S. HRG. 116–462

NOMINATION OF EUGENE SCALIA TO SERVE AS SECRETARY OF LABOR

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE NOMINATION OF EUGENE SCALIA, OF VIRGINIA, TO BE SECRETARY OF LABOR

SEPTEMBER 19, 2019

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C O N T E N T S

STATEMENTS

THURSDAY, SEPTEMBER 19, 2019

NOMINATION OF EUGENE SCALIA TO SERVE AS SECRETARY OF LABOR

Thursday, September 19, 2019

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

The Committee met, pursuant to notice, at 9 a.m., in Room SD–430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee, presiding.

Present: Senators Alexander [presiding], Murray, Isakson, Cassidy, Scott, Enzi, Romney, Collins, Murkowski, Baldwin, Kaine, Jones, Murphy, Hassan, Rosen, Casey, Smith.

OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

Today, we are considering the nomination of Eugene Scalia to serve as United States Secretary of Labor.

Let me say before I begin my opening statement that we welcome Secretary Chao. Secretary, good to see you. And we welcome Mr. Scalia's family. We will give him a chance to introduce all of them a little later. There are so many of them and I won't take the—the Scalias are an especially productive family, apparently, so it will not come off any of your allotted time for your statement.

I would say to the family members that the confirmation hearings are not necessarily a family exercise. I was before this Committee myself more than 30 years ago to be nominated for Education Secretary and was grilled pretty heavily, I thought, with my family sitting right behind me. I was accustomed to it, but they were not. But they got over it before very long. So, we welcome you here and we are glad you are here.

Yesterday, I received a letter from Senator Murray, asking me to delay today's hearing. As I think the Committee Members know, I do my best to do what Senator Murray suggests that I do. We work cooperatively, even when we disagree. But I am not going to agree to that, and I want to carefully explain why. We have already delayed the hearing one week at Senator Murray's request. Let me go over the nomination process just briefly.

On July 18, two months ago, President Trump said he would nominate Eugene Scalia as the United States Secretary of Labor.

Then on August 27th, three weeks ago, the Committee received Mr. Scalia's ethics paperwork from the Government, including his

public financial disclosures, his ethics agreement. And based on these documents, the Office of Government Ethics determined that Mr. Scalia is "in compliance with applicable laws and regulations concerning governing conflicts of interest."

Then, on the same day three weeks ago, August 27, the Committee also received his Committee paperwork, which is extensive, and is additional background information. So, all of that required paperwork has been before the Committee for 23 days—more than three weeks. And since that day, August 27, Mr. Scalia has offered to meet with every Member of this Committee and has met with most of us.

Now, to make sure I am being exactly fair in the way I scheduled these confirmation hearings, I checked closely to compare how the Committee handled President Obama's most recent Cabinet nominations and compared them with the way we handle President Trump's.

This is what I found. Let us take the example of Tom Perez, who was President Obama's second Secretary of Labor. The Committee received the last of Mr. Perez' paperwork ten days before his hearing. Or, take the example of John King, President Obama's second Secretary of Education. The Committee received the last of Mr. King's paperwork six days before his hearing. So, by comparison, Mr. Scalia had all of his paperwork in 23 days before the hearing.

I also think it is reasonable to vote on Mr. Scalia next Tuesday. This has been a thorough process. Senators have known for two months that the President has selected, nominated Mr. Scalia. As of today, we have had all of his paperwork for 23 days.

Today, Senators will have the opportunity to have two rounds of questions, so any Senator should be able to ask any additional question that a Senator wishes to ask that a Senator did not ask when that person met personally with Mr. Scalia. And if Senators still have questions, they can submit those by 5 p.m. tomorrow, and Mr. Scalia will answer them before the vote on Tuesday.

Now, I imagine the Democrats on this Committee disagree with Mr. Scalia on labor policy about as much as Republicans disagreed with Secretary Perez, who is now Chairman of the Democratic National Committee. And I disagreed with John King on many education matters. But when President Obama's Education Secretary stepped down in his last year of office, I went to the President, and I said, Mr. President, I think we need to have a confirmed Senate nominee in an important position like U.S. Education Secretary. If you will please nominate John King, with whom I disagree—I knew he wanted Mr. King, but he also knew we disagreed with him—I said, if you will nominate him, even though we disagree, we will consider and confirm him promptly, and we did. Within 32 days after President Obama nominated John King, the Senate had confirmed him.

I also voted, by the way, for cloture on the Senate floor for both of these nominees, even though I did not support their nominations. I did this because I believe it is important that we have a confirmed and accountable Cabinet member for Presidents. That is important to the Senate so that we have a chance to interview and deal with our Cabinet Members. And it is important to the Country

for the President to be able to have his choice of a Cabinet member promptly considered and confirmed.

As a matter of fairness, if having a hearing 10 days after receiving the last of Mr. Perez' paperwork, and six days after receiving Mr. King's paperwork, was good enough for President Obama, why is it not appropriate to have a hearing 23 days, or three weeks, after we have received Mr. Scalia's paperwork? It would certainly be hard for me as Chairman to justify treating President Trump's nominees worse than we treated President Obama's nominees.

As for today's hearing, Senator Murray and I will each have an opening statement. Then Secretary Chao will introduce Mr. Scalia. We welcome her. And after his testimony, Senators will each have five minutes of questions. And, as I said, we will have two rounds of questions so Senators can have time to ask them. I know, as is often the case, there are other meetings and hearings going on this morning, so I have asked Mr. Scalia, as I said, to stay for the two rounds.

Last week, a *Washington Times* headline read "Jobs Report Shows Strong Economy, Growing Wages, Low Unemployment Rate." Wages are growing at an annual rate of 3.2 percent. African-American unemployment fell to 5.5 percent in August; the record low of 4.4 percent for African-American women. Overall, unemployment is at a 50-year low. Businesses and workers need a Secretary of Labor who will steer the Department with a steady hand. I believe Mr. Scalia has those skills.

He has broad experience in both the public and private sectors. He is a partner in the Washington office of Gibson, Dunn & Crutcher, where he spent the majority of his career dealing with these issues.

In 2002 and 2003, he was Solicitor of the U.S. Department of Labor for President George W. Bush. As the Department's chief lawyer, he led initiatives to protect workers, to reduce burdens, to improve enforcement of workforce safety laws. For example, as Solicitor, he continued a case started by the Clinton administration to ensure that a poultry factory was paying workers what they were owed. The department ultimately announced a $10 million settlement for workers.

In 1992, he left the firm to serve as special assistant to U.S. Attorney William Barr in the George H.W. Bush administration.

He has a distinguished academic background, graduating with distinction from the University of Virginia in 1985, and University of Chicago Law School, where he was editor-in-chief of the Law Review. He has been a guest lecturer on labor and employment law at Chicago Law School and adjunct professor at the University of the District of Columbia.

He and his wife, Trish, have seven children.

He is altogether well-qualified for this job.

It is important for the Department to create an environment to help employers and employees succeed in today's rapidly changing workplace. One step the Trump administration has taken to help the 700,000 Americans who own and run their own franchises is involved with what we call the joint-employer standard.

In the Obama years, in 2015, the National Labor Relations Board issued a decision overturning more than 30 years of prece-

dent, creating a new joint-employer standard. That decision meant that mere indirect or even unexercised control over employees' working conditions could make a franchisee and franchisor joint-employers, discouraging large companies from franchising at all.

But after the board's decision, the Department of Labor itself issued a guidance, broadening the interpretation of joint-employer. This has led to a lot of confusion. One Federal judge said Federal courts have adopted a "dizzying world of multi-factored tests for determining joint employment."

The administration has attempted to eliminate this. In June 2017, Secretary Acosta withdrew the Obama Labor Department's guidance. He began a rulemaking process to clear up the patchwork of standards. In June of this year, the comment period closed for a new rule, which we hope will bring stability.

Then a second way the administration has sought to create more certainty for employees and employers has been to raise the salary threshold for overtime pay in a reasonable way. In 2014, the Obama administration more than doubled that threshold. There was bipartisan opposition from Congress. The Department has proposed a much more reasonable rule. The Department's proposal would require input from workers and employers prior to future changes. I am glad to see these steps.

As I mentioned earlier, the Senate confirmed John King as United States Secretary of Education about a month after President Obama said he wanted Mr. King to serve as Secretary. In this case, it has been about two months since President Trump announced that he would nominate Mr. Scalia to be the next Labor Secretary, and the Committee has had all of Mr. Scalia's paperwork and had an opportunity to meet with him for the past three weeks. The Committee considered President Obama's Cabinet nominees promptly and with respect, and I trust the Committee will continue that with President Trump's nominees.

It was embarrassing then, and it is now, for well-qualified Americans to be nominated by the President of the United States, any President, for an important position and then say to them in effect, you are innocent until nominated, or drag things out for a long period of time.

Mr. Scalia is supported by a number of trade organizations, and the Committee has received letters of support from women he has mentored; from former Department of Labor career attorneys, whom he worked with while he was Solicitor; from a Hispanic immigrant, whom he represented on a pro bono basis; from Cass Sunstein, who worked at the White House for President Obama; and from one of Senator Ted Kennedy's former senior counsels on the Judiciary Committee. Senator Kennedy, of course, was a former Chairman of this Committee.

I ask unanimous consent that those letters and 17 additional letters of support be submitted into the record.

The Committee will vote on Tuesday on Mr. Scalia's nomination, and I look forward to the full Senate confirming him soon.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you very much, Mr. Chairman. Secretary Chao, it is good to see you. Thank you for joining us today to introduce the nominee. Mr. Scalia, I appreciate you and your family being here today. I look forward to you introducing your apparently very large family behind you. I know that will take a while, but we welcome all of you, as well.

Mr. Chairman, I do want to start by expressing my frustration with this rushed process, and I have asked repeatedly to delay this confirmation hearing because I do believe that every nominee's background should be reviewed carefully and thoroughly, especially for a role this important.

Moving from a formal nomination that came on September 11th to confirmation in less than two weeks, as we have in this case, is deeply concerning. Members have not been given enough time to review Mr. Scalia's background, and I have repeatedly asked for more time. And, in fact, we did not get answers to follow-up questions until late last night. So, I want to be clear. I do not consider this nominee's vet complete or sufficient.

Mr. Scalia, I will be asking questions and gathering information about your record, and I expect thorough answers, and I am sure you will give them, so thank you.

Mr. Chairman, as I said, there is going to be a markup next Tuesday, the 24th, and I really do urge the Chairman to move the markup so everyone really does have more time to consider this nominee's very long, complex record. Why? Because workers and families across the country are counting on us to take our vetting responsibilities seriously, especially since President Trump clearly won't.

His first nominee was a millionaire fast food CEO, who disparaged his own workers and was forced to withdraw from consideration.

His second pick served as a yes-man for an anti-worker agenda before resigning in disgrace as the Country scrutinized his decision to give a sexual predator the deal of a lifetime.

President Trump's third pick, Eugene Scalia, is an elite corporate lawyer, who has spent his career fighting for corporations and against workers. I opposed Mr. Scalia's nomination to the Department of Labor back in 2001. Eighteen years later, his record defending corporations, as they trample workers' rights, has only gotten longer.

Meanwhile, the need for someone who will stand up for workers and families, and stand up to President Trump on their behalf, has only become more urgent because we have seen time and again that President Trump will not hesitate to throw working families under the bus to help corporations and billionaires and the powerfully connected get even further.

Like when he worked with Republicans to jam through a $1.5 trillion tax giveaway for corporations and the wealthy, a move that some Republicans now want to pay for by cutting Medicare, Medicaid, and Social Security. From rolling back a rule ensuring workers receive their overtime pay, to blocking Democrats' efforts to raise the minimum wage and ensure equal pay, to seizing every op-

portunity to undermine workers' rights to organize and join a union so they can advocate for higher pay and better benefits, and a safer workplace and a secure retirement.

The Trump administration has consistently sided with corporations over workers. Now, instead of nominating someone who understands the challenges working people face and will fight for them, President Trump has chosen a powerful, corporate lawyer, who has devoted his career to protecting big corporations and CEOs from accountability, and attacking workers' rights, protections, and economic security. Instead of nominating a Secretary of Labor, President Trump has nominated a secretary of corporate interests.

If there is one consistent pattern in Mr. Scalia's long career, it is hostility to the very workers he would be charged with protecting and the very laws he would be charged with enforcing, if he were to be confirmed. Like when he threw billions of dollars of workers' retirement savings into jeopardy by suing to strike down the Department's fiduciary rule. That is a commonsense rule that protected workers' retirement savings by simply requiring financial advisors to put their clients' interests ahead of their own.

Mr. Scalia has made a career out of striking down laws that protect people like—from big businesses looking to hack away at the safeguards and protections meant to avoid another economic crash, to fighting against protections for workers' health and safety.

When the Department was working on a rule requiring employers to make accommodations to help prevent and address one of the most commonplace workplace injuries—repetitive stress injuries—Mr. Scalia callously dismissed the health concerns of hundreds of thousands of workers as "junk science" and crusaded on behalf of corporate clients to undermine and eventually overturn that rule.

He has not just fought against rules to protect workers' safety, but also those to protect workers' wages from being stolen by employers. Democrats have been pushing to raise the minimum wage to $15, to end the lower wage for tipped workers and workers with disabilities, to close the pay gap and make sure workers are not cheated out of their hard-earned pay. Republicans continue to block our efforts to pay workers more.

I believe we need a Secretary who cares about giving workers a raise, not one who criticized President Obama's decision to increase the minimum wage for workers who are on Federal contracts; not one who fought to help corporate clients steal employees' tips and get out of paying overtime wages. And we need someone who will hold companies accountable, not let them off the hook at every opportunity.

The last time Mr. Scalia served in the Department of Labor, he restricted protections that prevent retaliation against whistleblowers so severely he garnered bipartisan criticism for being openly hostile to whistleblowers.

When it comes to accountability for discrimination, Mr. Scalia's record is equally unacceptable. In one case, he defended a company that discriminated against a job applicant because of her hairstyle.

In another, which Mr. Scalia has previously named as one of the most important issues he has worked on, he argued that employers should be able to discriminate against people with disabilities

based on perceptions about what they can do and successfully undermined the landmark protections in the Americans with Disabilities Act.

When it comes to accountability for workplace harassment, Mr. Scalia's record got worse. While our Nation is grappling with this epidemic, Mr. Scalia is working to help get businesses off the hook. Thirty women have been fighting to hold Ford accountable for sexual harassment and assault they allege they experienced in the workplace, everything from unwanted touching to assault. Mr. Scalia has been fighting to get their case thrown out of court. He argued some of the survivors should have their claims dismissed because they failed to note the lawsuit during a bankruptcy proceeding.

Our Nation needs a Secretary of Labor who will prioritize addressing the epidemic of workplace harassment, not someone who thinks the bar for what qualifies as harassment should be higher, or that the standard of accountability should be lower. And these are all just a few examples of the larger, alarming pattern of his career.

His nomination offers a straightforward test for each of us. If you care about workers and families, his record is absolutely, to me, disqualifying for Secretary of Labor.

But if, like President Trump, you want someone who will run up the scoreboard for corporations and billionaires at the expense of working families, his anti-worker record is exactly what you are looking for.

People are getting more and more tired of President Trump's anti-worker agenda. The last thing they want to see from this administration is one more person using their power to look out for those at the top.

I hope everyone who claims to care about working families watches this hearing closely, looks at Mr. Scalia's record thoroughly, and thinks long and hard about whether the workers they represent really want them to fight for someone who will not fight for them.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray. We will now welcome the nominee, Mr. Scalia. He will be introduced by Secretary Elaine Chao.

Secretary Chao currently serves as United States Transportation Secretary, and she previously served as Labor Secretary under President George W. Bush.

Secretary Chao, welcome.

STATEMENT OF ELAINE CHAO, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION

SECRETARY CHAO. Thank you, Chairman Alexander, Ranking Member Murray.

Before introducing today's nominee, Eugene Scalia, please let me acknowledge Senator Johnny Isakson, who recently announced his retirement. Senator Isakson's leadership, especially on the Pension Protection Act of 2006, has greatly benefited workers in our Country, and you will be dearly missed.

I am pleased to be here today to introduce Eugene Scalia, whom I have known for decades, as the President's nominee to be the 28th U.S. Secretary of Labor.

I worked closely with Gene when I was Secretary of Labor and can attest to his keen intellect, respect for the rule of law, personal integrity, and commitment to protecting our Nation's workers.

Let me note that there is a quorum of Scalia members here. Let me especially mention Maureen Scalia, who is a treasured friend for many years. She has been a strong, guiding influence on her family. She is a proud New Englander, who ensured that Gene read a long biography of Samuel Adams when he was just in grade school, to emphasize the importance of dedication and character in public service.

This is just one of the many ways that Gene's parents instilled within him a profound respect for public service, for the founding principles of our Country, and for the importance of using one's talents to make a difference for others. These ideals and background are important to Gene's success as a respected counselor and advisor throughout his Government service, and as a formidable attorney, caring educator, and dedicated volunteer during his many years in private practice.

He has served three previous Cabinet officers, including me, with distinction. In addition to lecturing at his alma mater, the University of Chicago School of Law, Gene has donated his time as a visiting professor at the University of the District of Columbia's David Clarke School of Law to help develop and support the next generation of young leaders.

He helped support a law camp for high school students organized by the National Hispanic Bar Foundation. And somehow, he found time to volunteer as a public member of the Administrative Conference of the United States.

As a former Solicitor at the U.S. Department of Labor, Gene knows very well the issues at the Department. During his tenure, he did a stellar job of leading the Department's attorneys, both career and non-career, and was widely respected for his fairness, his ability, and his integrity.

In private practice, Gene volunteered his time to represent on pro bono basis many, many workers fighting unfair dismissal and discrimination in the workforce.

When I was Secretary of Labor and he was Solicitor, Gene played a critical role in the Department's numerous enforcement actions, vindicating the rights of American workers under our Nation's employment laws. He was a leader in our work to update 40-year old overtime regulations to better protect our Nation's workers, while giving employers clear guidance on what the law required.

Gene's work to protect overtime is why he gained the support of the 13,000-member strong Sergeants Benevolent Association of New York, which was able to secure $20 million in unpaid overtime compensation for their members because of the overtime regulations that he helped to craft.

Gene understands that the mission of the U.S. Department of Labor is to protect and promote our Country's most valuable resource: the American workforce. He also recognizes that, because of the needs and composition of the American workforce and how it

is constantly changing, the Department must always be forward-looking, responsive, and nimble.

Gene is one of the Nation's leading experts on labor and employment laws and the issues at the forefront of a rapidly evolving workplace and workforce. He understands what it takes to protect workers and the importance of strong, relevant job training programs to empower workers with the skills that they need to succeed in an increasingly competitive workplace.

I want to thank the Committee for allowing me this time to introduce the President's nominee to be the next United States Secretary of Labor, Eugene Scalia.

Thank you.

The CHAIRMAN. Thank you, Secretary Chao. We know that you have a busy schedule, so when that schedule requires you to leave, you are excused. We appreciate you coming. It is good to have you before the Committee.

Mr. Scalia, we now invite you to give your opening remarks, and if you would—and invite you also to introduce your family.

STATEMENT OF EUGENE SCALIA, NOMINEE TO SERVE AS SECRETARY OF LABOR, WASHINGTON, DC

MR. SCALIA. Thank you, Mr. Chairman. Thank you, Ranking Member Murray.

If I could begin by introducing first my wonderful wife, Trish, seated next to my daughter, Isabella; my daughter, Megan; Jack; Bridgette; my oldest son, Neno.

Then certainly not to be forgotten, behind Neno is my 10-year old daughter, Erin. Beside her, my deeply understanding parents-in-law, Susan and Chris Larson. Oh, and my son, Luke. Luke, welcome.

I am very grateful to my brother, Matthew, for coming up from Fort Benning. Thank you, Matthew, for joining. And next to Matthew, my formidable mother, Maureen Scalia. Thank you for being here.

My brother, John; my sister-in-law, Adele; brother, Chris; and I—my sister Catherine is here, as well, with her husband, I believe, Bill Heenan; my sister, Mary Clare; her husband, Michael Murray; and my baby sister, Meg, with her husband, John Bryce.

Trish, did I miss anybody? I thank them all for coming.

Thank you for your patience, and thank you for allowing me to introduce them not on the five-minute clock that I have for my opening statement.

Chairman Alexander and Ranking Member Murray, thank you for the opportunity to appear today before this Committee. It is an honor to be here, and an honor to have been nominated to serve as Secretary of Labor. I am deeply grateful to the President for this nomination and for his trust and confidence.

I thank Elaine for that introduction. Secretary Chao was an exceptional Labor Secretary. She established clear priorities and a smooth operating structure. If I am confirmed, her management will be a model for me.

The Labor Department is a venerable agency with an important mission: Enforcing the worker protections enacted by Congress; offering programs that help prepare Americans for a lifetime of pro-

ductive work, while also helping supply the skilled workforce needed by our businesses; and providing support to workers who have fallen on hard times, whether through loss of work, loss of retirement benefits, or workplace injury or illness.

This is work that I valued when I served previously as Solicitor, the Department's third-ranking official. Then, as now, I was coming to the Department from the private sector, where I had advised and represented businesses regarding employment matters. But once at the Department, I had new clients, new responsibilities, and above all, I had a public trust. I am proud of the actions I took before as Solicitor to further the Department's mission.

That included helping to resolve a labor dispute at the West Coast ports that threatened to cripple the Nation's economy. My goal was to act with favor neither toward the company, nor toward the union, but to help them resolve the dispute.

I focused our enforcement efforts on low-wage and immigrant workers; encouraged increased use of a powerful OSHA enforcement tool; and took, at that point, an unprecedented legal action to protect the whistleblower at a garment factory.

I took these and other actions because I believed they were right, they furthered the Department's mission, and because I believe in law and order. But there was more, too. The most affecting part of the job for me was encountering individual workers in sometimes tragic circumstances, and recognizing the capacity we had to respond. The construction workers who died in trenching accidents. The 12 miners in Alabama who gave their lives trying to rescue one other's. Migrant workers who sacrificed for their families was preyed upon by others.

The Labor Department is a big agency with many programs, components, and acronyms. But, if confirmed, I will aim to remain mindful every day of the individual men and women like those to whom our efforts ultimately are targeted.

Back in the private sector, much of my work has been in the public eye, but there has been an important part of my job that went largely unseen. That included helping clients address workplace misconduct, including retaliation and harassment. I have advised clients to fire or take other serious action against executives and other managers who, in my judgment, had engaged in harassment or other misconduct. I have had direct and forceful conversations with clients, telling them to take steps that sometimes they wished they did not have to.

