient procurement of goods and services, as measured by comparison to typical private market behavior. It therefore qualifies as market participation exempt from preemption under *Cardinal Towing*'s first prong.

b. Narrow scope

We further conclude that the PSA challenged here is sufficiently narrow in scope that it qualifies as non-preempted market participation under *Cardinal Towing*'s second prong.

Despite covering many individual construction projects, the PSA limited its reach to construction projects costing over $200,000 that were paid for with the $337 million of Measure E funds and that were initiated during the three-year term of the agreement. This is undoubtedly narrower than the agreement approved in *Boston Harbor*, which covered $6.1 billion of spending over ten years. *Id.* at 221. Although the agreement approved in *Boston Harbor* covered the "one particular job" of cleaning up Boston Harbor, that one job almost cer-

tainly could have been characterized as many component projects. *Boston Harbor*, 507 U.S. at 232. Likewise, here, the PSA could be characterized as covering the single project of improving campus facilities.

Moreover, the PSA's substantive scope is very similar to the *Boston Harbor* agreement's. *See id.* at 232. Like the District's PSA, the *Boston Harbor* agreement recognized one exclusive bargaining agent, specified dispute-resolution mechanisms, required all employees to become union members within seven days of their employment, required use of the union's hiring halls to supply the labor force, prohibited strikes for the term of the agreement, bound all contractors and subcontractors to the agreement, and prescribed the benefits that workers would receive for the duration of the project. *Id.* at 221-22; *see also* Brief for Petitioners at 7, *Boston Harbor*, 507 U.S. 218 (1993) (No. 91-261), 1992 WL 511837.

[17] The District's Agreement does, however, contain one set of provisions that the *Boston Harbor* agreement did not appear to have: provisions requiring the parties to maximize work opportunities for the District's residents and for minority- and women-owned businesses. Specifically, the Agreement required signatory unions to establish apprenticeship programs for District residents, to encourage District residents to enter those programs, and to encourage the utilization of District residents on the projects covered by the PSA. These provisions do not render the PSA too broad to qualify as market participation under *Cardinal Towing*'s "narrow scope" test; they are simply part of the consideration that the unions provided in exchange for the benefits they received under the Agreement. This conclusion accords with the Supreme Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), that a city acted as a market participant not subject to the dormant Commerce Clause when it adopted an executive order requiring that certain percentages of workers on city-funded public

construction projects be city residents, minorities, and women. *Id.* at 206, 214.

[18] We therefore conclude that the District's PSA is sufficiently narrow to qualify as market participation exempt from preemption under *Cardinal Towing*'s second prong. Because entering into the PSA qualifies as market participation—under both prongs of the *Cardinal Towing* test—it is not subject to preemption by ERISA or the NLRA. We accordingly affirm the grant of summary judgment for the defendants on the preemption claims.

2. Substantive and Procedural Due Process Claims

The plaintiffs contend that the PSA violated their rights to substantive and procedural due process by depriving them of liberty and property interests protected by the Fourteenth Amendment. To succeed on a substantive or procedural due process claim, the plaintiffs must first establish that they were deprived of an interest protected by the Due Process Clause. *See Shanks v. Dressely*, 540 F.3d 1082, 1087 (9th Cir. 2008) (substantive due process); *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003) (procedural due process). We conclude that the plaintiffs cannot make this threshold showing and accordingly affirm the grant of summary judgment to the defendants on the due process claims.

a. Claimed Liberty Interest

[19] The plaintiffs first contend that the PSA deprived them of their protected liberty interest in pursuing careers as electricians by "categorically disqualif[ying] them and render-[ing] them ineligible for virtually any Rancho Santiago construction work for three years." The Due Process Clause does indeed protect the plaintiffs' liberty interest in pursuing their careers as electricians. *See Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (holding that the Due Process Clause protects

the right to "engage in the common occupations of life"). The PSA, however, did not deprive the plaintiffs of that interest.

[20] The Supreme Court made clear in *Board of Regents v. Roth* that merely declining to rehire someone does not infringe on his liberty interest in pursuing a career because the person "remains free as before to seek another" job. *Id.* at 575. Rather, the government violates this liberty interest only when it "foreclose[s the person's] freedom to take advantage of other employment opportunities," for instance by barring him or her from "all other public employment." *Id.* at 573-74. By extension, then, declining to hire someone in the first instance does not infringe any protected liberty interest so long as the decision does not bar the person from all public employment or otherwise foreclose him from seeking other job opportunities.

[21] The plaintiffs contend that the PSA violated their liberty by effectively barring them from working on a significant portion of the District's construction projects for three years. This contention fails for two reasons. First, the plaintiffs were not excluded from all public employment on the District's projects; they still had the opportunity to work on non-Measure E-funded projects and on Measure E projects costing less than $200,000. Second, and more importantly, the plaintiffs were not actually excluded from working on the projects covered by the PSA: the non-union apprentices remained free to join a union apprenticeship program qualified to provide workers for those projects. The PSA therefore did not violate the plaintiffs' liberty interest in pursuing their careers as electricians.

b. Claimed Property Interests

The plaintiffs also contend that the PSA deprived them of three protected property interests: (1) their interest in remaining eligible to work on the District's construction projects, (2) their interest in a state-funded education, and (3) their interest

in the credits, job hours, and training they had earned through their non-union apprenticeship programs. We conclude that the PSA did not deprive the plaintiffs of any such protected property interests.

First, the plaintiffs have not even made the threshold showing that the Due Process Clause protects their interest in remaining eligible to work on the District's construction projects. Protected property interests "are not created by the Constitution[, but r]ather . . . they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. State law creates a property interest protected by the Due Process Clause where it creates a "legitimate claim of entitlement" to a particular benefit. *Id.* A legitimate claim of entitlement "is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms." *Wedges/Ledges of Cal., Inc. v. Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (quoting *Ass'n of Orange Co. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983)). Although the plaintiffs contend, without explanation, that the "net effect" of a variety of California laws confers on them an entitlement to remain eligible for work on the District's projects, they point to no law that even comes close to mandating that non-union apprentices remain eligible for all construction projects. We therefore conclude that the plaintiffs have no protected property interest in remaining eligible to work on the District's projects.

Second, even if California law confers a protected property interest in a state-funded education, the plaintiffs do not explain how the PSA deprived them of that interest. Indeed, the plaintiffs clearly could not show that they suffered a deprivation of their purported right to an education, as they have all graduated. We accordingly reject this claim.

Third, even if California law creates protected property interests in the credits, job hours, and training that the named

apprentices earned through their non-union apprenticeship programs, the PSA did not deprive them of those interests. The PSA did not kick the plaintiffs out of their apprenticeship programs or strip them of their credits and training hours. At most, the PSA required the plaintiffs to put some of their credits and training hours in jeopardy if they chose to transfer to another apprenticeship program so that they could work on PSA-covered projects. This loss would have resulted from the apprentices' choice to transfer programs, not from the PSA itself.

[22] In sum, the PSA did not deprive the plaintiffs of any liberty or property interest protected by the Due Process Clause. We accordingly affirm the grant of summary judgment to the defendants on the plaintiffs' due process claims.

3. Equal Protection Claim

Finally, the plaintiffs contend that the PSA violated their rights to equal protection because it treated them differently than union-affiliated apprentices. The parties agree, as they must, that rational basis scrutiny applies to this claim.[8] *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (explaining that rational basis scrutiny applies to equal protection claims "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage"). State action will survive rational basis scrutiny if it is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under rational basis review, the state actor "has no obligation to produce evidence to sus-

[8]The District contends that the PSA does not constitute state action subject to the Equal Protection Clause because it constitutes market participation, not regulation. The market participation doctrine, however, applies only to the Commerce Clause and preemption. *See Engine Mfrs.*, 498 F.3d at 1040. The District offers no authority suggesting that states need not abide by the Equal Protection Clause when they are acting as market participants.

tain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (internal quotations, alteration, and citation omitted).

The plaintiffs have not met this burden. The plaintiffs contend that the PSA fails the rational basis test because it was not rationally related to the District's claimed legitimate interest in avoiding labor disruptions. In support of this contention, they point to evidence that the District did not analyze the PSA's "true cost impact." This contention misses the mark. First, the Equal Protection Clause "allows the States wide latitude" with economic decisions, and "presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440 (internal citations omitted). Thus, even if the District's purported failure to fully analyze the PSA's costs resulted in an improvident decision, the Equal Protection Clause will not invalidate it. Second, to survive rational basis scrutiny, a state action need not *actually* further a legitimate interest; it is enough that the governing body "*could have rationally decided* that" the action would further that interest. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis in original). Here, even if the PSA did cost the District more than it was worth, the District could have rationally believed that the PSA would promote its legitimate interest in avoiding labor disruptions. Indeed, the PSA plainly contains provisions that serve that goal by prohibiting work stoppages, strikes, and other disruptions.

[23] Because we conclude that the PSA was rationally related to the District's legitimate interest in preventing labor disruptions, we affirm the grant of summary judgment to the defendants on the plaintiffs' Equal Protection Claim.

IV. CONCLUSION

In sum, we conclude that this appeal is not moot and that the District has waived any claim to sovereign immunity.

Because we conclude that the PSA falls within the market participant exception to preemption, we affirm the grant of summary judgment to the defendants on the ERISA and NLRA preemption claims. We also affirm the grant of summary judgment to the defendants on the plaintiffs' substantive and procedural due process claims because the plaintiffs have not shown that the District deprived them of any constitutionally protected liberty or property interest. Finally, we conclude that the PSA was rationally related to the District's legitimate interest in avoiding labor disruptions and accordingly affirm the grant of summary judgment to the defendants on the Equal Protection claim.

DISMISSED in part; AFFIRMED in part.

Mr. KUCINICH. When you say racist, you had better be able to back it up.

Also, Mr. Chairman, I would like a yes or no answer from Dr. Belman. Did you say that these project labor agreements cover both public and private jobs? Yes or no.

Mr. BELMAN. Yes.

Mr. KUCINICH. And yes or no, Ms. Figg, did you say, when you were talking about that bridge project in Minnesota, was that done by a project, was there a project labor agreement involved in that bridge project, yes or no?

Ms. FIGG. Yes.

Mr. KUCINICH. OK, thank you.

Now, Dr. Belman, you have heard the testimony of several individuals and associations from the construction industry claiming that Federal agencies' use of PLAs will negatively impact competition and drive up construction costs. As you know, Executive Order 13502 focuses on large-scale construction projects where the total cost to the Federal Government is $25 million or more and which are generally more complex and of longer duration. Can you tell us how competition among bidders for these types of large construction projects impact costs?

Mr. BELMAN. Yes. There actually is very limited careful research on this. But what is clear, in some work done by a colleague of mine, Professor Peter Phillips of Utah, suggests that on large projects, having three to four bidders is more than enough to get close to minimum cost, because the gains from winning a bid are so large that employer bidders want to make sure that they get it.

Smaller projects, one is more willing to roll the dice, kind of a Las Vegas approach to construction contracting, because if you can get, if you put in a high bid but you still win, you make a lot of money. So the bottom line is it is not clear that you need to get huge numbers of contractors on a job for the public to get the low price and the low bid on it.

Mr. KUCINICH. Have you found that PLAs have a negative impact on competition for contracts?

Mr. BELMAN. I haven't researched that question.

Mr. KUCINICH. In his written testimony, Mr. Ennis expressed concern regarding the Government's insistence that all Government contracts of a certain size must use union labor, despite shrinking levels of union membership. Dr. Belman, based on your research and familiarity with various project labor agreements, do PLAs prevent non-union contractors from being included in large Federal construction projects?

Mr. BELMAN. It depends on the PLA. I know, I am aware of Federal PLAs that are fairly open. The most recent ones——

Mr. KUCINICH. So some are open? They do not prevent them?

Mr. BELMAN. No, they do not prevent them, nor do they impose undue burdens on them.

Mr. KUCINICH. Some of the other witnesses, Dr. Belman, have claimed that requiring the use of PLAs for Federal construction projects increases the costs to taxpayers. In fact, some reports have supported this claim that PLAs increase the cost of construction. Your research, however, suggests that these concerns are overstated. What about this discrepancy?

Mr. BELMAN. There is considerable anecdotal evidence. You can find projects where PLAs were more expensive. You can find examples, case studies of projects where PLAs were less expensive. In terms of careful research, what I would say is there are two peer reviewed studies, one by Beacon Hill, that suggests that PLAs increased project costs in Massachusetts schools by about 12 percent, 14 percent. My own work in industrial relations, which takes a much closer look at this, and allows for the differences, you don't use PLAs on a plain vanilla school, you use them on a more——

Mr. KUCINICH. OK, I——

Mr. BELMAN. No cost.

Mr. KUCINICH. Final question. You don't contend that PLAs should be used on every single large scale construction project, is that correct?

Mr. BELMAN. No.

Mr. KUCINICH. OK, no, meaning what?

Mr. BELMAN. No means right project, right PLA. Then they make sense to use.

Mr. JORDAN. I Thank the gentleman.

I now yield to the vice chairman, Ms. Buerkle.

Ms. BUERKLE. Thank you, Mr. Chairman. And thank you to all of our panelists for being here today.

This Congress has made the economy and job creation our No. 1 priority, as this Nation has faced 20 plus months of unemployment at 9 percent or above. So to you all in the panel who are the job creators, thank you, and we look forward to working with you to create an environment where you can create jobs and you can be successful, and the Government isn't in the way of your progress and your success. So thanks for being here today.

My first question is to Mr. Biagas. And I might say to you, my chief of staff is the oldest of 14. So you two have a lot in common, or not so.

I want to give you the opportunity, because the allegation in what you stated in your statement is a serious one. Maybe you could cite for us some specific examples.

Mr. BIAGAS. Yes, ma'am. In the attachment, the handout I had, there was a study that was done on the Washington National Stadium, which had a PLA it also had goals, and also hard goals, for hiring of inner city and minorities that actually reside in the District of Columbia. Due to the way the work actually went, that was never fulfilled. I would further say, if you would look into that study, you would certainly find that there was an obvious attempt not to hire these inner city minorities, which the intent, or the bill of goods that was sold with the PLA was they were going to hire a bunch of inner city youth and/or folks and put them through the apprenticeship to let them become trades workers.

It did not happen, nor does it ever happen on PLAs. It is all smoke and mirrors.

Ms. BUERKLE. Thank you very much.

Mr. BASKIN. May I supplement that response? It goes to your question as well as to Congressman Kucinich. In Chicago, African American and female construction workers were awarded $1.3 million under a consent decree, arising out of a PLA project asking for cases of racism. An Alameda County jury awarded a black con-

struction worker $490,000 for racial harassment on the PLA San Francisco airport project.

The Philadelphia City Council found that minority standards were not being met under PLAs in that city. The mayor of Buffalo, New York made similar criticisms, and the Washington National Stadium, already referenced to. These and other specific instances of racism and racist problems and minorities and women under PLAs are set forth in our reports on the poor performance of PLAs. A new edition is coming out, and I would be happy to provide that to the committee.

Ms. BUERKLE. Thank you very much.

My next question is to Ms. Figg. Because when you were asked the yes or no question regarding the PLA project for the bridge, the I–35 bridge, I had the feeling you wanted to explain that. But my understanding is you are here to talk to us about regulations. And that is what this subcommittee is about. So perhaps you could just give us, first of all, it is encouraging to know that a project of that magnitude could be accomplished in that short a period of time.

Had that not been on the fast track, can you give us some estimate of the cost and what it would have cost with the standard operating procedure, as well as the length of time?

Ms. FIGG. There is some information that would suggest that a project like that would take anywhere from 10 to 15 years to bring to actual construction. The processes are overlapping in that both State and Federal Governments require the same things. But there is no working together on those. So you have to go through these review processes.

Private industry knows what the regulations are. So they put forth a proposal that accomplishes meeting those. It is the review process that takes so long to just confirm that in fact what you put forward was meeting the criteria. So we see many times where you submit information for an environmental process, for instance, and it goes on for a number of years. But the project doesn't change from the day you submitted the original proposal.

So it is just, it is a time waster. And there are indications that there is at least a 10 percent additional cost and more. Some have indicated, in our Construction Industry Round Table sentiment indexes up to 50 percent of additional cost due to these overlapping regulations.

Ms. BUERKLE. Thank you.

Mr. Ennis, just briefly, you mentioned in your opening statement that you bid on three jobs and you did not successfully get any of those jobs. Can you just tell us if you have received any feedback as to why you didn't get the contract?

Mr. ENNIS. Because they were awarded as PLAs. Two of the three were actually, one was awarded as a PLA and a subsequent change order was issued, a couple million dollars, to make it PLA. We were asked on one of the projects to sign a PLA. The third project, from what I understand, they never could come to an agreement on a PLA. I believe they withdrew it.

All three of these proposals are technical proposals, of which any of that information was never available to us. But with the contractors that we bid with, we were told we were out because we would not sign a PLA.

Ms. BUERKLE. Thank you. I am out of time, but just quickly, was the shop that it was awarded to a union shop or a non-union shop?

Mr. ENNIS. To a union shop.

Ms. BUERKLE. Thank you very much. Thanks to all the panelists.

Ms. JORDAN. I thank the gentlelady.

Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman. I thank the witnesses.

Obviously a lot of scar tissue is built up on this issue. It seems like under the George H.W. Bush administration, project labor agreements were banned. Then under Clinton they were encouraged, then under George W. Bush, they were banned again. Now under Obama they are encouraged. So we have gone back and forth, back and forth.

And I know Mr. Baskin is a professional at figuring this stuff out. But it strikes me as odd that in a couple of panels of sworn witnesses here, we have such a completely different understanding of the facts. It is almost hard to imagine we could have such a different impression. Because on the face of the Executive order, it says that Executive agencies may require these things. It doesn't say they have to.

And then in the next panel, Mr. Gordon is going to testify, I believe, I don't want to jump the gun here, that he says on page 5, "Any contractor may compete for and win a Federal contract requiring a project labor agreement, whether or not the contractor's employees are represented by a labor union." And he goes on to describe a lot of other flexible provisions that these may contain, because these have to be negotiated.

So it is kind of hard for me to understand who is telling the truth here. Here, we hear from many panelists gloom and doom, from the other side we hear flexibility.

I don't have a dog in this fight. Who am I supposed to believe? It just depends on previous scar tissue or previous experience. As I say, you are all sworn witnesses. How do you reconcile those conflicts? Mr. Baskin, I will give you an opportunity, since you are a known professional in this area.

Mr. BASKIN. I think we have some agreement on this panel, which is that Dr. Belman has conceded that PLAs generally do exclude the non-union contractors. It is a totally false premise to say, well, they can bid, they just can't perform the work unless they agree to become——

Mr. COOPER. Well, sir, Dr. Belman is shaking his head. So you may have spoken, let Dr. Belman speak for himself.

Mr. BASKIN. And as well his previous testimony. But you asked about the Executive orders. President Bush's was the first Executive order to clearly prohibit but also stay neutral on the issue.

Mr. COOPER. Which President Bush?

Mr. BASKIN. President Bush, George W. Bush. President Clinton did not issue an Executive order.

Mr. COOPER. His father had also prohibited project labor agreements, according to Dr. Belman.

Mr. BASKIN. At the very end of his administration, when there was not time to implement it.

Mr. COOPER. But he had still done that, his father had done it.

Mr. BASKIN. And then President Clinton came in with a, did not issue an Executive order, merely a memorandum.

I guess the point about the current Executive order, let's talk about the present day. It says they shall encourage agencies to require. And under what right should any agency be able to require a restricted bid specification, which is what a PLA is? That reduces competition. That is really what this is all about. All we are asking for is full and open competition in a meaningful way without the restricted bid specifications.

Mr. COOPER. I am sure you would be interested in litigating that, if there is a fee involved.

Mr. BASKIN. We already have been. We already have it. It is regrettable that money has to be spent on litigating something that was already in the Competition and Contracting Act. But we have brought four protests that have all been successful, I think, because the agencies have Recognized that there is an over-reach involved here.

Mr. COOPER. But how about this direct statement that any contractor may enter into the PLA whether or not a contractor's employees are represented by a labor union?

Mr. BASKIN. And because of the discriminatory aspects of telling, what are you doing there, you are telling a non-union contractor to completely revamp his way of doing business, that which has made him successful and would make the Government successful if they used his services. Certainly, to accept union representation for employees who don't want it.

Mr. COOPER. Dr. Belman.

Mr. BELMAN. One, you can write PLAs many different ways, to be private sector PLAs often do require that a contractor be a permanent signatory to a local agreement. I haven't done a thorough enough study of public PLAs to know where they stand. But they are certainly moving toward greater openness to non-union contractors, to drag-along clauses and to dealing with benefit issues.

But I do have to say is, that while open competition is important, the point of the open competition is to provide the public with value. And there are projects, and that public value can be increased through the use of project labor agreements. I am not sure that it is wise to come up with a policy that would prevent the public from realizing that value.

Mr. COOPER. My time is expiring. It seems to me that a good lawyer could write a good PLA.

Mr. BELMAN. Many have.

Mr. JORDAN. I Thank the gentleman.

The gentleman from New Hampshire, Mr. Guinta, is recognized.

Mr. GUINTA. Thank you, Mr. Chairman.

I think the point that I would make is, why does a good lawyer have to write a good PLA? Mr. Baskin, if your preference would be, I assume, not to have to engage in writing a PLA, correct?

Mr. BASKIN. Yes, but it is not just me. We are talking thousands of contractors around the country who have voiced their opposition to being forced to change their way of doing business and to force unions on employees who work for them who don't want it. Have a vote, if that is what the unions want. Why are they being subjected to this? It is about them, it is not about me.

Mr. GUINTA. And second, if this Executive order was not in place, you or any other lawyer wouldn't have to sue for a fee, correct?

Mr. BASKIN. Absolutely right. Correct.

Mr. GUINTA. Now, I think we all know what the definition of require is. I just want to read Section 3 of the Executive Order 13502. And if I am not reading this correctly, I would like someone to correct me, please.

It states, "In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, executive agencies may, on a project by project basis, require the use of a project labor agreement by a contractor."

So what it says to me is a very clear suggestion that you should require project labor agreements. Now, technically, under the law, the word may covers the fact that you don't have to. But what I would like to know is, how many of these projects do not require a project labor agreement? Does anyone, Dr. Belman, would you know the answer to that question?

Mr. BELMAN. I haven't studied that in terms of Federal contracts recently.

Mr. GUINTA. You had testified earlier, and I would like to hear about this a little bit more, I apologize, I had to step out of the room. But you talked about value. Can you just talk to me a little bit more about the social value that you are referring to?

Mr. BELMAN. OK, well, let me give you an example. On the west coast, there are a number of project labor agreements that contain very extensive provisions for moving individuals in low income areas or from minority groups through pre-apprenticeship training programs into apprenticeship programs and then into full journeyman status.

Now, having, and there are extensive systems of community overview, there are extensive joint panels that make sure that these are effective and every review I have read suggests that they are extremely effective in moving particularly African Americans and Hispanics into well-paid, highly trained jobs where they are very productive members of the work force. So that is, I interpret that as a positive social value that can be generated by PLAs, and isn't generated in their absence.

Mr. GUINTA. So am I to assume based on that described value that non-union companies do not engage in apprenticeships with minorities?

Mr. BELMAN. What I would tell you is that from my own research and that of Johannes Beldens, and a number of others, is that, and also you can read in the engineering news record and from the construction users round table, is that there is a crisis in construction training, that there is under-investment in construction training, and that is largely on the non-union side.

Can we find good non-union construction companies? You bet. Are there non-union construction companies that will go out there and compete for PLA work, get the contracts and do well? You bet. But on average, non-union companies are much more dependent on public training contributions and provide much less training than do union construction firms.

Mr. GUINTA. The testimony that I heard from Mr. Ennis and Mr. Biagas would refute that last statement you made.

Mr. BELMAN. No, they don't. They simply say, as I said, there are some great companies, non-union companies out there that do very well. But the typical non-union company does much less training and invests much less in training than a union company. Just like contrary to some of the things that are said here, there is, African Americans make up a smaller percentage of the non-union work force today than the do the union work force. So if you hire a union company, you are more likely to have an African American worker on the job than if you hire a non-union company.

Mr. GUINTA. So based on that argument, we should apply this standard to every industry in the country?

Mr. BELMAN. Which standard?

Mr. GUINTA. The requirement that unions participate in any industry, not just the construction industry. Because unions, according to what you are saying, spend more time training. Yet the rest of the free market society would suggest otherwise.

Mr. BELMAN. There is, you can look at Peter Capelli's work on this. There is a strong suggestion that the U.S. spends considerably less on employee training than do most other industrialized countries. That is a reason why our economy is not functioning as well as we would like.

Whether unions are the solution to this, I have to be neutral on. But I do know that in construction, unions and their signatory employers, I should make that point, these are through joint labor management committees, spend far more on training through private means than does the non-union sector. And that in many times, the non-union sector is dependent on their, for their most skilled workers, on people who have left the union sector, people like, to some degree, like Mr. Biagas.

Mr. GUINTA. Thank you, Mr. Chairman.

Mr. JORDAN. Thank you.

I now recognize the gentlelady, Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman. And thank you for holding this hearing.

Let me first request unanimous consent that two statements be submitted for the record, by Tammy Miser and Kathryn Rilett.

Mr. JORDAN. Without objection.

[The information referred to follows:]

STATEMENT FOR THE RECORDY

By TAMMY MISER

Of United Support and Memorial for Workplace Fatalities

For the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Committee on Oversight and Government Reform

U.S. House of Representatives

March 16, 2011

My name is Tammy Miser and I founded the not-for-profit organization United Support and Memorial for Workplace Fatalities (USMWF). USMWF offers support, guidance, resources, and advocacy to empower family members who have lost a loved one from work-related injuries or illnesses. My brother Shawn Boone, 33, was killed at work from an aluminum dust explosion that was completely preventable. USMWF works with other organizations, government agencies, and businesses as a catalyst for positive change to ensure safe and healthy working conditions for all.

I understand the Committee on Oversight and Government is examining the impact of regulations on businesses. My husband and I used to run a small business. We understand about complying with regulations, but we recognize that regulations serve a purpose, especially those that are designed to protect workers' lives. I urge the Committee to not just look at the costs of OSHA regulations, but also the benefits to workers and their families. I ask the Committee to set aside the rhetoric about job-killing regulations and do a reality check. There have only been two new major OSHA regulations in the last 10 years: crane and derricks, and hexavalent chromium. Both only affect a fraction of U.S. businesses.

As I talked to families from around the country who have lost loved ones from workplace hazards, we don't see an avalanche of new OSHA regulations. It's more like a drought. I shook my head in dismay when I read several letters sent to Congressman Issa complaining about a possible OSHA rule to prevent explosions and fires from combustible dust. OSHA

hasn't even proposed a rule yet, and at its current pace, there likely won't be one on the books for 10 years.

My brother Shawn Boone worked at the Hayes Lemmerz plant in Huntington, Indiana where they made aluminum wheels. The plant had a history of fires, but workers were told not to call the fire department. My brother and a couple coworkers went in to relight a chip melt furnace. They decided to stick around a few minutes to make sure everything was ok and then went back to gather tools. Shawn's back was toward the furnace when the first explosion occurred. Someone said that Shawn got up and started walking toward the doors when there was a second and more intense blast. The heat from that blast was hot enough to melt copper piping. Shawn did not die instantly. He laid on floor smoldering while the aluminum dust continued to burn through his flesh and muscle tissue. The breaths that he took burned his internal organs and the blast took his eyesight. Shawn was still conscious and asking for help when the ambulance took him.

Hayes Lemmerz never bothered to call any of my family members to let us know that there was an explosion, or that Shawn was injured. The only call we received was from a friend of my husband, Mark, who told them that Shawn was in route to a Ft. Wayne burn unit. (Mark also worked at the plant.) When Mark asked the hospital staff where Shawn was, we found that no one even bothered to identify him. We were told that there was a "white, unidentified male" admitted to the unit. When Mark tried to describe Shawn, the nurse stopped him to say that there was an unidentified male with no body hair and no physical markings to identify. So my Shawn was ultimately identified only by his body weight and type.

We drove five hours to Indiana wondering if it really was Shawn, hoping and praying that it wasn't. This still brings about guilt because I would not wish this feeling on anyone. We arrived only to be told that Shawn was being kept alive for us. The onsite pastor stopped us and told us to prepare ourselves, adding he had not seen anything like this since the war. The doctors refused to treat Shawn, saying even if they took his limbs, his internal organs were burned beyond repair. This was apparent by the black sludge they were pumping from his body.

I went into the burn unit to see my brother. Maybe someone who didn't know Shawn wouldn't recognize him, but he was still my brother. You can't spend a lifetime with someone and not know who they are. Shawn's face had been cleaned up and it was very swollen and splitting, but he was still my Bub. My family immediately started talking about taking Shawn off of life support. If we did all agree, I would be ultimately giving up on Shawn. I would have taken his last breath, even if there was no hope and we weren't to blame. I still had to make that decision. To watch them stop the machines and watch my little brother die before my eyes.

But we did take him off and we did stay to see his last breath. The two things I remember most are Shawn's last words, "I'm in a world of hurt." And his last breath.

This has been the hardest thing my family has had to deal with until 2007. My youngest brother drove half way across the United States with a few photo's and phone records of the night Shawn was killed that he had tucked into his bible. Tommy then proceeded to shoot himself in the head. I can't say that Shawn's death alone caused my brother to take his own life, but I know for a fact he couldn't deal with it and that was what was on his mind.

The U.S. Chemical Safety and Hazard Investigation Board (CSB) said the explosion that killed Shawn probably originated in a dust collector that was not adequately vented or cleaned. The dust collector was also too close to the aluminum scrap processing area. Hayes Lemmerz management allowed dust to accumulate on overhead beams and structures which caused a second, more massive explosion. The CSB concluded that had the company adhered to the National Fire Protection Association's standard for combustible metal dust, the explosion would have been minimized or prevented altogether.[1]

[1] U.S. Chemical Safety and Hazard Investigation Board. Investigation Report Aluminum Dust Explosion, Hayes Lemmerz International, Huntington, Indiana, October 29, 2003. Report No. 2004-04-I-IN, September 2005.

During my own struggle for information about the OSHA investigative process, it became clear that family member victims of workplace fatalities needed a place to get information and support. That's how USMWF was formed. We are a virtual community of individuals with the shared experience of losing a loved one from a work-related injury or disease. Thousands of family members across the U.S. suffer profoundly because of our nation's inadequate regulatory system and its failure to protect workers' fundamental right to a safe and healthy worksite.

Steven Lillicrap was only 21 years old in February 2009 when he was fatally pulled into the cables of a 100-ton crane. OSHA had been working to revise its outdated crane safety standard for 10 years, but the new rule came too late for Steven. It was finally issued last July and is expected to prevent 22 deaths, 175 injuries, and millions of dollars in property damage per year. The benefits far outweigh the $154 million cost. When you look at the few standards that OSHA has issued over its 40 year history, the benefits always exceed the costs. And those are only the benefits you can quantify.

The CSB warned OSHA in 2006 about combustible dust hazards. Had the National Fire Protection Association (NFPA) standard been implemented, as a mandatory regulation instead of a voluntary consensus code, my brother Shawn and many others would still be here today. In 2008 the Imperial Sugar refinery explosion killed 14 workers and 36 were burned. The means to prevent these deadly explosions is well known. And preventing dust explosions has been done before, such as in grain handling facilities. Prior to OSHA's 1978 safety standard, there were about 20 explosions per year in grain elevators. Today, there are only about six. Yet some companies choose to gamble with workers' lives because there is no OSHA standard and failing to act gives them a competitive advantage over more responsible companies.

When preventable disasters strike in the workplace, they not only take a huge toll on the injured and their families, but workers can lose their jobs and the community suffers.

Some disasters occur because employers fail to comply with safety regulations. After the 2009 explosion at the Sunoco refinery in Pennsylvania, the company decided not to rebuild its ethylene unit. Fifty workers were laid off.[2] Had there been better compliance with OSHA's process safety management requirements, it would never have happened.

Some disasters occur because of inadequate regulations. In 2009, Con Agra's Slim Jim plant exploded, 3 workers were killed and 71 were injured. A contractor was using a procedure that purged natural gas into the indoor work environment, instead of purging the gas out of doors and using an explosivity detection meter. This disaster could have been prevented if OSHA had regulations requiring natural gas to be purged out of doors. The CSB found that OSHA doesn't have specific rules for natural gas purging, nor are there voluntary codes.[3] Because there is no OSHA regulation, there have been too many explosions of this nature in commercial and industrial facilities.

The lack of regulations not only killed 3 workers at the ConAgra plant, it also killed jobs. Before the disaster 700 people worked at the factory. Now the factory is closing. Rather than rebuild the damaged portion of the plant, the company is consolidating production elsewhere.[4]

The T-2 gasoline additive factory near Jacksonville, Florida had a runaway reaction in December 2007 involving highly reactive sodium metal. The explosion killed 4 and injured 32, including 28 at surrounding businesses. Pieces of the building were found a mile away. An investigation by the CSB found that the reactions could have been prevented if OSHA's process safety management standard covered reactive hazards. Sadly, the owner of the T-2 factory was among those killed by the explosion. Three adjacent businesses had to relocate from the

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[2] Logue T. Sunoco to lay off 40-50, close ethylene complex. *Daily (Delaware) Times*. July 7, 2009.

[3] U.S. Chemical Safety and Hazard Investigation Board. Urgent Recommendations on Gas Purging. August 2010.

[4] Nagem S, Wolf AM. Slim Jim plant's demise to put 450 out of work. *NewsObserver.com*. March 4, 2010.

industrial area, and a fourth business—a trucking company--was put out of business due to the damage.

There's no price tag that can be put on seeing your husband walk your daughter down her wedding aisle, or seeing your son graduate from college, or holding a grandchild. The economic disruption to a family who loses a breadwinner is never offset by workers' compensation benefits. Workplace safety regulations and even-handed enforcement help level the playing field for employers who do the right thing versus those who take the low road.

A one-sided look at the costs of OSHA rules, but excluding the benefits, does a disservice to workers, responsible employers, families and communities.

STATEMENT FOR THE RECORD

By Catherine A. Rylatt

Of United Support and Memorial for Workplace Fatalities

For the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Committee on Oversight and Government Reform

U.S. House of Representatives

March 16, 2011

My name is Catherine Rylatt, MPA. My nephew Alex Pacas was engulfed in grain and was killed. I became involved with USMWF (United Support and Memorial for Workplace Fatalities) when I began searching for answers. I also helped start the Grain Handling Safety Coalition in Illinois. GHSCs mission is to prevent and reduce accidents, injuries, and fatalities across the grain industry spectrum through safety education, prevention and outreach. I previously worked for a state government agency holding positions as budget analyst, liaison to county partners and manager of a specialized enforcement program.

On Wednesday July 28, 2010 I received a phone cal from my 72 year old mother in hysterics screaming "He's dead, Oh god, he's dead". When I was finally able to calm mom down she choked out between sobs my 19 year old nephew, Alejandro, "Alex", AKA "Poco" Pacas had become engulfed in a grain bin while attempting to free 14 year old Wyatt Whitebread. Will Piper 20, Alex's best friend, had been rescued a couple of hours ago. The accident occurred at a facility owned by Haasbach, LLC in Mt. Carroll, IL a small rural town in northeastern Illinois. Wyatt and Alex were presumed dead, although their bodies were not yet recovered. My husband, hovered in the background and began asking questions – "What were they doing in the bin? Had they been trained? Were they wearing safety harness?" It would be a few days before the significance of those questions became known to me.

It was about 6:15 PM. The rescue had changed to a recovery status a couple hours previously, but my sister Annette had refused to call, still holding out hope Alex would be found alive even though the accident happened at approximately 10 AM that morning. I shuddered to think of her waiting all those hours alone. I was the one who called the family that night and to tell them Alex was dead. I called the four other sisters (there are 6 girls in my family); our cousins, our aunts and uncles. On every call it was the same – "what do you mean Alex is dead? How do they know for sure? Maybe he is still okay? What do you mean engulfed?"

As I sat on the 6 AM flight to Chicago from Dallas the next morning with my 14 year old son, I remember trying to grasp what the clinical term engulfment truly meant in terms of my nephew's death.

Alex was the oldest of my sister's 7 children. He had 3 sisters and 3 brothers. He was their hero, their big brother. He was his 16 year old sister, Gaby's, confirmation sponsor, his 4 year old brother's, Emanuel AKA "Squeaks" Godfather. He proudly bestowed the family nicknames on all his siblings. Nicknames which became so ingrained, we, at times forgot their Christian names. He was returning to college in a few weeks to study electrical engineering. He wanted to be a robotics engineer and design better prosthetics. Alex loved music and was a talented musician.

While many people suffer exorbitantly wondering about their loved ones last moments when their lives are claimed by tragic accidents, we were very blessed in that Will Piper, the survivor sought us out immediately upon being released from the hospital. With courage and bravery, far beyond the youth and experience of his 20 years, Will proceeded to tell us the horror of that fateful morning. While disturbing in its content, it is Will's story I share with you today of the interminable moments between the vivacity of life in three young men and the extinguishing of two of those lives.

Four boys were inside the grain bin – Wyatt 14, Chris 15, Alex 19, and Will 20. Wyatt was the one who had been "working" there the longest (about 2 weeks). Alex was the newest – it was his second day as temporary day labor. Wyatt, being a seasoned veteran "trained" the others. They were supposed to walk around breaking up clumps of corn with shovels, their feet, etc to get the corn flowing. The manager told them to be careful when they got down lower in the bin to not get caught in the moving auger and to not stand on the engine of the auger. Wyatt showed the boys how you could "ride the corn" – sliding down it like on a sled, using your arms as paddles to break up clumps and get the grain moving faster. The manager poked his head in, saw the boys sliding down the corn and didn't say a word.

Then Wyatt went sliding and the bridged corn broke – he was sliding uncontrollably with the flowing grain. He yelled. Alex and Will tried to hurry toward his side through the corn. They yelled at Chris to get out and get help. They reached Wyatt and grabbed hold of his arms. The grain thankfully had stopped flowing and they were pulling on Wyatt trying to release him from the enormous weight of the corn. He was almost freed, when the corn's surface they were standing on broke through again.

This time the flow was faster and Wyatt started sinking quickly. His panicked screams "Save me, Save me!" resounding through the steel structure. As Alex and Will struggled to save Wyatt, they too began sinking. Like quicksand, the corn began pulling at them and each movement caused them to go further into its depths while it rapidly and surely filled in any voids. Within seconds the corn was up to Wyatt's neck. Alex and Will were taller and slightly above Wyatt. They saw the fear grip their young friend, now screaming insensibly and looked into his terror stricken crazed eyes. In the last moments, as the corn reached his chin, Wyatt let go of their hands and covered his face as the grain buried him – still screaming.

The corn – unforgiving and insidious began filling up around Alex – He started screaming to his best friend Will, "God, I think Wyatt's dead! I can't see him. We are going to die!" Anxious himself, Will tried to reassure Alex. "Help is coming Alex, hang on!" Will grabbed Alex's hand. With every second that past, the boys became further entrapped in corn. Alex's unclasped hand was buried and he couldn't free it. Alex began praying in Spanish and asked Will to pray with him. (Alex's parents were bilingual and raised their children to be bilingual since birth). Being a true friend, Will joked with Alex that he better pray in English if he wanted Will to pray with him. They recited the "Our Father". Alex started talking about his brothers and sisters, interrupting himself to murmur parts of the rosary. The corn was rapidly rising to neck level. Will still hanging on to Alex, used his other free hand to try and keep the corn out of Alex's face, but it kept flowing back in, tormenting Will's efforts. Comprehension dawned. Alex uttered words of apology for his wrongdoings, and asked for forgiveness. Alex spoke words of love, hope, and encouragement for his brothers, sisters, mom and dad, family and friends. The first rescue workers arrived. They saw Alex was still alive! The rescuers untrained and out of their depth, hurriedly tried to improvise. Time was not on their side.

Will was frantic, desperately pushing back the corn from Alex's face, imploring him to stay calm, not move, hang on. Yet, the corn kept flowing back in, progressively higher with each sweep of his hand. Alex was spitting out corn, breathing deeply through his nose. In vain, Will continued swiping at the corn. But he couldn't keep the grain out of Alex's face. Innately knowing time was running out swifter, Alex told Will to give messages to his brothers and sisters – to tell them he loved them; to tell them to be good and he would be watching from heaven. Alex asked Will to tell his mom and dad he loved them. His head tipped back as far as he could, Alex took his last breath, holding it as the corn made its final descent over his head, determined to hold it while the rescue people worked feverishly to save him.

And then Alex's hand went limp in Will's and Will understood.

However, the nightmare was not over for Will. The rescue took several hours. Will lost consciousness a couple of times. He almost died too. They first put a bucket over his head to keep the grain away. Then they started to build a frame of plywood around him –trying to keep the corn from its single minded progression. During this process, Alex's body was uncovered right in front of Will and he had to stare at his best friend, the one he knew of as enamored with living – joyful, impish, caring, fun. The intense weight of the corn kept pushing against Will and

more than once he fell on top of Alex's cold, lifeless, body. At one point he had to brace himself against the shoulders of his dead buddy to stay erect and keep his head above the corn, struggling to stay alive.

This was my epiphany – the moment I truly understood what engulfment meant.

I don't think any of us can truly comprehend the gravity of horror these boys faced. There are questions and thoughts which keep me awake at night, emblazoned on all levels of my consciousness. What depth of terror must Wyatt have felt as he realized he was being swallowed up by corn? How long was Wyatt conscious, entombed in the darkness and dankness of the corn, unable to move and breathe – long enough to know his life was at an end? Long enough to understand the corn he unwittingly treated with the nonchalant abandonment of youth would now kill him? How long did Alex hold his breath, now silently saying his prayers, desperate for just that one more second of life needed for rescue to occur? Did he know the moment his life was over right before his brain flickered out?

Within a couple of days, the preliminary findings of the investigations were released and were confirmed 6 months later with OSHA's citations. First and foremost, none of the boys had any real knowledge of the dangers. They certainly had no experience working with grain. None of the boys had safety harnesses, none of them were trained, they were "walking the corn", the auger was running, there was not an observer trained in rescue posted outside the bin, there was no safety plan, and it was unlawful to have a 14 and 15 year old in the grain bin. These were all regulations that should have been adhered to under the, then unfamiliar to me, OSHA Grain Handling Standard which was published 20+ years ago.

In the first "public statement" Haasbach,LLC has ever made since the accident, they were quoted in the Chicago Tribune[1] as saying OSHA rules did not apply to them and the youths were exempted from Child Labor laws under Agricultural regulations. Haasbach has appealed the OSHA citations. Should an ALJ interpret the regulations similarly, this company will be exonerated of all charges because gaps in regulations. They will not be held accountable for their actions even though the hazards of this industry and the appropriate safety measures are well known, well documented, and easily available.[2] The very preventable and needless deaths of Alex and Wyatt will be considered just tragic accidents. The travesty of the system is further compounded by the claims the fines levied by OSHA and the Wage and Hour Division create an undue burden on this "small" business and threatens the ability of the company to remain in business (potentially losing 10 or less jobs).

The fact that this company will spend as much, if not more financial resources to fight these citations than it would have spent to comply with them does not escape my attention. For approximately $2400, the facility could have been in compliance with the regulations.[3]

In August of 2010, Quelino Ojeda Jimenez, 20, an illegal immigrant from Oaxaca, Mexico was working as a subcontractor for Atlanta based Imperial Roofing Group, in the Chicago area when he fell from a ladder of the fourth floor to the cement below, breaking his neck and becoming a paraplegic. Mr. Jimenez did not have insurance and it is unclear whether the company had workman's compensation. In essence taxpayers footed the $710,000 medical bill as hospitals receive government funds to care for the indigent. The cost of fall protection which would have prevented this accident is roughly about $350. OSHA investigated this employer and issued citations and fines. However, shortly after the accident, the employer went out of business, stating economic reasons.

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[1] *Chicago Tribune*, March 8, 2011, Drowned in Corn: Grain Bin Deaths Hit Record, Judith Graham. http://www.chicagotribune.com/news/local/ct-met-grain-bins-20110309,0,662216.story

[2] Typing in "grain safety" on Bing I came up with 11,900,000 results. "Grain Bin Safety, yielded 3,040,000 results. On Google 24,700,000 and 130,000 results respectively.

[3] Based on calculating the cost of 2 safety harness at $350 each, basic grain awareness training for 2 workers at $100 each and rescue training for an observer at $1500. These costs are high as there are many basic grain awareness training courses offered for free and less expensive rescue courses. To minimally comply there should be two people in a bin with an observer trained in rescue procedures posted outside. As to the other citations, they would all be considered normal operating costs such as having a written safety plan, turning off equipment, etc.

Notre Dame was just fined $77,500 for ignoring industry standards which would have prevented the death of 20 year old Declan Sullivan on October 27, 2010 when the hydraulic lift he was in filming a football game was toppled by high winds – those in access of the manufacturer's specifications and warnings. The cost in dollars of complying - $0. They did not have to send that lift into the air during those winds. All that would have happened if they did not hoist that lift was a football game would have gone unfilmed.

Liberty Mutual Research Institute for Safety 2010 reports in 2008 the top 5 workplace injuries (overexertion, fall on same level, bodily reaction, struck by object, fall to lower level) accounted for 71% of the 2008 cost burden and cost $53.42 billion in direct workman's compensation costs which equates to an average of $1 billion per week. The staggering costs above to not include indirect costs of injuries[4]. Several articles state indirect costs are $4 to every dollar of direct costs. This would equate to $213.68 billion additional dollars spent due to the top 5 workplace injuries. Yet, increased vigilance in complying with current regulations could dramatically decrease this drain on American business. (Think how simple it would be to avoid some of these injuries by ensuring compliance with current regulations – training in proper lifting procedures and two people carries; walkways clearly marked and free of debris, ice, water, etc; the cost of a hard hat, fall protection, proper ladder usage).

To say excessive regulation or the cumulative cost of regulation places undue stress and costs upon an employer is a correct statement in its generality. However, we have yet to clearly define "excessive", "cumulative", or "undue burden". Does excessive mean more than one regulation about the same issue? Or does it mean some group thinks they have too many regulations to comply with? How would you choose which ones to discard? Would you look at which one costs the employer the most to implement and discard that regulation? Or would you use which regulations benefit employees the most as the guide? If you didn't take into account the far reaching benefits and savings, not just to the employee, but to society in general, and to future generations, a true analysis cannot be achieved.

Cumulative effect is also undefined. Is regulating the need for fall protection, employee training, use of hardhats, etc considered undesirable cumulative regulations in the construction industry? Is allocating resources to target those industries where violations of these cumulative regulations most often occur irresponsible? If $500 would cover the cost of fall protection, training and a hard hat and could potentially prevent almost $1 million dollars in medical costs, or hundreds of thousands of dollars in fines and attorneys fee is that not a profitable margin for a company to consider? Avoiding one trip to the hospital ER would easily cover that cost. Do we discount these savings because they might not be passed onto the employer directly, but rather the public at large?

What does "undue burden" mean? Theoretically, what is a burden for one company may not be burdensome for another. I listened to last week's testimony from the manufacturing industry. Each panelist was asked to tell how much the cost of these excessive regulations or cumulative effect regulations would cost them to implement them. The majority of the panelists replied billions, but never did give a clear indication of how many billions of dollars across their respective industries. Nor did those cost dollars get balanced against the billions of potential or real profits of the industry. Is there a standard to be achieved for "undue burden"? Does it mean we cannot lessen industry profits by 1% or 100%, especially if the rate of profit increase surpasses the rate of cost increases? How much profit is does one need to remain viable? When does excessive profit become excessive greed?

If "regulation itself" is stated as the cause for job loss or company failure I would have to question that analysis at every level. Was the company already financially unstable? Had the company failed to take previous measures to increase productivity, eliminate waste, and bring about financial stability in its overall business practice? Commonsense would say if a business claims it can't afford the regulations, perhaps they need to reconsider their management practices for compliance to regulation is a cost of doing business. Perhaps, the more important question is not if it "can't" afford, but if it doesn't "want" to afford.

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[4] Direct costs are things such as loss of productivity, cost of replacement worker and training, administrative costs, wages paid for lost time, damage to equipment or property, investigation of the accident, uninsured medical coverage, loss of employee morale, absenteeism, implementing correction plans, and the list goes on.