Something that became important to me at my law firm was supporting young lawyers who were trying to balance the demands of their jobs with their roles as young parents. In recent years, many of the young lawyers I worked with were on a part-time work schedule so they could spend more time with their families. It was important to me personally to visibly support that.

Shortly before the President announced he would nominate me, I organized a program for our summer interns to hear from men and women at the firm who were trying to strike that balance. I have had the good fortune to pursue a demanding career while enjoying a deeply rewarding family life. It became very important to me to support young men and women in the law, looking to do the same.

I look forward to your questions this morning and to a dialog that, if confirmed, I want to continue. I enjoy exchanging ideas with people who see things differently than I do, and I am betting I will be getting some of that today. That is good. I learn from it. And it is partly through this dialog with you that I hope to justify the President's confidence and to be the best possible Secretary of Labor should I be confirmed.

Thank you.

[The prepared statement of Mr. Scalia follows:]

PREPARED STATEMENT OF EUGENE SCALIA

Chairman Alexander and Ranking Member Murray, thank you for the opportunity to appear before this Committee. It is an honor to be here, and to have been nominated to serve as Secretary of Labor. I'm deeply grateful to President Trump for this nomination, and for his trust and confidence.

Elaine, thank you for that introduction. Secretary Chao was an exceptional Labor Secretary. She established clear priorities and a smooth operating structure. Her management will be a model for me if I'm confirmed.

The Labor Department is a venerable agency with an important mission: Enforcing the worker protections enacted by Congress; offering programs that help prepare Americans for a lifetime of productive work, while also helping supply the skilled workforce needed by American businesses; and providing support to workers who've fallen on hard times, whether through loss of work, loss of retirement benefits, or work-related illness or injury.

This is work I valued when I served previously as Solicitor of Labor, the Department's third highest official. Then, as now, I was coming to the Department from the private sector where I advised and represented businesses regarding employment matters. But once at the Department I had new clients, new responsibilities, and a public trust. I am proud of the actions I took as Solicitor to further the Department's mission:

- That included helping to resolve a labor dispute at the West Coast Ports that threatened to cripple the Nation's economy—my goal was to act with favor toward neither company nor union, but to help them end the dispute.
- I focused our enforcement efforts on low-wage and immigrant workers; encouraged increased use of a powerful mechanism for OSHA enforcement; and took an unprecedented legal action to protect a whistleblower at a garment factory.

I took these and other actions because I believed they were right, they furthered the Department's mission, and because I believe in law and order. But there was more: The most affecting part of the job for me was encountering individual workers in sometimes tragic circumstances, and recognizing the capacity we had to respond. The construction workers killed in trenching accidents. The twelve miners in Alabama who gave their lives trying to save a co-worker's. Migrant workers whose sacrifice for their families was preyed upon by others.

The Labor Department is a big agency, with many programs, components, and acronyms. But if confirmed, I will aim to remain mindful every day of the individual men and women—like these—to whom our efforts ultimately are targeted.

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career while enjoying a deeply rewarding family life. It became very important to me to support young men and women at our firm in doing the same.

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The CHAIRMAN. Thank you, Mr. Scalia. And again, welcome to family members.

We will now begin a five-minute round of questions as I—I would appreciate—Senators, the idea with the five minutes is that the questions and the answers can be completed within five minutes. If Mr. Scalia does not have time to answer a question, I will give him more time if he needs it to answer that question. And we will have two rounds of questions to make sure that all Senators have a chance to ask questions if they would like.

Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman, and thank you for accommodating my schedule as I am managing a markup of a bill in Appropriations this morning.

Mr. Scalia, before moving onto important programs at the DOL, including the H–2B program that is so important to the economy of Maine, I want to follow-up and ask you about the perception of some that you will not prioritize the health, safety, and economic well-being of working people. We have heard that this morning.

From your time as Solicitor, what specific examples can you provide us of when you acted to protect workers in wage and hour cases?

Mr. SCALIA. Senator Collins, thank you, and thank you for the question and for focusing on that central mission of the Department.

One of the first actions that I took as Solicitor when I was at the Labor Department before, I actually—the Chairman referred to briefly in his opening remarks. There was a possible case, an investigation, that had been at the Department for about two years when I came in to the Solicitor position concerning what are called donning and doffing practices in the poultry industry, whether to pay employees for the time they spend putting on this sometimes cumbersome protective gear, and then the time that they spend taking it off.

The Clinton administration had overseen an investigation but had not been prepared to go forward with the case, and when I came into the Solicitor's office, that case had been around for about two years. I very quickly in the job sat down, looked at the applicable statute, the regulations, met with the career folks, and decided that yes, this time should be paid.

We immediately obtained a $10 million settlement with one of the companies involved, which, my recollection was one of the largest settlements at the time in the history of the Wage and Hour Division.

Then we sued the other employer in a case that was ultimately won under Secretary Solis. She commended it as a very important action by the Department.

That is—there is more, Senator, but I should yield some time back to you, I know.

Senator COLLINS. Thank you. In your work in the private sector, do you have examples of where you represented employees, since obviously the bulk of your practice has been representing employers? And my related question is, was that pro bono work, or were you hired to do so?

Mr. SCALIA. I did pro bono work for a number of different employees in my time at the firm. Just two or three examples:

One, again, Chairman Alexander referred to. It was a young Hispanic woman, who had a hearing disability who believed that she had been subjected to discrimination in her workplace due to her ethnicity and that condition. And I represented her, was able to work out an agreement with her employer to enable her to continue to do the work that she wanted to do. She submitted a letter to the Committee about that representation.

I will just mention one other. Again, I did this pro bono. This was somebody who was fairly senior in an organization, reported and pressed on the subject of some financial conduct that he thought was improper. He was asked to leave this institution, and I represented him in connection with that and with his feeling that he was being treated improperly because he had blown the whistle on financial improprieties.

There are others.

Senator COLLINS. Turning to the Department's role in the H–2B program, which is especially important to Maine's tourism industry.

I represent a state with 1.3 million people. We have 36 million tourism visits in a year, so obviously the workforce is not adequate to handle that. As a result, we see restaurants, bed and breakfasts, inns, hotels, curtailing their hours, which hurts their regular employees, as well, because they simply cannot get the help they need.

The Department received 96,400 applications on January 1st, and that is nearly triple the number of H–2B Visas available for the second half of the fiscal year. If confirmed, will you work with Congress to make sure that there are enough Visas, including opportunities for returning workers, for those employers who have no choice but to rely on a seasonal workforce to be able to operate?

Mr. SCALIA. Mr. Chairman, if I could have just a moment to respond to that question.

Senator Collins, one of the privileges of being a nominee is the opportunity to meet with you all, with Members of this Committee, Members of the Senate, and to learn. And I have learned from you and from some of your other colleagues about some of the challenges that program presents and how critical it is to businesses and the employees that benefit from them, as well. So, I regard that program, and ensuring as best we can that it functions properly, to be an important priority if I am confirmed.

Senator COLLINS. Thank you.

The CHAIRMAN. Thank you, Senator Collins.

Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman.

Earlier this month, the Census Bureau released some data showing women were paid only 82 cents for every dollar to men in 2018,

which confirmed that women in working families—something that we have known for a long time—the gender pay gap is alive and it is well, and it is even worse for women of color.

Yet, just a day after that data was released, the Trump administration took steps to protect companies and sweep pay discrimination under the rug by rolling back the paid—the back-pay data collection at the Equal Employment Opportunity Commission, so we could not collect the data. And the Secretary of Labor's job is to protect those workers and fight for their rights and speak out on their behalf, so I wanted to ask you today a few straightforward yes or no questions.

Do you accept the Census Bureau's data, which show that women are only paid 82 cents for every dollar men are paid?

Mr. SCALIA. Ranking Member Murray, I don't know that I have seen that particular survey, but I am—yes, I am familiar with data suggesting that the figure is at about the point that you have identified. I think there is some data that puts it perhaps slightly lower. I am aware of that.

Senator MURRAY. Okay. Well, I am the lead sponsor of the Paycheck Fairness Act. It is a bill that would close that pay gap. The House passed it earlier this year. Would you support passage of the Paycheck Fairness Act?

Mr. SCALIA. Ranking Member Murray, I support fairness in pay and fair working conditions for women. It is something that in my work at my law firm as a manager of employees, it was important to me; and in advising clients.

Senator MURRAY. But you will not commit today to supporting that?

Mr. SCALIA. I will commit to two things, Ranking Member Murray: I can commit to providing any resources the Senate might find helpful in deliberating that legislation; and if it becomes law, which is, of course, your decision, the Senate's decision, Congress' and the President's. If it becomes law, I certainly promise to vigorously enforce it.

Senator MURRAY. Okay. I just want everybody to know that if these historic trends continue, it is going to be 75 years before that gap is—gets any better.

With just over two and a half years in office, President Trump's administration has rolled out a range of policies that are designed to reduce workers' wages and protect corporations who are engaging in what we call wage theft.

The Department of Labor instituted the so-called PAID program. It is a wage theft amnesty program that allows employers to audit themselves.

The Department proposed to rescind the Obama administration's overtime rule and replace it with a far weaker rule.

The Department proposed to weaken the Fair Labor Standards Act's joint-employer standard in order to allow corporations to shirk their responsibility, and, of course, the House has threatened to veto the House-passed Raise the Wage Act, which would raise the wages of more than 30 million workers.

Mr. Scalia, can you commit that, if you are confirmed, you will end the PAID program; yes or no?

Mr. SCALIA. Madam, Ranking Member, I cannot commit that. I can commit to review it. But I would also like to underscore how the economy that we have, in substantial part because of this President's policies, is delivering virtually unprecedented benefits to——

Senator MURRAY. Okay.

Mr. SCALIA. ——American workers right now.

Senator MURRAY. I have very little time, so let me get through a couple of important questions. And I just want to know yes or no.

Can you commit to placing the Trump administration's proposed overtime rule on hold and defending the Obama overtime rule in court; yes or no?

Mr. SCALIA. Senator, I can commit to review carefully the ongoing rulemakings that are at the Department. One of my responsibilities will be to look at them with a fair and open mind in light of the comments, but I don't——

Senator MURRAY. All right.

Mr. SCALIA. ——feel it would be appropriate for me to commit to——

Senator MURRAY. Can you commit to——

Mr. SCALIA. ——a particular——

Senator MURRAY. ——abandoning the Department's current proposal on joint-employer; yes or no?

Mr. SCALIA. Respectfully, no, I cannot commit because I respect the notice and comment process established by Congress and would want to see what the public say about it and help guide the agency——

Senator MURRAY. All right.

Mr. SCALIA. ——to making the right decision after.

Senator MURRAY. Can you commit to encouraging the President to withdraw his veto threat on the minimum wage bill?

Mr. SCALIA. I, again, Ranking Member Murray, if I am so fortunate as to be confirmed, that is an area in which I would like to be able to provide support to the Congress and to the President, who ultimately themselves will have to make the decision what the proper wage is. We are then ready to work with you to implement it and to enforce it.

Senator MURRAY. Okay. Thank you. And I have a very long question next, so I will retain my 20 seconds for my next round, if you don't mind.

The CHAIRMAN. You certainly have that prerogative, Senator Murray.

Senator Murkowski.

Senator MURKOWSKI. Mr. Chairman, thank you, and I apologize for kind of jumping the line, but I, too, have to go to the same Appropriations markup.

Mr. Scalia, welcome. Thank you for your willingness to step forward here.

I understand that Senator Collins asked a question related to the H–2B Visas. And as you and I have had discussions, this is a key and a critical issue in my state as we work to address the just dramatic seasonality that we have within our fisheries, the lack of

available workers, and the need to find a permanent fix, not a Band-Aid fix that we have kind of been struggling with.

We have made a little bit of headway, but just, again, seeking your commitment that you will work with us as you work with other coastal states that have such significant interest in their seafood processing industry.

Mr. SCALIA. Yes, Senator Murkowski. As I mentioned to Senator Collins, I learned from my meetings with you and others who spoke to me about this program and the challenges that it can present in, particularly, seasonal industries that sometimes are vital to a community—not just to the workers or a particular company, but a community.

If I am confirmed, I do genuinely look forward both to focusing on ways we can ensure that this program fulfills its mission, and also to communicating with you and continuing to work with you to do our best to implement the program.

Senator MURKOWSKI. We certainly look forward to that. We had 43 million salmon coming into Bristol Bay this season. We do not have 43 million people. We will go into that later.

I wanted to ask you a little bit more about the Industry-Recognized Apprenticeship Programs, the IRAPs, that Department of Labor is working on right now and developing standards, in addition to the registered apprenticeship model that has been in place for many years.

I do know that the registered apprenticeships have not been widely used in some states, and that some employers consider the process to become registered is pretty burdensome, time consuming. And we, in our state, we have got many registered apprenticeships that are training employees in healthcare, advanced manufacturing, IT, aviation, maritime, as well as the construction trades.

We have heard from some of our unions up north that they are concerned that the IRAP training will not be as rigorous as the registered apprenticeships, and that the issues—some of the issues that they have raised with me are concerns about safety on the job site being compromised. They do support—and I think I have mentioned this to you—they support keeping the construction trades out of the IRAP framework.

I have been concerned that some employers may see IRAPs as a way to create tax-payer funded training programs that will fit their immediate needs, but perhaps will not provide the employees with the high-quality, the portable, skills, that I think we recognize are needed and respected within the industry.

Your thoughts a little bit more on the Department's IRAP efforts and whether or not you think that the construction trades should be included in that effort at all?

Mr. SCALIA. Senator, thank you for raising it. It is an important subject, and happily, I think, one as to which there is consensus, even across the aisle, on certain basics.

I think that people interested in our workforce and people interested in education, too, recognize the value that apprenticeship programs can have for workers—that they can provide benefits that may not be available in traditional educational settings. And, obvi-

ously, they are valuable to Americans' business productivity. They can serve as one critical way of filling the skills gap.

Senator, you are referring to an ongoing rulemaking at the Labor Department, which is seeking to expand apprenticeship opportunities. I think, again, there is consensus to an extent that more apprenticeships would be a good thing.

I recognize that some are concerned that it might be approached in a way that undermines existing successful programs, or that does not really provide the rigor needed to protect the interests of workers. I think those are important considerations that need careful attention as the Labor Department moves forward.

Again, if I am fortunate enough to be confirmed, I know that is one of the very important things that will be on my plate. And what the public has to say in that notice and comment process is going to be important to me in striking the right balance.

Senator MURKOWSKI. I appreciate that and look forward to working with you.

I do have other questions, Mr. Chairman, but I will submit them for the record, and I appreciate this.

The CHAIRMAN. Thank you, Senator Murkowski.

Senator Casey.

Senator CASEY. Thank you, Mr. Chairman. Mr. Scalia, good to have you here and——

Mr. SCALIA. Thank you.

Senator CASEY. ——good to see your family. And thanks for taking the time yesterday to sit and talk. We had a good conversation.

I have to start, though, by saying I am skeptical of your nomination based upon your record as a lawyer, and even the work at the Department of Labor in that period of time you were there. When I compare that record with the mission of the Department—I'm just reading from the Department's website. The mission, in summary form, is to foster, promote and develop the welfare of wage earners, job seekers, and retirees of the United States. That's number one.

Number two: Improve working conditions.

Number three: Advance opportunities for profitable employment.

Number four: Assure work-related benefits and rights.

I have real concerns. Let me start with a reference from your opening statement. One group of Americans you referenced were coal miners. I think you referenced Alabama miners.

I come from a state that has a long coal mining tradition. At this point, we have real concerns about what used to be called in the old, old days miners' asthma, pneumoconiosis, black lung. In fact, I am holding here a letter from two labor organizations, the United Mine Workers and the Steel Workers, sent to the Department that you hope to lead in June, raising questions about and asking for a new standard with regard to respirable crystalline silica.

This request is made in the context of, as they say in the letter in paragraph two, "One in five miners with 25 years or more of experience are suffering from black lung. In many of these miners, the disease has advanced to the PMF stage, progressive massive fibrosis, the worst stage of black lung caused by the inhalation of coal and silica dust."

I guess the basic question I have for you is—and this is referenced also in the letter where the—both the head of the Mine Workers, Mr. Roberts, and the head of the Steel Workers, says MSHA—meaning the part of Labor that does the regulation—should consider the OSHA silica rule and then promulgate a new rule that is as, if not more, protective of miners. Currently our Nation provides less protection from silica to miners than to any other group of workers.

Do you agree with that statement?

Mr. SCALIA. Senator, Casey, I enjoyed our meeting yesterday, too, and appreciate your taking the time.

I also genuinely share your interest in the Mine Safety and Health Administration. I mentioned it in my opening because the importance of the Labor Department to conditions in that industry is, I think in some ways, especially great. There, to my knowledge, is not another single industry that has an agency within the Department dedicated to it.

When I was there, it really did come home to me, particularly in connection with that Alabama disaster, how important our role could be. I helped put together an emergency standard to deal with some of the problems that had caused that accident.

With respect to PMF particularly, I am aware that there is concern that new mining techniques are causing an increase in this, and I have reviewed some materials—possibly that letter. It is something that I would want to understand better——

Senator CASEY. I just have to cut you off because——

Mr. SCALIA. I'm sorry.

Senator CASEY. ——we have limited time. I just want to ask you a very simple question. I asked you do you agree with that statement in the letter. Let me say it a different way.

Do you agree that the standard should be, in a sense, twice as worse for the coal miner as opposed to any other worker? And I think that is just yes or no.

Mr. SCALIA. Senator, I don't know what the exact standards are. I agree that this is an issue that I would want to look at, and it was brought to my attention as an important one. And if I am confirmed, I would hope to have a chance——

Senator CASEY. I would ask you to do that.

Mr. SCALIA. ——to you about that further.

Senator CASEY. If you are confirmed, I would ask you to do that.

Finally, let me just—and I know we will have more time later, but I wanted to ask you a question about a part of the Department of Labor that has the obligation to do enforcement.

I would argue that enforcement of our trade agreements has been lacking under several administrations, going back many, many years. But the proposal by the administration now to cut the Bureau of Labor Affairs, which is the entity that does trade enforcement, to cut it by 78 percent from roughly 86 million to a little more than 18 million, a $67.5 million cut. Now, does that make any sense to you? Do you agree with a cut of that dimension, where funding has been pretty level for many years?

Mr. SCALIA. Senator, I do believe that fairness in trade agreements, and particularly with respect to working conditions, has been a priority for this President. That particular program is one

that, if I am confirmed, I would commit to take a look at and evaluate whether it would be able to continue to perform its mission.

Senator CASEY. I have heard no good rationale for a 78 percent cut in an office that does trade enforcement.

Thank you, Mr. Chairman, for giving me a couple extra seconds here.

The CHAIRMAN. Sure, Senator Casey.

Senator Isakson.

Senator ISAKSON. Welcome, Mr. Scalia. It is good to have you, and I appreciate the time you gave me last week in conversation. I enjoyed it a lot, and congratulations on your great family. You would solve half our labor problems if you all moved to——

[Laughter.]

Senator ISAKSON. We could use you in the chicken industry in Georgia, I can tell you that.

I am familiar with what you mentioned about the case you worked on because Georgia is the largest poultry producer in the United States of America. And if anybody has sympathy for a worker, have sympathy for guy who plucks chickens all day long. It is a tough job.

The stuff they wear that you worked for them to be able to be included in their earned time for their pay is tremendously important because, when they go home at night, the first thing they want to do is get hosed off before they darken the doorstep of their front step. I appreciate what you did with the chicken workers very much. And I wasn't aware of it until I found out today and I—I knew they had a good lawyer because they won the case. I didn't know it was you. Nobody ever brags about the lawyers, so I will brag.

[Laughter.]

Senator ISAKSON. The results are clear, and you made both sides happy, which is even harder to hear.

I have listened to a lot of things said today. You have been asked so many 'yes or no' questions, to which there are no 'yes or no' answers. So, those are easy for people to ask if they know you can't answer. It's like a trap. You know, did you stop beating your wife? If you say yes, I have, that means you did; and if you say no, I haven't, it means you are still doing it. So either way, you cannot answer a question—a lot of questions yes and no. But you——

Mr. SCALIA. That was not a question to me, was it?

[Laughter.]

Senator ISAKSON. No, that was not. I was not asking you ratify your own harassment whatsoever, believe me.

But I am reminded of a lot of cases in my history up here. Like ergonomics was a big issue during the Clinton administration, where they took a terminology that I was not familiar with at the time and began to apply it in the application of a rule that ultimately was to be administered by the Department of Labor, which ultimately would have said that no grocery bag kid could load a grocery bag that weighed more than 35 pounds. They started applying finite, definite limits to jobs that were done and forced employment to go up, or down in some cases, and it was applied because of a distant—an arbitrary mathematical formula, rather than doing what is right.

I want to ask you a question. Can you cite a case or two where, as a lawyer who deals with negotiating these things if you are on the attack, or being attacked, or negotiating some other way if you are on the attack, can you think of some cases, other than the chicken case you talked about, where you have been involved and where the resolution was a solution that allowed the flexibility of the application, or the enforcement of the rule, a benefit to the employer and the employee at the same time, which is ultimately the way all those rules should go?

Mr. SCALIA. Senator, if I can say first, it was a privilege to sit and speak with you, and I do want to echo Secretary Chao in thanking you for your service.

The poultry case was interesting to me in part because when I came before this Committee before, I was asked by Senator John Edwards, who was from North Carolina, whether I had ever worked in a poultry factory, and I had to confess that I had not. I think he believed that that reflected that I would be unable to understand the concerns of poultry workers. I, therefore, found it ironic when I—one of the first things I did was see the problems in that plant and authorize that important litigation. So, thank you.

I think that achieving the kind of, win-win that you have described is something that you seek for in litigation at times. But I would point particularly to some of the advice and counsel work that I have done for clients where it is, as I said in my opening, a part you don't see, necessarily.

I did spend a fair amount of my time as a private practice lawyer telling clients what their obligations were, helping them meet them by putting together anti-discrimination policies, or policies to help workers get accommodation under the ADA.

Then, as I mentioned, at times, pushing clients pretty hard to do what the law, and sometimes decency, indicated they needed to do.

That is one area where I was proud of what I was able to try to accomplish.

Senator ISAKSON. That is exactly what I was talking about. So much of this stuff that is the result of your work that happens in the back rooms is never seen in a courtroom. The important thing is you put together an adversary and an advocate, but they come to a common ground that is good for everybody, and that is the type of thing we need to have.

I want to tell you—I have just 40 seconds and I will tell you one more question, if I can. And I want to thank your remark—your reminding me to thank Secretary Chao and the kind remarks she had to me about the Pension Protection Act. I am getting ready to enjoy a pension one of these days and I am looking forward to it.

[Laughter.]

Senator ISAKSON. I am glad we protected it when I was not here so it wasn't self-interest at the time.

My last question to you about the joint-employer rule—I know Senator Murray is a wonderful lady and we worked on the workforce development—the WIOA Act, which we worked on so much, we had—it was for workers, and they—the Labor Department enjoys so much. We won't talk about that because that is a perfect bipartisan example of how we get things done up here.

But I do want to talk about the joint-employer rule just to give you a thought. The statement was made that—about how important the joint employment rule is to the future of employment and the future of workers in the United States of America. I don't know if that is a fair statement to make or not, but I know this: The application of the joint-employer rule to the franchise industry alone, which is most of American small business, will put them in the history books in terms of employers. Pure and simple. And it is because the application of that, as fair as it may sound, is absolutely impossible for somebody to make a living and run a business and support their workers, too.

I hope when joint-employer is finally ruled on, we will not look at it as an absolute yes or no solution to a problem, which is the workers' rights; but instead, understand that there are millions and millions and millions of Americans who are employed today by franchise operators; in other words, who would not be employed with joint-employer rule of the United States of America. And that is my little speech and I will yield that for another day.

Mr. Chairman, I also want to yield the rest of my time, if we have another round, to you, because I am not going to be able to stay for a second round.

The CHAIRMAN. Okay. Thank you, Senator Isakson.

Senator Smith.

Senator SMITH. Is it—I think it might be Senator Baldwin's turn.

The CHAIRMAN. I did not see her come in. Excuse me.

Senator SMITH. No worries.

The CHAIRMAN. Senator Baldwin. Excuse me.

Senator BALDWIN. Thank you. First of all, thank you for meeting with me earlier this week, and I want to welcome you, Mr. Scalia, and your family to the HELP Committee.

Mr. Scalia, your history and record on worker safety is of concern to me and is not what I would be looking for as—in our next Secretary of Labor. Specifically, on behalf of United Parcel Service, UPS, you opposed rules that would have required employers to pay for protective equipment for workers that they needed to stay safe on the job.

You represented Sea World in a well-known case when they contested monetary fines and three citations, including a willful citation.

Earlier this year, I met with a former nurse and a constituent of mine by the name of Patricia Moon Updike. On June 24th, 2015, while helping a patient, she was kicked in the throat, nearly collapsing her trachea. The assault led to multiple surgeries to save her life, and it sadly resulted in the loss of her ability to work as a nurse, which was her dream job since she was 9 years old.

Violence is now the third leading cause of workplace deaths. The Obama administration issued a proposal similar to a bill that I have introduced called the Prevention of Workplace Violence in Healthcare and Social Assistance that would protect healthcare and social services workers, like Patricia, my constituent, from—protect them from violent attacks. But OSHA, under this administration, has dragged its feet and still has not finalized this proposal.

Mr. Scalia, will you commit to prioritizing this proposal and make sure that it is finalized; yes or no?

Mr. SCALIA. First, Senator, if I can say, I did generally enjoy our meeting, and I appreciated your time.

[Laughter.]

The CHAIRMAN. Did you say generally or genuinely?

[Laughter.]

Mr. SCALIA. I said genuinely and in full.

[Laughter.]

Mr. SCALIA. With respect to the work that I did, if I could just respond briefly, I did handle certain cases for clients. It was my job at my firm and I had a duty, actually, to do that vigorously as a lawyer.

When I was at the Labor Department before, I was ever mindful that I had a new set of responsibilities, and even a higher set of responsibilities. The most important thing to me as a practitioner has been fidelity to my obligations and to the law. And there was a letter submitted by about 13——

Senator BALDWIN. Yes.

Mr. SCALIA. ——career folks that I worked with at the Labor Department about how I discharged those responsibilities when I was there.

Workplace violence happens. There are times when the employer is on notice and should be taking steps. I think there is a role for OSHA in that context. There is a balance to be struck, obviously, for those instances when it is just purely personally motivated and one would not expect to hold the employer responsible.

But I have been briefed on this issue. I know it is important to you. And if I am confirmed, I would like to look at it more closely, and I would genuinely like to speak to you about it further.

Senator BALDWIN. I appreciate that. And I would note in terms of Patricia's case that she was providing medical care to a youth at a juvenile detention facility, and this is the type of context where we see social workers and nurses, and I think it is—I hate to see the Agency dragging its feet on implementation of something that is so vital.

Mr. SCALIA. Yes. I have seen the hazards in that environment, too.

Senator BALDWIN. According to the Bureau of Labor Statistics, more than 5,000 workers were killed on the job in 2017, and almost three million workers were injured or got sick on the job. Now OSHA data shows worker safety enforcement activity is down, and the number of OSHA inspectors under this administration is at record lows.

Mr. Scalia, will you commit to supporting increasing the number of OSHA inspectors so that OSHA can fulfill its mission and keep workers safe?

Mr. SCALIA. If I could respond briefly, Mr. Chairman. Any workplace fatality or serious injury is too many, but the number have actually been down in the last couple of years. We can be thankful for that.

But you are correct. The number of OSHA inspectors, my understanding, is lower than Secretary Acosta, for example, wanted it to be. And I would commit to you to take a look at steps that might

be necessary to get the number of inspectors up to an appropriate level.

Senator BALDWIN. All right. Mr. Scalia, we——

The CHAIRMAN. We are going to have a second round.

Senator BALDWIN. I, too, have Appropriations to follow—Okay. Very good.

The CHAIRMAN. Senator—thank you, Senator Baldwin.

Senator Romney.

Senator ROMNEY. Thank you, Mr. Chairman.

Mr. Scalia, it is good to see you and I enjoyed our conversation together.

Our young people are told that they need to go to college in order to get a good job, and in many cases, we find young people are getting a college degree and then not finding a good job that actually requires a college degree. Actually, almost about one-third of our college graduates are working in jobs that do not require a college degree.

We, as a Nation, I think, have not been terribly effective in encouraging people in alternative career paths that have greater economic potential for them, and more rewarding opportunities for them. Some discussion of providing free college to everybody would just exacerbate the problem.

I wonder, is there something that you think is important to be done in your administration to help educate people and encourage paths, other than just four-year college paths, that may yield greater economic prosperity and opportunity?

Mr. SCALIA. Senator, I enjoyed our meeting, as well, and appreciate the importance of that very question.

I was an English major in college. I thought for a while that that was a background everybody should enjoy. But the truth is——

Senator ROMNEY. I suffer the same problem, yes.

[Laughter.]

Mr. SCALIA. The truth is that it does not always best equip one for the American workforce, and there are other ways that can be invaluable to people entering the workforce and to filling the skills gap that we have in our economy.

This President has convened an intra-agency group that has included the Department of Labor, as well as the Department of Education, to look, among other things, at apprenticeships as an alternative way of educating people, but educating them in a way that is more directly targeted toward ensuring they have skills and talents that will be useful for them for a lifetime of productive work.

I think those programs are one valuable way. I think the attention brought the issue by commissions, such as the President's, are another.

Senator ROMNEY. Thank you. I presume you are fully committed to putting the interests of American workers first, and consistent with that——

Mr. SCALIA. Yes.

Senator ROMNEY. ——where our American interests and the interests of our farmers and ranchers are also involved, that you will commit—I would hope that you would commit to endeavor to see if we can't make our H–2A Visa program more efficient and streamlined for the benefit of our ranchers and farmers. I am not

asking for a specific recommendation, but just that you would look at this and see if we can't make it a program that fully protects the interest of American workers first; at the same time, provides for the interests of our farmers and ranchers.

Mr. SCALIA. Senator, the Labor Department programs that supply extra workers to businesses that, for example, have, particularly high seasonal demands, or for other reasons are unable to attract American workers to their positions, are a central role of the Department. It is genuinely an area where I think there is something for everybody to be pleased with. It is an opportunity for workers. It is an opportunity for companies to bring in workers who might not otherwise be available.

It is important that in supervising that sort of interface, that intersection, between worker and company that the Labor Department be user-friendly. That is something that does not always come easy for the Government. I have heard from you and others about ways we might fall short. And if I am confirmed, that is high on my list of areas that, because of its importance, really to everybody, I want to look at closely and see if there is more we can do.

Senator ROMNEY. Thank you. You have been characterized as being anti-union by some, and that is also a malady I share, and I—the accusation, not the reality. I fully believe that unions play an important role in our society, have helped provide greater safety for our workers, greater employment opportunities, higher wages, and believe that unions play a very important role going forward.

What are your thoughts about the role of American labor and American labor unions? Our labor laws, of course, were written and signed by Dwight Eisenhower, so it has been a long time since we had legislation in this regard. What are your thoughts about the role of labor? And you have 21 seconds.

[Laughter.]

Mr. SCALIA. It is an important role that I have praised in a number of contexts.

I have talked in articles about how labor unions can be among the most effective advocates you will see for workplace safety and health. I have written about that. I have seen it in a number of contexts.

I have seen unions work effectively, also, to address discrimination in the workplace in work that I have done, and I have praised them for that.

I have said, as well, that it is fundamental our system that workers have the ability to decide whether to form a union.

I have said, I have written, that there are some workplaces where the best thing you could have for achieving the best terms and conditions of employment will be a labor union. They play an important role.

The CHAIRMAN. Thank you, Senator Romney.

Senator ROMNEY. Thank you. And Mr. Chairman, if I am unable to be here for the second round, I yield my five minutes of time to you, sir.

The CHAIRMAN. Thank you very much. Thank you, Senator Romney.

Senator Smith.

Senator SMITH. Thank you, Mr. Chairman, and Ranking Member Murray, and thank you very much, Mr. Scalia, for being here and thanks for your willingness to serve our Country.

I appreciated also the chance to visit with you when you came to my office. We touched briefly on the issue of pensions, and I would like to follow-up on that.

Last year when I was—right after I was sworn into the Senate, one of the first visits I made was to Duluth, Minnesota to talk with a group of participants in the Central States Pension Fund. It is a multi-employer pension fund.

As you know, that pension fund, and more than a hundred others, are projected to collapse in the next two decades, leaving at least 22,000 Minnesotans, and maybe as many as a million people across the Country, without their retirement savings.

Folks are scared. I will never forget the conversation I had with a woman named Vickie, who was talking to me about what was going to happen, and she said, Tina, I don't have a plan B. My plan B is living under a bridge. And it really helped me to understand how important this is.

Also, I came to understand how this issue affects businesses, as well, because they have paid in. They face—businesses face millions in costs if these pension plans fail. One business owner told me that his business, which he has spent 30 years building, is effectively worthless because of this pension issue.

I would like to just ask a couple of questions about this. First, I assume that you believe in the union's right to collectively bargain for pensions and benefits and better working conditions.

Mr. SCALIA. I do, Senator.

Senator SMITH. Do you believe that the current situation is the fault of the workers in these plans?

Mr. SCALIA. Senator, you are referring to the challenges facing, for example, the Central States——

Senator SMITH. Correct.

Mr. SCALIA. ——plan? Senator, if I could, I guess, answer a little bit more broadly, the—when we think of the Labor Department, we often think, or I think many people do, of the role in the workplace right now when the person is in the plant, safety conditions, wage conditions are very important. But pensions are another very central part of what the Labor Department does.

Senator SMITH. Right.

Mr. SCALIA. When I was at the Labor Department, we had to deal with the collapse of Enron and the impact that that had on the retirees or people who were planning on their retirement. It was financially a monumental catastrophe, but that broke down into, I think, tens of thousands of individual men and women who were severely affected by that unexpected loss and——

Senator SMITH. Through no fault of their own.

Mr. SCALIA. No fault of their own, and it was a weighty responsibility. And then with respect to the Central States particularly, I know, as I said in our meeting, which, I enjoyed, too.

Senator SMITH. Generally.

[Laughter.]

Mr. SCALIA. Genuinely, and in full. That is a historic, important plan. I cannot claim that I know all of the things that have led to

the problems it faces now, but it is no solution to blame it now on the workers.

Senator SMITH. Right, and nor the—would you agree, nor the business who paid in, as well? Both parties did what they were supposed to do just to save.

Mr. SCALIA. I think there has been a confluence of factors, Senator, that has led to the problems, and I am not steeped enough to know exactly what they are. But, I do agree with you that something does need to be done. I think there is——

Senator SMITH. Thank you.

Mr. SCALIA. ——bipartisan recognition of that. And if I am fortunate enough to be confirmed, it is something that I would want to work with people on because I think everybody recognizes the need to negotiate out some legislative solution.

Senator SMITH. That gets to the—my follow-up on this. And I want to just thank Chairman Alexander, who has served with me on the Select Committee on Pensions last year. And though we were not able to come to a resolution, I think that we did achieve some good education there.

I support the Butch Lewis Act, which would provide a long-term, low-interest loan to these troubled pension plans, and I think that Congress does need to act urgently, so I think maybe you and I would be in agreement on that. Even the Chamber of Commerce says that this is an urgent issue.

Would you agree that we need to take urgent action on this?

Mr. SCALIA. Senator, I would agree that we do need to take action, that it needs to be a priority both for the workers that are affected, and also for the solvency of the PBGC. That is the——

Senator SMITH. Which is the other issue, right.

Mr. SCALIA. Right. That is the agency that the Secretary of Labor has responsibility for in part, that insures pension plans and would face a serious—very serious—shortfall if we cannot find a solution here.

Senator SMITH. Would you agree that we ought to enact a program of long-term, low-interest loans to help the troubled pensions as the Chamber of Commerce has recommended?

Mr. SCALIA. Well, just because the Chamber of Commerce says it doesn't mean I believe it is right, Senator.

[Laughter.]

Mr. SCALIA. I would be interested in looking at the different approaches to be taken and finding one that helps workers and also helps taxpayer and the PBGC.

Senator SMITH. Well, as you and I discussed when we met together, this is a very important issue. It is an urgent issue. And I appreciate your comments. Thank you.

The CHAIRMAN. Thank you, Senator Smith.

Senator Cassidy.

Senator CASSIDY. Hi, Mr. Scalia. Nice to see you.

One of my—I do not read many economists, but there is one, Bastiat, from France, who—he has a nice quote about unintended consequences. He says the difference between a bad economist and a good economist is the bad economist really looks at the primary effect, if you will, whereas the good economist looks at secondary.

Earlier it came up that raising the minimum wage to $15 an hour. I say all of this as a prelude to my question.

I am struck because there is—the Foundation for Economic Education polled a bunch of economists, 35 percent of whom were Democrats, twelve Republican, and the rest Independent—seems like Republican are underrepresented among economists. But 74 percent of them thought that raising the minimum wage to $15 an hour was a bad idea.

The article quotes Paul Krugman. Any Econ 101 student tells you the answer: A higher wage reduces quantity of labor demanded, leading to unemployment. And then they give their reasons why, again, so many opposed, 69 percent of whom vehemently opposed. Minimum wages reduce employment; reduce the earnings of low-paid workers; make some low-paid workers better off at the expense of others; younger workers, who are less skilled, are less likely to be employed; lower future earnings. I could go on.

Now, that said—that's a prelude to this question—have you seen other policies which there is an unintended consequence? On the face of it, it sounded great. Why wouldn't we all do it? And then you look at the secondary affects, and they are quite negative—because you will have to make those judgments as the Secretary of Labor. And it is not just about any particular policy. Just kind of your experience and your, if you will, method of analysis.

Mr. SCALIA. Yes. I think that, unfortunately, the great majority of the problems that the Labor Department faces involve some tradeoff, where the central mission is to protect workers, and also it has this very important role of training workers and supplying the workforce that American businesses, and ultimately American consumers, want available there.

But some of those actions, if we are not thoughtful about how we go about them, can have adverse consequences by hurting the businesses that supply the jobs, sometimes hurting other workers, because one group benefits but another is set back. And, so, I think that we always need to think, as you were saying, like the good economists and consider not just the initial, first order effects, but what are the downstream consequences of this.

That, I think, is something that often is helpfully addressed in the rulemaking process that we have. A number of different ongoing Labor Department rulemakings have been brought up in this hearing. As I have mentioned to some of your colleagues in our discussions, the—that process of hearing from the public about what they think of a proposal and what affects it is going to have is a really important way of looking far down the road.

Senator CASSIDY. It is not so much a yes or no answer. It is the more nuance, what do we learn from the comments to come up with something in which we fully evaluate secondary affects and make something which is the maximal good for the maximum number of people.

Mr. SCALIA. That is exactly right, Senator.

Senator CASSIDY. I am reassured that that is your approach. Now I am going to ask you something that a little bit more arcane that is very peculiar to Louisiana involving sugar and cotton.

USDA defines the commodity, if you will, of sugar and cotton as refined sugar and—or raw sugar—I'm sorry—and cotton, which has

been ginned. But so far, I gather Labor is defining the commodity as cotton which has been picked, not ginned, and still has all the things that you have to get rid of, and sugar cane itself.

Now, this has an impact upon whether or not my guys can get H–2As to come drive their trucks. If their sugar cane itself, for example, is considered the final product, it is an H–2B issue. But if it is recognized that this is merely an agricultural product that has to be processed to the commodity, it is an H–2A issue. Now, although I am obviously begging an answer, it actually seems like the answer which is most apparent, even upon secondary analysis.

That said, would you please consider this because right now those drivers are being considered as H–2Bs? They are having a difficult time getting them, a difficult time getting their product out of the field, into where it needs to be processed. And the difficulty of that means that there is going to be some product left in the field, which is bad for the consumers, bad for the farmers, et cetera. So, if I could have your commitment, I would appreciate that.

Mr. SCALIA. I will consider that, Senator. That is something that I certainly will look at if I am confirmed.

Senator CASSIDY. Thank you.

The CHAIRMAN. You are helped by the expiration of his time.

Senator CASSIDY. But, I would like to say that I will be unable to stay for the second round and I yield my five minutes of questioning to the Chairman.

The CHAIRMAN. Thank you. Thank you, Senator Cassidy.

Senator Murphy.

Senator MURPHY. Thank you very much, Mr. Chairman. Thank you for being here with us today.

Mr. Scalia, as I think I mentioned to you in our private meeting, I have probably voted for more of this administration's nominees than many of my colleagues. I have come to the conclusion that as long as nominees are qualified and they are in the conservative mainstream, I think they are worthy of the Senate's support.

But, as I also mentioned to you, my question that I am attempting to ask is whether you are indeed qualified for this position. Now, that might seem silly given your decades of experience in the area of employment law. But your entire body of work, at least in the private sector, as Senator Murray mentioned, has been devoted to representing employers against workers; has been devoted to trying to stop workplace protections from being adopted.

Now, I have plenty of friends who work for big companies and work in employment law, and many of them are fine people, but I do not know that I would select them to be the one representative in the Federal Government in the Cabinet who is supposed to speak for workers. You might make a fine Secretary of Commerce in a Republican administration, but I just do not know that your experiences actually are qualifications to be the sole representative of workers. And so I put that on the record as the struggle that I am having, and I ask you a question in means of trying to seek out the values that you are going to bring to this job.

Way back in 1985, you wrote an article entitled Trivializing the Issues Behind Gay Rights. In it, you said, "I do not think we should treat it as equally acceptable or desirable as the traditional

family life." But you concluded the article by saying, "I'm not sure how I stand on the basic issue of gay rights."

I appreciate your honestly at the end of that article. My worry is that your views have not necessarily matured as the Country's have, given the fact that earlier this year, you joined the board of a group called Ethics and Public Policy—The Ethics and Public Policy Center, an organization which advocates a lot of time to arguing and advocating against the civil rights of LGBTQ individuals.

Let me just ask you to answer the question that you posed at the end of your article. Have your views changed since 1985 on the issue of rights for individuals in that community? And I am not asking whether you will follow the law because I am sure you will, but it is a question of the priorities you are going to have in this position. Have your views changed since you wrote that article?

Mr. SCALIA. Senator, thank you for the time that you made to meet with me earlier this week. And with respect to my qualifications generally for the job, I appreciate your positive words about the background that I have as a long-time labor employment lawyer. As you said, I think it is approaching I think three decades concentrating in the field.

Yes, often I have represented business, but I believe that this Committee has the good fortune of my past tenure at the Labor Department, which showed how effectively I am able to recognize the new clients, the new obligations, that I have in my capacity to discharge those responsibilities very vigorously.

There was a reference earlier to the issue of ergonomics, and it is true that I represented clients opposed to ergonomics regulation, which this Congress ultimately repealed the rule. But once I was at the Department, I worked very closely with some of those same lawyers. In fact, one of them—the lawyer who had the lead on the issue of ergonomics—wrote a letter—joined the letter from former career officials supporting my nomination. So, I—as did, by the way, the chief administrative law judge who oversaw the ergonomics hearing, joined that letter saying, Gene did a very good, even-handed job here.

With respect to the article, Senator, you are talking about an article that I wrote when I was in college. It was 1985, about 35 years ago. And yes, I certainly have changed in how I view any number of things since I was in college. I think we have all matured—one would hope—since those days. And I would certainly enforce the law in this area and respect the decisions of the Supreme Court.

Senator MURPHY. How have your views changed on this specific issue? You referenced in that article that they were not equal of the same treatment, those different lifestyles. Has that changed?

Mr. SCALIA. I would not write those words today, Senator. I would not write those words today in part because I now have friends and colleagues to whom they would cause pain, and I would not want to do that.

Then, finally, if I could just say, you referred to an organization. I went on their board in March, and it is a respected organization that has been praised by Paul Ryan, the Speaker of the House; by George Will, Charles Krauthammer. Jeane Kirkpatrick was once on their board. That organization, with which I have had brief involve-

ment, says nothing about what my views might be on any number of different issues.

Senator MURPHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murphy.

Senator Scott.

Senator SCOTT. Thank you, Mr. Chairman. Mr. Scalia, good morning. Thank you for being here.

Mr. SCALIA. Good morning.

Senator SCOTT. I do want to start off by echoing my support for the Department's recent efforts in joint-employer and overtime. I know that has been mentioned a few times. Johnny spent some time on it, as well. So, I am appreciative of the current direction. As a former employer, I think it is incredibly responsible actions on the part of the Department.

I want to start the conversation off with the topic that I think is really important for our workforce, and frankly, it is going to be a topic of discussion for however long you are the Secretary of Labor—and I hope that that begins sooner than later.