When accessing the cost of regulation, one must consider all sides of the puzzle. It must stringently look at the benefits compliance entails including both direct and indirect costs. It must also look beyond the "traditional" viewpoint of regulation and consider all contributing regulation. It's not just about OSHA and EPA – although they are the easiest regulatory agencies to target. It is looking at how the current bankruptcy laws allow for businesses to close their doors and reopen under another name, thereby skipping out on paying fines and covering up a trail of noncompliance. It is looking at how loopholes which allow employers to not be responsible for ensuring employee compliance to basic safe work procedures places an undue burden on the taxpayers to fund the uninsured. It is looking at how the agricultural industry can receive billions of dollars in subsidy payments for crops, have special loan programs for farmers to build grain bins or other such things, yet none of these are tied to complying with any type of minimal standards on safety. It is looking at the detriments of more lenient EPA regulations and balancing them against the skyrocketing costs of health care largely bore by the average working American. It is looking at the cost of the regulation vs. the cost of plunging a family into poverty if the main wage earner becomes disabled or dies on the job. And into this we must weigh consequences of deregulation and the effect not just on the employer but the individual employee. When someone is killed at work, the family receives $8,000 in a death benefit to pay for funeral expenses which usually exceed that amount. Workman's comp is usually capped far below what the individual would have made in earnings. So if we dismantle OSHA, then the workman's compensation system must also go, allowing family's to sue employers for negligence. Do we want yet more lawsuits against companies, further driving up their costs?

The first step to this analysis should be bringing regulations in line with each other, closing gaps, and fixing contradictions across all sectors of government. One needs also to consider the advantages of fewer but broader regulations which give companies the autonomy to address the issues within the contextual framework of their business, but clearly puts the onus of responsibility onto them to do so. Companies such as Haasbach, LLC should not be allowed to wiggle out of regulatory compliance because gaps exist in defining different types of facilities/industries when there are clearly recognized and known hazards and widely known proven ways to protect against these hazards. The same can be said for the case of Mr. Jimenez.

We equate employee health and safety to regulatory interference and compliance. Yet, as the global market has expanded, and competition has become fiercer, and economic stability has become more challenging, many employers have realized on their own the value of a safe and healthy workforce. By decreasing accidents and improving employee health, they can reduce workman's compensation and health insurance costs as well as significantly reducing indirect costs – creating a win/win solution. Some employers are also extending this beyond the workplace and instituting programs which encourage safe practices at home and play to further reduce burdens on their healthcare costs.

Employers who have embraced the concept of change and realigned both their business practices and their attitudes toward safe and healthy employees are the ones who are surviving and thriving and remaining competitive in the global market. They are increasingly employing many known, but not widely used practices such as TPM or Total Productive Maintenance, the concept of 5S, Lean Manufacturing and Six Sigma. These processes use both data driven and information based methodologies to streamline internal process and procedures, eliminate waste and increase overall efficiency by aligning safety goals into the same contextual framework of the business objectives whereby resources are allocated to meet the overall needs. Utilizing employee participation to drive the identification, assessment and solution process creates more innovation and increased internal compliance with both safety and other processes.

The I2P2 OSHA regulation which is being discussed will in many ways help resolve the issue of over regulation. It will place responsibility on employers like Haasbach. More importantly, like discussed briefly above, many companies, are already employing similar practices but view this differently due to OSHA's terminology. Whether it be I2P2 or something else, clearly this type of more encompassing regulation can and does allow employers the autonomy they desire.

Our government has called upon and demanded from its citizens a return to personal responsibility especially in terms of finances and community service. For those who were already practicing this concept, they have been able to ride out the economic crisis. Others changed their habits. Over the years, the government has established rules and regulations designed to increase personal responsibility when individuals have failed to do so on their own. From child support regulations to seatbelt and child safety seat laws – and everything in between, the government has stepped in to enforce individual responsibility and ensure the safety of individual citizens. It is time then also for businesses to assume the onus of responsibility for their actions regarding the safety and health of their workers. Many businesses have done this on their own by enforcing safe work practices and often going above minimum regulations - and we applaud their efforts. Sadly though there is the small percentage who refuse, such as in the case of my nephew, and they create the hardship of burdensome regulation on others. The cry for increased autonomy and self-policing is loud and being heard in all sectors of business. I support and honor that concept but only if it is balanced with responsibility and accountability of their practices. Over regulation has occurred in business not because businesses comply, but because they have not! Any analysis of burdensome regulation must not just look at dollars and cents, but must also look at how it restores the balance of power – because that is just as important. Regulation in and of itself is not the culprit. The culprit is not doing the right thing in the first place; THAT is the total reason Regulation occurs. Don't make us write a piece of paper to do the RIGHT thing. Just do it – and you won't have to worry about regulations?

Ms. SPEIER. Thank you.

Just a couple of points. I think this is just a fascinating discussion, because as Mr. Cooper had said, it seems like we are talking over each other and not necessarily getting much clarity. The project labor agreement that Toyota has embraced is one that is worth spelling out a little bit. And Jeff Caldwell said, as the former head of the construction for Toyota North America, "I have numerous real world experiences with PLAs, and I can say without any equivocation that they are valuable tools for any entity seeking an economical and efficient construction process. Toyota has constructed numerous automobile, truck and engine production facilities in the United States, each of these construction projects was completed or is being completed under a project labor agreement that ensures that our facilities were built with a steady supply of high-skilled and productive workers."

In every instance, and I underscore this, this process worked beautifully. And the proof is in the results. Toyota North America construction costs are roughly one-third less than other major automobile manufacturers who eschew the use of project labor agreements.

Now, a big point is being made that somehow the Government, under the Executive order by President Obama, is forcing these PLAs by various Federal agencies. Mr. Baskin has made that point over and over again.

But let me point out, in an article that just appeared, nine workers were detained in a raid at a VA hospital job site in Florida. These nine people are in the United States illegally, were found to be working on the construction of a new Veterans Administration hospital in Orlando, Florida. It is estimated costs of over $600 million that the VA project represents. VA has strongly opposed doing PLAs.

So on the one hand, we have some Federal agencies that are not interested in doing PLAs. We have an example where one was clearly not using a PLA and they have nine workers who have been detained because they are illegal and working in this country. I am sure they are jobs that American workers would love to have.

Let me just speak a little bit about Tammy Miser, who is the sister of a man that was burned to death at a job site in this country. It was a company that did not follow the U.S. Chemical Safety and Hazardous Investigation Board's recommendations relative to dust collectors. And the CSB concluded that had the company adhered to the National Fire Protection Association standard for combustible metal dust, the explosion would have been minimized or prevented altogether.

I guess my question is to you, Dr. Belman, do you think that we have a productive discussion today about the impact of OSHA regulations without involving stories like the worker who lost his life?

Mr. BELMAN. Any economist would say, if you are going to take a look at regulations, you need to look at the benefits as well as the cost. One could of course look at purely the costs of building a containment vessel on a nuclear reactor and conclude they are a bad idea. But every now and then their benefits are very great. So you need to look at the benefits of regulation, fewer lives lost, and so on, as well as their costs.

Ms. SPEIER. Thank you. I think my time has expired.

Mr. JORDAN. I thank the gentlelady.

Mr. Belman, the OSHA deciding to back off the noise regulation that they were initially talking about relative to machines and manufacturing facilities, do you think that was a good move? Do you think they heard that in this situation that what perceived benefit was not there, and that it was a cost issue?

Mr. BELMAN. Although as an academic I believe I know all things, I don't have enough information to answer that question yes or no.

Mr. JORDAN. I appreciate it.

I recognize the gentleman from Iowa, Mr. Braley.

Mr. BRALEY. Thank you, Mr. Chairman.

Let me begin by stating that I strongly support project labor agreements. Apparently, the bipartisan majority of the House of Representatives does as well. Because recently, during the debate on the job-killing spending bill that we passed, my colleagues on the other side of the aisle attempted to end all PLAs on public constructionsites across the country and that amendment failed on a tie vote in the House. If you do the math, you realize that would not have passed or would have not been prevented without Republican support in opposition to that amendment.

PLAs play an important role for economic development in Iowa and across the country. They provide good-paying jobs for hard-working Americans. And now they are under attack, not just here, but also in my State.

The truth is that PLAs have proven to be very cost-effective. In the 1990's, in Dubuque, Iowa, the local building trades council negotiated private sector PLAs for nine sites. Four of these sites were for the Dupaco Community Credit Union. These projects were completed ahead of schedule and under budget. One of them is shown up on the screen.

The President and CEO of Dupaco stated that "building construction exceeded our expectation because it was finished 30 days ahead of schedule and 10 percent under budget." I have a list here of 280 PLA projects in the Quad Cities that were completed either on time or ahead of schedule. Mr. Chairman, I ask unanimous consent to enter them into the record.

Mr. JORDAN. Without objection.

[The information referred to follows:]

Submitted by Congressman Bruce Braley - 10/09
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IMPACT – Increasing Markets, Productivity and Construction Teamwork

Illowa Construction Labor and Management Council has entered into 281 projects worth over $6.4 billion.

1989 **Quad City Times** *Davenport, IA* Estes Company

1990 **Alter Corporate Headquarters** *Bettendorf, IA* Green Bridge Co.
Illini MedCentre *Silvis, IL* Azzarelli Builders
Nichols-Homeshield Casting Plant *Davenport IA* Davy Dravo
****Quad City Airport Expansion (Phase I & II)** *Moline, IL* Hillebrand Construction
Skip-a-Long Daycare Center *Moline, IL* Hillebrand Construction
****United Township High School Addition & Renovation** *East Moline, IL* ABS&M

1991 **Eagle Country Market #008** *East Moline, IL* Williams Brothers Construction
Eagle Country Market #285 *Bettendorf, IA* Russell Construction
Eagle Country Market #307 *Davenport, IA* Williams Brothers Construction
Deere Family Health Center *Moline, IL* Estes Company
Heritage Place Office Tower *Moline, IL* Azzarelli Builders
Mercy Hospital Bettendorf Plaza *Bettendorf, IA* Estes Company
President Riverboat Landing *Davenport, IA* Figgins Construction Group CM
Rock Island Riverboat Landing Wall *Rock Island, IL* Civil Constructors

1992 **MARK of the Quad Cities** *Moline, IL* Huber Hunt Nichols Inc. CM

1993 **Eagle Country Warehouse #027** *Clinton, IA* Glenn H Johnson Construction Co.
Fidlar & Chambers *Rock Island, IL* Estes Company
Friendship Manor Renovation *Rock Island, IL* Contracting Corp of IL
Midland Press Corporation *Davenport, IA* Estes Company
Modern Woodmen Expansion *Rock Island, IL* Kraus-Anderson Construction CM
Putnam Museum Addition & Renovation *Davenport, IA* Contracting Corp of IL
Quad City Bank & Trust *Bettendorf, IA* Estes Company
Trinity Lutheran Church Expansion *Moline, IL* Hillebrand Construction
Value RX *Davenport, IA* Estes Company

1994 **Aluminum & Glass Company** *Bettendorf, IA* Russell Construction
Brenton Bank *Davenport, IA* Estes Company
Deere Computer Center *Moline, IL* Koehler Electric & Estes Company
Galesburg Labor Temple Association *Galesburg, IL*
Illowa Construction Labor & Management *Moline, IL* Contracting Corp of IL
Merrill Lynch *Moline, IL* Estes Company
****Moline High School Phase I Asbestos Abatement** *Moline, IL* JVI
****Moline High School Phase II Re-Construction** *Moline, IL* Contracting Corp of IL
Smith Filter Company *Moline, IL* Russell Construction
St. Ambrose University Library *Davenport, IA* Williams Brothers Construction
Villa Montessori School *Moline, IL* Russell Construction

1995 ****Airport Maintenance Building** *Moline, IL* Construction Partners Inc
Factory Outlet Center *Bettendorf, IA* Russell Construction
Crow Valley Park II *Davenport, IA* Estes Company
Maytag Expansion *Galesburg, IL* Korte Construction Company
Mississippi Medical Plaza *Davenport, IA* Estes Company
Quad City Bank & Trust *Davenport, IA* Estes Company
Salvation Army Renovation & Repair *Davenport, IA* Priester Construction Co.
St Ambrose University Tiedemann Residence Hall *Davenport, IA* Estes Construction
Trinity Medical Center 7th Street Campus *Moline, IL* M A Mortenson

1996 **American Bank & Trust** *Rock Island, IL* Lower Construction Co.
Eagle Country Market #064 *Moline, IL* Glenn H Johnson Construction Co.
****Franklin School** *Moline, IL* East Moline Glass
Genesis East Emergency Room Renovation *Davenport, IA* Estes Company
Genesis Family Care Northwest *Davenport, IA* Estes Company
Genesis Ambulatory Services/Cancer Center *Davenport, IA* Estes Company
Genesis Education Foundation Clinic *Davenport, IA*
**** Horace Mann School** *Moline, IL* ABS Construction Group
John Deere Health Care Office Building *Moline, IL* Ryan Construction
****Moline High School Water Piping Replacement** *Moline, IL* Mechanical Inc.
****Moline High School Life Safety Correction Work** *Moline, IL* Priester Constr.
****Moline High School Asbestos Abatement** *Moline, IL* Dore & Assoc. Contracting
Radisson Hotel *Moline, IL* Ryan Construction
T.G.I. Friday's Restaurant *Moline, IL* Ryan Construction
U S Post Office @ Quad City Airport *Moline, IL* Korte Construction
****Washington School** *Moline, IL* Contracting Corp of IL
****Wilson School** *Moline, IL* East Moline Glass

1997 **Augustana College Science Facility** *Rock Island, IL* Kraus-Anderson Construction
Financial Center *Bettendorf, IA* Estes Company
Junior Achievement *Moline, IL* Estes Company
Lady Luck Casino *Bettendorf, IA* Ryan Construction

Neighborhood Place *Davenport, IA* Russell Construction
Palmer College of Chiropractic *Davenport, IA* Estes Company
Quad City Botanical Center *Rock Island, IL* ABS Construction Group
****Rock Island High School** *Rock Island, IL* Gilbane Building Company
Utica Ridge Office Complex *Bettendorf, IA* Estes Company
Velies Plantation Renovation *Moline, IL* Estes Company

1998 **American TV** * Davenport IA * Kenneth Sullivan Company
****Bicentennial Elementary School** *Coal Valley, IL* JVI
****Blackhawk School** *Moline, IL* Economy Roofing
Borders Bookstore *Davenport, IA* Cord Construction
DHL/BAX Global - Airborne Express *Moline, IL* Estes Company
Eagles Country Market *Bettendorf, IA* Glenn H Johnson Construction Co.
****Horace Mann Elementary School** *Moline, IL* JVI
Illinois Quad City Chamber of Commerce *Moline, IL* Ken Curry Construction
****Logan Elementary School** *Moline, IL* Sentry Asbestos Abatement Co.
Northwest Mechanical *Davenport, IA* Estes Company
Quad City Training Center *Davenport, IA* Lower Construction
Sam's Club *Davenport, IA* Chance Construction
Wharton Field House Asbestos Abatement *Moline, IL* JVI

1999 **Caxton Block Building** *Moline, IL* Estes Company
Deere Computer Cabling Center *Moline, IL* Koehler Electric
Illini Nursing Home *Silvis, IL* ABS Construction Group
Rainbow Day Care Center *Rock Island, IL* Estes Company
Rock Island Justice Center *Rock Island, IL* River City Construction
Salvation Army *Moline, IL* Construction Partners Inc.
United Township High School Renovations *East Moline, IL* Lower Construction

2000 **American Red Cross of the Quad Cities Area** *Moline, IL* Estes Company
****East Moline School District #37** *East Moline, IL* ABS Construction
(Ridgewood, Wells, Hillcrest, & Bowlesburg Schools & Glenview No & So)
Genesis Medical Center Heart Institute *Davenport, IA* Estes Company
Genesis Medical Center Heart Institute Site Work *Davenport, IA* Langman Constuction
Genesis Medical Center Landscaping *Davenport, IA*Suburban Landscaping Union
Genesis Medical Center East Campus Expansion *Davenport, IA* Russell Construction
Iowa American Water Co. Clearwell Addition *Davenport, IA* General Constructors
I H Mississippi Valley Credit Union *Moline, IL* Bank Building Corp.
IMAX Theatre at the Putnam Museum *Davenport, IA* Estes Company
Mississippi Valley Regional Blood Center *Moline, IL* Estes Company
Plumbers & Pipefitters Local #25 *Rock Island, IL* Contracting Corp of IL
Ridgecrest Village *Davenport, IA* Estes Company
St. Ambrose University Hagen Residence Hall *Davenport, IA* ABS Construction
Trinity at Terrace Park Medical Center *Bettendorf, IA* M A Mortenson

2001 **Barnes & Noble Bookstore** *Davenport, IA* Contracting Corp of IL
Boys & Girls Club *Moline, IL* Precision Builders
Deere Harvester Credit Union *Davenport, IA* New Ground Resources
**** Eagle Ridge School** *Carbon Cliff, IL* Leander Construction
Illini Hospital OB & Dietary Addition *Silvis, IL* Taylor Ball
The Law Center *Rock Island, IL* DISCO Inc.
Millwrights Local #2158 *Bettendorf, IA* Gilbert Leech Company
Mississippi Valley Blood Center *Bettendorf, IA* Gilbert Leech
Olsen Engineering *Eldridge, IA* Estes Company
Redstone Building *Davenport, IA* Estes Company
Two Rivers YMCA *Moline, IL* Russell Construction
Wal-Mart Super Store *Davenport, IA* R. G. Brinkman

2002 **ALCOA Employee Credit Union** *Davenport, IA* New Ground Resources
Bethany for Children & Families *Moline, IL* Russell Construction
Augustana College Carver P.E. Center Renovation *Rock Island, IL* Taylor Larson
Edgerton Women's Health Center Genesis *Davenport, IA* Russell Construction
I. H. Mississippi Valley Credit Union Branches *East Moline & Rock Island, IL* New Ground Resources
Mississippi Valley Regional Blood Center *Muscatine, IA* Gilbert Leech Company
Quad City Distribution Center *Davenport, IA* Ryan Companies Us, Inc.
Robert Young Center for Community Mental Health *Rock Island IL* Russell Construction
Vera French Housing *Davenport, IA* Russell Construction

2003 **Alter Care Plus Medical Center** *Davenport, IA* Estes Company
Bass Street Landing/River Station *Moline, IL* Estes Company
Carpenters Training Facility Addition *East Moline, IL* Precision Builders
Carpenters Union Hall Local #166 *Milan, IL* Diversified Construction
Davenport Lofts Apartments *Davenport, IA* Estes Company
Deere Enterprise Support Facility *Moline IL* Estes Company
Deere Harvester Credit Union *Geneseo, IL* New Ground Resources
DuTrac Credit Union *Davenport, IA* New Ground Resources
DuTrac Credit Union *Eldridge, IA* New Ground Resources
Gastroenterology Associates *Bettendorf, IA* Estes Company
I. H. Miss. Valley Credit Union *Davenport, IA* New Ground Resources
Illini Hospital MRI Addition *Silvis, IL* Taylor Larson Construction
Mississippi Plaza *Davenport, IA* Ryan Company
Mississippi Valley Region Blood Center *Davenport, IA* Russell Construction
New Ventures Initiative/AG Tech *Davenport, IA* Estes Company
R J Boars Restaurant *Davenport, IA* Estes Company
Russell Construction *Davenport, IA* Russell Construction
Skip A Long Day Care *Davenport, IA* Estes Company
St. Ambrose University Rogalski Center *Davenport, IA* Russell Construction
Trinity Maternity Expansion *Moline, IL* Russell Construction
Trinity Nursing College *Rock Island, IL* Design Build

U.S. Marshall Federal Building *Rock Island, IL* Priester Construction

2004 **ARC of Rock Island County** *Rock Island & Moline, IL* Contract. Corp Midwest
American Bank *Moline, IL* Russell Construction
Deere Harvester Credit Union/Administrative Office *Moline, IL* New Ground Resources
Genesis Medical Center West ER *Davenport, IA* Russell Construction
Genesis Medical Center East Cath Lab *Davenport, IA* Russell Construction
Genesis Medical Center 3rd & 4th Floor Remodel *Davenport, IA* Priester Construction
Hammond Henry Hospital *Geneseo, IL* Russell Construction
Merrill Lynch/Birchwood B1 *Davenport IA* Russell Construction
Merrill Lynch/Birchwood B1/Build Out *Davenport, IA* Russell Construction
****Moline Police Station** *Moline, IL* General Constructors
****Moline Public Library** *Moline, IL* Russell Construction
Quad City Bank & Trust *Davenport, IA* Estes Co.
St. Ambrose University Franklin Residence Hall *Davenport, IA* Russell Construction
Trinity West Emergency Power Facility *Rock Island, IL* Tri City Electric
Vera French Mental Health Renovation *Davenport, IA* Ryan & Associates
Walgreen Drug Store *Milan, IL* Russell Construction
Walgreen Drug Store *East Moline, IL* Russell Construction

2005 **ALCOA Employees Credit Union** *Moline, IL* Russell Construction
Augustana College Swanson Commons Residence Hall *Rock Island, IL* Russell Construction
Bettendorf Office Products *Bettendorf, IA* Russell Construction
CASI Center for Aging *Davenport, IA* Russell Construction
Genesis/Clarissa Cook Hospice House *Bettendorf, IA* Estes Construction
Genesis West ER Remodel *Davenport, IA*
I H Mississippi Valley Credit Union *Milan IL* Estes Construction
Isle of Capri Hotel *Bettendorf, IA* Ryan Companies
****Rock Island County Animal Shelter** *Moline, IL* Lower Construction

2006 **IBEW Training Center Expansion** *Moline, IL * Gilbert E. Leech Company
Orthopedic Rheumatology & Associates *Bettendorf, IA* Russell Construction
****Rock Island County Indian Bluff Golf Club House** *Milan, IL Construction Partners Inc.
****Rock Island County Hope Creek Care Center** *East Moline, IL* Estes Construction
St. Ambrose University Christ The King Chapel *Davenport, IA* Russell Construction
St. Paul Lutheran Church *Davenport, IA* Estes Construction
Trinity Robert Young Inpatient Expansion *Rock Island, IL* Estes Company

2007 **Augustana College Carlsson Hall** *Rock Island, IL* Estes Construction
Augustana College Dorothy Parklander Residence Center *Rock Island, IL* Hodge Construction
****Black Hawk College Boiler Room Modernization** *Moline, IL* Johnson Controls
****Black Hawk College Science Lab Renovation** *Moline, IL Swanson Construction
****Black Hawk College Electrical Improvements** *Moline, IL* Tri-City Electric
****Black Hawk College Health & Safety Improvements** *Kewanee, IL* Swanson Construction
****Black Hawk TownshipMaintenance Building** *Milan, IL * Valley Construction
****Black Hawk Township Salt Storage Building** *Milan, IL * Valley Construction
Butterworth Center & Deere Wyman House *Moline, IL * C.E. Peterson & Sons
Deere & Company Conference Room Renovation *Moline, IL* C.E. Peterson & Sons
DHCU Community Credit Union *East Moline, IL * Centennial Contractors
****East Moline Screening Building Improvements** * East Moline, IL* General Constructors Inc.
Jumer's Casino & Hotel *Rock Island, IL * Kraus-Anderson Construction Co.
Manor Care Health Services Skilled Nursing Home *Davenport, IA * Estes Construction
Merrill Lynch Tenant Improvements *Davenport, IA* Russell Construction
****Milan Village Hall** *Milan, IL* Ryan Companies
****Moline Fire Station Renovation** *Moline, IL* Valley Construction
Olympic Steel Expansion *Bettendorf, IA* Russell Construction
****Rock Island County Indian Bluff 12th Hole Renovation** *Milan, IL * Kodiak Site Contractors
St. Ambrose University Residence Hall & Classrooms *Davenport, IA Russell Construction
Stern Beverage Expansion *Milan, IL * Valley Construction
Terrace Park Professional Center Build Out *Davenport, IA * Hillebrand Construction
Trinity Cath Lab I Renovation *Rock Island, IL * D.G. Franck Inc.
Trinity CT Scan Remodel *Rock Island, IL * D.G. Franck Inc.
Trinity IDPH Project Improvements *Rock Island, IL* Estes Construction
Trinity Private Bed Initiative *Rock Island, IL* Estes Construction
Trinity Redundant Utility Feed *Rock Island, IL* J.W. Koehler Electric
Trinity Sprinkler System & Fire Protection *Rock Island, IL* Estes Construction
Trinity Surgical Center Addition *Rock Island, IL* Estes Construction
Trinity Surgical Partners *Davenport, IA * Hillebrand Construction
Virdi Eye Clinic *Rock Island, IL* Ryan Companies

2008 ****Bicentennial School Renovation & Expansion** * Coal Valley, IL * General Constructors Inc.
****Black Hawk College Roof Replacement** * Moline, IL * Economy Roofing
****Black Hawk College Electrical Upgrades** * Moline, IL * Art-O-Lite Electric
****Black Hawk College Electrical Upgrades** * Kewanee, IL * Tri-City Electric
****Black Hawk College Health & Safety Improvements** * Kewanee, IL * Hein Construction
****Black Hawk College Restroom Renovations** * Moline, IL * Priester Construction
Deere & Company Airport Hanger * Moline, IL * Estes Construction
Deere & Company Parts Distribution Center Expansion * Milan, IL * Estes Construction
****Eugene Field School Addition** * Rock Island, IL * Hillebrand Construction
Eye Surgeons Associates * Rock Island, IL * Estes Construction
Genesis Illini Cath Lab Remodel * Silvis, IL * Russell Construction
Genesis Medical NICU Remodel *Davenport, IA * Priester Construction
IH Mississippi Valley Credit Union * Silvis, IL * Estes Construction
****Longfellow School Addition** * Rock Island, IL * Hillebrand Construction
Plumbers & Pipefitters Local 25 Expansion *Rock Island, IL * Estes Construction

****Primary Academy School Addition** * Rock Island, IL * Hillebrand Construction
Quad City Kidney Center * Rock Island, IL * Hodge Construction
****Rock Island Alley Improvement** * Rock Island, IL * Centennial Contractors
****Rock Island County Emergency Response Center** * Rock Island, IL * Estes Construction
****Rock Island Center for Math & Science School** *Rock Island, IL * Bush Construction
****Rock Island Schwiebert Riverfront Park** *Rock Island, IL * Williams Valley Joint Venture Inc.
St. Ambrose University Speech Pathology Building *Davenport, IA * Estes Construction
Trinity Ambulatory/Waiting Room/Surgical Renovation *Rock Island, IL * Estes Construction

2009 **** Black Hawk College Exterior Site Lighting Upgrades** *Moline, IL * Tri-City Electric
**** Black Hawk College Parking Lot & Roadway Upgrades** * Moline, IL * Laverdiere Construction
**** Black Hawk College Outreach Center Renovation** * East Moline, IL * Swanson Construction
**** Black Hawk College East Storage Building** * Galva, IL * Swanson Construction
**** Denkmann School Addition & Renovation** *Rock Island, IL * Russell Construction
DHCU Community Credit Union, * South Park Mall Moline, IL * Centennial Contractors
Genesis Dialysis Remodel East Campus *Davenport, IA * Russell Construction
Genesis Internal Medicine Remodel East Campus *Davenport, IA * Russell Construction
Genesis Davenport Surgical Group Remodel East Campus *Davenport, IA * Russell Construction
Genesis Wound Clinic Expansion West Campus*Davenport, IA * Priester Co. Inc.
**** Frances Willard School Addition** *Rock Island, IL * Construction Partners Inc.
**** Ridgewood School Addition** *Rock Island, IL * Precision Builders Inc.
**** Rock Island Fitness & Activity Center Expansion** *Rock Island, IL * Estes Construction
2010 **St. Ambrose University Health Sciences Education Center** * Davenport, IA * Estes Construction
**** Thomas Jefferson School Addition & Renovation** *Milan, IL * Swanson Construction

****Black Hawk College East Teacher Learning Center** *Galva, IL * Swanson Construction
****Black Hawk College East Ag Pavilion Parking Drainage** * Galva, IL * Swanson Construction
****Black Hawk College Restroom Renovations** * district wide * Construction Partners Inc.
****Black Hawk College East Well Controls** * Galva, IL * Ragan Mechanical Inc.
Carver Aero Davenport Municipal Airport * Davenport, IA * Ryan Companies
Deere & Company Product Engineering Facility *Silvis, IL * Russell Construction
Deere & Company Southwest Office Building (SWOB) *Moline, IL * Ryan Companies
****Earl Hanson Elementary School Addition** *Rock Island, IL * J.B. Robertson Construction
****East Moline Wastewater Treatment Plant** *East Moline, IL * General Constructors Inc.
Holiday Court LLLP, Vera French Court * Bettendorf, IA * Russell Construction
****John Deere Middle School Addition & Remodel** *Moline, IL * Russell Construction
**** Martin Luther King Center Expansion** *Rock Island, IL * Estes Construction
**** Mercer County Hospital Renovation** *Aledo, IL * Walsh Construction
****Mercer County Jail Addition & Improvements** *Aledo, IL * Vanguard Contractors
****Niabi Zoo Entry Plaza & Discovery Center** * Coal Valley, IL * Estes Construction
Quad City Bank & Trust Renovation *Davenport, IA * Estes Construction
****Quad City International Airport Administrative Offices** * Moline, IL * Swanson Construction
****Quad City International Airport Parking Lot Addition** * Moline, IL * Langman Construction
****Quad City International Airport Fuel Storage Facility** *Moline, IL * Seneca Companies
****Rock Island Public Works Garage** *Rock Island, IL * General Constructors Inc.
****Rock Island Wastewater Treatment Plant** *Rock Island, IL *
****Silvis Middle School** *East Moline, IL * Estes Construction
Trinity Birthing Center Expansion *Bettendorf, IA * Russell Construction
Trinity Boiler Replacement *Rock Island, IL * Northwest Mechanical Inc.
Von Maur Inc. E-Commerce Facility *Davenport, IA * Russell Construction
2011 ****Woodrow Wilson Middle School Addition & Remodel** *Moline, IL * Estes Construction

Kone Centre * Moline, IL * Ryan Builders Inc.
Trinity Pain/Wound Care HBOT *Moline, IL * O.G. Franck
Trinity Surgical & Clinical Services Renovation *Rock Island, IL * Estes Construction

**** Publicly funded project**

(updated 3/2011)

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Mr. BRALEY. These projects include the Putnam Museum in Davenport, the St. Ambrose University science library, the Palmer Chiropractic College. And just recently, our Governor, Terry Branstead, issued an executive order banning PLAs on public works projects in Iowa, including an existing PLA in Cedar Rapids for the Cedar Rapids Convention Center, a city that was devastated by flooding 2 years ago when its entire downtown was underwater.

Ironically, Mr. Chairman, the No. 1 supporter for this PLA project moving forward is the current mayor of Cedar Rapids, Ron Corbett, who used to be the Republican leader of our State Senate. After the executive order was issued, Mayor Corbett asked the Governor to consider using $15 million from a State jobs fund to finish the project. But our Governor refused the Mayor's request, and as a result, this enormously important economic development project is now on hold. Putting a work stoppage on this project is harmful to Cedar Rapids' community and to Iowa. If PLAs are banned in Congress, what is happening in Cedar Rapids will happen all over the country.

That is why I urge my colleagues to continue opposing any efforts to end PLA funding.

And now I want to talk about that PLA on the bridge in Minneapolis, which I happen to have in my hand. One thing we know is that this project finished early and under budget. That is correct, isn't it, Ms. Figg? It was completed under a PLA in only 11 months and for less than the $250 million earmarked by Congress. And the Transportation Secretary, Mary Peters, said it should not take a tragedy to build a bridge this fast in America.

And I should point out, this PLA was entered into when George W. Bush was President. Isn't that correct?

[No audible response.]

Mr. BRALEY. So then Mr. Baskin, you brought up something I want to talk about, and you went off script in your opening, so I wasn't prepared for this, but you mentioned the Iowa Events Center, something I happen to know a great deal about. You said, when referring to these building projects, those did fall down, causing fatalities and untold damages. Do you remember saying that?

Mr. BASKIN. Yes.

Mr. BRALEY. In fact, the Iowa Events Center did not fall down, did it?

Mr. BASKIN. Only a large crane, which killed a construction worker.

Mr. BRALEY. The Events Center did not fall down, did it?

Mr. BASKIN. Part of the construction did, yes.

Mr. BRALEY. Well, semantics. Certainly the building itself never fell down. And tragically, one worker, a 65-year old steel erector, was killed. And we know that on massive construction projects of this size, regrettably, fatalities are not uncommon, whether or not they are union contractors. Isn't that true?

Mr. BASKIN. Yes, we will agree that the safety level between union and non-union is roughly the same.

Mr. BRALEY. And so one of the things that you talk about is the challenges that your group has filed to these PLAs. In fact, you filed a challenge in Iowa on that Events Center project, and the

Iowa Supreme Court in a six to one decision upheld the right of that PLA to move forward, even though my State is a right to work State, isn't that true?

Mr. BASKIN. Well, I didn't, the local chapter did.

Mr. BRALEY. The local chapter of the group you are here testifying on behalf of today filed that suit. It went all the way to our Supreme Court and they upheld this PLA.

Mr. BASKIN. Right, and as a result, there were cost overruns, construction defects, nearly 50 construction accidents and it was not a model project. There have been papers written on just that project and the problems that happened with it.

Mr. BRALEY. And is it your testimony today that on massive construction projects built by non-union contractors, those problems you identified have never occurred.

Mr. BASKIN. No, but the risks——

[Simultaneous conversations.]

Mr. BRALEY. Mr. Chairman, my time is expired, I yield back.

Mr. BASKIN. If I might respond, the burden is on those who are seeking to discriminate. And the justification has been that PLAs are better somehow, and that PLAs don't have safety problems and that they don't have delays and all the things we just heard. And that is simply not the case. They do have these problems and then some.

And so then what is the justification for discrimination, which they unquestionably have? That is our only point. And we are only talking about Government-mandated PLAs. We are not concerned here today with the private. What the private sector wants to do with their own money is for them to decide. Sometimes it is under coercion. We are not arguing about that.

Mr. BRALEY. So is it your testimony today that the ABC is not opposed to private PLAs?

Mr. BASKIN. We are not, we stand for the proposition that private employers can decide how to spend their own money.

Mr. BRALEY. All right, thank you.

Mr. JORDAN. I quickly recognize the ranking member, and then I want to get to the ranking member of the full committee.

Mr. KUCINICH. For unanimous consent, to submit to the record, from the Campaign for Quality Construction, testimony that says PLA do not discriminate against non-union contractors and workers.

Mr. JORDAN. Without objection it will be entered.

[The information referred to follows:]

CAMPAIGN FOR QUALITY CONSTRUCTION

CONGRESSIONAL HEARING
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON REGULATORY AFFAIRS

March 16, 2011

Regulatory Impediments To Job Creation:
The Cost Of Doing Business In The Construction Industry

Statement for Submission to the Record

The Campaign for Quality Construction (CQC) is an employer-based construction coalition representing approximately 27,000 employers. We are comprised of the leading specialty contracting firms in the nation and include the International Council of Employers of Bricklayers and Allied Craftworkers (ICE), the National Electrical Contractors Association (NECA), the National Finishing Contractors Association (FCA), the Mechanical Contractors Association of America (MCAA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and The Association of Union Constructors (TAUC). These groups represent more than 25% of the total building construction industry volume in this country and employ approximately 500,000 skilled workers. Specialty contractors hold a market share of more than 60% of non-residential building construction. Our members employ highly trained and highly skilled workers who are well compensated in wages, health and pension benefits – core components of a strong and sustainable workforce.

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The Campaign for Quality Construction is pleased to offer this statement for the record for the March 16, 2011 Committee on Oversight and Government Reform Subcommittee on Regulatory Affairs hearing on "Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry". Although the scope of the Subcommittee's hearing is a broader one, these comments specifically are in reference to and in support of project labor agreements (PLAs).

The Campaign for Quality Construction (CQC) is comprised of the International Council of Employers of Bricklayers and Allied Craftworkers (ICE), the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), the National Finishing Contractors Association (FCA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and The Association of Union Constructors (TAUC). Together these six organizations represent the interests of approximately 27,000 construction employers.

In both the private and the public sector, PLAs are considered to be a useful construction management tool for on-time, on-budget quality construction. They are valued by many experienced, cost-conscious owners and construction contractors. PLAs ensure that all parties associated with the completion of a construction project are working under the same set of rules from the outset, and also offer a defined roadmap for conflict resolution if the need arises.

It seems an odd oversight that the hearing panel today does not include a single construction contractor who has long-standing familiarity and experience with PLAs to speak in their support. The panel would benefit from more users/government owners of PLAs with a business or proprietary perspective that are also strong supporters of PLAs. In a prudent environment, Committee members should be able to weigh the facts after hearing from both supporters and opponents of PLAs. The CQC looks forward to a future hearing where CQC contractors can offer an alternative view of PLAs based on long experience with business conditions, current construction workforce development practices and workforce supply issues. There are a variety of enabling workforce development mechanisms such as dispute resolution and cooperative labor/management relations programs, including basic skills training and journeyman upgrade training, project safety training, and jobsite supervisory training, along with jointly administered health and welfare and pension benefits programs and other labor/management cooperative workforce development programs - including recruiting that stems from local area multiemployer and labor union collective bargaining agreements.

Background

Project labor agreements have been used for almost 100 years in private sector construction and for roughly 60 years in federally funded construction projects. The Supreme Court Boston Harbor Decision in 1993 permitted states and municipalities to

use project labor agreements. In 2009, President Barack Obama issued Executive Order 13502 to permit, not mandate, government agencies to consider Project Labor Agreements on projects over $25 million.

Disney, Toyota, General Motors and major oil companies on the Trans Alaska Pipeline have all used Project Labor Agreements for major construction projects. The Grand Coulee Dam, Kennedy Space Center, several nuclear research facilities, the Woodrow Wilson Bridge Project, and dozens of professional sports stadiums, including the Washington Nationals Stadium, are examples of public sector projects that have used PLAs.

At times, PLAs have been lightning rods for political and legal challenges, but nearly all such challenges have failed. Through it all, PLAs have been proven to be sound tools that garner the highest quality workforce and project results. Republican and Democratic governors alike have endorsed the use of PLAs. Proprietary owners and government agencies reasonably assess the appropriateness of a PLA authorization on a project-by-project basis. It is also important to note that project labor agreements are neither mandatory nor "union-only" projects. Once a PLA has been negotiated, both union and nonunion contractors are free to bid on the work as they do on any other construction project.

PLAs Address Concerns by Prime Contractors Over Availability of Skilled Labor

The skilled construction industry faces many of the same problems as other business sectors when it comes to maintaining an adequate workforce, including the challenge of replacing an aging demographic with a new supply of apprentices with the proper skill sets and determination it takes to pursue these demanding and rewarding careers.

Public and private sector employers are beginning to acknowledge their own stake in addressing these workforce development deficits. Employers want to make sure that they, too, are contributing to the continued development of a skilled workforce, since the successful outcome of their future projects depends on it.

No less an authority than the Construction Users Roundtable (CURT) is encouraging its private and public sector market participants to incorporate workforce development factors in their contractor evaluation/responsibility determination process. CURT counts many federal procurement agencies among its members, including USACE, GSA, NAVFAC and others. It cannot be challenged that the scope of proprietary interest pursued in EO 13502 is more narrow than the industry standard established by CURT. On the contrary, U.S. Army Corps of Engineers (USACE) is pursuing that proprietary interest most robustly by participating in the overall CURT workforce development efforts and by finding standardized ways to routinely evaluate and implement BCTD PLA's. In a PLA project for West Point, to the extent that the PLA would draw on the resources of the local BCTD workforce training and development jointly administered

apprenticeship programs, and the good pay and benefits investments of BCTD employers in the area, is the same extent to which the USACE would be supporting those high-value workforce investments to buttress its future proprietary interest in a skilled workforce in the area.

Moreover, we might add that those same BCTD unions and employers frequently participate in military workforce recruiting programs, such as Helmets-to-Hardhats and the United Association's Veteran in Piping programs. These programs are exemplary workforce development efforts as well as very sound equal employment opportunity and affirmative action programs because they rely on the integrated gender and racial military workforce as a recruitment source, as per the EEO/AA objectives laid out in EO 13502.

PLAs Benefit Projects with Unique and Compelling Mission Critical Schedules

To the extent a project requires workforce screening and background credentialing, the BCTD apprenticeship and referral system that would be used under the PLA provides an administrative system that facilitates that project security requirement.
Security screening delays can be addressed under a PLA, and the BCTD and local referral procedures can facilitate the E-Verification program to a degree a non-PLA project would not. Moreover, the BCTD system can include drug testing and other background screening that would not otherwise be available for all workers assigned to the project in the absence of a PLA.

Workforce availability disruptions are effectively hedged against under a PLA, as the standard BCTD PLA can rely on a nationwide referral network to meet manpower needs in all covered crafts. A BCTD PLA standardizes scope of work assignments for all crafts and provides a problem-solving mechanism to address work assignment questions. Furthermore, there are "no-strike/no-lockout" features to a PLA that are unavailable to firms not working under such collective agreements. Also, local bargaining agreements frequently include local labor/management cooperative committees that provide even further problem-solving capabilities, in line with EO 13502's labor/management cooperative aspects. Of course, those same forums facilitate compliance with wage and hour laws, project safety standards, and guard against illegal employment and worker misclassification on all projects — again, all in line with EO 13502's larger proprietary objectives.

PLAs Do Not Discriminate Against Nonunion Contractors and Workers

Public sector PLAs are designed to obtain the best possible work at the lowest possible price. While union-only agreements are permitted in the private sector, bid awards in the public sector cannot be based on union or nonunion status. In addition, according to the NLRA, job referral procedures cannot lawfully favor union members or discriminate against equally qualified non-members. Any contractor has the sole right

to reject any applicant referred by a local union. Nonunion contractors are permitted to by-pass union referrals for an agreed-upon percentage, such as 12% of its "core employees." Nonunion contractors have challenged the fairness and legality of PLAs for years, but the courts have indicated that as long as union and nonunion employers are free to participate in the bidding process, PLAs are not anticompetitive. The Court of Appeals echoed the U.S. Supreme Court, stating, "The fact that certain, nonunion contractors may be disinclined to submit bids does not amount to the preclusion of competition..."

PLAs Neither Limit the Pool of Bidders nor Raise Construction Costs

Specific quantification is not possible pre-award or perhaps even after project completion. However, alternate bidding schemes are no way to prove the differential either, as first cost is theoretical as compared with actual project experience. And, the project owner cannot know what they might have experienced had they used an alternative. Only specific project experience can be relied on to prove the benefits of a PLA relative to not using a PLA. As virtually all projects under EO 13502 would be subject to the Davis Bacon Act or other prevailing wage workforce protections, the actual per-hour craft worker costs would be based on comparing the wage determinations for the project with the rates applicable under the PLA. To the extent there is a differential, then that added cost would have to be weighed against the manifold benefits returned under a PLA as compared with project administration and performance without a PLA.

As PLAs standardize project workforce terms and conditions; provide problem solving and dispute resolution mechanisms; guard against delays for project staffing; guard against strikes and lockouts to a degree to which is not available in the absence of a collective bargaining agreement; contain workforce supply and credentialing mechanisms; guard against illegal employment, worker misclassification and promote E-Verification; contain OSHA and other labor and employment law protections and safeguards against disruption because of non-compliance; and, promote the high-value workforce development systems in the area, then the return to the project and the project owners' direct proprietary stake in industry standards is manifest.

In a study by Fred B. Kotler, J.D., Cornell University School of Industrial and Labor Relations, it is noted that market conditions and business cycles impact bidding behavior. During the current economic downturn, CQC contractors who normally work exclusively in the private sector have bid on public sector work to keep workers on the payroll and to stay afloat financially until the construction market returns to normal. As the volume of work increases in the construction market, there will be a decline in the number of bidders on any project, public or private. Mr. Kotler also notes that separate prime contracts lead to more bidding activity. The point is a number of factors contribute to the pool of bidders, including the fact that some nonunion contractors do want to work under the specifications set out under a PLA. We know some contractors

do not want to work for the federal government at all due to payment and paperwork issues and some do not want to work under prevailing wage law.

PLAs Do Not Thwart Participation by Small Businesses or Women or Minority Owned Firms

The construction industry is one comprised almost totally of small businesses. In fact, 90 percent of construction employers have 20 or fewer employees. CQC member employers are no different. An overview of our six organizations would reveal that 80 percent of our employers have ten employees or fewer and 50 percent employ five or fewer workers. The union and nonunion sector mirror each other with regard to firm size. So, it is not a valid argument to say that small business contractors cannot successfully bid on PLA jobs. Likewise, each organization has women and minority owned businesses that successfully bid and complete work on PLA projects.

One of the women-owned companies from Oregon sent forms from the Edith Green – Wendell Wyatt (Portland, Oregon) project. The PLA specifically required reach-out to small businesses and established a Small Business Subcontract Plan to ensure small businesses were included in the project. A Small Business Fair event was held June 29, 2010 for the project.

The truth is, many CQC business owners come from the ranks of the apprenticeship programs and working in the craft. Women and minorities have business opportunities based on their career training and work experience that are facilitated by PLAs. PLAs in no way thwart small businesses opportunities.

PLAs Help Prevent Degradation of Workforce Standards

The PLA is a business model that offers jobsite efficiencies, with a steady, local and legal supply of highly trained and productive skilled craft workforce from training programs that invest almost one billion dollars a year in private investment in apprenticeship programs. A workforce that is well-paid with health care and pensions contributes to a solid tax base and the health of local business. PLAs contribute to the health of the U.S. economy and local communities where they are used.

Some may believe that the construction industry and public construction projects in general are best served by assembling the lowest cost, most vulnerable and exploitable workforce. The construction of the Veterans Affairs (VA) Medical Center in Orlando, Florida is a poignant example of how taxpayer dollars can be ill-used when PLAs are not utilized. In the Florida VA project without a PLA in place, subcontractors on the jobsite hired illegal workers, some of whom were living on the construction site. This should never happen on a public job, as it does not serve the best interests of the owner, the unemployed legal workforce, the abused worker, the local community or the tax payer at large.

PLAs are not detrimental to the taxpayer or to the nonunion contractor or to any small business owner. In fact, the taxpayer and local workers and communities are hurt when illegal and undocumented workers are paid "off the books" or misclassified as independent contractors.

PLAs greatly assist in establishing a higher workforce standard that all contractors should be willing to meet.

CLRC Study on the National Maintenance Agreements 2007-2009

The National Maintenance Agreements (NMA) is one of the largest private-sector PLAs in the country. The Construction Labor Research Council (CLRC) recently completed a study on the impact that the NMA has had in the creation and promotion of work opportunities in the U.S. construction industry. CLRC utilized work hour data supplied by the National Maintenance Agreements Policy Committee, Inc. (NMAPC) covering the years 2007 through 2009, but the analysis goes beyond simply using work hours reported in evaluating the impact of the Agreements. CLRC found that during this three-year period the NMA on average has been responsible for facilitating **40,000** full-time industrial construction and maintenance jobs per year within the construction industry. In 2008 alone, the total amount of taxes (Federal Social Insurance Taxes, Federal Income Taxes and State Income Taxes) paid by workers on NMA projects were **$420 million**.

Conclusion

CQC employers provide good wages, health care and pension benefits. They compete successfully every day in the marketplace against employers who do far less for their employees. These employers compete successfully because they have a ready source of trained labor available to do the job on-time and on-budget. They are successful in the private market because they have learned how to achieve efficiencies that building owners want even though it may not be at the lowest price.

The Campaign for Quality Construction strongly urges the committee to support EO 13502 giving government owners the same flexibility to use Project Labor Agreements. Private owners have determined that on many important projects PLAs give them the most cost-effective way to build a project and government owners and contracting officers should have the same construction management tool for on-time, on-budget quality construction.

Mr. JORDAN. But we come back to this point that Mr. Cooper raises, too. When the President of the United States tells the agencies they may require, that is not just any old citizen telling how an agency is going to make a decision. So this idea that somehow that is neutral I just don't think people buy that concept.

The ranking member of the full committee, the gentleman from Maryland.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Mr. Belman, let me ask you this. In my district, we have some situations where I would guarantee you that African American male unemployment is like 65 percent. And I assume that a PLA would be helpful there. Do you think?

Mr. BELMAN. A properly designed PLA that was sufficiently large could be used to move disadvantaged men and women through various stages of training to much better jobs than they currently fill.

Mr. CUMMINGS. And what happens so often in these neighborhoods is that folk come in and they do work right in front of their houses, and they're sitting on the sidelines, not having an opportunity to work. They come from everywhere. I see it all the time.

And so a PLA, I take it, you could have provisions in there that would help with regard to training, so that they would be given an opportunity to use their tax dollars to take care of their families, learn a trade or, and then move forward in life. Has that been your testimony?