Experts say that about $2 trillion of current payroll could be automated. The minimum wage increase only, in my opinion, accelerates automation of the payroll. If we see a greater acceleration toward automation, what we see are the first rung in the ladder of economic success and mobility being pulled away. The response to that is that low-skill folks have fewer opportunities to get engaged in the workforce, which the consequence of that is longer terms of unemployment and a debilitating impact on communities of color, and in rural America, as well.

What are your comments on the notion that there is a relationship or a correlation between a higher minimum wage and lower opportunities to enter the workforce?

Mr. SCALIA. Senator, it is an important potential tradeoff that one has to keep in mind as one thinks about what the proper wage for a National minimum wage or for what a local wage might be. Different legislative bodies in different locales have reached different conclusions about where to set a wage. There is one Federal minimum.

But as, Senator Scott, you are pointing out, every time you set the wage, I think people on all sides recognize that if a wage that is mandated is too high, there will be adverse impacts that actually hurt some of the workers that are meant to be helped. I think that needs to be considered.

But, on the other hand, obviously the workers' interests more broadly need to be considered, too. We have a long-standing Federal policy of having a Federal minimum wage, and it is the Labor Department's obligation to enforce that.

Senator SCOTT. I would note that in New York City, when they increased the minimum wage to $15 an hour that from January 2018 to January 2019, there was a loss of about 6,500 jobs in restaurants, which was the largest reduction since the 2001 recession. So the impact, I think, can be measured in the loss of jobs.

As a kid who grew up in some of the impoverished areas of South Carolina, my first job was—the minimum wage was $3.35. At that time, you could pay folks $2.85, or 50 cents less than the minimum

wage, in order to encourage more employment opportunities for kids.

I am not advocating that position, but I do think it is really important for us to recognize the powerful impact that minimum wage increases will have on those folks looking for employment. And frankly, fewer than 3 percent of the current workforce makes the minimum wage.

On apprenticeship programs, which I think are incredibly important, I think Germany is a great model for apprenticeships. I am looking forward to the day that America is the model for apprenticeships around the world. In South Carolina, we have tackled the challenge of apprenticeships in a very powerful way. A big shout out to Apprenticeship Carolina, who has truly taken the responsibility seriously, and we have changed the trajectory of apprenticeships in our state by an incredible number. We are now 50 percent over our 2020 goals.

I have legislation co-sponsored by some of my friends on the other side that provides tax credits to encourage more utilization of apprenticeship programs by reducing the actual cost of the programs. Any quick thoughts with my 30 seconds left?

Mr. SCALIA. Sure. You mentioned German apprenticeship programs when we met, and it is something that I am interested in learning more about if I am confirmed. And with respect to South Carolina programs, I had dinner recently with a friend who has been very interested in apprenticeship programs. And by the way, she has no South Carolina ties, but she called out South Carolina as a State that really stands out.

Senator SCOTT. She is very educated since I——

[Laughter.]

Mr. SCALIA. Brighton is a perceptive person.

Senator SCOTT. Yes, sir. Just in my few last seconds, Mr. Chairman, if you would allow, two things: One, the gig economy is something that we should have a longer conversation about; perhaps a hearing on the gig economy and what the impact that will be on employment and the necessity of having portability in the benefit structure of that economy.

I will tell you that the only way to truly understand and appreciate the success and the progress that we have made in South Carolina as it relates to apprenticeship programs is to perhaps come visit South Carolina. I would invite you to spend some time throughout the state, Charleston being the number one tourist destination that the Nation has today, perhaps the third time in the last 3 years, maybe four times in the last 4 years. But, because my time is running out, Mr. Chairman——

The CHAIRMAN. It has run out.

Senator SCOTT. I am unable to remain for my second round of questions, but would like to yield my time to you if necessary.

The CHAIRMAN. Thank you, Senator.

Mr. SCALIA. If I could say, I promise to visit South Carolina tomorrow for back-to-school day at my daughter's college.

Senator SCOTT. Very good, sir.

The CHAIRMAN. Thank you, Senator Scott.

Senator Kaine.

Senator KAINE. Thank you, Mr. Chairman. And Mr. Scalia, congratulations on the nomination from the President.

I noticed in the dialog you had with Senator Murphy about his questions—if you go back and read the transcript, your answers do not use the phrase LGBT. Your answers actually would not enlighten anyone about the discussion. And when he asked about the change in your views, what you said is, I would not write those words today because it would cause pain to individuals, so that makes me want to follow-up.

I think I know the answer to this question. You do believe LGBTQ Americans are entitled to equal protection of the law; correct?

Mr. SCALIA. That is what the Supreme Court has ordained, Senator, and I accept that.

Senator KAINE. Well, that is not the question that I asked.

Mr. SCALIA. Also——

Senator KAINE. So you believe it personally? I know what the Supreme Court has said. I am asking about your personal belief LGBTQ Americans are entitled to equal protection of the law.

Mr. SCALIA. I do, and——

Senator KAINE. Let me ask you——

Mr. SCALIA. ——in the article—if I could finish. In the article—again, it was from college, 1985.

Senator KAINE. But I am not asking about the article. I am asking about your beliefs today. And let me just follow-up and say this. Do you believe it is wrong for an employer to terminate someone based upon their sexual orientation or gender identity?

Mr. SCALIA. I do believe it is wrong. I think that——

Senator KAINE. Thank you.

Mr. SCALIA. ——most of my clients had policies against that. Certainly my firm did. And it is something that would not have been tolerated by me or my firm or most of my clients.

Senator KAINE. Thank you for that answer. That is important.

Should you be confirmed—this is an issue that is pretty important in Virginia—could you commit to requiring that mining companies who violated worker protections and are delinquent in paying the penalties that are assessed against them for that would be held accountable and not be able to open new mines until they square the account and pay the penalties to workers that they have been assessed?

Mr. SCALIA. Senator Kaine, I am familiar with—I believe it is Blackjewel, which is a company that had operations in Virginia, West Virginia, I think Kentucky and Wyoming, went into bankruptcy and has left I think thousands of workers in those states in the lurch. That is a serious problem. The Labor Department has an authority called the Hot Goods authority that enables it to seize goods, product, of companies that have defaulted on their wage obligations.

Senator KAINE. How about the issue of opening new mines, getting permission to open new mines, when there are penalties that have been assessed and are delinquent and have not been paid to the workers for violations?

Mr. SCALIA. Senator, I do not know what the law provides on that. If there are existing laws that prohibit the opening of new

mines if there are unsatisfied pension obligations, then that is one that certainly the Department would enforce vigorously.

Senator KAINE. Thank you. Let me ask you this. In cases of wage theft, the Trump administration is engaged in a practice where when there are wage theft findings, they order back pay, but not liquidated damages. And often, the back pay does not include interest, which means that in cases where wage theft has been found, workers get the pay, but get it much later and essentially have made an interest-free loan to the company that has violated the wage theft laws.

Should you be confirmed as Secretary of Labor, would you work to make sure that in instances of wage theft, people are made whole, including interest or other calculations that would be necessary to truly make them whole in instances of wage theft?

Mr. SCALIA. Senator, wage theft is obviously a violation of the law. When I was Solicitor, I sought to vigorously enforce the wage hour requirements. I have mentioned a couple of the cases that I brought, in certainly at least one instance, one that was innovative to defend employees' rights.

There can be circumstances, though, where you can get more for workers by offering a cooperative program with the Government to satisfy obligations that a company has. You see those kinds of cooperative programs across agencies. The Justice Department, for example——

Senator KAINE. Let me switch to another topic. Do you believe workers with disabilities should be paid a sub-minimum wage under 14(c) of the Fair Labor Standards Act or should be paid a minimum wage in the same way as other workers?

Mr. SCALIA. Section 14(c), as I believe Senator, authorizes a different wage, and potentially a lower wage. I know that it is important both to you and to Senator Hassan, and that is a law that the Department is charged with administering.

Senator KAINE. 14(c) was put into law in 1938 when the expectations for individuals with disabilities were vastly different than they are today. Do you have a personal opinion about whether workers with disabilities should be paid a sub-minimum wage or should receive the minimum wage that other workers receive?

Mr. SCALIA. That, as you say, is a long-standing provision. If Congress were to change it, obviously the Labor Department would change its approach accordingly. With respect to the issue more generally, what I can say is I recognize that there are strongly held views on both sides. I think that there are people on both sides of this issue that, many of them really do think that their approach is one that is in the interest of people with disabilities. So, that is a discussion to be had, and if I am confirmed, I would be honored to be a part of it. I—that is another area where I think there are opportunities for consensus, bipartisanship, but it is a hard issue.

Senator KAINE. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kaine.

Senator Murray and I are going to go vote in the Appropriations Committee. Senator Enzi has agreed to preside. We will be back shortly, and there will be—and I will stay for a second round of questions until Senators have a chance to ask the questions that they would like to of Mr. Scalia.

Senator Enzi.

Senator ENZI. [Presiding] Thank you, Mr. Chairman. I thank Mr. Scalia for being willing to take this job. As we go through confirmation hearings, I often wonder why.

[Laughter.]

Senator ENZI. Of course, I got to ask you that personally and appreciated your answer and appreciated all the public service that you have done.

I was here for your 2001 confirmation and enjoyed your answers then and enjoyed the conversation that we had the other day in my office. And I have to say, you have the biggest family attending in the 22 and a half years I have been here, and you have also got the highest percentage that have stayed for the questions.

Mr. SCALIA. I see that Isabella left, the 5-year old.

Senator ENZI. She was probably the one understanding the questions, too.

[Laughter.]

Senator ENZI. I appreciated Senator Murray's comments about pay gap. It is something that I have been concerned about for a long time. But, I am an accountant, and now you have to settle for the accountant's questions.

If anybody is not being paid the same thing for the same job in the same company, I will help get them to a—get an attorney that will prosecute on it. That is what the law is. It is not that everybody is going to get the same wage that is doing the same job regardless of what company they work for and the other person might work for.

Some of the most fascinating hearings that I have been at here have been ones where people were—had gone into non-traditional jobs. I remember having a young lady sitting where you are sitting and talking about how she had always wanted to be a brick mason, and she was, and she got to build some flower boxes, and then she got to build some patios, and then she got to build some fountains. And at the present time, she was hanging marble on New York skyscrapers at high altitudes. We asked her what her pay was, and I can tell you that she exceeds anything that we make.

If we can get more into the non-traditional jobs and have them trained, then we do not have to worry about the minimum wage as much because minimum wage is minimum skills. When you first hire somebody, you do not know what their capabilities are. You have to spend a lot of time training them for the work that they are doing. And, when you increase the minimum wage, it increases everybody's salary. I mean, you cannot put the lowest one up above the next one in skill level.

It escalates everything, and that is good, provided the business can afford to do that, but they have to have the economy to do that. I have got to say that the Tax Cuts and Jobs Act did help the economy a little bit. It blossomed the economy. I had a little bit of a role in that, and so I get a little upset when anybody mentions the trillion and a half deficit. That was as though that bill would make no difference in the economy. That is how that scored.

We all thought that it would make some difference, and it has made a difference. Last year, there was more revenue coming into this Country from taxes than there had been any previous year.

And now this year, we are beating last year for some of the overseas money starting to come in.

There are a number of things that pay into these—play into these things, and one of them, of course, is job training. And the last two states in the Nation to get a Job Corps training center were New Hampshire and Wyoming, and we both have job training centers now, and I think they are making a difference.

What are your ideas and priorities for what you would like to encourage—accomplish in terms of job training? And does the Job Corps fit into your vision of such training?

Mr. SCALIA. Senator, briefly on the subject of the economy and the minimum wage, yes, we have been talking today about the minimum wage a bit. But, as you know, there are other factors that sometimes are even more important to the well-being of American workers and how well jobs pay. And right now, we are, in part because of the act that you mentioned, we are looking at virtually record-low unemployment, record-low unemployment for African-Americans, Hispanics. We are looking at more than a year of 3 percent wage growth, and people at the lower end of the wage scale are enjoying some of the biggest benefits. So it is important to enforce the minimum wage law, but we should not lose sight of the changes that we have seen in our economy as part—partly as a result of this President's policies.

With respect to Job Corps, that is an important responsibility of the Department of Labor. You and I spoke about I think a new center that you have near the Wind River Range. And I think that, again, that is one of a number of different ways that the Labor Department helps workers, but also helps America's productivity by matching interested, willing workers with businesses that have the kinds—that have the need for the kinds of talents that they are bringing.

Senator ENZI. Thank you. And Wyoming had some people that invented something called Climb Wyoming, which is for single moms to get non-traditional jobs. They are driving trucks and managing warehouses, and the programs are being copied by a number of other states now.

My time has expired.

Senator Rosen.

Senator ROSEN. Thank you, Senator Enzi, and thank you, Mr. Scalia, for your willingness to serve and for meeting with me yesterday.

Mr. SCALIA. My pleasure.

Senator ROSEN. I enjoyed meeting with you, as well.

I want to talk a little bit about Nevada and Nevada's test site where we are responsible for the integrity—personal integrity of our nuclear arsenal.

The Department of Energy Employees' Occupational Illness Compensation Program, what it does is provide services to former Energy employees, like Nevada's nuclear test site workers, and compensation for work-related illnesses developed as a result of exposure to radiation and toxic substances. These hard-working Americans have sacrificed and served our Country by working at test sites and other locations that are essential to defending our Nation from attack.

I have a deeper question, so I am just going to ask this yes or no. Are you aware of this program at the Department of Labor?

Mr. SCALIA. I am. I think it used to go by the name of EEOICPA——

Senator ROSEN. Yes.

Mr. SCALIA. ——was the acronym?

Senator ROSEN. Yes. It is a hard acronym, so——

Mr. SCALIA. I could not spell that acronym, but I think I can pronounce it. But it was a program that was having some problems when I was at the Department before. I do not know how it is doing now, but——

Senator ROSEN. Well, let me finish——

Mr. SCALIA. ——I know it is on the radar.

Senator ROSEN. ——and I am going to ask a question about working on it and maybe making it better.

I understand from our home healthcare workers in Nevada that changes implemented by the Department earlier this year have made it harder for former Atomic and Energy workers to get their claims processed and to access the benefits to help them afford their healthcare because of these—because of their prior working conditions.

What I really want to do is ask you if you will commit to looking at this program, working to streamline the claims, the approval process, and specifically implementing an electronic claim so that Energy workers, many of them who are so sick—they are aging, they have chronic pain. They really need to get the care that they need.

Mr. SCALIA. Senator, I am not familiar with the particular problem that you are referring to, but I would be interested in reviewing it, studying it more, and—if I am confirmed, and working with you to address it.

I do recognize that there are some Labor Department programs that are not as attuned as they could be to changes in our economy and changes in how people communicate, how they access and submit information. There are other program areas where we would benefit, and I think have tried to benefit, by greater reliance on electronic communications.

Senator ROSEN. I look forward to streaming—streamlining that for you to benefit their care.

I want to move on quickly to workforce and apprenticeships. I know they have been touched on here before. Registered apprenticeships, of course, popular across the country, very popular in Nevada. As I mentioned in our meeting yesterday, we have more than $20 billion worth of construction projects just in the Southern Nevada area alone.

Our carpenters, our electricians, they have very robust training programs, and so what we need to work on is those nationally recognized credentials. Apprenticeships strengthen our economy. We know they create pathways to good paying careers and help meet our Country's current workforce demand in middle-skilled job.

For all those reasons, it is troubling to me that the administration is not supporting registered apprenticeships programs. The President only requested $160 million for the Office of Apprentice-

ship, only a small increase, and we need to help our businesses develop these skills so we can continue to grow our communities.

The Department has failed to properly staff the registered apprenticeship program. Six to eight office apprenticeship director positions are vacant, including one in Nevada. These vacancies are in the Employment and Training Administration's regional offices, and of course at Job Corps.

If confirmed, will you commit to properly staffing, to increasing the staffing, and to working on promoting these registered apprenticeships that will really build our Nation's economy?

Mr. SCALIA. Senator, the apprenticeship programs are, I think, very important to our President. He has made it an area of emphasis. There has been interagency interest within the executive branch in looking at ways to improve apprenticeship programs. And as you are noting, there is an ongoing rulemaking——

Senator ROSEN. There is a vacancy in Nevada. I have $24 billion in construction projects. I need some more apprenticeship programs.

Mr. SCALIA. Yes. I can commit, if I am confirmed, Senator, to take a look at that because this administration is interested and supportive of these programs. And if there is a vacancy causing a shortfall there, that is something that, if I am confirmed, I would want to take a look at and see if we can address it.

Senator ROSEN. Thank you.

Senator ENZI. I will yield the chair back to the Chairman, and also yield any additional time in case I do not make it back.

The CHAIRMAN. [Presiding] Thank you, Senator Enzi, and thank you for chairing the Committee.

Senator Hassan, are you ready?

Senator Hassan.

Senator HASSAN. Well, thank you, Mr. Chairman, and thank you to Ranking Member Murray, as well. Thank you, Mr. Scalia, for being here today. Congratulations on your nomination.

Mr. SCALIA. Thank you.

Senator HASSAN. Thank you for meeting with me earlier this week. And I just want to thank your family, too. Public service is a family affair and a family commitment, and I am grateful for your family's commitment to public service.

I wanted to just start on the issue again of the rights of workers with disabilities. We have had a little bit of a discussion about it.

Throughout your career in a number of cases, you have represented companies that denied workers with disabilities needed accommodations. In a letter to Senator Ted Kennedy during your nomination to be the Labor Department Solicitor in 2001, you named one particular disability case, EEOC versus UPS, as in the top five most important legal issues you had worked on. This case was ultimately used to narrow the Americans with Disabilities Act and its protections for workers with disabilities by permitting employers to limit employment eligibility based on a perceived disability and how it limits a prospective worker's activity.

I will just note in the discussion about 14(c) that you just had with Senator Kaine, that is a little bit of what we are trying to get at. New Hampshire was the first State in the Country to repeal the sub-minimum wage for people with disabilities, which I will note

we did because the business community came forward and said this is not right or fair. And it was, again, about pre-judging people with disabilities and their capacity, something that I think we have been trying to change over time.

In the case of your private law practice and in the case—the UPS case that I just cited, I know you were representing your client as a lawyer, but today I would like to know your personal views because I think that is relevant should you become Secretary of Labor.

Do you believe that workers with disabilities are entitled to accommodations in the workplace? And if so, can you provide an example of the type of accommodation you think they are entitled to?

Mr. SCALIA. Senator, I appreciate how important these issues are to you and the work that you have done, including with respect to 14(c). And if I am confirmed, I would welcome the opportunity to speak with you about it further because, as I think we discussed, I see this as an area where people across the aisle historically have had—found ways to work together. As you know, the Americans with Disabilities Act was signed by President George H. W. Bush.

Senator HASSAN. That's right.

Mr. SCALIA. With respect to accommodations, of course the law does require workplace accommodations, and I think that they are a good thing for the workers and for business, as well. There are a range of different things, as you know, that can be appropriate accommodations. You see, for example, accommodations to enable people who need a wheelchair to get about to work more productively in the workplace. At times, there can be accommodations to help people who have hearing problems to function fully in the workplace. There is a range of things.

I would like to talk briefly about that EEOC case you mentioned, but I want to emphasize, too, I have spent a fair amount of time with clients, explaining to them both the legal obligations they have under the ADA, but also ways that they can satisfy them because a lot of managers, shop level managers, think, I can't do that.

Senator HASSAN. Right.

Mr. SCALIA. That is impossible. Or, we have never done that.

Senator HASSAN. Let us move on just a second because I am limited in time, and I appreciate that answer.

I also want to touch on the issue of disability claims in terms of systemic discrimination, because you have also argued that such claims brought by a class of workers with disabilities are not suitable for class action because each case required individual proof.

You mentioned in your answer to Senator Collins that you had represented clients pro bono who needed representation when they thought their disability was impacting their treatment in the workplace.

I would like to make sure that clients do not have to go finding a lawyer who will be willing to represent them pro bono. If there is systemic discrimination, I would like the Department and its leadership to really move to eliminate a system of discrimination.

Can you give me your thoughts, not in your past representing clients, but about the role of investigations concerning systemic disability discrimination?

Mr. SCALIA. This is an area that is the responsibility of the EEOC to a great extent, as you know. I do think that in areas where it is difficult for one reason or another for individuals to come together and bring a class action, there may be a greater demand on the Federal Government to step in.

When I was at the Labor Department before, an area of emphasis for me was low wage and immigrant workers. I met with my staff on ways we could change our programs to better address those conditions because I believed that those were people among those most likely to be victimized and least likely to be able to address it. And so I think in circumstances where class actions are harder to bring because of the Supreme Court's rulings and because of the rules that govern them, there may be a greater demand on the Government.

As you know, at the Labor Department we have what we call ODEP, which is an office dedicated to helping with research and, in some circumstances, outreach and education on accommodating people with disabilities.

Senator HASSAN. Thank you, and I notice I am well over time. So thank you for your indulgence, Mr. Chairman, and thank you Mr. Scalia.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Jones.

Senator JONES. Thank you, Mr. Chairman. Thank you, Mr. Scalia, for being here, your willingness to serve, and also for the visit yesterday.

I would like to revisit a couple of questions asked by Senator Murphy and Senator Kaine regarding protections for LGBTQ individuals in this Country because, quite frankly, I think we are kind of dancing around the heart of the matter.

Right now there are three Supreme Court cases in front of the court that will be heard in October concerning discrimination in the workplace for LGBTQ individuals. The EEOC said the Civil Rights Act of 1964 guarantees protections from workplace discrimination for LGBTQ individuals. The Trump administration, as I understand it, has taken a different approach and said that that cannot—they cannot read the 1964 Act to apply to discrimination based on sexual orientation.

What is your position? You are not—we are not here as a judge like your dad was. What is your position with regard to the Civil Rights Act and whether or not it can protect those LGBTQ employees from discrimination based on their sexual orientation?

Mr. SCALIA. Senator, this is an area where, as I think you are suggesting, to a significant extent that the Supreme Court has stepped in and spoken and established certain parameters. And then when it relates particularly to the Labor Department, President Obama amended the executive order administered by the Department regarding discrimination to include LGBT. And President Trump has reaffirmed his commitment to that. That is a law that I would have, if I am confirmed, responsibility for enforcing, and that I—I would not hesitate to do so.

With respect to the cases that are now in the Supreme Court, I think that the Department of Justice has taken one position. I do not know currently what position is being staked out by the EEOC,

but I do not believe that the Department of Labor has been called to present its views because it is not a statute administered by the Department, again, focusing on the statues administered by the Department and the executive order.

As I said back in that college piece, prejudice is abhorrent. I agree with that. It is not something that I have tolerated in my workplace, and I would vigorously enforce the laws in my responsibility as Secretary if I were confirmed in that important area.