Mr. BELMAN. In point of fact, most of the west coast port and other PLAs which have these training programs also have an effective local hire provision, which sets very clear goals for movement through pre-apprenticeship into apprenticeship programs. They are pretty thoroughly reviewed, and there is oversight by community group as well as by employers, the ports or other owner organizations in the building trades. And the reports that I have read and people I have talked to have indicated they have been very effective in this.

And PLAs have an advantage over any other training program. Because they are connected, one problem with Government-supported training programs it that they tend to not be connected to jobs at the end. You train people, they come out, there is not a job. For most of the PLA work, there is a job and there is a clear advancement, pre-apprenticeship, apprenticeship and then into journeyman status. All relatively high wage and solid benefits.

Mr. CUMMINGS. So in other words, these folks get an opportunity to participate in a process that then opens the door for opportunity. In other words, it is like an engagement and then hopefully a marriage.

Mr. BELMAN. Yes, because the pre-apprenticeship programs, in particular, can do, there are people who this is the perfect job for. There are people who don't like working outside. If you are going to be a construction worker, some, figuring out whether you want to work outside is very good before we invest a lot of money in training. But that is very important.

So it is not a guarantee, simply because you show up, that you are going to end up in a wonderful career. But for the right person, it opens up opportunities that otherwise don't seem to exist.

Mr. CUMMINGS. And so when you have, for example, the African American unemployment rate consistently, consistently almost double the general unemployment rate, and if you are talking about creation of jobs, and you are talking about long-term jobs, and you are not just talking about jobs, but you are talking about careers, and you are talking about people contributing back into society, a PLA may not be a bad idea if it is structured right and if it has the proper oversight. Is that right? Is that a reasonable statement?

Mr. BELMAN. That is very reasonable. An example would be the San Jose school system, which used a PLA as a basis for establishing a construction academy. They were rebuilding a high school. It has been very successful. Indeed, the construction academy and the linkage from high school students taking courses and then doing internships over the summer and having privileged access to apprenticeship opportunities has continued, even though the PLA has expired. And indeed, the construction industry is so enthused about getting very good students, and into white collar as well as blue collar jobs, that they have now started a training program for high school math teachers, so they can take their experiences in construction back to the classroom and encourage better students to think about construction careers.

Mr. CUMMINGS. So it is about opportunity?

Mr. BELMAN. Yes.

Mr. CUMMINGS. I yield back.

Mr. JORDAN. I thank the gentleman. We do have to get to a vote.

One last question, and it may be better for the second panel. Mr. Biagas, I believe, mentioned in his testimony only 6 percent of the construction firms in Virginia, maybe it is northern Virginia, are union firms. Is that right, Mr. Biagas?

Mr. BIAGAS. Yes, sir.

Mr. JORDAN. Do we have any data on what percentage of Federal projects are awarded to, what is the percentage awarded to union and non-union? Do we have any of that data? To me, that seems to be the central question. If only 6 percent are union, if they are getting the vast majority of the contracts, then that shows you how skewed the system is. Do we have any of that data?

Mr. BIAGAS. I don't have that data with me, Congressman.

Mr. JORDAN. Mr. Belman.

Mr. BELMAN. No.

Mr. JORDAN. We are going to ask GSA in the next panel.

Mr. BELMAN. But I would be fascinated to learn.

Mr. BASKIN. And it is a moving target, because the PLA program has not been fully implemented yet. We are fighting as hard as we can to stop it, and we are calling for help from Congress.

Mr. JORDAN. I understand that.

Thank you all very much. We have to recess for a vote on the floor.

[Recess.]

Mr. JORDAN. We will welcome our second panel of witnesses. I don't know if any of you were here for the first round, but it is the practice of the committee to swear our witnesses in. So if you would just stand up and raise your right hands.

[Witnesses sworn.]

Mr. JORDAN. Let the record show that all witnesses answered in the affirmative.

You guys know the game. Well, I should introduce you, I apologize. Mr. Gordon is the Administrator for the Office of Federal Procurement Policy, Executive Office of the President. The Honorable Robert Peck is the Commissioner for Public Buildings, U.S. General Services Administration. And the Honorable David Michaels is Assistant Secretary for Occupational Health and Safety, U.S. Department of Labor.

We thank each of your gentleman for your public service and your willingness to be in front of the committee today. We will probably, as you know, have Members join us, we hope so, but we want to hear your testimony. So let's go right down the row. Mr. Gordon, you are up first.

STATEMENTS OF DANIEL I. GORDON, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET; ROBERT A. PECK, COMMISSIONER, PUBLIC BUILDINGS SERVICE, U.S. GENERAL SERVICES ADMINISTRATION; AND DAVID MICHAELS, PHD., MPH, ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR

STATEMENT OF DANIEL I. GORDON

Mr. GORDON. Thank you, Mr. Chairman.

Mr. Chairman, other members of the subcommittee, I appreciate the opportunity to appear before you today to discuss the regulatory implementation of Executive Order 13502, which governs the use of project labor agreements, PLAs, in Federal construction contracts.

I was pleased to sit in and listen to the first panel, with the diverse views that were expressed there, and to hear the Members' questions. I will be happy to followup with any questions you want to raise with me.

As Administrator for Federal Procurement Policy, I am responsible for overseeing the development of Government-wide contracting rules and policies and ensuring that those rules and policies promote economy and efficiency. This afternoon, I would like to briefly describe the steps my office has taken to shape the Federal Acquisition Regulation [FAR], as we usually call it, rule implementing the Executive order.

Let me first, though, address a misperception, or a misconception about what the FAR rule says about the use of PLAs. Contrary to what the subcommittee members heard from some people earlier this afternoon, the FAR rule does not require the use of PLAs. Like the Executive order, the FAR rule gives each contracting agency the discretion to decide for itself on a project by project basis whether use of a PLA will in fact promote economy and efficiency on a specific construction contract.

The FAR rule calls PLAs, and I am quoting from the rule, "a tool that agencies may use to promote economy and efficiency in Federal procurement." In offering PLAs as a tool to the contracting agency, the FAR rule on PLAs is similar to many other provisions of the Federal Acquisition Regulation. For example, the FAR lets

contracting agencies decide, based on the specifics of their needs and their circumstances, whether they should purchase through the Federal supply schedule or on the open market, whether they should seek bids with price as the only evaluation criterion, or rather, run a competitive procurement with other selection factors, such as past performance or technical excellence, in addition to price.

The FAR does not dictate to our acquisition professionals which choices to make. It gives them the tools to make the choices so that they can tailor a procurement to an individual agency's specific requirement. That tool kit approach and the flexibility that comes with it lie at the very heart of our ability to get the best value for every taxpayer dollar that we spend, whether we are buying lawnmower services or war planes for the Air Force.

Our approach to PLAs is no different. We have structured the FAR rule to create a process where decisions are made on a case by case basis. The FAR rule sets out factors that an agency may decide to consider. But it doesn't dictate the factors. It doesn't prohibit agencies from considering other factors.

Among the factors that are named in the FAR are whether the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades, and whether completion of the project will require an extended period of time.

As with other FAR rules, though, the PLA rule sets boundaries. Most significantly, the agency may require a PLA for a specific project only, only if it decides that doing that will advance the Government's interest in achieving economy and efficiency in Federal procurement.

But equally importantly, with respect to the content of any PLA created pursuant to the FAR rule, and this is particularly relevant in light of what the subcommittee heard from the first panel, the FAR rule requires that any PLA allow all firms to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. This mandate ensures that if an agency decides that they should be using a PLA, it is done consistent with the principle of open competition, a bedrock of our Federal procurement system, so that all interested bidders are given an opportunity to have their offers considered by the Government.

We appreciate that taxpayers would not benefit from a rule that requires the use of PLAs regardless of circumstances. But we also don't think taxpayers would benefit if agencies were prohibited from taking advantage of opportunities where a PLA could help them achieve or increase efficiency and timeliness.

With these thoughts in mind, my office intends to continue working with the agency, with the agencies across the executive branch, to facilitate the sharing of experiences and best practices for the consideration and appropriate use of project labor agreements in the Federal marketplace.

I will be delighted afterwards to answer any questions the subcommittee members have. Thank you.

[The prepared statement of Mr. Gordon follows:]

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STATEMENT OF
THE HONORABLE DANIEL I. GORDON
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT
AND GOVERNMENT SPENDING
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

March 16, 2011

Chairman Jordan, Ranking Member Kucinich, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the implementation of Executive Order (E.O.) 13502 through the regulation governing the use of project labor agreements in federal construction contracts. As Administrator for Federal Procurement Policy, I am responsible for overseeing the development of government-wide contracting rules and policies, including those for construction, and ensuring that the contracting rules and policies promote economy and efficiency. Today, I would like to briefly highlight a few key provisions of the E.O. Then, I will discuss the steps my office, the Office of Federal Procurement Policy (OFPP), has taken to implement the requirements of the E.O. in the Federal Acquisition Regulation (FAR), which governs executive branch procurements, and to ensure that the FAR rules promote economy and efficiency in contracting.

Executive Order 13502

Executive Order 13502 encourages federal agencies to consider requiring the use of project labor agreements on large-scale construction projects, where the total cost to the Government is $25 million or more. A project labor agreement is a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. Section 1 of the E.O. explains that use of a project labor agreement may promote the efficient and expeditious completion of federal construction projects by providing structure and stability that can help agencies manage challenges to efficient and timely procurement that are posed by large-scale construction contracts. These challenges may include difficulty in predicting labor costs when bidding on contracts, the uncertainty of a steady supply of labor through the life of the contract, and the potential inability to timely resolve disputes that may arise between the multiple employers who are typically working onsite at a single location.

It bears emphasizing that the E.O. leaves to the discretion of each agency the decision of whether use of a project labor agreement will promote economy and efficiency on a given construction contract of $25 million or more and should be required. Section 3 states that these decisions on such larger construction contracts are to be made on a *project-by-project basis*, where the agency determines whether use of such an agreement will advance the government's interest in achieving economy and efficiency, producing labor-management stability, and ensuring compliance with law and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters. Section 5 reinforces the case-

by-case nature of the policy, stating that the E.O. "does not require an executive agency to use a project labor agreement on any construction project . . . ."

FAR implementation

Last April, a new FAR Subpart 22.5 was promulgated to implement E.O. 13502, after careful consideration of public comments on a proposed rule issued in the summer of 2009. In developing these regulations, OFPP worked with the other members of the Federal Acquisition Regulatory Council – namely, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration – as well as several other agencies that undertake large-scale construction projects.

Consistent with the express terms of the E.O., FAR Subpart 22.5 provides guidance and flexibility to allow agencies to make reasoned evaluations about whether a project labor agreement is appropriate for a given construction project. The rule is specifically structured to ensure that project labor agreements are treated as a tool for consideration -- and not a one-size-fits-all solution for every large-scale construction project. The rule provides (1) factors to help agencies in considering whether a project labor agreement would be beneficial, (2) guidance regarding the content of such an agreement, and (3) solicitation provisions and contract clauses to use in construction acquisitions if a decision is made to require a project labor agreement.

Factors. The FAR identifies a number of specific factors that agencies may consider to help them decide, on a case-by-case basis, if the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project. These factors include whether:

- the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades;

- there is a shortage of skilled labor in the region in which the construction project will be sited;
- completion of the project will require an extended period of time;
- project labor agreements have been used on comparable projects undertaken by federal, state, municipal or private entities in the geographic area of the project; and
- a project labor agreement will promote the agency's long-term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.

These factors reflect the experience of federal agencies, such as the Department of Energy and the Tennessee Valley Authority, other governmental entities, and private sector entities, in analyzing planned construction projects to determine whether a project labor agreement is likely to promote smooth, successful, and timely performance of the construction project. The list is non-exhaustive and agencies have the discretion to pick and choose which, if any, of these enumerated factors, or any other factors they may identify, are appropriate to consider on a particular project, provided that their decision has a reasonable basis, achieves economy and efficiency, and is consistent with law. The rule encourages agency managers and members of the acquisition team to work together in evaluating whether to use a project labor agreement and to start the evaluation early in the planning process. By doing so, all experiences relevant to a particular project can be fully considered in deciding what is best for the agency in meeting its mission, such as whether similar projects previously undertaken by the agency have experienced substantial delays or inefficiencies due to labor disputes or labor shortages in a particular locale or job classification. It is worth noting that OFPP plays no role in agency decision-making associated with individual contract actions, including those associated with construction contracts. By law, these decisions are made by the individual buying agencies.

Content of project labor agreements. The FAR states that all project labor agreements shall fully conform to all statutes, regulations, and Executive Orders. It further prescribes a number of specific requirements that must be in the agreement. For example, all project labor agreements must allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. Put another way, any contractor may compete for – and win – a federal contract requiring a project labor agreement, whether or not the contractor's employees are represented by a labor union. The same principle of open competition applies to subcontractors as well. The agreement must also:

- bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- contain guarantees against strikes, lockouts, and similar job disruptions;
- set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement; and
- provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health.

The rule further states that an agency may, as appropriate to advance economy and efficiency in the procurement, specify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions in order to receive a contract award. An agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency's effort to identify appropriate terms and conditions of a project labor agreement for a particular construction project and facilitate agreement on those

terms and conditions. The preamble explains that "[e]xperiences of entities that have successfully used project labor agreements suggest that, in some cases, an agency may be able to more effectively achieve economy and efficiency in procurement by specifying some or all of the terms and conditions of the project labor agreement in the solicitation. Their experiences also suggest that, if the agency specifies some or all of the terms and conditions of the project labor agreement in the solicitation, contractors not familiar with project labor agreements may be better able to compete."

Solicitation provisions and clauses. The FAR provides solicitation provisions and contract clauses for incorporation into acquisitions for large-scale construction if an agency decides to require a project labor agreement. Again, the rule provides flexibility through alternative clauses that support various approaches for timing the submission of an executed project labor agreement on a particular project – namely, with the initial offer, after offers are submitted but before award, or after award. This flexibility allows agencies to select the alternative that makes the most sense in advancing the economy and efficiency of a particular project and best fits with their mission.

Conclusion

Each year, the government spends tens of billions of dollars on construction projects. As stewards of the public fisc, it is our responsibility to make sure these resources are spent in the most effective and efficient manner possible. Project labor agreements, like many other procurement authorities provided to agency contracting offices, are just one tool that may help agencies achieve greater economy and efficiency in particular cases. As the E.O. states, our policy is to encourage agencies to *consider* the use of project labor agreements, but not to require

such use by agencies. Neither the E.O. nor the FAR makes any mandates to compel use of project labor agreements. We don't believe that taxpayers would benefit from a rule that mandates their use regardless of circumstances. Similarly, however, taxpayers would not benefit if agencies ignored legitimate opportunities that could have been identified through reasoned analysis to achieve greater economy and efficiency in a large-scale construction project, such as by reducing challenges to timely completion of the project and thereby keeping costs down by having an agreed-upon resolution mechanism in place to address labor disputes.

We believe the structure of the FAR, as described above, will facilitate reasoned analyses and measured actions so that project labor agreements are given meaningful consideration where they can promote economy and efficiency and are not pursued where their use would not be beneficial. OFPP will work with agencies to facilitate the sharing of experiences and best practices for the consideration and appropriate use of project labor agreements in the federal marketplace.

This concludes my remarks. I am happy to answer any questions you may have.

Mr. JORDAN. Thank you, Mr. Gordon.
Mr. Peck.

STATEMENT OF ROBERT A. PECK

Mr. PECK. Thank you, Mr. Chairman and other members of the subcommittee.

I too heard the first panel, and I am happy to be here to set the record straight and discuss GSA's measured business approach to the implementation of project labor agreements on our construction contracts. We share with you an interest in seeing that our construction projects are finished as expeditiously as possible and with the best value and cost to the American taxpayer.

A PLA is a proven tool to help provide structure and stability to a project, especially on certain large projects. The private sector uses PLAs also for a variety of construction projects, similar to those GSA manages. PLAs are also used at the State and local levels for a wide array of construction projects varying in size and scope.

PLAs have been used in all 50 States and the District of Columbia. They can help reduce risks associated with wage stability, avoidance of work stoppages, increase labor availability and project-specific coordination of work rules. PLAs can also include provisions that promote career development through valuable job training for construction workers.

GSA uses PLAs when they promote economy and efficiency in Federal procurement. Executive Order 13502 and the FAR encourage executive agencies to consider requiring contractors to use PLAs on projects totaling at least $25 million. As Mr. Gordon said, the Executive order does not mandate that Federal agencies require PLAs, but encourages the consideration of PLAs.

Our procurement process provides for the consideration of PLAs. We allow contractors to submit a proposal with a PLA, without a PLA or both. We evaluate these proposals on a project by project basis. If we accept a PLA proposal, the awardee is required to execute a PLA in accordance with the Executive order and the FAR. In GSA's contracts, the PLA is an agreement between the contractor and the labor organization, rather than between GSA and the labor organization.

As we typically do on our major construction projects, GSA selects the proposal with the best value to the Government by weighing a number of technical factors against cost. A PLA recently has been included as one of those technical factors. I should note that the other technical factors for many more points are past performance, key personnel and a management plan which often includes the requirement of their being a plan to include small business.

Proposals with a PLA receive 10 percent, 10 of the possible 100 points for technical evaluation. If you consider that then the technical factors as a whole are balanced against price on the other hand, you will see that the PLA in and of itself is far less than 10 percent, more like probably 5 or 6 percent of total award. And we don't really quantify them that way, which I will be happy to explain.

We award to contractors who usually work with labor organizations, and we also award to contractors who do not usually work with labor organizations.

Shortly after the Executive order was signed, GSA received $5½ billion through the American Recovery and Reinvestment Act of 2009. These funds, which were used principally to help modernize and green our federally owned inventory, provided GSA the opportunity to conduct a PLA pilot program. I am proud to tell you today that in our spending on the Recovery Act so far, we estimate we have created 16,000 jobs in the American construction industry.

For the pilot PLA program, GSA selected 10 projects with budgets of more than $100 million. The selected projects cover seven States and the District of Columbia. Of the 10, 7 ended up with PLAs and three did not. From our comparisons, in most instances, it appears that there has been little to no cost differences, although I will be the first to tell you, in some cases, that is hard to tell.

Our experience in this pilot program has shown us that our bidding process has not hindered competition. In all of our projects, we received sufficient bids to ensure adequate competition and the best value to the American taxpayer. We typically receive between three and eight offers for our projects, for the pilot projects.

Through the construction of these projects, GSA plans to assess the use of PLAs for future implementation of best practices and updates to our policies. This pilot program has enabled GSA to obtain real market data regarding the impact of PLAs on competition. We have recently reached out to contractors and union officials to hear their feedback on our pilot projects in order to develop ways to further improve our PLA procurement process.

Mr. Chairman and members of the subcommittee, this concludes my prepared statement. I am of course happy to answer any questions.

[The prepared statement of Mr. Peck follows:]

STATEMENT OF

ROBERT A. PECK
COMMISSIONER

PUBLIC BUILDINGS SERVICE
U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS,
STIMULUS OVERSIGHT, AND GOVERNMENT SPENDING

COMMITTEE ON
OVERSIGHT & GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

"PROJECT LABOR AGREEMENTS AND THE COST OF DOING BUSINESS IN THE CONSTRUCTION INDUSTRY"

March 16, 2011

Good afternoon Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee. My name is Robert A. Peck, and I am the Commissioner of the U.S. General Services Administration's (GSA) Public Buildings Service (PBS). Thank you for inviting me here today to discuss GSA's measured business approach to the implementation of Project Labor Agreements (PLA) in our construction contracts.

A PLA is a project-specific collective bargaining agreement that establishes the terms and conditions of employment for a specific construction project. A PLA is a proven private sector tool to provide structure and stability to a project, especially large projects that take many years to complete. The private sector uses PLAs for a variety of construction projects similar to those GSA manages. Additionally, PLAs are used frequently at the state and local level in connection with a wide array of construction projects of varying sizes and scopes. PLAs have been used in all 50 states for a variety of construction projects.[1] GSA only uses PLAs when they promote economy and efficiency in federal procurement.

Upon issuance of the President's Executive Order 13502 to "promote the efficient administration and completion of Federal construction projects," GSA established internal guidance on the consideration of PLAs and pursued ten pilot projects under the American Recovery and Reinvestment Act of 2009 to test their use.

Project Labor Agreement Regulations and Guidance –

Executive Order 13502, which President Obama signed on February 6, 2009, encourages executive agencies to consider requiring contractors to use PLAs on large construction projects, defined as those totaling at least $25 million. The Executive Order does not mandate that Federal agencies require PLAs; rather it states a policy "to encourage federal executive agencies to consider requiring the use" of PLAs on major construction projects in order to promote economy and efficiency in Federal procurement. The order only allows agencies to require PLAs where doing so would "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, produc[e] labor-management stability, and ensur[e] compliance with" federal employment laws. After a lengthy review process, and with hundreds of comments submitted by the public and industry, the Federal Acquisition Regulation was amended to implement the Executive Order. The final FAR rule, FAR Case 2009-005, was published in the Federal Register April 13, 2010 and became effective May 13, 2010.

Prior to the final rule, GSA issued interim guidance for PLA consideration in accordance with the Executive Order. Upon issuance of the final FAR rule, GSA revised its guidance accordingly. This procurement instructional bulletin provides guidance on creating solicitations and evaluating proposals related to PLAs on a project-by-project basis. GSA allows contractors to submit a proposal subject to the PLA requirements in the contract, a proposal not subject to the requirements in the contract or both. If GSA accepts a PLA proposal, the awardee is required to execute a PLA in accordance with

[1] As cited in the preamble to the final FAR rule FAR Case 2009-005

the Executive Order and the FAR. In GSA's contracts, the PLA is an agreement between the contractor and the labor organization, and GSA is not a party to the agreement.

Awarding Construction Contracts with Project Labor Agreements –

In selecting a contractor for award, GSA uses the "best value" method of award, which takes into consideration both cost and technical qualifications. While cost is always considered, the value of using well-qualified contractors who are able to perform the contract efficiently and effectively is also part of the decision process. GSA weighs numerous technical factors to evaluate a contract proposal. The inclusion of a PLA is one of these factors. Contractor submissions that include a PLA receive a 10 percent increase in their technical evaluation for submitting a proposal subject to the PLA requirements. This allows us to recognize the value of the potential benefits of a PLA to the project, including reduced project risks associated with wage stability, avoidance of work stoppages, increased labor availability, and project-specific coordination of work rules.

By using our optional bidding process, GSA does not discriminate against contractors. GSA awards to contractors who work with labor organizations, as well as contractors who work without such organizations.

The viability of a PLA on a given project is evidenced by the relative cost of the PLA proposals (if any) submitted. If a market is not suitable for a PLA, GSA believes that offerors will not submit PLA proposals or the proposals will include an elevated cost, which may take them out of the competitive range.

GSA's Implementation of Project Labor Agreements –

GSA is the Federal government's real property expert, managing a real estate portfolio of more than 1,500 owned buildings. We manage and execute an average of $1.5 billion capital construction program annually. After President Obama signed the Executive Order for PLAs, GSA was also allocated $5.5 billion through the American Recovery and Reinvestment Act of 2009 (Recovery Act) to help construct new facilities and modernize our federally owned inventory, transforming many of our buildings into high-performance green buildings.

During the implementation of our Recovery Act Spend Plan, GSA conducted a pilot program with Recovery Act projects to consider the use of a PLA. For this pilot program, GSA selected projects with budgets of more than $100 million. Ten projects met this criterion and were selected for the pilot. Of these ten projects, seven have PLAs and three do not. Our experience in this pilot program has shown us that our bidding process has not hindered competition.

The following projects were included in the pilot program:

- 50 United Nations Plaza in San Francisco, California (signed PLA)
- A.J. Celebrezze Federal Building in Cleveland, Ohio (signed PLA)
- Byron Rogers Courthouse in Denver, Colorado (no PLA)
- Edith Green-Wendell Wyatt Federal Building in Portland, Oregon (signed PLA)
- GSA Headquarters Building in Washington, DC (no PLA)
- Lafayette Federal Building in Washington, DC (signed PLA)
- Nogales West Land Port of Entry in Nogales, Arizona (no PLA)
- Peter Rodino Federal Building in Newark, New Jersey (signed PLA)
- Prince Jonah Kuhio Kalanianaole Federal Building and Courthouse in Honolulu, Hawaii (signed PLA)
- Department of Homeland Security at the St. Elizabeths Campus in Washington, DC (signed PLA for 1 of the 3 contracts)

Through the construction of these projects, GSA plans to assess the use of PLAs for future implementation of best practices and updates to our policies. This pilot program has enabled GSA to obtain real market data regarding the impact of PLAs on competition. GSA has recently reached out to contractors and union officials to hear their feedback on our pilot projects in order to develop ways to further improve our PLA procurement process.

These pilot projects represent the first projects for which GSA had considered the use of PLAs; however, it is important to note that contractors have, of their own volition, entered into PLAs in certain instances where it makes sense.

Conclusion –

As real estate experts, GSA ensures that we are procuring construction goods and services at the best value for the Government on behalf of American taxpayers. Consideration of the use of PLAs is encouraged because of the benefits that they may bring. PLAs can provide wage stability for workers, establish mechanisms for resolving labor disputes, and reduce the risks of work strikes and lockouts to ensure the project continues on schedule.

In awarding construction contracts, GSA considers a variety of technical factors, including the potential benefits from a PLA, and weighs them against cost, to help determine the winning proposal. By leveraging our experience and expertise, GSA ensures high design and construction excellence at the best value to the American taxpayers.

Chairman Jordan, Ranking Member Kucinich, this concludes my prepared statement, and I am pleased to be here today to discuss GSA's measured business approach to the implementation of PLAs. I will be pleased to answer any questions that you or any other Members of the Subcommittee may have.

Mr. JORDAN. Thank you, Mr. Peck.
Mr. Michaels.

STATEMENT OF DAVID MICHAELS

Mr. MICHAELS. Chairman Jordan, Ranking Member Kucinich, members of the subcommittee, thank you for inviting me to testify about the important work of the Occupational Safety and Health Administration, and to listen to your suggestions about how we can improve the approaches we take to fulfill the important mission given to us by Congress, protecting the lives and health of American workers.

In the four decades since the OSHA Act was enacted, the Nation has made dramatic progress in reducing work-related deaths and injuries. Since 1970, workplace fatalities have been reduced by more than 65 percent. Reported occupational injury and illness rates have decreased by over 67 percent since 1973.

But far too many preventable injuries and fatalities continue to occur.

I am also glad that you chose the important issue of construction safety. The safety of construction workers is one of OSHA's top concerns. Construction is among the most dangerous industries in the country, and construction inspections comprise 60 percent of OSHA's total inspections.

In 2009, preliminary data from the Bureau of Labor Statistics indicate that there were 816 fatal, on the job injuries to construction workers, more than in any other single industry sector, and nearly one out of every five work-related deaths.

But we are talking about much more than just statistics here. We hear about these tragedies almost every day in the news. Almost every construction worker that dies leaves behind a family whose lives are devastated. A breadwinner's serious injury can throw a family permanently out of the middle class.

It is clear that OSHA enforcement and regulations save lives, that many workers are alive today because of OSHA's activity. Since its creation 40 years ago, OSHA has relied on the same basic strategies to ensure the safety of American workers. For those many employers who want to do the right thing, we offer compliance assistance and cooperative programs. For those employers who endanger workers by cutting corners on safety, we believe in strong enforcement.

The ultimate goal of OSHA's enforcement is deterrence. Using penalties is one way to change employer behavior, with a goal of preventing injuries, illnesses and deaths before they occur. Strong enforcement not only benefits workers, but it also levels the playing field for the vast majority of employers who play by the rules and who make the health and safety of their employees a priority.

Failing to prevent injuries, illnesses and fatalities is a major burden on the American economy. Every year, the most disabling injuries cost American employers more than $53 billion, over $1 billion a week in workers compensation costs alone. Indirect costs to employers, workers and their families can double these costs.

One of the primary duties that Congress gave OSHA was to issue standards to protect workers from these costly injuries and deaths. OSHA goes through an extensive public consultation process before

issuing new standards. We conduct sophisticated reviews of the economic impact of proposed regulations. We hold stakeholder meetings and online Webinars. And we listen to the input of small employers through the Small Business Regulatory Enforcement Fairness Act, that is SBREFA panels, for major regulations. We then hold public hearings and we solicit extensive written comments.

Finally, all of our significant regulatory proposals and final standards are extensively reviewed by the Office of Management and Budget. I will go off script here, Mr. Baskin referred to a tragedy in Iowa in 2006, where a worker was killed in a crane collapse. At that point, OSHA was working on a new crane standard, started in 2000. And only last year, in November 2010, did our new crane standard finally go into effect after all those multiple opportunities for public input. We now have a strong crane standard which we know will prevent deaths like that from occurring.

OSHA is a full Service organization. Our strong compliance assistance programs operate under the belief that every employer should have access to the knowledge he or she needs to provide a safe workplace, and every employee should be award of their basic rights under the law and the hazards they face. In addition to the numerous fact sheets, guidance documents and online tutorials that can be found on OSHA's Web site, our onsite consultation program provides free workplace safety and health evaluations and advice to small businesses that cannot afford to hire their own safety and health experts. This program is completely separate and independent from OSHA's enforcement program.

Last year, the consultation program conducted over 30,000 consultation visits, more than 9,000 in small construction companies. OSHA also has compliance assistance specialists in every area office.

OSHA's strong commitment to compliance assistance is evidenced by the President's request in his fiscal year 2011 and fiscal year 2012 budgets to increase funding for this onsite consultation program.

Finally, I know this committee is interested in why OSHA has temporarily withdrawn its musculoskeletal disorder column proposal in order to solicit more comments, and why we withdrew our proposed noise reinterpretation in order to take a more comprehensive approach to preventing work-related hearing loss. In brief, these actions stand as an example of this administration's willingness to respond to public concern about our programs.

I will be glad to answer any questions about these actions or any other OSHA initiatives. Thank you.

[The prepared statement of Mr. Michaels follows:]

STATEMENT OF
DAVID MICHAELS, PHD, MPH
ASSISTANT SECRETARY
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

U.S.HOUSE OF REPRESENTATIVES

March 16, 2011

Thank you very much for inviting me to testify here today. I have been looking forward to coming before you to describe the important work of the Occupational Safety and Health Administration and to listen to your comments and suggestions about how we might improve the approaches we take to fulfill the important mission given to us by the Congress.

This year marks the 40th anniversary of the establishment of the Occupational Safety and Health Administration and I think by any measure, this agency has been one of the true successes of government efforts to protect workers and promote the public welfare.

It is difficult to believe that only 40 years ago, although some states had limited worker protection laws, most American workers did not enjoy the basic human right to work in a safe workplace. Instead they were told they always had a choice: They could continue to work under dangerous conditions, risking their lives, or they could move on to another job. I think we can all agree that we have made great progress since then.

The results of this law speak for themselves. . In the four decades since the OSH Act was enacted, the nation has made dramatic progress in reducing work-related deaths and injuries. Since 1970, workplace fatalities have been reduced by more than 65 percent.

Reported occupational injury and illness rates have decreased by over 67 percent since 1973, but far too many preventable injuries and fatalities continue to occur. In 1971, the National Safety Council estimated that 38 workers died on the job every day of the year. Today, the Bureau of Labor Statistics puts that number at 12 per day, with a workforce that is almost twice as large.

The Private Construction Industry

I am also glad that you chose the important issue of construction safety to discuss here today. Construction safety is also one of OSHA's top concerns. Construction is among the most dangerous industries in the country and construction inspections comprise 60% of OSHA's total inspections. In 2009, preliminary data from the Bureau of Labor Statistics indicate that there were 816 fatal on-the-job injuries to construction workers – more than in any other single industry sector and nearly one out of every five work-related deaths in the U.S. that year

In 2009, private industry construction workers had a fatal occupational injury rate nearly three times that of all workers in the United States: 9.7 per 100,000 full-time equivalent construction workers vs. 3.3 for all workers. Construction also had two of the ten occupations with the highest fatal injury rates: roofers at 34.7 fatal work injuries per 100,000 full-time equivalent workers and structural iron and steel workers at 30.3. The number of fatal injuries in construction declined from 975 in 2008 to 816 in 2009. The Bureau of Labor Statistics attributes much of the fall in construction fatalities to a weak economy. The challenge for OSHA will be to keep these numbers down as the economy begins to pick up.

The leading causes of worker deaths in the construction industry were: falls, struck by object, caught-in/between, and electrocution. These "Fatal Four" were responsible for nearly three out of five (59%) construction worker deaths in 2009, BLS reports. In 2009, falls accounted for more than one-third of fatal occupational injuries in construction (34%). Nearly half (48%) of all fatal falls in private industry involved construction

workers. Transportation-related events were the second leading fatal injury event (25%) in construction, followed by contact with objects and equipment (19%) and exposure to harmful substances and environments (16%). Illnesses in construction include lead poisoning, lung disease and cancer from exposure to asbestos and silica, hearing loss and musculoskeletal disorders.

But we're talking about much more than just statistics. We read about these tragedies almost every day in the newspaper or see them on the 11:00 news. Almost every construction worker that dies leaves behind a family: children, spouses, parents whose lives are devastated. A breadwinner's serious injury can throw a family permanently out of the middle class.

Enforcement

We know that OSHA enforcement and regulations save lives, that many workers are alive today because of OSHA's activities. But it is rare to see news reports about the lives that *haven't* been lost, the fathers who can still join their children for dinner because they are alive after a day of work. Just over a week ago, the nation witnessed the dramatic demonstration of lives saved when a scaffold holding two workers collapsed 12 stories above the ground in Yonkers, NY. The two men on that scaffold were protected by fall protection equipment until rescuers were able to bring them safely to the ground.

And last week in the state of Ohio, we were reminded again about the life-saving value of OSHA regulations. Our inspectors were called to investigate a report of a worker in a deep construction trench. Upon arrival, OSHA inspector Rick Burns identified a worker in a 10-foot deep unprotected trench. OSHA regulations require trenches greater than 5 feet deep to be shored, sloped or protected in some way.

Burns immediately directed the worker to leave the trench. The worker exited the trench and 5 minutes later, the walls of the trench collapsed right where the worker had been standing. There is little doubt that he would have been seriously injured or killed.

Unfortunately, for construction workers, far too many work days do not end so happily.

One of the goals of enforcement is to level the playing field for the vast majority of employers, who play by the rules and make the health and safety of their employees a priority. While most employers strive to do the right thing, too many try to save a few dollars by cutting corners on safety and health – often with tragic results. Last year, for example, OSHA fined the C.A. Franc construction company $539,000 following the investigation of the death of a roofing worker, Carl Beck, who fell 40 feet at a Washington, PA worksite. Fall protection equipment was readily available on site but not provided to workers. Carl Beck Jr. was 29 years old and had two small children.

But I also want to be very clear that OSHA is not satisfied with just responding to fatalities or dramatic accidents after a worker has been hurt of killed. We are about prevention – getting to dangerous workplaces BEFORE incidents happen that injure or kill workers.

Here is one example of preventive enforcement. In December, OSHA proposed penalties totaling $360,000 to Gerardi Sewer & Water Co. in Norridge, IL for eight willful, two serious and three repeat safety violations for failing to protect workers from cave-ins during trenching operations. The company had been cited 8 times before for many of the same violations. We later ordered the company to inform OSHA of all of its future work locations. Enforcement actions like this are a success story for OSHA and for workers. We were able to send a strong message to this company and others – before workers were hurt or killed – that OSHA will not tolerate putting workers in dangerous environments.

The ultimate goal of OSHA penalties is deterrence – using penalties as one way to change employers' behavior. Unfortunately, maximum OSHA fines do not rise with inflation and are generally quite low. The last time OSHA penalties were raised was in 1990. Despite the high fines in a few egregious cases like CA Franc and Gerardi, for example, the average OSHA fine for a serious violation in 2010 was only around $1,000.

Vulnerable Workers

Among the most vulnerable workers in America are those who work in high-risk industries, particularly construction. Because of language barriers, literacy and other limitations, these workers are often hard to reach through traditional communications methods.

Latino workers suffer and die on the job at a higher rate than other workers. To put this in painful, human perspective: About 13 Latino workers die on the job every week while doing the most difficult, unhealthful and dangerous jobs in America. This is an intolerable, national disgrace.

These hard-to-reach workers, who are so vulnerable to serious harm, are also the least likely to feel safe speaking up for their rights. As a result, they are often exploited by unscrupulous employers who callously expose them to health and safety hazards with little or no training or personal protective equipment.

OSHA is reminding employers to comply with requirements that they must present information about workers' rights, safety and health training materials, information and instructions in a language that their workers can understand. Earlier this year we issued a directive to OSHA inspectors to check for this during site visits to be sure that employers are complying.

To address the problem of protecting these hard-to-reach workers, Secretary Solis convened a National Action Summit for Latino Worker Health and Safety in Houston in April 2010.

Nearly a thousand workers, employers, labor leaders, representatives from community-

and faith-based organizations, consulates and government gathered for two days to seek new and effective ways to improve workers' knowledge of their workplace rights and their ability to exercise those rights.

Texas was an appropriate location for this conference. At the summit, we met the surviving worker from a June 2009 tragedy in Austin. Juan Mirabel came to the Summit to tell how he warned his employer, to no avail, not to overload a scaffold, not to use it to haul heavy loads. He told us how the scaffold -- uninspected, improperly assembled and overburdened -- collapsed. Juan hung on for his life while three other workers fell to their deaths.

These are not just tragedies for workers and their families; they are also tragedies for the American economy. Workplace injuries, illnesses and fatalities take an enormous toll on this nation's economy – a toll we can hardly afford in good times, but that is intolerable in the difficult times we are experiencing today. A March 2010 Liberty Mutual Insurance company report showed that the most disabling injuries (those involving 6 or more days away from work) cost American employers more than $53 billion a year – over $1 billion a week -- in workers' compensation costs alone. Indirect costs to employers, such as costs of down time for other employees as a result of the accident, investigations, claims adjustment, legal fees, and associated property damage can up to double these costs. Costs to employees and their families through wage losses uncompensated through workers' compensation, loss of home production, and family care for the workers further increase the total costs to the economy, even without considering pain and suffering.[1]

OSHA Standards

One of the main duties that Congress gave OSHA was to issue standards to protect workers from these costly injuries and deaths. OSHA goes through a long and extensive public consultation process before issuing any new standards. OSHA conducts sophisticated reviews of the economic impact of regulations, and reports on economic and technical feasibility. In addition to stakeholder meetings and on-line webchats,

[1] Liberty Mutual Research Institute for Safety, 2010 Liberty Mutual Workplace Safety Index, available at www.libertymutualgroup.com

OSHA gets small business input through the Small Business Regulatory Enforcement Fairness Act (SBREFA) panels for major regulations, holds public hearings and solicits extensive written comments. All significant regulatory proposals and final standards are extensively reviewed by the White House Office of Management and Budget.

Just this past year, OSHA issued a long awaited standard to protect employees who work in and around cranes and derricks. The previous rule, which dated back to 1971, was based on then 40-year-old standards. After years of extensive research, consultation and negotiation with industry experts, this long overdue rule addressed the leading causes of deaths and injuries related to cranes and derricks, including electrocution, boom collapse and overturning. The final standard will prevent 22 fatalities and 175 non-fatal injuries each year.

Like the Cranes and Derricks standard, many standards that OSHA is working on are long overdue and replace outdated and outmoded regulations. For example, OSHA is currently working on a much needed standard to protect workers – including construction workers – against silica exposure. Silica exposure causes lung cancer and has been known for hundreds of years to cause a debilitating disease called silicosis. The current OSHA silica exposure limit that covers construction workers dates from the early 1970's and is based on an obsolete sampling method that has not been used for many years.

But OSHA is not satisfied with just issuing new and updated standards. We also look back at our previously issued standards to ensure that they effectively protect workers without overburdening business. Some of those lookback studies have addressed construction standards. For example, according to comments and analyses in the final lookback report for the Trenching and Excavation Standard, the number of trenching and excavation fatalities declined from an estimated 90 fatalities per year prior to the enactment of the 1989 Standard, to approximately 70 per year since 1990. The numbers have now fallen to fewer than 50 per year according to the Bureau of Labor Statistics. Since this 22% reduction occurred over a period when there was a 20% real increase in construction activity, fatalities were actually reduced by more than 35%.

Similarly, according to another lookback review final report for OSHA's Lead in Construction Standard, issued in August 2007, blood lead levels of exposed employees declined significantly after the standard was adopted, showing that compliance with the OSHA Lead in Construction Standard effectively protects workers from high lead levels.

To further ensure that OSHA targets the right areas in standards and enforcement, OSHA also has a committee to advise the Assistant Secretary on construction-related issues. The Advisory Committee on Construction Safety and Health (ACCSH) is composed of labor, management and public representatives and meets several times a year.

Compliance Assistance

At OSHA, we are also committed to a robust compliance assistance effort. We recognize that most small construction businesses may not be able to hire full time health and safety staff, nor are many able to afford to hire consultants to address their safety and health obligations. To assist these small employers, OSHA's Onsite Consultation Service provides **free** workplace safety and health evaluations and advice to small businesses with 250 or fewer employees, and is completely separate and independent from OSHA's enforcement program with very few exceptions. Last year, the Consultation Service conducted over 30,000 consultation visits, more than 9,000 in small construction companies.

We also invest heavily in compliance assistance to ensure that employers know how to comply with our standards. OSHA has compliance assistance specialists in most of our area offices—ready to provide assistance and information. In FYI 2010, we helped over 200,000 individuals through our toll-free number. In addition, we develop materials for employers to help with compliance. For example, with respect to our new Cranes standard that I mentioned before, in addition to the materials we have already published, we are currently developing 4 fact sheets to help employees and employers implement the new standard. Last week we issued a Small Entity Compliance Guide for cranes and

derricks, and we are working on a compliance directive, as well as adding additional frequently asked questions.

OSHA has also been working closely with the building industry and labor unions to find and implement solutions to worker injuries and deaths by incorporating engineering controls into construction practices. For example, Prevention Through Design, a novel idea a few years ago, is finding wider acceptance in the industry. With the support and leadership of IMPACT, Building Trades Employers' Association of NY, ACCSH and others, these life-saving controls are moving toward becoming the norm for new and renovated buildings.

Examples of Prevention Through Design that OSHA has promoted include reinforcing skylights and designing parapets for rooftop workers, and the idea of "Cocooning" for poured-in-place concrete buildings is now providing added safety for workers erecting One World Trade Center in New York. Cocooning means wrapping entire floors of a building in plastic, preventing falls and avoiding the need for fall protection equipment and other more expensive and less safe measures.

OSHA Initiatives

Finally, I know there is also some interest in two proposals that OSHA has recently withdrawn. I'd like to say a few words about both of those.

First, OSHA has temporarily withdrawn its musculoskeletal disorder column regulation because it was clear to us that there was still a great deal of concern about what this regulation would require, and we thought it made sense to take more time to listen to stakeholders' concerns. We are currently working with the Small Business Administration's Office of Advocacy to organize small business stakeholder meetings to listen to small businesses and address their concerns.

I'll summarize briefly what this regulation would do. Since the early 1970's, OSHA has required that high hazard employers maintain a list of work related injuries and illnesses on the OSHA 300 log. These include musculoskeletal disorders such as back injuries. Recordable injuries must meet one of the following criteria: involve medical treatment (more than first aid); involve lost time; involve restricted duty. In addition to deciding whether the employee has suffered an injury or illness, the employer must also decide whether that injury or illness is work-related. Again, this is what employers must do now for all work-related injuries and illnesses. Almost 350,000 musculoskeletal disorders (MSD) with days away from work are recorded by private industry and State and local government employers who go through this process every year.

Our proposed regulation would add a column to the OSHA 300 Log to identify which recordable injuries and illnesses are MSDs. Employers who have recorded a work-related musculoskeletal disorder would be required to identify such injuries as MSD by checking a box in a new MSD column. This new MSD column would join existing columns that identify recordable work-related injuries or illnesses, including skin disorders, respiratory conditions, and hearing loss. We believe that including the MSD column on the 300 log will provide valuable information about the magnitude of MSD problems and trends across industries. Employers and workers would have a much clearer understanding of the pattern of injuries in their workplace which is the first step in controlling those hazards.

You should also note that low hazard employers and small employers with 10 or fewer employees do not have to keep an OSHA 300 log. This means that only around 15% of small employers even have to keep a log and would even then only be affected by this standard if one of their employees suffered a recordable musculoskeletal disorder.

Second, I'll describe briefly the intent of OSHA's proposal regarding noise —which, as you know, we have withdrawn. First, let me provide a little background. Between 20,000 and 25,000 workers every year suffer noise-induced hearing loss. Hearing loss is also a major problem for construction workers. OSHA has a history of working constructively

with employers to develop cost-effective ways to control noise. Most construction workers have suffered substantial loss of hearing after 15-25 years on the job and have to live with a significant loss of hearing for the rest of their lives. Hearing aids can increase the sound levels, but do nothing to increase comprehensibility or decrease problems like ringing in the ears. Hearing loss is rarely compensated among construction workers.

Last year, OSHA issued a Federal Register notice announcing a proposal to change the way we interpret OSHA's noise standard. I want to emphasize that this was a proposal, issued for public comment in order to gather information. It was not a final decision. The Agency committed to reviewing all of the comments prior to making any final decision. In fact, OSHA extended the comment period and is continuing to accept comments, even though the proposal has been withdrawn. OSHA withdrew the proposed interpretation because it became clear from the concerns raised that addressing this problem would have required much more public outreach and many more of the agency's scarce resources than we had originally anticipated. The agency decided to suspend work on the proposal in order to conduct more education and consultation on work-related hearing loss. We are initiating a robust outreach and compliance assistance effort to provide enhanced technical information and guidance on the many inexpensive, effective engineering controls for dangerous noise levels.

In conclusion, construction is hazardous work, and OSHA is working hard to protect workers in this industry with standards, enforcement, outreach, education, and consultation. We are hopeful that the current record low numbers of fatalities and injuries are more than an indication of low construction levels associated with economic difficulties, and that safer and more healthful construction work will help keep the toll of these accidents down as the economy and construction industry recover.

Thank you again for inviting me to this hearing to discuss the important issue of keeping this nation's construction workers safe on the job. I would be glad to answer your questions.

Mr. JORDAN. Thank you, Mr. Michaels, and I do want to get to that in a few minutes here, on the noise regulation.

But let me start with Mr. Peck. Mr. Peck, what percent of Federal contracts come through your agency? Do you know? And what is the overall dollar amount that you award in construction contracts? Do you have that data?

Mr. PECK. I don't have the number or percent of even construction projects in the Federal Government. I can tell you in a typical year, major construction, depending on how much money Congress gives us in our capital program, we are somewhere between usually a billion and a billion and a half if you include new construction and major alterations.

Mr. JORDAN. Mr. Gordon in his testimony talked about the flexibility that the FAR rule has and provides for agencies and how that is implemented. Isn't it true that GSA has decided that the project labor agreement is an important part of the consideration in awarding contracts?

Mr. PECK. Well, as I said, we have actually run a pilot program on 10 of the projects that we had under the Recovery Act, that were over $25 million. That is 10 out of 57 projects that were only over $25 million. As I said, we are using them as a test to see whether and how we should implement PLAs on our projects. So that is our record to date, sir.

Mr. JORDAN. And what have you found?

Mr. PECK. Well, as I said, so far, you have to know that we don't have, well, the products that we have awarded on, the one that was awarded the first, is a little over a year under construction. So we have not completed the project yet. So it is hard to make a determination there. What we can tell you is that on all of our PLA bids, we got adequate competition, the same kind of competition we get on most construction projects.

Mr. JORDAN. How do you weight an encouraging of PLAs? How do you weight that and preference that in the bid process?

Mr. PECK. Again, let me just reiterate, on the 10 projects that we have done a pilot on, we included as one of the technical factors in our bid considerations a PLA and a willingness of a contractor to offer us a contract with a PLA. And we balance that, we take that as 10 points out a 100 on the technical factor and balance that——

Mr. JORDAN. So 10 percent——

Mr. PECK. No, sir, and balance that against the price that we are offered. So in essence, we are trying to let the market tell us how it values the use of a PLA.

Mr. JORDAN. I guess I am not following. You are weighting it 10 percent? It seems to me you are saying, you are weighting it 10 percent but we are not.

Mr. PECK. That is correct.

Mr. JORDAN. Explain that, then. Maybe that is why I am confused.

Mr. PECK. Someone on the first panel suggested that if someone bids $100, we are taking 10 percent off the top of that for a PLA bid. And that is absolutely not true.