Senator JONES. I appreciate that. I am concerned, though, that from a private sector, that the—should these cases not go the way that I think they should go, then the LGBTQ folks are going to be without any real enforcement under the law.

What I am concerned about, if you couple that with the administration's proposed religious exemption rules, which I believe gives folks, under—using Federal tax dollars the right to discriminate folks.

What do you believe—what is your view on that issue and the religious exemption right now? Because we—times have changed a lot. We have had the Obergefell decision, but we have also had Hobby Lobby, and I think people can hide behind that. I am all about religious freedom. I really am. But I do not want that religious freedom to be used to discriminate against people in the workplace, and I am afraid that the proposed rule with the Department of Labor and the administration is going to do just that. And, so, how do you reconcile those two?

Mr. SCALIA. Senator, I think your question began by asking about the cases in the Supreme Court and, we will see what the court decides.

Precisely who to protect from discrimination in the workplace or elsewhere often ultimately is a decision to be made by Congress, or states and locales. The executive branch and the Department of Labor can provide a role in helping Members of Congress make that decision. And then if the Supreme Court does not address these issues in a way that Members of this Committee or Members of the Senate think is appropriate and legislation is enacted, then, again, that is an important role for us to make sure it is enforced.

With regard to the rulemaking that you mentioned, this is, Senator, an ongoing rulemaking within the Labor Department concerning Federal contractors who are religious organizations. And, as I understand it, it seeks to update the existing rule to protect religious rights in a manner more similar to the way that is done under the law enacted by Congress, Title VII.

There are, I know, strong views. I have read I believe at least one letter—I think it was submitted earlier this week—by a member of the Committee on the rule. And if I am confirmed, I am going to take a careful look at that rulemaking to see that we get that balance right between our interest in protecting religious liberty on the one hand, and on the other hand not discriminating improperly on other grounds.

Senator JONES. Thank you, Mr. Scalia. And I know, Mr. Chairman, I would like to just add that I appreciate Congress' role. Unfortunately, the way the Senate of the United States is operating right now, we do not do anything unless the administration expresses a willingness to sign it and sign on.

I would urge, if you are confirmed, to help regard and make sure that protections for LGBTQ people are across the board, private and public.

Thank you so much.

The CHAIRMAN. Thank you, Senator Jones.

Mr. Scalia, we have—except for my questions, which I will ask in a minute, we have completed one round of questions, and I will stay in case Senators have a second round of questions. But let me ask a few, and then I will turn to Senator Murray, and then we will see what other Senators might come back.

There have been a number of allusions to your representation of clients and the clients' views. You practiced law for a prominent law firm for a long time. You have probably represented some clients who were pretty good people, or my experience with a law practice is people who are in real trouble. And we have a very good lawyer over here, a trial lawyer, defense lawyer, Senator Jones. He has probably represented some real scoundrels in his day because that is mostly politicians. They have needed a really good lawyer.

[Laughter.]

The CHAIRMAN. If I am not mistaken, when he was elected to the U.S. Senate, he was the president of the National Trial Lawyers or something. No, wait. It was the District Attorney—U.S. Attorney. What was it?

Senator JONES. National Association of Former U.S. Attorneys.

The CHAIRMAN. Yes. But he is such a good prosecutor that people in trouble I will bet have come to him to get out of trouble.

One of my earliest lessons in United States history was about John Adams, who was President of the United States. Before he was President of the United States, he was a lawyer in Boston. If I remember right, he represented a British colonist who had murdered or killed a British soldier, which had to be a very unpopular thing to do in the midst of the American Revolution.

I wonder if President Adams' representation of a British soldier who had killed an American colonist—I wonder if you would want to reflect on that story in American history and talk about your representation of so many clients over a period of time, and the difference between your views as Secretary of Labor and what your views might be as a very effective advocate.

Mr. SCALIA. Well, yes. With respect to John Adams, I should say I was blessed with an extraordinary father, but with an extraordinary mother, too, who is Boston Irish and loved John Adams. And I lived in Virginia, and she did not care much for George Washington or Thomas Jefferson, but I had—I learned a lot about John Adams and Samuel Adams, and other things, by the way.

As I said, my mom was Boston Irish, and I remember growing up as a kid and my mom telling me there used to be signs when she was a kid, No Irish. So, that was—part of my upbringing was my mother, Irish, telling me about the kind of just, blatant, shameless, overt discrimination that she witnessed as a kid.

But yes, I learned about John Adams and that story, which you have mentioned, Chairman Alexander, is one of the great stories in American history. The Boston Massacre was, a terrible event. It was a seminal event in the American Revolution. And John Adams did the deeply unpopular thing of representing these British sol-

diers and getting their acquittal, and it is a wonderful story about the Bar, about lawyers and their obligations—sometimes their obligation to do things that they disagree with. And I am proud to have had the representations that I have had in the business world and have represented my client zealously. But you are absolutely right that I am not necessarily my clients. I will seek to defend them, to vindicate their rights, but that does not mean that I necessarily think that what they did was proper, or that I——

The CHAIRMAN. Well, I would assume that some of your clients came to you because they were in trouble. Is that right?

Mr. SCALIA. That is usually why you——

The CHAIRMAN. I mean, you just don't have a lawyer to lunch at X hundred dollars an hour, but—if everything is doing fine.

[Laughter.]

Mr. SCALIA. Sadly, they were not coming just because they liked me.

The CHAIRMAN. Yes.

Mr. SCALIA. As I have suggested earlier, part of that relationship with my clients is there is what I am doing in court and defending their rights and addressing what their rights are under the law. But on the other hand, there can be a separate conversation sometimes with a client where I know, and maybe they know, that there was something done that was wrong and we need to find a way to fix that. And that is part of my responsibility, and a part of my job that I cherished.

Then finally, of course, I have had the U.S. Government as a client before. I have—this would be my fourth time in Government, including as the principal law enforcement officer for the Department of Labor. And of the clients that you can have, that is the most important. That is the weightiest and gravest responsibility. It meant a great deal to me when I was Solicitor. And if I were confirmed, I would certainly, again, be so mindful of the special duties that come when you are representing the United States Government, and when you are looking out for people who lack the means to care for themselves.

The CHAIRMAN. Thank you for your answer.

We will now begin a second round of questions, and I will go in a minute to Senator Murray.

But I have—I have noticed over the last several years and really been concerned—and this is not a Republican or Democrat issue—if you are an effective lawyer, you are going to be representing a lot of people. You don't start out by representing people whose views agree with yours. There are certain ethical responsibilities lawyers have, but you represent people who have a right to be heard, to get justice before the Bar. In our society, we need to remember the story of John Adams and the British soldier whom he represented. That is an important part of our system of justice in this Country. Everyone is entitled to a fair hearing and very effective advocacy now because of Supreme Court rulings, and I don't like to see nominees, or lawyers who are not nominees, criticized for effectively representing people who have different views than someone else.

Senator Murray, your turn.

Senator MURRAY. Thank you, Mr. Chairman.

Mr. Scalia, back in 2001, when you appeared before this Committee for your nomination as Solicitor, I asked you a question about the pervasive problem of workplace harassment. And unfortunately, little has improved over the last 18 years.

Over the past 2 years of the Me Too movement, countless women and men have come forward to share their stories, and I have heard from domestic workers and hotel housekeepers and fast food workers, and many others, about the harassment that they have faced in their workplace and how much they have feared coming forward and what—I believe we have to do better.

Earlier this year, I introduced the BE HEARD in the Workplace Act to help prevent and address workplace harassment and ensure that all workers are treated fairly and with dignity. Now, as I mentioned in my opening remarks, you have represented corporations that defended against allegations of rampant harassment—the Ford Motor Company against more than 30 female workers alleging sexual harassment and retaliation at the Chicago assembly plant. Women there reported unwanted touching, unwelcomed sexual advances, requests for sexual favors, and attempted rape.

Many women never speak out about harassment in the workplace because they are afraid of being fired, so I am really glad those women did speak out and speak up about their experience in the workplace. And I wanted to ask you, do you agree that the laws and regulations on the books today are too weak to actually adequately protect workers from harassment and discrimination at work?

Mr. SCALIA. Madam Ranking Member, we spoke yesterday when we met about sexual harassment in the workplace. I know what an important issue it is to you, and I have, as you mentioned, spent a number of years in the field of labor and employment, among other things, dealing with issues of harassment. And I was struck and disappointed, too, as the Me Too movement took off with the extent of mistreatment that we learned about at different workplaces. So, it is, and continues to be, a problem. It is one that in my practice I have helped clients try to address, help them improve their discrimination policies, help them improve their policies regarding respecting whistleblowers or those who have reported a potential harassment. As I said in my opening, I have had some very difficult conversations with clients where they have wanted to——

Senator MURRAY. I appreciate that experience, and you did speak to it. But I just wanted to ask, in that experience, do you think our laws are strong enough to protect workers, or do you agree that we need to strengthen our laws so that they have protections in place today?

Mr. SCALIA. I think that—honestly, Senator, I think we do have some strong, important protections in place. I think education on those protections sometimes is needed. I do believe that it is important to have vigorous enforcement of the rights of women and others against harassment. And then if the Congress were to conclude that even more tools were needed and the Labor Department were to become involved in that, I would certainly——

Senator MURRAY. But you would not lead any efforts or speak out in any efforts to do that, which really concerns me because in my experience, it is very—the current system is very ineffective.

Mr. SCALIA. If I could just respond to that briefly, Senator. Legislatively, if I were confirmed, I would view my job as following Congress' lead, and if new laws were enacted, to enforce them. But as Secretary, there are things that I could do and would look into doing——

Senator MURRAY. Yes.

Mr. SCALIA. ——as relates——

Senator MURRAY. I will just generally say that many of your answers have been that you will follow the law. Obviously, we all expect any Secretary to do that. But oftentimes our Secretaries need to step up and say our laws are not effective enough or encourage legislation. I hope you would think about that, as well.

I only have a few seconds left in my second——

The CHAIRMAN. Take your time.

Senator MURRAY. Okay.

The CHAIRMAN. Whatever you want.

Senator MURRAY. I wanted to ask you about the fiduciary rule because a lot of our economy has really shifted from traditional pension, where the risk is on the employer, to plans like 401(k)'s, where workers face all of the risk; yet, these savers who needed help figuring out their investments have been surprised to learn that professional advisors are today under no obligation to put the needs of savers and their families first, and that conflicted advice costs families billions of dollars annually.

In order to make workers help manage the risk they bear in retirement, the Obama administration worked to help retirement savers get investment advice that was free from conflicts of interest. You have been an outspoken critic of that commonsense protection. You have called it a regulatory Godzilla. Even after several courts upheld the fiduciary rule among legal challenges, you fought to get it overturned.

I wanted to ask you just this simple question: Do you think families who are seeking professional investment advice about their retirement savings deserve advice that is in their best interest?

Mr. SCALIA. I do think that they should be able to seek that advice, and Senator——

Senator MURRAY. And know that when they get it, it is in their interest, not the person who is advising them?

Mr. SCALIA. I think that that should be available and they should be informed of the nature of the advice they are receiving and if there are conflicts.

This is a case where, as the Chairman and I were discussing earlier, I was retained by clients to address a rule that was—it was a controversial rule. Thankfully, the Security and Exchange Commission has now stepped in and itself adopted what is called a Best Interest standard with respect to broker/dealers, who are folks that ordinarily are regulated directly by the SEC, rather than by the Department of Labor.

But I, again, having worked at the Department before, I am very mindful of the special role the Department has in protecting pensions and workers' retirements.

Senator MURRAY. You have had a lot of work done on this in overturning the rule. Would you recuse yourself from participating in DOL's forthcoming revised fiduciary rule because of that?

Mr. SCALIA. As you know, there are Federal ethics rules that will govern what matters that I can work on when I am at the Department where there might have been some prior connection on my part or the part of my firm or a client. And so in the case of the fiduciary rule, I would seek guidance from the designated agency ethics official at the Department of Labor regarding what my ability to participate would be.

Senator MURRAY. Okay. And one final on this. You are obviously being nominated to lead the Department of Labor, which Congress explicitly selected to oversee retirement investment advice. In the wake of the Studebaker pension failure, Congress wanted to provide a higher level of protection for retirement savings than investments overseen by the SEC; yet, you have suggested that the Department of Labor should allow the SEC to oversee the fiduciary rule, and that is ironic since you spent a significant part of your career attacking the SEC rules.

If you are confirmed as Secretary of Labor, do you intend to cede DOL's authority to the SEC?

Mr. SCALIA. If confirmed, I would not cede responsibility to the SEC. I engaged in some vigorous actions as Solicitor to help protect the right of retirees to their pensions. I mentioned the Enron pension plans and actions that I took there. I worked particularly closely, actually, with some of the lawyers in that office at the Labor Department and know how important that mission of the Department is.

I will say that the Labor Department's mission, although very important, is focused on employment retirement savings. One of the concerns raised by the fiduciary rule was that they were actually treading on the SEC's jurisdiction. So I think part of what is necessary in the Government is making sure that there is the proper balance between the different regulatory authorities, and I would want to, if I am confirmed, work with the SEC if necessary to strike that balance correctly.

Senator MURRAY. Okay. Thank you. And thank you for the additional time. And I would ask unanimous consent, Mr. Chairman, to enter 16 letters in the record expressing concern or opposition to the nomination.

The CHAIRMAN. So ordered.

[The following information can be found on page 73 in the Additional Material.]

The CHAIRMAN. Thank you, Senator Murray.

As a courtesy to the witness, we are going to take a five-minute break before we proceed with the second round of questions, but I will be glad to stay here as long as Senators would like. The Committee is in recess for 5 minutes.

[Recess.]

The CHAIRMAN. Thank you, Senator Murray. We will continue with our second round of questions.

Senator Casey.

Senator CASEY. Mr. Chairman, thanks very much.

Mr. Scalia, I know you have had a long morning and just have a couple of follow-up questions. I will try to be brief in the interest of time for colleagues, as well.

Senator Kaine had asked you about employment of Americans with Disabilities, and I will not—I will follow-up with you later, but I was hopeful that maybe that is something that, if you were to be confirmed, that you could work together with us on. The particular issue is competitive integrated employment. I have the leading bill on this in the Senate, and I hope we talk more about that.

Also, on the question of disability claims and what happens in the workplace, obviously Department of Labor plays a big role in that. The United Parcel Service case that Senator Baldwin referred to, and others, I have real concerns about how you might approach issues that were involved in a case like that, which did narrow the protections for workers under the Americans with Disabilities Act, so I will be following up with you on that.

I wanted to ask you in particular, and I am going back to the issue of what happens to one category of workers—coal miners. The Black Lung Disability Trust Fund is running out of money to cover the cost of both health and disability benefits for coal miners with black lung disease. The Department of Labor administers claims filed under the Black Lung Benefits Act.

I would ask you just a simple question: Do you believe that coal companies that benefit from the hard labor of those miners should be responsible for paying the health and disability benefits for those miners who develop black lung disease, which is unfortunately on the rise now?

Mr. SCALIA. Senator Casey, I share your hope that, if I am so lucky as to be confirmed, the ability for folks with disabilities to participate more fully in the workplace is something we might work together on. I think, as we discussed earlier, there are reasons for people of sort of all stripes of views and beliefs to want to help and work together and make that happen. And so, I would welcome the chance to contribute to that.

I feel I should respond briefly on the EEOC case that has been mentioned a couple of times. That was a matter I was handling for a client. I was not, that I can recall, personally seeking to make any significant change with respect to the Americans with Disabilities Act.

The Federal Government had brought this case against my client. It was seeking to force UPS to hire drivers for somewhat heavy trucks who had vision out of only one eye, and UBS—UPS had some safety concerns. There were Federal rules saying that to drive a good sized truck, it was important to have vision out of both eyes. And so that—I was just defending them in the case, but I was not seeking to make any significant change in the law.

Finally, with respect to coal miners, I confess that I would need to study more fully the exact parameters of the obligations that coal companies currently have to their workers, but my understanding is that they are currently obligated to make contributions to fund the healthcare.

Senator CASEY. The contribution is a lot smaller. That is the problem. That is why the trust fund has run out of money.

I would say on both issues—and I know we are short on time—that I realize that as a lawyer in private practice, you have clients that you represent. You have to represent them zealously. But you are going to be wearing a different hat if you are nominated—or

if you are confirmed. And just to say, well, I hope we can work together on that, or I cannot comment on a bill, or I cannot—you can be, in this position, an advocate. And both your advocacy, your point of view, your attitude about these issues matters, and I would hope—I would hope that, if you are confirmed, that you would act like a champion, not just business as usual.

The reason I mention the ADA is it is about more than a quarter century old, and there are two problems with it. Number one is we have not achieved the goals of the Americans with Disabilities Act; nowhere close in large measure. And number two is there are constant hits that are taking place over time that are undermining the goals of the Act. So, we need champions in both parties, in both branches. That is all I would say, and I know I am out of time, but thank you.

Mr. SCALIA. Thank you.

The CHAIRMAN. Thank you, Senator Casey.

Senator Murphy.

Senator MURPHY. Thank you, Mr. Chairman, for the opportunity for a second round.

I wholeheartedly agree with Senator Casey. Obviously your chief responsibility is to enforce and implement the law, but good Secretaries are also advocates for change in the law when they think that we can do better. And you obviously will have a lot of decisions to make about priorities when you get there.

One area of law in which the prior Secretary was an advocate on was the issue of mental health parity. This is the law that requires our insurance companies to treat mental health coverage just like they treat coverage for all sorts of other conditions.

The President's commission, President Trump's commission, on combatting drug addiction and the opioid crisis called on the Department to aggressively enforce the Mental Health Parity and Addiction Act. It suggested additional authorities be given to the Department of Labor, which Secretary Acosta agreed with; in fact, asked this Committee for additional audit abilities and civil monetary penalty authority for violations of the law.

Maybe I won't ask you to, weigh in specifically on those recommendations, but I think we were really making some progress until Secretary Acosta's departure in trying to get this Congress to give the Department more authority. And I just want to get your confirmation that you will be, an active participant in what—in the work that the Department of Labor can do to combat the drug addiction crisis and the mental health crisis in this Country. You have an active role to play to make sure that insurance companies do not continue to be part of the problem.

Mr. SCALIA. I would welcome that opportunity, Senator. I had a good conversation, among others, with Senator Smith, too, about these issues. And when I was speaking to her, I think I mentioned that, as I look at people that I know that are struggling with medical problems of these days, it is not I broke my leg on the job or something of that nature, although that still happens. It is difficulties with substance abuse or depression or the like, and it—I agree that it is very important that we not slight the needs that people have in that area or treat them as less worthy of attention than other kinds of illness or injury.

Then with respect to opioids particularly, it is a National crisis. I am well aware of the role that the Labor Department can play. I think it has been doing some good things. I had some good conversations as I was getting briefed by personnel at the Department, some good conversations about some programs that are in the works. And that is an area that, again, there is room for consensus and cooperation because there are ways to help these people with opioid addiction better than we are doing. And I think the Labor Department has made some strides in its workers' compensation program. But also, there is—business wants to help because this is one of the reasons we have a skills gap right now.

Senator MURPHY. Well, we just all know that when you go to access a mental health benefit or an addiction benefit, you go through all sorts of hoops that you do not have to go through if you are getting reimbursement for an orthopedic procedure, and that is a violation of the law, and the Department of Labor can help us clarify that.

Second, Mr. Scalia, the Eastern Connecticut Manufacturing Pipeline initiative is an example of these innovative efforts that are happening all around the Country to try to make sure that we are ready for all of the new defense jobs that we are funding. We have a defense/industrial-based workforce crisis in this Country.

You do not have a lot of experience in workforce development, but that is a big part of your job, and it is vital that the Department of Labor, the Department of Defense, and state and local Governments partner together to make sure that, as we are building more submarines and more ships, more land-based military vehicles, that we have the workforce to fill those roles. And there is just no way to do that without the Department of Labor playing an active role. We could not have gotten that partnership off the ground in Connecticut. We just had a 92 percent job placement rate without the Department of Labor.

Secretary Acosta came to Connecticut, spent a day looking at the partnership, was I think very impressed by it. I would invite you to do the same, but I would also love to know that this will be a focus of yours because it will be a crisis in this Country if we cannot meet that workforce need.

Mr. SCALIA. I welcome the chance to visit, Senator, if I am confirmed. And I am deeply appreciative, and even more so having come through this process now, of the role the Department of Labor does play in sustaining programs like what you just described.

The CHAIRMAN. Thank you, Senator Murray—Murphy. I was thinking of calling on Senator Murray, but thank you, Senator Murphy.

Senator Murray, do you have any other comments or questions you would like to make?

Senator MURRAY. Well, Mr. Chairman, I think there were several Members of our set who wanted to come back with additional questions but were unable to come back, so I know they will have questions they will submit for the record. I will, as well, on a number of topics that I want to get additional information from the nominee. And I would really seriously hope that we get those back in a timely fashion so that we can all have the information we need in moving this forward. So thank you again, and thank you, Mr.

Scalia, for being here, and thank you to your very large family for sitting behind you for a very long time.

Mr. SCALIA. Thank you so much.

The CHAIRMAN. Thank you, Senator Murray, and Senator—I want to thank my colleagues for conducting a confirmation hearing that included vigorous questioning of the nominee, which one would expect for someone from—who has been nominated by any President for Secretary of Labor. There is probably no set of issues about which we have more different opinions politically than on labor issues, but with treating the nominee with the kind of respect that a Presidential nominee should have. So I thank my colleagues for that.

I thank Senator Murray and her staff and our staff for the professional way they have conducted the various discussions we have in connection with the nomination.

Mr. Scalia has—it has been two months since the President made known his intent to nominate Mr. Scalia. We have had all of his records sent for three weeks. We will—we have had good questions today, and we will vote next Tuesday.

I will not have any further questions except to make a couple of comments. One is there are opportunities, as Senator Murphy indicated, despite our political differences, to get some pretty good results, and we often did on the Committee. Senator Murphy has been a part of that with mental health parity, so I hope you will take those opportunities seriously.

Senator Murray and I are regularly looking for areas of agreement where we can move ahead. We cannot do anything in the Senate unless we have bipartisan agreement, and sometimes we get it. And usually, when we do, we are in the middle of it, so I would encourage you to continue your visits with Democratic, as well as Republican, Members of this Committee and identify areas where the administration and Members of the Committee can work on.

From my part, I hope you will take a look at association health plans. We have big differences on Obamacare, but one things that is clear is people who make $50,000 a year in Tennessee, songwriters, independent business people, they are paying through the nose for their health insurance, and the association health plans are a help for that.