Mr. JORDAN. Well, then, how is the 10 percent defined?

Mr. PECK. I will tell you. The Government does it on construction projects. Some time ago we all realized that just going low bid, while it sounds good, hardly any of us buy things that way. And the Government, when we used to do what we called low bid, we would often find ourselves with a low bidder who couldn't carry out the project for that low bid, and we ended up often not getting that value. And we would end up having to take the project to someone else, or they would file delay——

Mr. JORDAN. Well, let me ask it this way, then. Someone who was not willing to enter into a PLA, how can they make up for the 10 percent you weight for those who are willing to enter into a PLA?

Mr. PECK. Well, in fact, on 10 of the pilots that we have run, of the 10, three came, we have awarded three of them without PLAs. So it seems quite clear that you can, under our process, come in with a non-PLA bid and win it.

Mr. JORDAN. Well, that brings me to the question I asked the last panel. According to Mr. Biagas, and I understand there is a variation in size, and some union contractors are bigger, and there is a size component when you are doing this evaluation project this large, I get that. But he indicated 6 percent of construction companies in Virginia are union. And yet you are telling me 70 percent of the, so 94 percent aren't. And you are telling me 70 percent of the 10 you have studied were awarded to the 6 percent out there, is that right?

Mr. PECK. Well, but there is a——

Mr. JORDAN. Is that right?

Mr. PECK. No, sir. No, that is not correct. Because we did not award, awarding a PLA does not mean you are awarding a contract to a union construction company, to a closed shop company. We are awarding the PLAs to open——

Mr. JORDAN. In the majority of cases, I would assume in most cases it does, based on Mr. Baskin's testimony in the last panel.

Mr. BASKIN. That is not, well, that is——

Mr. JORDAN. He said most of his members won't enter into a PLA because of what it means for their work force.

Mr. PECK. Well, I couldn't quite tell what he was talking about. I can just tell you that we have the facts of who we have awarded to. And in this market——

Mr. JORDAN. You just told me that 70 percent were PLA-awarded projects.

Mr. PECK. Yes, sir, in this market.

Mr. JORDAN. OK, so of this 70 percent, how many were union, how many were non-union? Do you have that fact?

Mr. PECK. I don't, but I can——

Mr. JORDAN. That would be helpful based on what you are telling me.

Mr. PECK. I can tell you, of the two that have been awarded in this market, they were both to firms that, three, I am sorry, all three were to firms that are not union contractors. This area does not have very many closed, if any closed shops, any more.

Mr. JORDAN. Well, we knew that. Mr. Biagas told us that in the first panel.

Mr. PECK. That is right. So we awarded contracts with PLAs to non-union contractors. Awarding a PLA does not mean you are awarding a contract to a union contractor.

Mr. JORDAN. Let me ask you one more, and I do want to get the ranking member, and I apologize. We will give the ranking member an additional minute as well.

On your list of PLA/non-PLA projects, it identifies the GSA headquarters building as a no-PLA. Wasn't this originally awarded as a PLA project?

Mr. PECK. Yes, it was.

Mr. JORDAN. And so what happened?

Mr. PECK. Well, as I said, we allow, we ask, we awarded to the contractor who said he could get a PLA. In the end, after we awarded, he was not able to reach agreement with the union. So we issued a notice to proceed without the PLA. I think it shows our flexibility. We are not hell-bent for——

Mr. JORDAN. But it also raises the question, did it discriminate, because you initially awarded it, and you said he could be, enter into a PLA agreement, and his competitor bidding, who is not willing to enter into a PLA agreement, i.e., a non-union construction firm, did they get prejudiced in the bid process, because now obviously the one who said he was going to do it and is not doing it still has the contract? That is probably an important question that the taxpayers want to know the answer to.

Mr. PECK. That is a fair question, and I would be happy to provide for you in the record an analysis of who bid how on that project. I don't believe in this case you will find that to be the—I don't think you will find that to be the case in the instance of our building.

Mr. JORDAN. OK, that would be very helpful for the committee.

The ranking member is recognized.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Listening to Mr. Peck's testimony and your questions, where it is clear that PLAs are used for jobs that involve unions and some that are not unions, Linda Figg, who was a witness on the previous panel, I guess was somehow involved in creating this beautiful brochure about the new I–35 bridge. And as I asked her in the questions, she responded that this was a project labor agreement.

Mr. PECK. Yes.

Mr. KUCINICH. I didn't ask her if it was union or not, just said it was a project labor agreement, she said yes.

So Commissioner Peck, as you know, in awarding a public contract, it is of the upmost importance that taxpayers are getting the best value for their investment. In fact, in your written testimony, you state that in selecting a contractor for award, GSA uses the best value method of award, which takes into consideration both cost and technical qualifications.

Can you elaborate on the best value method?

Mr. PECK. Yes, thank you. As I said, it is not a low bid method, because it allows us to take quality into account. I always say to people, if cost was the only factor, we would all be driving Yugos. People take quality into account.

And what this allows us to do is that we have a panel of Government experts who take a look at the submissions that contractors

make. And they are required to submit such technical factors as their past performance on Government and other projects, the key personnel they are putting on a project, their plan for performance on the project, which as I said could include a small business plan, and we then decide who on technical factors is the best.

Then we look at the bids that they have given us, and our panel makes a decision about whether the, whether, the technical factors outweigh the dollar bid or vice versa.

Mr. KUCINICH. But we have heard witnesses here today say that PLAs drive up the cost premiums of public projects. And in your experience, have you seen that PLAs have a significant impact on the cost premium of a specific project?

Mr. PECK. I can answer this in a, it is a great question.

Mr. KUCINICH. Can you give me a yes or no?

Mr. PECK. No, sir. Because that would be, it would be misleading to give a yes or a no. I hope I will give you a straight answer. On a number of our projects, we got PLA and non-PLA bids that were exactly the same. On two of our projects, we paid more, the bid with the PLA was more than the bid without. But on at least, but I have, but I say again, some of the selections are made not just on whether there is a PLA or not. But as near as we can tell, isolating it, we can tell on two products, we paid some kind of, we paid more for the PLA. And our panel decided in essence, or we decided that there was a value to that.

Mr. KUCINICH. What was the value?

Mr. PECK. In both cases, we thought that the PLA itself, on a project that was a complex, long-term project, and this is when people usually find PLAs to be of most value, it was worth spending a little more. It is the reason that you will find——

Mr. KUCINICH. That sounds nebulous. Where was the value? Do you remember?

Mr. PECK. Sure. The value, well, the value of a PLA is that, particularly where you need highly skilled labor, you have a steady source of labor. You know——

Mr. KUCINICH. OK, that is what I want to get at. Get specific, OK.

Mr. PECK. And there are, we definitely are trying to guarantee against work stoppages where there are projects on which there are lots of different trades involved. Even on projects, I have to say this, even on projects that don't have PLAs that you might say are awarded to a non-union contract, there are trade crafts in which people who work for the non-union contractor are members of unions. And so it is useful on a lot of projects to have an agreement with all the labor unions about how they are going to coordinate vacation time, hours, overtime, all those sorts of issues. And on those projects, as I said, we found that there was value.

Mr. KUCINICH. I want to go over one other point here, Mr. Chairman. Mr. Peck, some of the witnesses on the first panel expressed concern that the use of PLAs inhibits members of the construction industry from competing for Government contracting opportunities. Now, in your written testimony, Mr. Peck, you state "By using our optional bidding process, GSA does not discriminate against contractors. GSA awards to contractors who work with labor organizations, as well as contractors who work without such organizations."

Have you found that PLAs limit competition for Government contracts?

Mr. PECK. Not that we have seen.

Mr. KUCINICH. Can you elaborate on that, how GSA has found that PLA bidding process has not hindered competition?

Mr. PECK. Yes, sir. On the, as I said, on the 10 pilots projects that we have had, we have gotten between three and eight bids. And that is about the same number we get typically on our large construction projects. Because we can't have mom and pop firms as our general contractors. We certainly have small firms as subcontractors to those. But that is about the competition that we typically get on our construction projects.

Mr. KUCINICH. Thank you, Mr. Chairman.

Mr. JORDAN. I Thank the ranking member.

We recognize the gentlelady from New York, Ms. Buerkle.

Ms. BUERKLE. Thank you, Mr. Chairman, and thank you to our members of the panel this afternoon. Thanks for bearing with us through the vote.

Mr. Peck, my first question goes to you, and it is a followup to the chairman's question. You mentioned in your opening statement that some contracts are awarded to union shops and some are not. Now, just to clarify, if my question is the same as the chairman's, can you give us a number as to how many go to a union shop and how many go to a non-union shop?

Mr. PECK. Again, of the 10 projects that we have awarded, is that what you are talking about?

Ms. BUERKLE. Overall.

Mr. PECK. That is a number I will have to provide you for the record. But as the committee has noted, the vast majority of major, of general contractors in this country are not union shops.

Ms. BUERKLE. The next question is to Mr. Michaels, and welcome. I must say, as I interview and talk to a lot of the small businesses and businesses in my district, OSHA tends to be one of the impediments and one of the obstacles that they are always trying to get around. So I hope that we can flesh out some of the issues today. We would like to make you more user friendly for our business people. Because they are the job creators, and that is what this committee is about.

You mentioned in your opening statement about compliance and the compliance assistance that OSHA offers to businesses. Now, my understanding is that OSHA just recently cut the budget for the voluntary protection program. And it seems to me that would indicate that you are moving away from compliance and more to something punitive when it comes to enforcement.

Mr. MICHAELS. That is actually not true. There was a proposal to do that. But the current administration proposal is to maintain the VPP at the same funding levels. And I have made a commitment to the program, in fact, I think if you look at my particular record, I have a real commitment to the program. I ran that VPP program when I was at the Energy Department some years ago. So I am doing what I can to make sure that program thrives.

But beyond VPP, because a relatively small number of companies, and very few small companies, we are trying to push those, the basic concepts that the VPP has embraced, down to all employ-

ers, especially the small employers. So we have tremendous amount of compliance assistance materials, we have a Web site that gets 183 million hits a year. We have information for employers. And we have this program that we fund through the States, an onsite free consultation program. We find that many small employers don't know about it. So for example, in New York State, it is run by the New York State labor department, but it is independent from OSHA, we just fund it.

So we really like to encourage Members, when they hear from their constituents, to say, have you looked at this program to get some free help, so you can essentially have your hazards abated before OSHA comes in, or before someone is hurt.

Ms. BUERKLE. Thank you.

Mr. Peck, my last question is for you in the time that I have left. Has GSA ever conducted a study that looks at these PLA agreements and determines the impact, whether it is price-wise or any other wise, in the benefit or the not so good PLA contracting?

Mr. PECK. Ms. Buerkle, we have not conducted a study of their effectiveness throughout the course of a construction project, because these are new to us. We have just begun awarding them. We are tracking the projects as they go forward to completion. They take a couple of years to complete. At the end of that, we hope to have some good data on whether they provided us the benefits that we thought they would.

Ms. BUERKLE. So there was never a study done specifically on the Lafayette Federal Building, or the Department of Homeland Security at St. Elizabeth's campus in Washington?

Mr. PECK. No, ma'am, I am sorry. We conducted a study, we began a study in 2009, I believe it was, to see, that looked forward to complying with the Executive order before the FAR was done. We started to look, market by market, at the pilot areas that we were looking at. For example, we were doing a project in Cleveland, we were doing a project in Denver. And we did have a contractor look at those labor markets to see if they could come up with a formula that would tell us how we could, on a project by project basis, evaluate the PLAs.

Ms. BUERKLE. First of all, if you could provide that study to the committee, I would appreciate that.

Mr. PECK. We will do that.

Ms. BUERKLE. But beyond that, can you just disclose what the findings of that study showed?

Mr. PECK. On all the projects?

Ms. BUERKLE. On those two that I cited.

Mr. PECK. It was Lafayette and?

Ms. BUERKLE. It was Lafayette and Department of Homeland Security at St. Elizabeth's campus.

Mr. PECK. I do not recall on the St. Elizabeth's campus, so I will provide that for the record.

On Lafayette, the study, which, well, we didn't quite complete, did question whether a PLA would be valuable on that project.

Ms. BUERKLE. Very good, thank you so much.

Mr. PECK. Yes, ma'am.

Mr. JORDAN. The gentleman from Pennsylvania, Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman.

My question goes to Dr. Michaels. I am in a private business, so I have dealt for years with OSHA. I was a little bit confused. In your written testimony, there is a statement in there that the fines have not been increased since 1990. Is that——

Mr. MICHAELS. Yes. Congress limited our fines. The maximum level for a fine, for a serious violation, is $7,000. We have some discretion within that $7,000 to reduce the level of the fine, which we do on the basis of being a small employer, history of lack or presence of OSHA violations, and good faith. But that $7,000 maximum is not inflation-adjusted and hasn't been changed in almost 20 years, actually in 20 years.

Mr. KELLY. So the figure that I was looking at, the average OSHA fine for a serious violation in 2010 was only around $1,000?

Mr. MICHAELS. That is correct. I know, it is shocking, isn't it. I sign letters for a fatality investigation where the fine is $2,400. In fact, the average fine last year, in 2010, for a fatality, for a violation in connection to a fatality, was $4,000. It is quite small.

Mr. KELLY. I am trying to understand, though, who defines what is serious and not serious?

Mr. MICHAELS. Serious, we have an extensive field operations manual. Serious is that the hazard could result in death or serious bodily harm. So certain violations are not serious, and if a serious violation where someone could be killed or hurt could get up to a $7,000 fine. Although it is very rare that we for any violation issue a $7,000 fine.

Mr. KELLY. So part of the determination, did I hear you say, the history of the company, its safety record, and the size?

Mr. MICHAELS. We always discount for a small employer, yes.

Mr. KELLY. And the other thing, if I heard you correctly, did you tell me that the voluntary protection program is still in effect, and is not going to be cut?

Mr. MICHAELS. It hasn't, in our fiscal year 2010 budget, it is protected. We are now in the continuing resolution, where we continue at our 2010 levels. In the President's 2012 proposed budget, it is maintained at that level as well. And we actually asked for an increase in the funds for consultation for small employers.

Mr. KELLY. OK, well, I hope you continue that. Being a small employer myself, it is nice to be involved. I don't think there is anybody out there who runs a business who thinks, you know what? I am going to operate unsafely and maybe make a couple extra dollars but put my people at risk. I don't know of anybody in business who does that. I have worked for years with OSHA on a lot of different things. While we may not think it is burdensome and overregulating, I have to tell you, from the guy that has to write the check, sometimes it makes no sense to me.

I have a body shop. OSHA came in, and made me put a railing around the top of the paint room. And my question was, how in the world would anybody even get up there? And they said, that is not the problem. There is enough space between the top of your paint room and the ceiling that somebody could get up there and possibly fall.

So I think the intention of all this is to do a good job. It is the unintended consequences of some of this. And depending on who it is that comes to your store, they don't all look through the same

lens as maybe you think they do. I appreciate your being here today and thank you.

I yield back my time, Mr. Chairman.

Mr. JORDAN. I thank the gentleman from Pennsylvania.

We will now go to the ranking member, the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I appreciate your calling this hearing today, and part of the title of the hearing, as we were understanding it, was to address the OSHA standards.

On the first panel, we had an industry representatives, some of which the on the record identified OSHA standards as being impediments to job creation and business. But a little bit earlier, Ms. Speier submitted for the record a letter from a woman named Tammy Miser. I would like to use my time to make sure that her voice is heard.

I would like to read excerpts from a statement submitted by her, Ms. Miser of Kentucky, who lost her brother in a factory explosion. I just want to read this because it is very chilling, particularly with the gentleman just talking about OSHA.

It says, "My brother, Shawn Boone, worked at the Hayes Lemmertz plant in Huntington, Indiana, where they made aluminum wheels. The plant had a history of fires, but workers were told not to call the fire department. My brother and a couple of coworkers went in to relight a chip melt furnace. They decided to stick around a few minutes to make sure everything was OK, and then went back to gather tools. Shawn's back was toward the furnace when the first explosion occurred. Someone said that Shawn got up and started walking toward the doors when there was a second and more intense blast. The heat from the blast was hot enough to melt copper piping.

Shawn did not die instantly. He lay on the floor smoldering while the aluminum dust continued to burn through his flesh and muscle tissue. The breaths that he took burned his internal organs and the blast took his eyesight. Shawn was still conscious and asking for help when the ambulance took him away. We drove 5 hours to Indiana, wondering if it really was Shawn, hoping and praying that it wasn't. This still brings about guilt, because I would not wish this feeling on anyone. We arrived only to be told that Shawn was being kept alive for us. The onsite pastor stopped us and told us to prepare ourselves, adding that he had not seen anything like this since the war. The doctors refused to treat Shawn, saying even if they took his limbs, his internal organs were burned beyond repair. This was apparent by the black sludge they were pumping from his body.

I went into the burn unit to see my brother. Maybe someone who didn't know Shawn wouldn't have recognized him. But he was still my brother. You can't spend a lifetime with someone and not know who they are. Shawn's face had been cleaned up. It was very swollen and splitting, but he was still my Bub. My family immediately started talking about taking Shawn off the life support. If we did all agree, I would be ultimately giving up on Shawn. I would have taken his last breath, even if there was no hope and we weren't to

blame. I still had to make that decision, to watch them stop the machines and watch my brother die before my eyes.

But we did take him off, and we did stay to see his last breath. The two things I remember most are Shawn's last words. I'm in a world of hurt, he said, and then he took his last breath.

The U.S. Chemical Safety and Hazard Investigation Board said that the explosion that killed Shawn probably originated in a dust collector that was not adequately vented or cleaned. The dust collector was also too close to the aluminum scrap processing area. Hayes Lemmertz management allowed dust to accumulate when overhead beams and structures, which caused a second, more massive explosion. The CSB concluded that had the company adhered to the National Fire Protection Association standard for combustible metal dust, the explosion would have been minimized or prevented altogether. The CSB warned OSHA in 2006 about combustible dust hazards. Had the National Fire Protection Association standard been implemented as a mandatory regulation instead of a voluntary consensus code, my brother Shawn and many others would still be here today."

A one-sided look at the cost of OSHA rules but excluding the benefits does a disservice to workers, responsible employers and families and communities. Mr. Michaels, do you think that we can have a productive discussion today about the impact of OSHA regulations without involving people like Tammy?

Mr. MICHAELS. I think it is very important to hear from people like Tammy Miser and the families of workers who have been hurt. Every day, OSHA saves lives. There was just an OSHA inspector in Ohio last week, 2 weeks ago, Rick Burns, who went out to, who was called and he was told, there is someone doing a trench job, down in a different town. He went out there and saw a man in the trench, the trench was 10 feet deep. He said, you had better get out of that trench immediately. The man got out. Five minutes later, that trench collapsed. If he hadn't been there, that man would be dead.

But we don't hear from his family. We unfortunately hear from the people who had employers who didn't follow OSHA standards. And there are far too many of those. So what we are trying to do is make sure that we can get out there, we can have stronger standards to ensure that more people like Tammy don't have to——

Mr. JORDAN. Mr. Michaels, was this terrible accident, tragedy, was it a result of not having the right standards in place, or the company not following the standard that was in place?

Mr. MICHAELS. Well, in that case, I don't know the specific stuff, but most dust explosions, and there have been some terrible dust explosions recently, a well-known one in Imperial Sugar down in Georgia killed several workers, there was one recently in West Virginia, or Virginia. Two different things. Generally, the violation of numerous OSHA housekeeping standards. What OSHA is now doing is try to essentially put out standards that makes much more clear what they have to do. But in that case, it is very well known what can be done. In those cases——

Mr. JORDAN. Again, it wasn't a failure to have a regulation in place that is going to help the safety. It was a failure of someone

not to follow that. So it wasn't deciding that we need more regulation.

Mr. MICHAELS. Well, OSHA——

Mr. JORDAN. Yes or no?

Mr. MICHAELS. We do need more regulation, because it is clearer to employers what they can do. But the obligation under——

Mr. JORDAN. Well, let me be clear. Are you saying we need clarification or we need more regulation?

Mr. MICHAELS. You need more regulation.

Mr. JORDAN. Really?

Mr. MICHAELS. Yes. You need clarity. It has to be very, employers say, well, what should we do?

Mr. JORDAN. You are saying both things. You are saying clarity, you are saying more regulation.

Mr. MICHAELS. Well, the regulations give you clarity. Without a regulation, the OSHA law says an employer has the obligation to provide a workplace free of Recognized serious hazards. But then they say, what is——

Mr. JORDAN. Well, let me ask you this, with the indulgence of the committee, and we can go a second round quickly with everyone if we would like. Let's go to the rule. I talked to you before we started today's hearing, or the second half of today's hearing, the decision that OSHA made relative to the noise regulation, walk me through the process there.

Mr. MICHAELS. Sure.

Mr. JORDAN. Let me back up 1 second and preface it by saying that we heard from manufacturers, I have been in their plants. We heard from an individual in my home county, and she runs a very successful business. I have been there, you put the ear protection in, everything, but now she is talking about, they were going to have to have guards up and barriers up and everything else. This is according to a constituent of ours. So walk me through it.

Mr. MICHAELS. Well, that is an interesting example, because that is not actually a change in the regulation. We have a noise standard that says, anything above 90 decibels you actually have to use engineering controls. We know that ear muffs and ear plugs don't always work. But for the last 20 or so years, we have said to employers, we are not going to enforce our standards. We are going to essentially allow you to use, instead of engineering controls, you can use ear muffs.

But we know ear muffs don't work well enough. There are 20,000 to 25,000 new cases of hearing loss reported every year, and that is a vast underestimate. We know that most construction workers develop hearing loss by the time they are retired from work. It is very clear. And we want construction workers, we want all workers to be able to hear their grandchildren, when they are old enough to have grandchildren.

So we have to do something. What we did was we said we are going to enforce our noise standard like we enforce every other standard. We proposed that. And we heard from many constituents like yours. So we said, OK, that is clearly going to be more than we expected. We need to step back and think about other ways. Because in the last 20 years, there were a huge number of new technologies. There are a lot of very inexpensive things employers can

do to reduce noise. We are going to work with them, work with the National Institute for Occupational Safety and Health to get more compliance materials out. Because we really do want to reduce noise exposure. But we recognize now is not the time to change our enforcement rules.

Mr. JORDAN. Does the ranking member wish additional time for questions? You are welcome to, because I think Ms. Buerkle does.

Mr. KUCINICH. Actually, if it please the chair, I do have a follow-up with Dr. Michaels. Would that be OK?

Mr. JORDAN. Certainly.

Mr. KUCINICH. Dr. Michaels, I want to go back to the testimony of Tammy Miser that was discussed earlier. Through testimony, Ms. Miser illustrates that OSHA regulations not only save lives, but they save businesses, too. She gives the example of the 2009 ConAgra plant explosion in North Carolina. The explosion occurred because a contractor was purging natural gas into the indoor work environment. There is currently, as you know, no OSHA regulation for natural gas purging. Three workers were killed, 71 workers were injured.

Now, before the explosion, 700 people worked at the factory. Today the factor is shutting down, 700 lost jobs because of a workplace disaster. Seven hundred people would be working, and three families who would not have been torn apart, had there been more regulation.

Now Ms. Miser also gives the sample of the 2007 explosion of a Jacksonville, Florida gasoline additive factory. The explosion killed 4, injured 32 including 28 at surrounding businesses. Pieces of the building were found a mile away.

A subsequent investigation revealed that the explosion could have been prevented if OSHA's process safety management standard covered reactive hazards. So three businesses that were adjacent to the factory were forced to relocate, a fourth was forced to completely shut down.

We talk about lives that would have been saved and jobs that would have been preserved had there been regulation. Dr. Michaels, do you agree with Ms. Miser that OSHA regulations not only can save lives but also can save businesses as well?

Mr. MICHAELS. Yes, I do.

Mr. KUCINICH. I know that you touched on this in your written testimony, but would you elaborate, when you look back, do you see a history of OSHA regulations being overly burdensome to industry?

Mr. MICHAELS. There have been studies on this. The Office of Technology Assessment was a branch of Congress that actually studied eight OSHA regulations in 1995. The study is very valid, there have been very few OSHA regulations since then. They went back and they looked and they found for the most part, there was one exception that was questionable, but the other seven, the companies were able to meet those regulations without hurting their own profitability, without hurting their productivity. And in fact, there are some very clear examples where the OSHA regulations which were opposed by industry ended up saving jobs and saving money.