There is a rule that Secretary Acosta put out that was stopped by Federal court, but Avalere, the independent agency that reviews such—or reviews health insurance, estimated that this kind of coverage could help as many as three or four million Americans reduce their insurance premiums by about one-third. Now, one-third of a $20,000 a year insurance bill is a lot of money. It is several thousand dollars. And this is not junk insurance. This is insurance of the kind the big companies have. It is insurance that includes preexisting conditions and all of the—and those sorts of benefits. So, the whole point of it is, if it is good enough for IBM, why is it not good enough for the small business?

I would encourage you, as a tactic, not to try push the envelope as far as you can and get overruled by the courts, but—my piano teacher used to tell me at a recital, play it a little slower than you can play it. So, if you can get a rule out there, or enforcement out

there, that is clearly within the law, go ahead and take that opportunity because there are lots of people—in Las Vegas, for example—in small business who are already signed up. There are many in Tennessee who would like to sign up. And I would like to see association health plans go as far as they can within the law.

Same with the overtime rule. We need changes in the overtime threshold. It just needs to be done in a reasonable way. There was bipartisan concern about the earlier decision, so I hope that you will enforce that and come up with that in a way that is within the law. It may not go as far as somebody would like—for example, people at the Office of Management and Budget. They might want to push you a little further. Well, you do not need to go that far from my point of view. I would like to see you play it a little slower than you can play it, and make sure we get a rule on overtime and rule on association health plan and enforcement of those areas that is clearly within the law and that actually helps people.

The questions for the record will be due at 5 p.m. tomorrow. The record will remain open for 10 days. Members may submit additional information for the record within that time if they would like.

The CHAIRMAN. Mr. Scalia, I thank you for being here today and answering all the questions the Senators had. We would expect the answers to their additional questions to be here by the time we vote on next Tuesday.

The Committee will stand adjourned.

ADDITIONAL MATERIAL

LETTERS OF SUPPORT FOR EUGENE SCALIA

KEN ANDERSON AND OTHERS,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The undersigned are a group of people who have known Gene Scalia in a number of different capacities. We represent a broad political spectrum. Some of us are Democrats who have been active in campaigns for Democratic candidates at all levels of elective office. Some of us have held positions in Democratic administrations. Others are Libertarians or Conservatives who are equally active in support of a different set of candidates. And some of us are not politically active. Despite these differences, we are united in our wholehearted and unqualified support for the nomination of Gene Scalia to serve as the Secretary of Labor.

We have each known Gene for at least 15 years (some of us for more than 30 years). Some of us met Gene in college or law school. Some of us met Gene during his previous government service. Many of us met Gene through our work with him at Gibson Dunn. We all agree that Gene is a first-rate person. His intellect is razor-sharp, his judgment sound and his integrity absolute. Gene is the sort of person one seeks counsel from for the most difficult and sensitive of issues.

We would be remiss if we did not also mention Gene's openness to views different than his own. Gene's broad-mindedness is evident in his dealings with a range of people, including classmates, friends, colleagues, and others whose views differ significantly from his own. Gene enjoys healthy debate, is open to others' positions and enjoys challenges to his own views. A good number of us thoroughly enjoy catching up with Gene, among other reasons, to have a discussion/debate on any number of different topics on which we know he will (respectfully) both consider and challenge our views and on which we will be encouraged to challenge his. In these discussions, Gene's humor and decency, as well as his great intellect and respect for others and for intellectual discourse, shine through.

We are each highly confident that Gene will serve the Labor Department and our country with the same keen intellect, open-mindedness, decency and integrity that we have seen in all of our dealings with him over the years. We recommend him most heartily; our government would be most fortunate to have his service again.

Please let us know if we can provide further information.

Very truly yours,

KEN ANDERSON, TED BOUTROUS, BARBARA BECKER, SCOTT HARRIS, MARK GRANNIS, JIM HALLOWELL, JASON MENDRO, CHUCK MUCKENFUSS, ANDREW NUSSBAUM, ADAM OFFENHARTZ, MICHAEL SMALL, JEFF THOMAS, REBECCA WHITE, SAM WILKINS, BILL WILTSHIRE, MERYL YOUNG.

SERGEANTS BENEVOLENT ASSOCIATION, POLICE DEPARTMENT, CITY OF NEW YORK,
NEW YORK, NY,
August 19, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR MR. CHAIRMAN AND RANKING MEMBER MURRAY: I am writing on behalf of the more than 13,000 members of the Sergeants Benevolent Association of the New York City Police Department to advise you of our union's support for the nomination of Eugene Scalia to be Secretary of Labor. We ask that once his nomination is received in the Senate that you promptly schedule a confirmation hearing so that he may be considered by the full Senate as soon as possible. As the Department of Labor works to finalize several important rulemakings and chart a course for regu-

lating a rapidly evolving workplace, it is vital that it have a confirmed, competent leader willing to accept input from all of the Department's stakeholders.

My union's experience with Mr. Scalia dates to his previous tenure at the Labor Department, when he was a critical part of Secretary Chao' s team that developed the 2004 Overtime Rule. This rule clarified important protections for police sergeants and other first responders. It was decisive in our union's fight with the city of New York to obtain $20 million of unpaid overtime for our members.

In addition to his public service, Mr. Scalia has had a distinguished career in private practice as a management-side labor lawyer. While he has no history of working directly with unions, we never experienced—nor have we heard from any third parties who have dealt with Mr. Scalia—that he harbors any animus toward unions or their members. In fact, in an article on occupational safety and health enforcement written after his service at DOL, Mr. Scalia acknowledged that "[u]nions are among the most effective advocates for workplace safety" and "play an important role in identifying and addressing occupational hazards."

Mr. Scalia has qualities beyond his knowledge of labor and employment law that we feel make him well-suited to be an effective Labor Secretary. Throughout his career, Mr. Scalia has exhibited a capacity to place his respect for the rule of law above his personal ambitions and preferences. We are confident that he will take his oath of office seriously. We are also confident that he will recognize the limitations that the law places on him and his Department, and that he will abide by any recusals arising from his past work. In addition to sharing our union's respect for the rule of law, Mr. Scalia is also someone likely to resume the Department's past practice of giving all stakeholders a fair hearing on matters under its purview.

Our nation is fortunate that someone of Mr. Scalia's considerable abilities is willing to leave a successful law practice to return to public service. We hope that you will facilitate prompt consideration of his nomination by the full Senate so that the DOL can once again have proper leadership.

Sincerely,

ED MULLINS, PRESIDENT,
Sergeants Benevolent Association.

AIR CONDITIONING CONTRACTORS OF AMERICA,
ARLINGTON, VA,
September 19, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The Air Conditioning Contractors of America (ACCA) is the national association of heating, ventilation, air conditioning, and refrigeration (HVACR) professionals across the U.S. with a membership of nearly 60,000 industry leaders. We write in support of the nomination of the Honorable Eugene Scalia to serve as the U.S. Secretary of Labor.

The HVACR industry is a backbone of the American economy. The products ACCA members design, install, service, and maintain are responsible for ensuring information technology centers are operational, making modern medicine possible, maintaining a fresh food supply, and providing essential comfort for every home, office building, and healthcare facility in the country.

The HVACR industry is experiencing significant workforce challenges and the Department of Labor plays a pivotal role in helping address these issues. By 2022, the HVACR industry will require more than 115,000 skilled professionals to fill jobs due to retirement and anticipated growth in the industry.

ACCA supports efforts from the Department of Labor to expand industry recognized apprenticeships and promote rewarding careers in the skilled trades. Throughout his time in office, President Trump has focused efforts from his administration to drive more men and women into the skilled trades and these efforts are having a positive impact. President Trump is also advancing a regulatory agenda, including the overtime rule, that will have a positive impact on workers and small businesses.

ACCA is confident that Mr. Scalia will continue to lead efforts promoted by the Trump administration to address our industry's workforce challenges. Mr. Scalia

has a history of supporting workers, promoting workplace safety, and holding executives accountable for misconduct. ACCA believes that Mr. Scalia will also support President Trump's initiatives to promote the value a highly educated and skilled workforce to meet the growing demand in our industry.

Additionally, Mr. Scalia comes from a family that has emphasized the importance of public service. He has served our country honorably for many years and we look forward to a swift conformation by the U.S. Senate.

If we can be of any service, please reach out to Alyx Simon on my staff.

Thank you for leadership on the Senate Committee on Health, Education, Labor and Pensions. ACCA has enjoyed positive relationships with your staff and fellow Committee Members for several years.

Sincerely,

BARTON JAMES, PRESIDENT AND CEO.
Air Conditioning Contractors of America.

AMERICAN HOTEL AND LODGING ASSOCIATION,
WASHINGTON, DC
September 19, 2019

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the American Hotel and Lodging Association (AHLA), I write in strong support of the nomination of Eugene Scalia to be Secretary of Labor. Mr. Scalia is extremely qualified to serve in the role to which he has been nominated, and his swift confirmation is necessary to ensure the Department of Labor (DOL) continues to fulfill its mission to wage earners, job seekers, and retirees by improving working conditions and advancing opportunities for profitable employment.

Eugene Scalia has decades of experience as a labor, employment, and regulatory lawyer. Outside his extensive legal career, Scalia served as Solicitor of the Department of Labor under President George W. Bush's administration from 2002–2003, Special Assistant to U.S. Attorney General William P. Barr during the George H.W. Bush administration from 1992–1993, and as a speechwriter for Education Secretary William J. Bennett from 1985–1987 during the Reagan administration. AHLA believes Mr. Scalia is an extremely qualified nominee who would be a welcome addition to DOL and the President's Cabinet. We encourage the U.S. Senate Committee on Health, Education, Labor and Pensions to move swiftly to approve the nomination of Mr. Scalia.

Serving the hospitality industry for more than a century, AHLA is the sole national association representing all segments of the U.S. lodging industry, including iconic global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. The lodging industry is one of the Nation's largest employers. With 8.3 million employees in cities and towns across the country, the hotel industry provides more than $92 billion in wages and salaries to our associates and generates $660 billion in economic activity from the 5.3 million guestrooms at nearly 56,000 lodging properties nationwide.

I urge the U.S. Senate Committee on Health, Education, Labor and Pensions to approve the nominee promptly following this hearing, so the Senate may confirm him, and DOL can fulfill its mission.

Respectfully,

CHIP ROGERS, PRESIDENT & CEO,
American Hotel and Lodging Association.

ASSOCIATED BUILDERS AND CONTRACTORS,
WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of Associated Builders and Contractors, a national trade association representing nearly 21,000 members from construction and industry-related firms, we write in strong support of the confirmation of Eugene Scalia as the next secretary of the U.S. Department of Labor.

We are confident Scalia will embrace DOL's mission of protecting workers and promoting policies that put Americans to work. As a seasoned attorney with positions in the public and private sectors, Scalia has decades of real-world experience working on the issues and challenges that our workers and employers face every day. We believe he is the ideal candidate to continue this administration's mission of putting our workers first and expanding economic opportunities for all Americans.

DOL plays an important role in ensuring workers are provided with workplace flexibility and protected from policies that limit their growth potential. We trust that Scalia will focus on collaborative efforts with employers and ensure industry stakeholders' voices are heard and workers' rights are protected.

As builders of our Nation's communities and infrastructure, ABC members believe exceptional jobsite safety and health practices are inherently good for business. We understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to implementation costs and input from the business community. However, during the last administration we witnessed businesses struggle due to the DOL's numerous misguided, unnecessary, burdensome and costly regulations. We applaud President Trump for charting a different course and we look forward to working with Scalia on crafting common-sense policies and regulations.

Additionally, during his previous stint at DOL, Scalia was instrumental in the creation of the Honors Program in the Office of the Solicitor at DOL, which attracts top law school graduates to work for the department and develop their professional talents while working in public service. At ABC, workforce development is the cornerstone of our mission: we believe all Americans should develop new skills and continue their professional education to better themselves and benefit their communities. Scalia's efforts to create the honors program illustrates his focus on development and continuing education.

ABC and our members fully support the nomination of Scalia as the next DOL secretary. ABC strongly encourages the U.S. Senate Committee on Health, Education, Labor and Pensions to give him a fair and thorough hearing and the Senate to move quickly to bring his nomination to the floor for a vote.

Sincerely,

KRISTEN SWEARINGEN, VICE PRESIDENT OF LEGISLATIVE AND POLITICAL AFFAIRS.
Associated Builders and Contractors.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
ARLINGTON, VA,
September 25, 2019.

Hon. MITCH MCCONNELL,
U.S. Senate
Washington, DC.

DEAR LEADER MCCONNELL: On behalf of the Associated General Contractors of America (AGC), I write to you to express support for the nomination of Eugene Scalia to serve as the next Secretary of Labor.

AGC is the leading association for the construction industry representing more than 26,000 firms including America's top general contractors, specialty contractors, service providers, and suppliers consisting of both union and open shop firms en-

gaged in building our Nation's infrastructure. The majority of AGC member firms are small and closely held family businesses.

Mr. Scalia has a strong background in employment matters, making him highly qualified to be the next secretary. His broad perspective and experience in labor and governance issues will be welcomed at the department as it finalizes the President's deregulatory agenda. More important will be the department's focus on creating opportunities for the Nation's employers to create new, high-paying jobs. The department will also play a crucial role in rebuilding the Nation's workforce training system and making sure industries have access to trained and safe workers.

AGC looks forward to the swift confirmation of Mr. Scalia so he can lead this important agency through a smooth leadership transition and work on behalf of millions of construction workers.

Sincerely,

JIMMY CHRISTIANSON, VICE PRESIDENT, GOVERNMENT RELATIONS,
Associated General Contractors of America.

August 19, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I am writing in support of the nomination of Eugene Scalia to be Secretary of Labor. I believe that he is a superb choice for the position, and I am confident that he would do an outstanding job.

In terms of qualifications: Scalia has a tremendous intellect, and he has devoted much of his career to labor and employment law. As you are aware, he was Solicitor of Labor from 2002 to 2003, where he compiled an excellent record and earned immense respect from diverse people. In private practice, he has specialized in the field. In the process, he has also learned a great deal about Federal regulation—both procedure and substance. He counts as a master of that topic. In terms of background and expertise, he is an exceptionally distinguished nominee, among the very few most impressive and perhaps at the very top in past decades.

In terms of character: Scalia is gracious and honest, and he is unfailingly decent and kind. He knows what it means to be a public servant, and to have the privilege of serving the American public. His knee does not jerk. He doesn't kiss up, and he never kicks down. What most matters, of course, is what a public official does, not whether he is a nice guy. But in Scalia's case, his work and his character are closely related. His decency is part of what makes him someone who tends to go case-by-case, and to end up where the facts and the law take him.

In terms of his likely performance as Secretary: Scalia is exceptionally fair-minded, and he listens to arguments—carefully and always with respect. I should add in this regard that I have known him for thirty years, from his time at the University of Chicago Law School to the present. In all of those years, he has been open to the force of the argument, and he engages carefully with the particulars. (He is also able to change his mind.) I was not at all surprised to see that in the George W. Bush administration, he worked hard and successfully on behalf of workers, often trying to protect their economic interests.

I am aware that in some domains, Scalia has taken positions, in terms of policy and law, in opposition to regulations that many reasonable people strongly support. (I suspect, though I do not know for sure, that he has opposed regulations that I strongly supported during my time as Administrator of the Office of Information and Regulatory Affairs in the Obama administration.) For Scalia, as for many lawyers, it is easy to take comments or positions out of context, and to give a less-than-favorable picture of what he really thinks, or what he would do in a position of public trust. It is important to emphasize that there is all the difference in the world between a private lawyer, representing a client, and a cabinet official, working for the American people. Whether the issue involves occupational health, overtime pay, racial discrimination, or pensions, there is no question that Scalia would be keenly sympathetic to the rights and interests of working people. He does not have an ideological straightjacket. He takes issues on their merits.

With your indulgence, I will conclude with some more personal points. As a Senate-confirmed appointee in the Obama administration, I have had a firm practice, since January 2017, of neither publicly supporting nor publicly opposing any nominees of President Trump, on the theory that for officials in the immediately prior administration, silence on such matters is generally golden. This is the first time that I have broken that practice, and I expect that it is the only time that I will do so. I might add on some important questions (including several that involve the Department of Labor) it is an understatement to say that I have been concerned about policies adopted or proposed since 2017. Even—especially—in these circumstances, there is good reason to support an exceptionally qualified and exceptionally fair person to lead a Cabinet-level Department.

Scalia is a terrific choice. I am honored to support him, and I would be honored to discuss his nomination at any time.

All best wishes.

Sincerely,

CASS R. SUNSTEIN,
Robert Walmsley University Professor.

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24 July 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington DC.

DEAR CHAIRMAN ALEXANDER: I am a deaf, Hispanic immigrant to the United States and (as a result of divorce) a single mother, working full-time to support my special-needs daughter, and I have information—which I hope will be helpful in considering Mr. Eugene Scalia's impending nomination to be Secretary of Labor—about his handling of a labor/employment matter involving me. When I read the news that the President intended to nominate Mr. Scalia, I immediately thought to write this letter—on my own initiative, without any prompting from, or co-ordination with, Mr. Scalia.

In 1991, I began full-time work for a very large private employer in Washington, DC. By 1998, the work environment there had become increasingly hostile toward me, abusive, and difficult for me to bear, and I was terrified that I would lose my job. In desperation (I was heavily in debt following my divorce and living from paycheck to paycheck, just to make ends meet), I went to several labor-lawyers in the area, who advised me that they thought I had grounds to file lawsuits under the 1964 Civil Rights Act, the DC Human Rights Act, and the Americans with Disabilities Act, based on the facts of my employment situation, and on the grounds of my ethnicity/race, my hearing disability, my sex, my marital/family status, and a medically diagnosed chronic condition I was suffering from and under treatment for at the time. Unfortunately, all of these lawyers—even those who said that they were willing to take my case on a contingency-fee basis-insisted on my paying them a substantial retainer up front, and l had no money to pay them any more than their consultation fees.

Then a friend of mine recommended that I try the "pro-bono" program at Gibson, Dunn and Crutcher, and that I try to get help from Mr. Scalia in particular. I was very nervous and asked my brother (who is not deaf) to call for me, and see if I could have an appointment. I was so worried that Mr. Scalia might be too busy and turn me away (after all, I had never even heard of him before)! But he agreed to an appointment immediately. At our meeting a few days later, Mr. Scalia was so kind, and thoughtful, and patient. (I remember that he even asked to see a picture of my little daughter.) I fear I must have rambled a great deal when I told my story, but he didn't seem to mind.

Our meeting lasted a long time, but he didn't ask for a consultation fee or a retainer, and he told me right there that he and his law firm would take my case "pro bono." He said that he didn't think a lawsuit (which could take a long time) would be necessary, because often these matters could be resolved through what he called "firm negotiations," which he was fully willing to undertake for me. He made every effort to reassure me, saying that he and his associate would do everything they could to "resolve this" for me. He seemed to sense my extreme anxiety and tried his best to calm my fears. I was able to walk away with confidence and hope.

The negotiations went on for several weeks, but they were tremendously successful—much more than I had even hoped for. "Firm negotiations" is right: The employer agreed to just about everything I had asked for, and "*my* lawyers(!)" got the employer to agree to things I hadn't even thought to ask for. Not only did he and his very helpful associate negotiate around the employment problems that I was facing right then, they took great care to look ahead and watch out for my future interests. A few months later, when I was able to get a new job, with a different employer (as a result of the settlement Mr. Scalia got for me), I was impressed to receive brief word from him, saying that he had heard of my new job and hoped that my daughter and I were well. We sure were—and are . . . thanks in such great part to him.

Throughout my ordeal, Mr. Scalia went out of his way to help. He seemed especially to be concerned about not making things worse for me on the job, while he was vigorously defending my rights against my employer. Even though he had never seen me before and even though he knew I could never pay him, simple justice is what he wanted for this employee and worked hard to get. And that is exactly what he got for me. I am so very grateful to him for his efforts as my lawyer. And I hope you soon will allow this advocate for justice and fairness in the workforce to have an opportunity to serve the people of the United States—my adopted country—as Secretary of Labor.

Please let me know if you need more information from me or if I may help with Mr. Scalia's impending nomination in any way.

Sincerely,

CECILIA MADAN.

CENTRAL STAFF SERVICES, INC.
MOUNT SINAI, NY,
September 9, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing to support Eugene Scalia's nomination to be the next Secretary of Labor.

Mr. Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor. He has a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the intellectual and legal background and the temperament to oversee fair and sensible regulations that both protect employees while at the same time allowing small businesses like mine to thrive.

I would urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Sincerely,

GEORGIA PERRONE, PRESIDENT,
Central Staff Services, Inc.

August 30, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: We formerly served in various leadership positions as career attorneys and, in one case, as the Chief Administrative Law Judge, in the United States Department of Labor, and are writing to support the nomination of Eugene Scalia for the position of Secretary of Labor. We were all long-term employees of the Department of Labor and worked closely with Gene during his tenure as Solicitor of Labor and Acting Solicitor of Labor. Some of the undersigned worked in Washington, DC, and others served in Regional Offices.

Gene would bring to the position of Secretary of Labor an in-depth knowledge of the Department of Labor ("DOL") and all of the laws DOL is charged with administering and enforcing. These include the Fair Labor Standards Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, the Mine Safety and Health Act, and the Black Lung Benefits Act, among many others.

As Solicitor of Labor, Gene's "clients" were the Secretary of Labor and all of the Assistant Secretaries who headed the various components of DOL. The mission of the Office of the Solicitor is to meet the legal service requirements of DOL by providing legal advice to the Secretary and other DOL officials, representing the Secretary and client agencies in both enforcement actions and defensive litigation, and providing legal assistance in the promulgation of regulations and legislative proposals.

Gene showed great respect for the mission of the Office of the Solicitor and DOL and understood the role of the Solicitor in ensuring that the laws and regulations within the agency's purview were faithfully executed. He was very supportive of enforcement litigation to vindicate the rights of workers, both at the trial and appellate levels.

Gene would bring a powerful intellect to the position of Secretary of Labor. As Solicitor of Labor, he analyzed complicated legal issues on a daily basis. He was always willing to listen to divergent views. He quickly learned the intricacies of our laws and regulations and brought to the position thoughtful analyses and a willingness to make difficult decisions.

Gene was also very interested in pursuing initiatives to strengthen the Solicitor's Office. The most notable example is his creation of the Honors Program to attract the best and brightest law school graduates. Honors attorneys spend their first two years handling a broad range of assignments before being placed in a permanent position. The program has been in effect for 18 years now, and has been highly successful in recruiting, training and retaining a strong pool of new attorneys.