The best example is vinyl chloride. Vinyl is a product, widely used. In 1974, it was discovered to be a carcinogen. OSHA said, we have to essentially protect workers from those exposures. Industry said more than a million jobs would be lost. But OSHA went ahead, they issued a standard saying they essentially had to fully control exposure in these major facilities.

The industry very quickly figured out how to do that. Not a single job was lost, as far as I can tell. The headlines in the business papers were, vinyl industry celebrates in triumph, they were able to enclose the materials, save money and move forward.

So we always hear, and it is understandable, every industry says, it is going to cost us too much money, because they don't try. So we want to work with industry to try, to say, we can save you money, we can save jobs. Look at the Clean Energy explosion, last Super Bowl Sunday, which killed six workers, injured 50. It destroyed a billion dollar natural gas power plant that has to be rebuilt from scratch.

Mr. KUCINICH. I thank the gentleman.

Mr. JORDAN. Let me just ask the gentleman, you said earlier when I was questioning that you think we need more regulation.

Mr. MICHAELS. There are areas that we don't have regulation that we need regulation on.

Mr. JORDAN. So the gentleman's testimony is, you think we need more regulation.

Mr. MICHAELS. Yes.

Mr. JORDAN. And you would also argue, I understand the example you talked about, where science had discovered that this element, then OSHA rules put forward and actually was helpful and beneficial. But you also would, I assume, say that there is a compliance cost for business owners relative to regulation?

Mr. MICHAELS. Yes.

Mr. JORDAN. OK. Need more regulation, there is a compliance cost.

Mr. MICHAELS. Yes. And we have to balance those out, obviously. We have to think about both of those things.

Mr. JORDAN. The gentlelady from New York.

Ms. BUERKLE. Thank you, Mr. Chairman.

I think that the goal here for this hearing today is really, we want a win-win situation, where we have safety in the workplace and we don't deter economic growth and hurt job creation. I want to just go back to a statement you just made, because I want to make sure I heard it correctly. In 1995, you said a study was done on seven regulations?

Mr. MICHAELS. I believe it was eight.

Ms. BUERKLE. Eight, OK. And did you say there haven't been many more regulations added to that?

Mr. MICHAELS. There have been very few major regulations in the last 15 years that OSHA has put out. It takes OSHA a long time to put out a regulation. There were a number of years in the George W. Bush administration where OSHA really had no interest in putting out any regulations. So the only health standard that OSHA put out during that period was on another carcinogen, hexavalent chromium, that the Federal court said, you must put it out.

So it is hard to look at new regulations, because there haven't been new regulations to look at. We have issued a new standard on cranes, that is our first big one, and we have a couple more important ones coming out.

Mr. BUERKLE. Thank you, Dr. Michaels.

I want to just talk to you a little bit about this I2P2 regulation that you are proposing. If you could just briefly explain what that regulation will entail.

Mr. MICHAELS. This is a very different sort of regulation where OSHA has a regulation about cranes, it is about how to operate your crane or what to do about fall protection. This is telling employers, we don't want to tell you how to do it, but we want you to think about your hazards and address them. Mr. Biagas was on the first panel here. His Web site talks about how my company, it says, Bay Electric develops a detailed and specific safety plan for each project we perform. We expect that of all employers, to figure out what your hazards are. If it is not a serious hazard, then do whatever is appropriate. But if you have a serious hazard, then you have to address it.

So this approach, which is actually what VPP is, essentially says, you have to think about your hazards in a systematic way. Now, we are very early in the process. We are still considering it, we haven't started the Small Business Regulatory Enforcement Fairness Act process. So there will be lots of opportunity for people to have input and talk to us about it. But we think this will be more effective than trying to do standards on every specific hazard. Because we can't have a standard on every hazard. There are so many different things out there.

So this is telling employers, you figure it out. We trust you, you know more about it than anybody else. But you have to figure it out, you have to think about it. And we hope you will support that and ask us more about it later on.

Ms. BUERKLE. When we see it, we will consider it.

With I2P2, what are the penalties that you are talking about for a violation of that?

Mr. MICHAELS. We haven't gotten anywhere near that yet. We are so early in the process. I know that one thing that industry is concerned about is sort of the double penalty. We want to make sure, we are not trying to make this an onerous requirement. We want to work with employers to make sure they see the purpose of this and they see it is really separate.

We still have all of our rules that issue penalties for violations of different standards, or just not providing a safe workplace. This really is very different.

Ms. BUERKLE. So what are the employers hearing or seeing, if this is so new in development, what are they hearing or seeing that they are concerned about a double penalty?

Mr. MICHAELS. Well, frankly, it is hard for me to tell. I know that a couple of big trade organizations that oppose everything OSHA ever does, they came out and they opposed it. But I think that is to raise money from their constituents. Because I hear from employers every day who say, this is obvious, of course, we do this every day. Every employer does this, and we will support you.

So we will have to see. Obviously some are concerned. But I think some just like to raise red flags. We are asking them to work with us, bring your concerns to us, don't announce you are opposed to it before you even see it. Because that is what I am hearing, that there are some people who are saying, well, we are opposed to it. I don't think that is right.

Ms. BUERKLE. And with this I2P2 regulation, do you think that is going to take us away from the compliance assistance and more to the punitive? Or do you think it is going to be more user friendly?

Mr. MICHAELS. We do both. That is the thing. For employers who want to do the right thing, who want to do this, we will give them all the help we can. But there are always going to be some who don't. We are going to do both. It is not one or the other.

Ms. BUERKLE. How do you know what is right, though? Some of these, like what we heard earlier, these are subjective, subjective criteria that when you have someone going into the work site, he may have a different standard or a different vision than you have. How are we going to ensure a fair and equitable distribution of these regulations?

Mr. MICHAELS. Are you asking specifically about I2P2 or the general balance?

Ms. BUERKLE. I2P2 is what we are talking about.

Mr. MICHAELS. Well, California has had an I2P2 standard for almost 20 years. And employers there are very comfortable with it. We actually are having conversations with stakeholders around the country. We have had five big meetings. But also talking directly to the OSHA offices in California, saying, how do you do this, how do you make sure you have that right balance.

Ms. BUERKLE. But again, I will just go back to my concern, and that would be a fair application of the law, and the interpretation of the law.

Mr. MICHAELS. I certainly appreciate that.

Mr. JORDAN. The gentleman from Maryland.

Mr. CUMMINGS. I would certainly agree with the gentlelady. I think a fair application of the law is so very important. And I will tell my story until I die. As a young boy in high school, working at Bethlehem Steel. And after you would blow your nose, after being on the property for an hour, when you blew your nose, the mucus was black. A lot of the men who worked with me died early. I just worked there for a summer. Some of them worked there for years. And they would breathe it in and breathe it out, breathe in, and I am sure their lungs got covered with that stuff.

So I think, and I was just wondering, Mr. Michaels, how important is enforcement with regard to OSHA regulations? And are inspections a part of that process?

Mr. MICHAELS. Our basic view of this is, we have to, it is deterrence. We have to do everything we can to make sure employers do the right thing. The law is about employers, they have to apply the right standards, they have to protect workers. So we do enforcement, and when we do enforcement and it is a significant case, we also try to publicize it and we try to reach out to the industry and say, look, you can do the right thing, you can get the compliance assistance program. But at the same time, if we go there and

we find a hazard, we are going to give you a fine. And in many cases, we are going to put it in a press release so people so it. So we know that we want to do everything we can to encourage the right behavior.

We are a small agency, so we do as much enforcement as we can. We have about 2,200 inspectors for the whole country, to cover 130 million workplaces, 7 million workplaces, 130 million workers.

Mr. CUMMINGS. How many inspectors do you have?

Mr. MICHAELS. Right now, about 2,200.

Mr. CUMMINGS. With the budget cuts, how many will you have? Do you know?

Mr. MICHAELS. The budget cuts will take us down, in terms of the number of inspectors, to the number of inspectors we had in the 1970's, with a work force that is pretty much twice as big. If those cuts go through permanently. If the cuts go through in the short run, if the CR is passed immediately, we would probably have to lay off or furlough almost all the enforcement personnel we have, because the cuts are really focused on our enforcement program. And it so late in the year, that a 20 percent cut on the agency, focused on enforcement, will have a very, very big impact.

Mr. CUMMINGS. So we don't have to do away with the regulations, we just stop people, we just fire people or furlough them, and they won't be able to do their job, is that right?

Mr. MICHAELS. That is right.

Mr. CUMMINGS. One of the most interesting articles I have ever read was by Ezra Klein, it says how House GOP spending cuts would add up to more spending later. Basically it is a very interesting article, because what he talks about is March 14th of this year. He talks about how we are doing all this cutting, cutting, cutting. But it is an issue of whether you are doing a lot of damage in the process. And what you are talking about there, if this Congress continues to cut, cut, cut all of our enforcement people and our inspectors, you don't have to worry about the regulations, because you take the guts out of the regulations by doing that. Am I right?

Mr. MICHAELS. That is right. We know, the thing that drives compliance assistance, the reason employers go and get the free consultation, a big reason is they fear an OSHA inspection. That is reality. It is unfortunate. A lot will do it because they want to do the right thing. But they also think, well, I had better do this, because I don't want to get a fine. So if our inspections disappear, it would have a big impact. I don't think people would use compliance assistance much, either, frankly.

Mr. CUMMINGS. There is another thing that kind of bothered me about this whole idea of costs, regulations that might cost jobs, job-killing regulations or whatever you call it. And this is my statement, this is not you, this is me. Nothing guarantees that even if they got rid of the regulations and even if they saved the money that would relate to more jobs. It might just, you don't have to comment on this, it might just be more profit.

And so I just think, I just hope that we keep sight of this. This OSHA thing, the reason why I cited my example is because I will never forget how those older men at Bethlehem Steel would beg me to stay in school. Although they were making a lot of money, they

said, stay in school. You know why? Because they knew that I would die early, like they would.

I yield back.

Mr. JORDAN. Mr. Michaels, would you agree that the vast majority of employers care deeply about the well-being of their employees?

Mr. MICHAELS. I think so. I don't have evidence, but that is my feeling as well.

Mr. JORDAN. Particularly in the high tech world we live in today, where there is so much investment in their employees, they put so much money at stake, and they want their employees there, because that is what keeps their business profitable in this high tech international marketplace we are in. I would venture to say the vast, vast majority of employers care deeply about their employees.

Mr. MICHAELS. I would like to agree with you.

Mr. JORDAN. Well, let me ask you this. Do you think you care more about their employees than the employer who employs them? Is that what you are insinuating?

Mr. MICHAELS. I am not suggesting that at all.

Mr. JORDAN. Do you think a bureaucrat in the Federal Government cares more about the employees at Mike Kelly's business than he does?

Mr. MICHAELS. I would never suggest that.

Mr. JORDAN. Well, that is what you were saying when I asked, do you think the vast majority of employers do not care passionately and deeply about the well-being of their employees. I just think that is the norm.

Mr. MICHAELS. Well, I think you are right.

Mr. JORDAN. Well, why did you say that when I asked you the question?

Mr. MICHAELS. I think I did say that.

Mr. JORDAN. I don't think you did. You said, I would like to think that.

Mr. MICHAELS. No, I said I think that, excuse me. But I think it is also clear that we see employers who, with——

Mr. JORDAN. And you have also said you think we need more regulation.

Mr. MICHAELS. Yes.

Mr. JORDAN. You have also admitted that there is a compliance cost with that regulation. And if you remember the first panel that was in front of the full committee that Chairman Issa had, he had witnesses, he had small business owners here. And the question was asked by a freshman member, if you knew then what you know now, would you have started your business, relative to regulation. Do you know what the answer was from most of those witnesses?

Mr. MICHAELS. No, I don't.

Mr. JORDAN. They said, no, they would not have started their business. If they knew then all the regulations, all the things they were going to have to deal with with government, they would not have started their business. These are profitable businesses, employing lots of people. One was from our district. I know how big of an influence he is in this community that he comes from.

So that is what we are also trying to get at.

Mr. MICHAELS. I think what we said before is we are looking for the right balance between enforcement, because we have to be cognizant of the fact that if we are not there, and OSHA, the employer says, well, this time, that man who is going on the scaffold today, he doesn't have the time, I am going to tell him to skip the safety harness and that scoffold goes down. Instead of the photograph in the newspaper of the worker just hanging there being saved, he is on the ground dead. We see it too often. So we need that balance.

Mr. JORDAN. I want to thank the witnesses.

Mr. Kelly wanted additional time. Then we will stop here after this. I apologize for going so long.

Mr. KELLY. Thank you, Mr. Chairman. I have to tell you, I think all of us are trying to do the right thing. The question becomes, then, how do you get to the right thing. And I have to tell you, I am a private business person. I understand how difficult it is. I have friends that work at Armco Steel, I have friends that worked at Pullman Standard. I have people that work in my shop.

You know the biggest problem employers have is workers that won't use the safety. When I go out in the shop, my guys are supposed to wear a hard hat when they have a car up in the air. They are supposed to wear goggles when they have a car up in the air. They are supposed to wear goggles when they use a grinding wheel.

What people are supposed to do, whether there is a regulation or not, is kind of secondary. I know this is purely anecdotal, but everything in these hearings is anecdotal. Because we all know a guy who knows a guy who knew a guy. But the question of the hearings were, at some point, is the cost of regulation reaching a level where we can't legislate complete safety? It is just impossible, because people's nature is to take the easy way out of everything. I am talking about people that work in the job. I have friends that are hurt every day in the steel mills because they don't follow the safety standards.

So are we going to get to a regulation where we have to have somebody who walks with these guys to make sure they do the right thing all the time? And I think the question becomes where is the end game with regulation? Because you say we need more regulations. The chairman says, are you talking about more regulations or more clear regulations. And I ask you this. Is there any penalty put on a worker, other than by his employer, not to follow safety standards by OSHA?

Mr. MICHAELS. No. The OSHA Act is written only giving OSHA authority to do something about the employers.

Mr. KELLY. Right. That is my point. Because you cannot legislate people using common sense. Don't I wish. Don't I wish. It is like a dog chasing its tail. We keep coming up with new regulations every day to protect people from doing dumb things that they do themselves. I wish there were an answer to all this. I do appreciate your coming here today. But I have to tell you, from a guy who has lived it, who has paid more in training and equipment, and I see the same things being done by the same people who just got hurt the week before and say, what are you thinking about.

So I am not putting down what you do, by gosh, we all want everybody to come to work and get through the day healthy and go

back home. I want to see everybody get to be a grandfather. I am a grandfather. I also want to see my business survive, and I don't want it to get to the point where I am regulated out of business because of something that I can't possibly watch 24 hours a day. It just is impossible.

Thank you.

Mr. KELLY. The vice chairman has asked for 15 seconds, then we will adjourn.

Ms. BUERKLE. Thank you, Mr. Chairman.

I just wanted to comment, Dr. Michaels, when you were talking about businesses fearing an OSHA inspection. I think that is what we are troubled with. OSHA should be working with businesses so we all get to that win-win where we have a safe workplace and we keep jobs and the economy going.

Thank you.

Mr. JORDAN. Again, let me thank our witnesses. We appreciate it. Mr. Gordon, we didn't get you many questions today, but thank you nonetheless for your testimony and for spending time with us this afternoon. We are adjourned.

[Whereupon, at 5:12 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

1. **As stated in other testimony during the March 16 hearing, there is no evidence that any federal construction projects covered by President Bush's Executive Order 13202 prohibiting PLAs suffered from any significant labor-related strikes, delays, cost or quality problems. This testimony has been confirmed by OMB and other agency responses to FOIA request and a study performed by the Beacon Hill Institute. Do you concede that there is no such evidence?**

   Response: We have not conducted an analysis of the group of construction projects covered by E.O. 13202 and therefore cannot state the extent to which the above-cited problems existed.

   We do know, however, that current and past representatives of the Department of Energy (DOE) have stated that project labor agreements (PLAs), which were used during the period E.O. 13202 was in effect, contributed to economy and efficiency of DOE construction projects. The benefits that DOE cited as contributing to economy and efficiency are summarized in the preamble to the regulatory guidance on PLAs in the Federal Acquisition Regulation. See 75 Fed.Reg. 19170. These benefits include: completing projects on time and within budget; providing a mechanism for coordinating wages, hours, work rules, and other terms of employment across the project; creating structure and stability through the use of broad provisions for grievance and arbitration of any disputes that may arise on site, including procedures for resolving disputes among the construction crafts; prohibiting work stoppages; and ensuring expeditious access to a well trained, assured supply of skilled labor.

   The preamble also notes that TVA, which had used project labor agreements on its construction projects for nearly 19 years, experienced no formal strikes or any organized work stoppages in the nearly 200 million man hours of work on TVA construction projects using project labor agreements. In addition, TVA cited the added benefit that the rate of injury on TVA projects has been significantly reduced.

   A number of studies support the view that using PLAs can provide economic benefits. According to one study cited in the preamble on private sector experiences in California, companies wanted "project labor agreements in order to meet their speed-to-market demands, and ensure against delays that can be caused by worker shortages, work stoppages or collective bargaining agreements." PLAs have been used successfully by the private sector for a variety of construction projects that are similar in nature to those undertaken by the public sector.

   Both the Executive Order and the regulation implementing the EO recognize that PLAs will be beneficial in some large-scale construction projects, but not all such projects. By allowing each contracting agency the discretion to decide for itself on a project-by-project basis when use of a PLA makes sense, the E.O. and the implementing FAR rule help to ensure that the tool's use is tailored to circumstances where it will promote economy and efficiency on a specific construction project. Inasmuch as instances of labor

unrest may vary across time periods, a case-by-case approach allows an analysis of the factors at play in any given instance.

2. **Do you agree that the federal government has spent more than $150 billion on federal construction projects since 2001 that were not subject to government-mandated PLAs and did not experience any significant labor-related problems of the type now being relied upon in Section 1 of Executive order 13502 to justify imposing PLAs?**

   Response: As explained in the response to question no. 1, we have not conducted an analysis evaluating the group of construction projects covered by E.O. 13202 and therefore cannot state the extent to which the above-cited labor problems did or did not exist. As further explained above, neither E.O. 13502 nor the FAR rule mandates the use of PLAs. To the contrary, both documents emphasize that the federal government's policy towards PLAs is that they are a tool to be used in the agency's discretion when doing so promotes economy and efficiency.

   During the previous Administration, an agency could not require the use of a PLA even if the contracting officer thought that a PLA would help the agency increase efficiency and get better results on a particular project. This Administration believes that it makes more sense for contracting officers to have the additional tool of PLAs to use where appropriate and justified so that we may ensure we are maximizing the efficient use of taxpayer dollars.

   The FAR rule contains a number of features that are intended to maximize an agency's ability to identify and successfully use PLAs when doing so promotes economy and efficiency. For example, the rule encourages agency managers and members of the acquisition team to work together in evaluating whether to use a PLA and to start the evaluation early in the planning process, so that all relevant circumstances and the needs of stakeholders can be fully considered in deciding what is best for the agency in meeting its mission. In addition, the rule identifies a number of specific factors that agencies may consider in making a decision to require a PLA and clauses that support various approaches regarding when to require submission of a PLA, including options for specifying the specific terms and conditions of the PLA in the solicitation.

3. **Identify all factual evidence relied upon by OMB to justify the claims asserted in Section 1 of Executive Order No. 13502, i.e., that any of the "challenges" or "problems" referenced in that Section to justify the imposition of PLAs have in fact "threatened the efficient and timely completion of construction projects undertaken by Federal contractors."**

   Response: The preamble to the promulgation of the final rule implementing E.O. 13502 cites a number of representative sources supporting the benefits identified in Section 1 of the E.O. As discussed in the response to question 1, above, these include statements made by DoE representatives who have experience with project labor agreements, the

experiences of TVA, and studies that have found benefits from using project labor agreements.

4. **Provide the Subcommittee a description of all actions taken by OMB to implement Section 7 of the Executive Order No. 13502, which calls upon OMB to provide the President with recommendations about whether broader use of project labor agreements will help to promote the economical, efficient, and timely completion of federal and federally assisted projects. Please include a list of all non-governmental parties who have communicated with your office and advise the Subcommittee of any timetable that has been established for completing OMB's report.**

   Response: OMB conferred with the Department of Labor, as envisioned by section 7, and consulted with a range of relevant stakeholders, such as agency acquisition and labor relations officials, contractor associations, construction industry associations, Building Trades, and community groups. OMB and DOL concluded that it is premature to make a comprehensive recommendation in light of agencies' limited experience with PLAs to date. OMB and DOL will work together with agencies to evaluate information from the agencies as they gain more experience, but no timetable has been set for making a recommendation.

5. **Pursuant to the OMB Memorandum M-09-22 of July 10, 2009, federal agencies are "responsible for submitting quarterly reports to OMB identifying all contracts awarded in connection with large scale construction projects. The information should cover a fiscal quarter (e.g., July 1-Spetember 30) and be reported to PLA-Activity-Report@omb.eop.gov within 30 days after the completion of the fiscal quarter." What do these reports reveal with regard to the number of PLAs imposed by federal agencies pursuant to the President's Executive Order and the costs of such PLAs? Please provide the committee all of these reports received to date.**

   Response: Copies of the agency PLA reports received to date for solicitations following issuance of the E.O. are enclosed. The reports indicate that, during this period of initial implementation, there has been only a small number of PLAs entered into across the government since E.O. 13502 became effective. This suggests that agencies are carefully considering projects on a case-by-case basis and using PLAs only when the agency determines a PLA will promote economy and efficiency.

6. **Please explain how the Middle Class taskforce's "Project Labor Agreement Technical Assistance Team" is related to the "Inter Agency PLA Working Group" referred to in communications from the White House Middle Class Taskforce.**
   a. **Are both of these groups promoting PLAs with federal agencies or are they the same group?**
   b. **Explain OMB's role with these groups, and the statutory authority for any such role.**
   c. **Have these groups shared with the public any meeting minutes, emails, memos and other internal and external communications in the spirit of this administration's commitment to transparency?**

d. **Please provide the committee with a copy of all meeting minutes, emails, memos, contact information of participants, and internal and external communications between these groups and the Middle Class Taskforce, the White House, OMB and other government and non-government entities.**

Response: The Interagency PLA Working Group and the PLA Technical Assistance Team are the same and may have been informally referred to by both names. The group includes representatives from agencies across government, including the Departments of Interior, Commerce, Defense, Energy, Justice, Labor, Transportation, Housing and Urban Development, Agriculture, and Veterans Affairs, as well as the General Services Administration and OMB. The group does not have a charter and was not designed, nor operated, to promote PLAs. It formed after the issuance of Executive Order No. 13502 to facilitate interagency discussions concerning how to implement the Executive Order consistent with its purpose and principles, including the principle that PLAs are not mandatory but rather are a tool that agencies may use in their discretion on a case-by-case basis when they can promote economy and efficiency.

7. **How many times has OMB, the White House and/or members of the Middle Class Taskforce been in contact with individual construction trade unions or members of the AFL-CIO/Building Construction Trades Department (BCTD) – the clear beneficiaries of the administration's PLA policy – about project labor agreements (PLAs)? Please provide to the Subcommittee records of any and all such communications.**

Response: Administration officials reached out to a range of relevant stakeholders (see response to question no. 4 for some examples) both to make the rulemaking process more participatory and to gain insights – both positive and negative – on experiences with this tool. These have included agency acquisition and labor relations officials, contractor associations, construction industry associations, building trades, and community groups.

8. **Is it not true that under most PLAs employers must pay into union health and retirement benefit programs even for their nonunion field employees?**

- **How does the FAR Rule implementing Executive Order 13502 protect nonunion employees from forfeiting fringe benefit payments to union benefit and pension plans made during the life of a PLA project unless they join a union and become vested in these programs?**

  Response: Both the E.O. and the FAR rule are silent on this issue. Terms addressing this matter would be negotiated between the contractor and the union, not by the government. OMB has not collected information on this issue.

- **Is it not the case that many of the union pension funds who are the likely beneficiaries of the Administration's pro-PLA policy have been classified as critical or endangered status by the U.S. Department of Labor: http://www.dol.gov/ebsa/cricitalstatusnotices.html**

Response:

As noted above, the E.O. is designed to allow each contracting agency the discretion to decide for itself when use of a PLA makes sense. Because the decision whether to rely on PLAs is made on a case-by-case basis, because PLAs may involve construction projects in many different areas of the country, because there has been relatively little experience under the E.O. so far, and because PLAs may vary in their terms and need not necessarily involve unions, OMB is unable to make any reliable assessment about any such possible correlation.

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