Gene's temperament is well-suited to the position of Secretary of Labor. As Solicitor, Gene headed a legal staff of approximately 500 career attorneys and support staff, located in the Washington, DC. area and in 14 regional and branch offices. He consistently treated us with respect. He was fair, open and honest and listened attentively when we discussed legal issues with him. He also displayed a wry sense of humor and seemed to take delight in interacting with people. He is very much a "people person," which made working with him an enjoyable experience.

For all of these reasons, we believe that Gene would be an outstanding Secretary of Labor in this administration, and we fully support Gene's nomination.

Respectfully,

RICHARD J. FIORE, JAYLYNN K. FORTNEY, THERESA S. GEE, CRAIG W. HUKILL, JUDITH E. KRAMER, FRANK V. MCDERMOTT, CATHERINE O. MURPHY, LESLIE CANFIELD PERLMAN, DONALD S. SHIRE, MICHAEL A. STABLER, WILLIAM W. TAYLOR, JOHN M. VITTONE, JOSEPH M. WOODWARD.

THE ERISA INDUSTRY COMMITTEE,
WASHINGTON DC,
September 19, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The ERISA Industry Committee ("ERIC") strongly supports the nomination of Eugene Scalia to Secretary of Labor and encourages the Senate Committee on Health, Education, Labor, and Pensions to vote favorably on his nomination. Mr. Scalia's experience both as Solicitor of Labor and Acting Solicitor of Labor as well as at a major law firm handling relevant legal matters makes him uniquely qualified to head the Department of Labor ("DOL"). Representing the views of large employers that provide health and retirement coverage to millions of their own employees and families across the country, we believe that it is critical for the Secretary of Labor to understand the importance of employee benefits and the impact on the Nation's workforce.

ERIC is the only national trade association that advocates exclusively for large employers on health, retirement, and compensation public policies on the Federal,

state, and local levels. ERIC member companies operate in every industry sector and most have employees or retirees in every state. As such, the work of the DOL has a significant impact on the ability of our member companies to continue providing generous employee benefits to workers and retirees across the Nation. We believe that Mr. Scalia is the right person for this job.

Mr. Scalia's experience in the Solicitor's Office at the DOL provides him with an in-depth knowledge of the DOL that will allow him to immediately engage on substantive issues. Also, as a former Solicitor of Labor, he has worked with all of the laws DOL is charged with administering and enforcing including the important Employee Retirement Income Security Act ("ERISA").

As an employee benefits organization, we are most impressed with Mr. Scalia's experience with ERISA. In addition to his work at the DOL, he has done significant work in private practice to ensure that employers are able to continue providing voluntary health care and retirement benefits, including working to preserve Federal ERISA preemption which is critical to large multi-state employers that offer benefits to employees and their families in every community in the country, as well as the fiduciary requirements under ERISA. These examples demonstrate that Mr. Scalia has a deep understanding of an area of labor law that is complicated and very important to the lives of millions of Americans who rely heavily on employer-provided health care and retirement benefits.

For all of the reasons above, ERIC urges a positive vote on the nomination of Eugene Scalia as Secretary of Labor. We are happy to answer any questions or provide additional information. We appreciate the opportunity to share our support for Mr. Scalia.

Sincerely,

ANNETTE GUARISCO FILDES, PRESIDENT AND CEO,
The Erisa Industry Committee.

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION,
WASHINGTON, DC,
August 30, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I am writing you today as President of the Federal Law Enforcement Officers Association (FLEOA) to endorse Eugene Scalia to serve as Secretary of the Department of Labor. FLEOA is the largest nonpartisan, nonprofit professional association, exclusively representing more than 26,000 Federal law enforcement officers from over 65 different agencies.

Mr. Scalia is a qualified candidate for this position, with a Juris Doctorate from the University of Chicago and an MBA from the Wharton School at the University of Pennsylvania. Scalia has continually demonstrated his appreciation for rule of law and labor policy. In serving as special Assistant to the Attorney General within the Department of Justice, Scalia became familiar with many of our members in law enforcement agencies. In his role as Solicitor of Labor during the George W. Bush administration, Scalia received exposure to all facets of the Department of Labor.

We believe Scalia's background in understanding the unique issues experienced by law enforcement and knowledge of the fundamental responsibility of the Department of Labor to facilitate the treatment of injuries sustained by Federal officers while performing their duties are the ultimate qualifications for undertaking the role of Secretary of Labor. We are confident in Scalia's ability to serve law enforcement within the American workforce.

FLEOA fully supports the confirmation of Eugene Scalia to serve as Secretary of Labor and encourages a swift confirmation.

Sincerely,

NATHAN R. CATURA, NATIONAL PRESIDENT,
Federal Law Enforcement Officers Association.

NATIONAL FRATERNAL ORDER OF POLICE,
WASHINGTON, DC,
21 August 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I am writing on behalf of the members of the Fraternal Order of Police to express our strong and unreserved support for the nomination of Eugene Scalia to be our Nation's next Secretary of the U.S. Department of Labor.

His nomination comes at a pivotal time for the Labor Department, which is finalizing important rulemakings and need a confirmed and sure-handed leader at the helm who understands these issues and can work with organizations representing the rank-and-file like the FOP.

We have every confidence that Mr. Scalia will be a partner to the law enforcement community because we had the pleasure of working with him closely in the Bush administration under then Labor Secretary Chao to help develop overtime reform regulations in 2004. The revised rules clarified important protections for law enforcement and other public safety officers, particularly those who had some supervisor role, like sergeants, yet were still fully engaged in law enforcement operations. During this process, Mr. Scalia demonstrated a willingness to listen, the ability to lead, and a commitment to an outcome that was fair to the American worker.

While in private practice, Mr. Scalia's clients were on the management side of the labor management paradigm, he has always demonstrated the utmost respect for the role that unions and collective bargaining units play. After he left the Labor Department, Mr. Scalia acknowledged that ". . . unions are among the most effective advocates for workplace safety" and "play an important role in identifying and addressing occupational hazards." The FOP strongly agrees.

The FOP believes that President Trump has made an outstanding choice in nominating Eugene Scalia to be the next Secretary of the U.S. Department of Labor. We have every confidence that his knowledge of labor law, his commitment to the rule of law and his understanding of the limitations the law places on him and the Department will prove him to be a highly effective Secretary. Like his predecessor, we have no doubt that the FOP and other labor organizations will always have an open door and a fair hearing before Eugene Scalia.

On behalf of the more than 349,000 members of the Fraternal Order of Police, I am proud to offer Eugene Scalia our strong and enthusiastic support. If I can provide any more information in support of this nomination, please do not hesitate to contact me or Jim Pasco, Senior Advisor to the National President, in my Washington office.

Sincerely,

PATRICK YOES, NATIONAL PRESIDENT,
National Fraternal Order of Police.

HR POLICY ASSOCIATION,
WASHINGTON DC,
September 20, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The Association consists of more than 390 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. The Association is writing to support the nomination of Eugene Scalia for the position of Secretary of Labor.

Mr. Scalia has extensive public and private practice experience and a great depth of knowledge regarding the various laws and regulations enforced by the Department of Labor. He is an incredibly thoughtful person that is open to a wide variety of perspectives, making him especially suitable to meet the challenges of today's evolving workplace.

Mr. Scalia has more than three decades of outstanding private practice experience, involving compliance advice and litigation in nearly every area of labor and employment law. His demonstrated in-depth understanding of administrative, constitutional, and labor and employment law make him especially qualified to lead the Department of Labor.

Mr. Scalia has already demonstrated his leadership ability during his previous tenure as Solicitor of Labor. His actions as Solicitor include significant contributions to overhauling the Federal overtime rule by greatly simplifying the underlying methodology used to determine exemption status, ensuring workers are adequately compensated. Further, as Solicitor, he secured a $10 million settlement for poultry factory workers—a settlement that at the time was one of the largest in the history of the Wage and Hour Division, and which earned the praise of the United Food and Commercial Workers union leadership. Mr. Scalia again earned praise from union leaders for his role in resolving a West Coast ports labor dispute between ownership of the ports and unions, with the leadership noting that his efforts "showed that the administration was seeking to heed union concerns."

Throughout his outstanding career in the public and private sector, Mr. Scalia has demonstrated the intellect, leadership ability, and critical understanding of the Nation's extensive labor laws and regulations necessary to lead the Department of Labor as it faces the important challenges related to the future of work.

For these reasons, the Association firmly believes that Eugene Scalia would be an exceptional Secretary of Labor and fully supports his nomination.

Sincerely,

DANIEL V. YAGER, CHIEF EXECUTIVE OFFICER,
TIMOTHY J. BARTL, PRESIDENT,
G. ROGER KING, SENIOR LABOR AND EMPLOYMENT COUNSEL,
H.R. Policy Association.

INTERNATIONAL FRANCHISE ASSOCIATION,
WASHINGTON DC,
September 24, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the members of the International Franchise Association (IFA), I respectfully urge you and your fellow HELP Committee Members to support the nomination of Eugene Scalia to serve as Secretary of the U.S. Department of Labor (DOL).

The IFA is the world's oldest and largest organization representing the industry. Since 1960, it has educated franchisors and franchisees on beneficial methods and business practices to improve franchising and better serve communities around the country. Through its educational, public-policy, and government-relations programs, it furthers the interests of more than 733,000 franchise establishments supporting nearly 7.6 million jobs and contributing more than $674 billion to the U.S. economy.

Mr. Scalia is a labor law expert and a dedicated public servant who has spent years wrestling with complex legal issues. He recognizes the importance of certainty in the law for businesses and the need to balance the interests of employers with employees. Further, Mr. Scalia's experience in both the private and public sectors has prepared him to be an effective leader of the DOL.

The importance of quickly confirming Mr. Scalia cannot be overstated because franchise business owners continue to face a great deal of unnecessary risk due to regulatory overreach by the Department of Labor during previous administration. One example is the previous administration's expansive view of joint employer liability, which has annually cost the franchise community an estimated $33.3 billion and 376,000 jobs. We are hopeful that, once confirmed by the Senate, Mr. Scalia will

make it a priority to finalize the Department's proposed rulemaking on joint employment (RIN 1235-AA26) to provide clear rules to both job creators and employees.

In sum, the IFA urges the Committee to approve Mr. Scalia today and the full Senate to confirm him without delay. Thank you for considering our views.

Sincerely,

ROBERT C. CRESANTI PRESIDENT & CEO,
International Franchise Association.

BOB ADAMS,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

I had the pleasure of visiting with you earlier this year to review the Form 5500 filing matter and PEO's having to report their client names and FEIN as part of that process. I appreciate your time and consideration of this important matter which has an impact on the 13,000+ employees Adams Keegan serves in Tennessee.

I'm writing today to ask that Senator Alexander and the HELP Committee move quickly to report favorably to the Senate on the nomination of Eugene Scalia to lead the U.S. Department of Labor. Secretary-designate Scalia is an extremely qualified candidate for this position and holds proven, impeccable legal credentials and experience. He has a demonstrated understanding of both the regulatory process within the Department and its enforcement responsibilities and has the ability to oversee sensible regulations that protect employees while at the same time allowing businesses to continue to create jobs. In short we believe he is an excellent choice to lead the agency. I ask that you encourage the Committee to move with all due speed to approve Secretary-designate Scalia's nomination.

Thank you for the your consideration and if I can assist you in any way please let me know.

Sincerely,

BOB ADAMS.

GABRIELLE LEVIN AND KATHERINE V.A. SMITH,
WASHINGTON DC,
July 29, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: We are labor and employment partners at the law firm of Gibson, Dunn & Crutcher LLP ("Gibson Dunn") and write to enthusiastically support the nomination of Eugene Scalia to serve as United States Secretary of Labor.

We have both worked closely with Gene for over a decade and have the honor of considering him a law partner, mentor, and friend. Gene has been among our biggest supporters at Gibson Dunn, both on the path to partnership and after we became partners. Gene has provided us critical opportunities to develop as attorneys and showcase our skills on high-stakes and high-profile matters. While working with Gene, we personally have first-chaired jury trials, argued motions in court, taken and defended key depositions, interviewed senior executives of large corporations, and presented to boards of directors. Gene has also introduced us to several significant clients, and has made room for us to develop our own relationships and connections with those clients, which has in turn allowed us to develop our own practices and business. Finally, and perhaps most importantly, Gene has always been available to us to provide his sage advice, whether it be on case strategy, our careers, or business development.

Working closely with Gene has also afforded us the opportunity to observe firsthand how he interacts with and manages associates at Gibson Dunn. And we have

both seen Gene to be an incredibly strong advocate for our women associates. He has pushed for women associates to be promoted, and he has given them critical opportunities such as in trial, in depositions, and in court. He gives them leadership opportunities and formal and informal guidance.

Gene also seeks to ensure that the women he works with get the support they need in balancing their personal and professional lives—including when they are going out or coming back from maternity leave, or when family or personal issues arise. Many of the women associates that Gene works with are on a "flex time" or part-time schedule with small children, and Gene is invested in helping these associates keep their schedules to flex time, which is naturally challenging in litigation where we are constantly responding to changing and fast-paced case deadlines. It is for these reasons, among many more, that we routinely advise junior associates that they should make every effort to work with Gene.

We have also witnessed first-hand how Gene handles the harassment, discrimination, and whistleblower retaliation matters that are a regular part of our labor and employment practice. Gene has not hesitated to counsel clients to terminate, where appropriate, the employment of managers-including senior executives-who have engaged in inappropriate behavior, including sexual harassment. Furthermore, employment litigation often requires fact-finding into issues of sexual harassment, discrimination, and retaliation, and Gene always approaches these matters with sensitivity and respect, and demands the same of the team members working with him on these cases.

For these reasons, we offer our support for Gene's nomination without reservation.

We would be pleased to discuss these matters with you further.

Sincerely,

GABRIELLE LEVIN, KATHERINE V.A. SMITH.

LYONS HR,
FLORENCE, AL,
September 11, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: Please accept this letter as an indication of support for Eugene Scalia's nomination to be the next Secretary of Labor.

Mr. Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor and has proven to have a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the intellectual and legal background, along with the requisite temperament, to oversee fair and sensible regulations that protect employees while allowing small-to medium-sized businesses (like Lyons HR and our clients) to thrive.

I would urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Sincerely,

CATHERINE REEVES GLAZE, VICE PRESIDENT HUMAN RESOURCES AND CORPORATE COUNSEL,
Lyons HR.

NATIONAL ASSOCIATION OF PROFESSIONAL EMPLOYER ORGINIZATIONS,
ALEXANDRIA, VA,
September 10, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing on behalf of the National Association of Professional Employer Organizations (NAPEO), the voice of the industry that provides HR solutions to small business. NAPEO represents approximately 500 professional employer organizations (PEOs) and service partner members representing ap-

proximately 4 million employees in all 50 states. I ask that your Committee move quickly to report favorably to the Senate the nomination of Eugene Scalia to lead the U.S. Department of Labor.

Secretary-designate Scalia is an extremely well qualified candidate for this position. Indeed, his entire career has been in training for it. He has impeccable legal credentials and experience. His intellect and ability in this area is unequalled. He has a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the ability to oversee fair and sensible regulations that both protect employees while at the same time allowing businesses to continue to create jobs. We believe he is an excellent choice to lead the agency.

I would urge you to move with all due speed to approve Secretary-designate Scalia's nomination.

Sincerely,

PAT CLEARY, PRESIDENT AND CEO,
NAPEO.

NATIONAL RETAIL FEDERATION,
WASHINGTON DC,
September 24, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the Nation's retail industry, I write to share the National Retail Federation's strong support for the nomination of Eugene Scalia to be the next Secretary of Labor. Mr. Scalia is a highly qualified and well-respected labor attorney with decades of experience, and NRF urges Members of the Committee to support his confirmation.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the Nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the Nation's economy.

Mr. Scalia's diverse experiences in both public service and the private sector position him well to be an effective leader at the Department of Labor and member of the President's Cabinet. He has extensive expertise under the many statutes administered by the Department, stemming from his role as Solicitor of the Department of Labor during the George W. Bush administration and his decades of experience in private practice. The new Labor Secretary will play a critical role in continuing to implement the President's regulatory reform Executive Orders, and NRF looks forward to working with Mr. Scalia once confirmed on a pro-growth agenda that supports innovation, investments in the workforce, and American competitiveness.

The nominee is extremely qualified, and NRF urges Members of this Committee and the Senate to move toward Senate confirmation without delay.

Sincerely,

DAVID FRENCH, SENIOR VICE PRESIDENT,
GOVERNMENT RELATIONS,
National Retail Federation.

THE NATIONAL ROOFING CONTRACTORS ASSOCIATION,
WASHINGTON DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The National Roofing Contractors Association (NRCA) strongly supports the nomination of Eugene

Scalia as Secretary of Labor. We urge the Health, Education, Labor, and Pensions, Committee to advance his nomination to the full Senate for consideration.

Established in 1886, NRCA is one of the Nation's oldest trade associations and the voice of roofing professionals worldwide. NRCA's nearly 4,000 member companies represent all segments of the industry, including contractors, manufacturers, distributors, consultants and other employers in all 50 states. NRCA members are typically small, privately held companies with the average member employing 45 people and attaining sales of $4.5 million per year.

Mr. Scalia has developed an impressive track record in both the private and public sectors. He has built a valuable resume working in government, having served as solicitor of the Department of Labor during the administration of George W. Bush, as well as positions at the Justice Department and Education Department during the George H.W. Bush and Reagan administrations, respectively. In addition to his work in government, he has garnered vast experience on employment law issues in the private sector.

NRCA strongly urges the Committee to report Mr. Scalia's nomination as Secretary of Labor to the full Senate. Thank you for your consideration of NRCA's view on this important appointment.

Sincerely,

REID RIBBLE, CHIEF EXECUTIVE OFFICER,
NRCA.

THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION,
ALEXANDRIA, VA,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the over 400-members of the National Stone, Sand & Gravel Association (NSSGA), I am writing to express our strong support for the confirmation of Eugene Scalia to be the Secretary of Labor.

NSSGA is the leading voice and advocate for the aggregates industry, with member companies representing more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. Our members are responsible for the essential raw materials found in every home, building, road, bridge and public works project, employing over 100,000 working men and women. Aggregate businesses can be found in every congressional district and are a trusted resource for all issues related to the aggregate industry.

Mr. Scalia is an expert in workplace and administrative law, who has the right skills and experience to guide the Department of Labor (DOL) on its critical mission to protect workers, while simultaneously ensuring the Department engages in policies that foster job creation and economic opportunities. Further, we appreciate Mr. Scalia's commitment to addressing the current skills gap facing many of our Nation's employers, including aggregates producers, and promoting critical job training programs that ensure American workers have the skills for in-demand jobs.

NSSGA and our member companies are committed to furthering the safety and health of our most precious resource: American workers. We are pleased that Mr. Scalia shares these important values and look forward to working with him to continue promoting safe and healthy working conditions for all the men and women in the aggregates industry.

We appreciate your consideration of our views and thank you for your dedication and tireless work to advance the nomination of Mr. Scalia. Should you have any questions, please do not hesitate to reach out to Michele Stanley, NSSGA Vice President of Government and Regulatory Affairs.

Sincerely,

MICHAEL W. JOHNSON, PRESIDENT AND CEO,
National Stone, Sand & Gravel Association.

NEXTSTEP,
NORMAN, OK,
September 9, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing to support Eugene Scalia's nomination to be the next Secretary of Labor.

Mr. Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor. He has akeen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the intellectual and legal background and the temperament to oversee fair and sensible regulations that both protect employees while at the same time allowing businesses like mine to thrive.

I would urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Sincerely,

BRIAN E. FAYAK, PRESIDENT AND CEO,
Nextstep.

PETER J. HURTGEN,
LAGUNA NIGUEL, CA,
September 2, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I write to advise you of my support for the nomination of Eugene Scalia for Secretary of Labor and of my experience working with him on a labor/management problem of tremendous import in the Fall of 2002.

In that year I was appointed, after Senate confirmation, to the office of Director of the Federal Mediation and Conciliation Service (FMCS), a position which reports directly to the President. Immediately prior to this I had served as a Member of, and then Chairman of, the National Labor Relations Board (NLRB), appointed by President Clinton, and as Chairman by President Bush.

Shortly after my appointment as Director of the FMCS, I sought to intercede in the negotiations between the International Longshore and Warehouse Union (ILWU), and the Pacific Maritime Association (PMA), the employer association representing all the west coast ports in the negotiations to renew the parties' collective bargaining contract. The negotiations had been in progress for weeks and involved all the ports on the west coast. A threatened shutdown would inflict economic damage reportedly of one billion dollars a day.

The PMA was amenable to my mediating the negotiations but the ILWU was not. After several meetings with ILWU leadership, including all the local unions involved, I finally convinced them that my efforts would be impartial, non-partisan, and balanced; and that I would seek only a fair contract based on principled compromises. Thereafter, negotiations resumed at my direction and with me chairing the meetings.

Bargaining continued for several weeks with little progress. The structure of the negotiations made it very difficult to craft small agreements which could lead to larger ones. Each side had twenty-five to thirty-five individuals involved and each side was plagued by internal disagreements which made consensus formation almost impossible. A constant undercurrent to the negotiations was a union view that the PMA and the Bush administration were aligned and that the administration would support PMA tactics and positions. The PMA did nothing to disabuse the ILWU of that opinion.

After a month of negotiations, during which time I kept Labor Secretary Chao advised of the day to day developments, or lack thereof, I was introduced to Eugene Scalia, the Solicitor of Labor. He became the Secretary's principle liaison with me and I relied upon him to support my efforts to achieve balance concerning the issues

and to convince the PMA that it had to compromise to reach a settlement; that legal or political pressure would not suffice.

Mr. Scalia understood that economic pressure, including strikes and lockouts, was the most effective way to resolve a collective bargaining labor dispute, and he counseled restraint in the administration's seeking an injunction under the Taft-Hartley Act. He also proposed a short-term agreement to both parties to forestall an injunction proceeding and to give them more time to reach a permanent agreement. The ILWU agreed to his proposal but the PMA did not.

Notwithstanding my efforts, and with the support of Mr. Scalia, to craft a settlement, it did not occur. An injunction was entered and bargaining proceeded thereafter. Throughout the post-injunction bargaining period, Mr. Scalia urged the PMA to compromise and unlike some in the business community, administration, and Congress, was not critical of the Union. He understood the bargaining process, the pressures it produces, and demonstrated objectivity and even-handedness.

My experience with Mr. Scalia, as summarized above informs me that he has the objectivity, knowledge, temperament, and balance necessary to serve as Secretary of Labor and I urge his confirmation.

Respectfully,

PETER J. HURTGEN.

PREMIER EMPLOYER SERVICES, INC,
ENGLEWOOD, CO,
September 9, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing you today to offer my support for Eugene Scalia's nomination to be the next Secretary of Labor.

Mr.Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor. He has a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He also has the intellectual and legal background, along with the necessary temperament,to oversee fair and sensible regulations that both protect employees while at the same time allowing small businesses like mine to thrive and grow.

I would urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Thank you for your time and consideration.

Sincerely,

ROGER HAYS, JR., PRESIDENT & CEO,
Premier Employer Services,Inc.

RETAIL INDUSTRY LEADERS ASSOCIATION,
WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On September 19, the Senate Health, Education, Labor, and Pensions Committee (HELP) will consider the nomination of Mr. Eugene Scalia to serve as Secretary of the Department of Labor. We write today to support Mr. Scalia and to urge the full Senate to confirm his nomination as quickly as possible.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA and its members strongly support equal employment opportunity and have adopted policies to achieve this core mission of the EEOC.

We want to highlight our strong support for his nomination. Mr. Scalia is a highly accomplished lawyer who understands the myriad complexities of the statutes that the Department of Labor administers. His prior service as Solicitor of Labor gives him a firm grounding in the positions of the Department.

As a private practitioner, Mr. Scalia provided invaluable advice to the RILA Board of Directors when he served as Counsel to the Board from January 2012 until January 2019. During his tenure, he helped the CEO's who serve on RILA's Board navigate multiple challenging industry issues including those related to the retail workforce. Mr. Scalia successfully argued on behalf of major retailers in Walmart v. Maryland, explaining to the court why it should invalidate a state law that unlawfully singled out large retail employers.

The mission of the Department of Labor is to enforce laws that govern the workplace. The retail community has hundreds of thousands of workplaces and employs millions of workers. Mr. Scalia's experience counseling the retail industry has given him an additional perspective on the workforce that further strengthens his candidacy for Secretary of Labor.

RILA strongly encourages the Committee to review and send the nomination to the full Senate to confirm Mr. Scalia as Secretary of Labor as expeditiously as possible. Please do not hesitate to call on us if we can provide any additional information.

Sincerely,

SANDY KENNEDY, PRESIDENT,
Retail Industry Leaders Association.

SHOLA OMOJOKUN,
August 8, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I am honored to ask that you support the nomination of Eugene Scalia for the position of Secretary of Labor. Mr. Scalia possesses a unique combination of character, acumen, and humanity that makes him professionally, intellectually, and personally qualified for this position.

Mr. Scalia has spent decades building a distinguished and unparalleled legal career in the public and private sectors. He is recognized as a passionate and adept defender of the Constitution, and is a respected expert on labor, employment, and administrative law issues. Mr. Scalia's professional accomplishments are clear and cannot be reasonably debated.

Mr. Scalia's professional accolades are well deserved, but his character is his most impressive trait. Mr. Scalia is a person of integrity who has been a compassionate mentor, a loyal ally, and a teacher to numerous attorneys. I met Mr. Scalia in the Fall of 2008 when interviewing for a Summer Associate position at his law firm, Gibson, Dunn & Crutcher, LLP. I was a second-year law student at the University of Virginia School of Law, a recent immigrant, and a first-generation aspiring lawyer who had limited experience with the practice of law in the United States. During my interview, Mr. Scalia asked thoughtful questions and provided insightful advice on various professional and personal matters. Mr. Scalia also offered a kind exchange during our conversation—if I was diligent and receptive to constructive feedback, he would mentor me and help guide my legal career. Over a decade later, Mr. Scalia has kept his promise. As an Associate Attorney at Gibson Dunn, Mr. Scalia was generous with his time, knowledge, and wisdom. Mr. Scalia was also a fierce advocate for female Associate Attorneys, regardless of their political affiliations. Five years after departing from Gibson Dunn, Mr. Scalia remains a mentor, teacher, and advocate. He was there when I lost my father and he has been there at various stages of my legal career.

I have no doubt that someone with this level of commitment to others—who gives of himself without expecting anything in return—will stand up for all workers across the country and will prioritize their interests above any others. I have always

known Mr. Scalia to be a fair and principled individual who is passionate about the law and about providing opportunities for everyone, regardless of their personal traits. And I hope that you and the Committee vote to confirm his nomination as the 28th United States Secretary of Labor.

Sincerely,

SHOLA OMOJOKUN.

SAN JOSE POLICE OFFICERS' ASSOCIATION,
SAN JOSE, CA,
August 29, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: On behalf of the San Jose Police Officers' Association (SJPOA), I am writing to advise you of my union's support for the prompt and fair advancement of the nomination of Eugene Scalia to be Secretary of Labor. The SJPOA is a labor union charged with the enhancement of wages, benefits, and working conditions of over 1,100 men and women of the San Jose Police Department. We have been the collective bargaining agent for San Jose police officers since 1968. In addition to serving as the collective bargaining representative for San Jose's finest,the SJPOA supports the San Jose community through charitable giving, community service, and the promotion of programs that enhance public safety.

Mr. Scalia is indisputably qualified by his professional experience to serve as Labor Secretary. He witnessed first-hand during his service under former Labor Secretary Elaine Chao what it takes to execute faithfully and well the responsibilities of this office. While we cannot know what the future holds, we have reason to believe that he will follow her example and render good and honorable service to the Nation if confirmed.

We know that Mr. Scalia has an appreciation for the men and women of law enforcement. This dates back to his service at the United States Department of Justice under Attorney General Barr during the administration of George H.W. Bush. During the George W. Bush administration, Mr. Scalia served as part of Secretary Chao's highly capable team that crafted regulations on Part 541 of the Fair Labor Standards Act, clarifying and enhancing important overtime protections for police officers and other first responders. We are confident that he will defend these important wage protections. Furthermore, Mr. Scalia's support for the men and women of law enforcement has continued during his years of private practice at one of California's preeminent, home-grown law firms, Gibson, Dunn & Crutcher, LLP. Among other acts, Mr. Scalia participated in a pro bono representation to save the job of a police officer accused of off-duty misconduct.

While Mr. Scalia's considerable private practice experience has been as a management-side labor lawyer, we see no indication that he possesses the anti-union animus common to many of his management-side peers who might have been selected for this position. He has never disputed the right of unions to exist. He has actually acknowledged in his scholarly writings the important and valid role that labor organizations play in the American workplace. For instance, he has praised unions as being "among the most effective advocates for work place safety."

Mr. Scalia is a seasoned, capable public servant who respects the rule of law and the men and women of law enforcement who uphold it. We hope that he will be confirmed promptly so that the Labor Department can have capable, inclusive leadership with integrity. We appreciate your consideration of the SJPOA's views on this matter.

Sincerely,

PAUL KELLY, PRESIDENT,
San Jose Police Officers' Association.

SMALL BUSINESS & ENTREPENEURSHIP COUNCIL,
VIENNA, VA,
September 23, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The U.S. Labor Department is critically important to America's small businesses. Business owners, entrepreneurs and their employees desire a fair, responsive, and qualified individual to lead this Federal entity. Eugene Scalia is eminently qualified to serve as the next Secretary of Labor and the Small Business & Entrepreneurship Council (SBE Council) strongly supports his nomination and confirmation. We urge all Members of the HELP Committee to vote favorably on his nomination.

Unprejudiced minds who still believe that qualifications and experience matter for these key Federal leadership positions, will find Mr. Scalia's background quite impressive. He is among the most respected labor and employment lawyers in the country and would be one of the most qualified nominees ever put forward for Secretary of Labor.

Mr. Scalia served as Solicitor during the George W. Bush administration, and during his service fairly applied workplace safety laws, minimum wage and overtime requirements, and other statutes administered by the department. In the aftermath of the Enron scandal, Mr. Scalia was highly engaged in addressing the losses of the company's pension plans so that employees and retirees would not be financially harmed. In his confirmation hearing, he noted other areas where he vigorously applied the law regarding key actions, which demonstrates his respect for both the rule of law and the mission of the U.S. Labor Department.

Mr. Scalia is an engaged leader who will listen to the small business community. This is vitally important, as outdated or potentially excessive regulation can make it more difficult for small firms to compete and hire employees, or for new businesses to launch. The U.S. economy is highly dependent on robust entrepreneurship and small business growth, therefore a Labor Secretary who takes into account small business impact, as he or she deliberates proposed actions or new initiatives, is critical to the future of startup activity and quality job creation.

A comprehensive and fair review of Mr. Scalia's career, especially the period he spent in public service, will show that he appropriately administered the laws and did the right thing for workers and small businesses alike.

A Labor Secretary who understands the evolving economic and competitive landscape, and who can take a balanced approach toward protecting workers and the health of the job-creating sector is vital to America's economic future. An objective review of Mr. Scalia's career, devotion to the rule of law, pro bono work on behalf of employees, and actions taken during public service at the U.S. Labor Department demonstrate that he is eminently qualified to be its next leader.

Mr. Scalia's qualifications and engaging leadership are the right fit for this dynamic period, and SBE Council urges a "yes" vote on his confirmation as U.S. Labor Secretary.

Thank you for considering our views, and do not hesitate to contact SBE Council if you have questions.

Sincerely,

KAREN KERRIGAN, PRESIDENT & CEO,
SBE Council.

STAFFLINK OUTSOURCING, INC,
PLANTATION, FL,
September 11, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing to support Eugene Scalia's nomination to be the next Secretary of Labor.

I am confident that Mr. Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor. He has a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the intellectual and legal background and the temperament to oversee fair and sensible regulations that will balance the need to protect employees, while at the same time allowing small businesses like mine to thrive.

I urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Very truly yours,

ABRAM FINKELSTEIN, PRESIDENT,
Stafflink Outsourcing, Inc.

SYNDEO,
WICHITA, KS,
September 11, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER: I am writing to support Eugene Scalia's nomination to be the next Secretary of Labor.

Mr. Scalia is an extremely well qualified candidate to lead the U.S. Department of Labor. He has a keen understanding of both the regulatory process within the Department and its enforcement responsibilities. He has the intellectual and legal background and the temperament to oversee fair and sensible regulations that both protect employees while at the same time allowing small businesses like mine to thrive.

I would urge you to move quickly to confirm Eugene Scalia as the next Secretary of Labor.

Sincerely,

BILL G. MANESS, PRESIDENT/CEO,
Syndeo.

THOMAS M. SUSMAN,
WASHINGTON, DC,
September 6, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: I am writing in my personal capacity to express my strong support for the confirmation of Eugene Scalia to be Secretary of Labor. I have been a lawyer for over 50 years and spent the early part of my career in all three branches of government—as a law clerk to Fifth Circuit Judge John Minor Wisdom, an attorney in the Department of Justice Office of Legal Counsel, and a senior counsel for Senator Edward Kennedy on the Senate Judiciary Committee. I have also worked in the private sector, including 27 years as a partner in a major law firm and over a decade with a large nonprofit association, and I got to know Gene personally and professionally during that time. I have also known his family for over four decades.

Gene's intellectual and professional qualifications, as outlined on his resume, are both stellar and obvious. But his personal attributes and character are even more impressive and remarkable. Gene is precisely the kind of person that our country needs in the Cabinet: experienced, ethical, professional, open-minded, fair, and brilliant. We certainly have our political differences, but that does not stand in the way of my stepping forward to voice enthusiastic support for him.

The idea that a lawyer should be judged by positions he or she takes for clients belies our Nation's history of taking pride in an independent legal profession that stands ready to serve all clients and interests that need effective counsel—whether popular or unpopular, claimants or defendants, employees or management. The

question should not be what side the lawyer was representing, but whether the lawyer did so with diligence, honesty, integrity, candor, energy, even-handedness, and respect for both the opposing parties and our legal institutions. By this measurement, Gene Scalia deserves tremendous accolades.

I urge you to confirm Gene without delay. I am confident that he will serve the Department and our Nation with dignity, honor, and distinction.

Sincerely,

THOMAS M. SUSMAN.

ASHUTOSH BHAGWAT AND CO-AUTHORS,
August 22, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The co-authors of this letter, as third-year law students in 1989 and 1990, were each members of the Editorial Board of The University of Chicago Law Review, whose leader at the time was our classmate Eugene Scalia, the Editor-in-Chief. We vary in the degree to which we have worked with or remained close to Gene in the years since law school, but based on our collective experiences with Gene, including time together serving on the Editorial Board of the Law Review, we all uniformly support his nomination to serve as Secretary of Labor and are writing to convey our enthusiastic endorsement.

Being appointed to the Editonal Board of the Law Review is an honor. These appointments are made by the prior year's Editorial Board members, so it was that group of individuals who chose each of us for the editorial positions we held and chose Gene as our Editor-in-Chief. Our work as a newly constituted Editorial Board started in the summer of 1989, as we began to plan and assemble the first of four issues comprising Volume 57 of the Law Review. It is the responsibility of the Editorial Board to determine what legal scholarship the Law Review will publish, what topics it will feature in assembled collections of articles or symposia, what books to review, which legal academics to solicit as authors, and which student-written articles, or "comments," to include among the Law Review's pages. And it was the job of the Editorial Board to select which staff members to elevate to Board positions for the following year. We made these decisions collectively, under Gene's leadership, in an environment in which we were each free to openly express our views and opinions.

The composition of our Editorial Board reflected the diversity of the law school as a whole. Our Board was fairly evenly split between women and men, and we came from diverse regional and educational backgrounds, with a wide range of viewpoints across the political and ideological spectrum—a diversity that is reflected among the signatories to this letter. Whatever our differences in perspective, as an Editorial Board we had a common goal: to publish sound legal scholarship worthy of the Law Review's reputation for excellence. Our individual perspectives and views played no role in determining what we would publish or by whom, and in this regard Gene as our leader set a strong example.

One of the more controversial decisions we made as an Editorial Board involved two reviews we published of Judge Robert Bork's book, *The Tempting of America*. Judge Bork had been nominated to the U.S. Supreme Court by President Ronald Reagan in the summer of 1987, roughly two months before we started law school. The Senate rejected his nomination by a 58–42 vote in October of the same year. For each of us as first-year law students at the time, these unusually contentious confirmation hearings, involving a distinguished alumnus of our law school, made a searing impression. Some of us felt the outcome was justified, while others did not. Two years later, we found ourselves in a position of some influence. Judge Bork's new book, *The Tempting of America*, was his personal memoir and commentary on the failed nomination and related hearings. We were the only prominent law review in the country to review the book, and the decision of what type of review to publish and by whom was subject to our editorial discretion.

In the interest of achieving balance and offering differing perspectives, we solicited two reviews of the book, one by Ronald Dworkin and the other by Robert Nagel. As it happened, both reviews proved quite negative. It is notable, we think, that

these two critical reviews were published at a time when Gene Scalia was the Law Review's Editor-in-Chief. Gene knew Judge Bork personally, and his father (Justice Scalia) had previously served together with Judge Bork (from 1982 to 1986) as a federal appeals judge on the DC Circuit. Yet, consistent with the approach taken by our Editorial Board under Gene's leadership, personal views and affiliations had absolutely no bearing on our editorial decisions.

As a law school classmate and as the leader of our Editorial Board, Gene exhibited many other positive qualities, qualities that those of us who know him best can attest he continues to exhibit today. He was and is an excellent colleague. When debating points of law or other strongly held views, Gene is unfailingly courteous and shows due respect for the opinions of others. He is open to being persuaded by a well-supported argument, even where doing so may involve conceding error. In all of his dealings with others, Gene is exceedingly professional and respectful. And he places great value on encouraging a diversity of perspectives. Indeed, he drew upon that diversity in ensuring that we as an Editorial Board made the best decisions possible with regard to article and author selection, staff promotions, and the like.

In short, we have the utmost respect for Gene as a person, a colleague, and a lawyer. Although we cannot speak to all of his many qualifications, we believe Gene's character, temperament, intelligence, and personal integrity will be crucial assets for this important executive branch position. We are confident that he will serve admirably should he be confirmed as Secretary of Labor and we are pleased to convey our unqualified support for his nomination.

Sincerely,

ASHUTOSH BHAGWAT, M. SEAN ROYALL, JACQUELINE GERSON COOPER, J. ROBERT ROBERTSON, D. GORDON SMITH, ANDREA NERVI WARD, CYNTHIA VREELAND.

LETTERS OPPOSING THE EUGENE SCALIA NOMINATION

SERVICE EMPLOYEES INTERNATIONAL UNION,
1800 MASSACHUSETTS AVE., NW WASHINGTON, DC,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the 2 million members of the Service Employees International Union (SEIU), I write to oppose the nomination of Eugene Scalia to be Secretary of Labor. Mr. Scalia has spent his entire career putting the interests of big corporations ahead of workers, defending an entire range of bad corporate behavior no matter how egregious. America needs a labor secretary who will protect workers' right to organize and form a union and uphold worker protections. Mr. Scalia is unfit in every sense to serve as Labor Secretary and his nomination should be rejected.

Mr. Scalia has consistently sided with corporations at the expense of workers. Mr. Scalia represented SeaWorld when it unsuccessfully tried to fight off an Occupational Safety and Health Administration (OSHA) citation and fine for failing to protect Dawn Brancheau, a trainer at SeaWorld who was killed on the job by a killer whale. Mr. Scalia' s work on this case demonstrated his utter hostility to the core mission of the Department of Labor, and he would likely continue this administration's assault on the most basic of rules that protect workers every day from harm on the job.

Furthermore, Ford Motor Co. has turned to Mr. Scalia to defend the company in numerous cases involving sexual harassment at the company's plants. Mr. Scalia has been involved in at least 27 cases involving sexual harassment since 2007, and he has defended the company continuously despite a very clear culture of harassment at the company. Given his history, it can be inferred that Mr. Scalia would not take seriously sexual harassment claims made by workers, and that he would continue this administration's efforts to undermine the mechanisms established in law by which workers can have their voice heard on the job. At a time when workers have been Empowered by the #MeToo movement to come forward to share their stories and their trauma and demand stronger workplace rights and safety, Mr. Scalia is continuing to work on behalf of those that would silence the voices of these workers.

Mr. Scalia has also made it clear he will not enforce evidence based rules the Department of Labor has put in place to protect workers and their families. As a lawyer representing the U.S. Chamberof Commerce, Mr. Scalia fought to have the Courts strike down the " fiduciary rule," which required investment advisors to put the interest of retirees and clients ahead of their own profit interests. Mr. Scalia's record demonstrates that he consistently chooses to put profits over workers no matter the negative impact his actions have on working families.

Based on his record, we respectfully urge you to reject Mr. Scalia's nomination to be Secretary of Labor and urge you to call upon the President to put forth a candidate who will be a champion for working families. We will consider adding any vote on this nomination to our legislative scorecard. If you need any additional information, contact John Foti.

Sincerely,

MARY KAY HENRY, INTERNATIONAL PRESIDENT,
Service Employees International Union

UNITED STEELWORKERS,
1155 CONNECTICUT AVE, NW WASHINGTON, DC,
September 11, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the 850,000 members of the United Steelworkers and in support of all working Americans, I urge you to oppose the nomination of corporate attorney Eugene Scalia to serve as Secretary of the United States Department of Labor.

While the Department of Labor's mission is to protect the welfare of wage earners, job seekers, and retirees, Eugene Scalia has spent his entire career dismantling labor and financial regulations aimed at protecting American workers and consumers. Specifically, he has worked to remove protections aimed at decreasing injuries from repetitive stress, ensuring retirement advisors act in the best interests of their clients, and holding Wall Street accountable for abusive financial practices.

Scalia's career is littered with efforts to help corporations defeat state laws and regulations that would have protected worker's pay and lives. It is egregious that the nominee for the Federal agency that will oversee the Occupational Safety & Health Administration (OSHA) once opposed a policy that would have required employers to purchase personal protective equipment (PPE) for their employees. Workers should not be subjected to buying equipment to safely work on the job. Scalia has fought against casino workers ability to take home their hard-earned tips, and opposed efforts to spend a minimum share of profits of major corporations, like Walmart, on employee healthcare.

More recently, the nominee challenged a new law in California that allows workers to participate in process safety management (PSM) standards at oil refineries. He has even defended employers, like SeaWorld, against workplace safety violations following the death of a worker killed on the job.

Over his career, Scalia has devoted countless hours to ensuring that corporate greed and investor interests are prioritized over worker and consumer safety and well-being. After years spent stripping workers of their rights to fair and safe working conditions, Eugene Scalia should not be the individual tasked with enforcing them.

The Secretary of Labor has a responsibility to protect employees in the workplace, to hold corporations accountable for the lives and safety of their workers, and to fully enforce some of America's most important Federal labor laws. Given Eugene Scalia's long history of pro-business deregulatory work, he is unfit to carry out the responsibilities of the job.

The United States deserves a Secretary of Labor that will protect workers, not corporations. The USW urges you to oppose the nomination of Eugene Scalia to serve as Secretary of Labor.

Sincerely,

ROY O. HOUSEMAN, JR., LEGISLATIVE DIRECTOR,
United Steelworkers

WORKSAFE,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of Worksafe, I write to register our opposition to the confirmation of Eugene Scalia as the next Secretary of Labor.

Worksafe is a California-based organization dedicated to eliminating workplace hazards. We advocate for protective worker health and safety laws and effective remedies for injured workers. We watch dog government agencies to ensure they enforce these laws. We also engage in campaigns in coalition with unions, workers,community,environmental and legal organizations, and scientists to eliminate hazards and toxic chemicals from the workplace.

Mr. Scalia has spent virtually his entire legal career working to expand corporate and employer power, and narrow protections for workers. He is, quite simply, not someone who is suitable to serve as this country's chief advocate for working people. The mission of the Department of Labor is to "foster, promote and develop the well-being of wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." We do not believe that Mr. Scalia, whose greatest accomplishments have included defeating rules that would have protected millions of workers from musculoskeletal disorders and required that retirement investment advisors put a client's financial interests ahead of their own, will be able to fulfill this critical mission.

If confirmed, Mr. Scalia will be among the most conflicted Labor Secretaries in the agency's history. His list of potential recusals is extensive, underscoring that he consistently engages in work that is at odds with what is in the best interest of our Nation's workforce.

His views about sexual harassment are also far outside the mainstream of both law and public consensus. In a controversial 1998 article written for the Harvard Journal of Law & Public Policy, Mr. Scalia argued that "quid proquo" sexual harassment on the job should not be categorized as a separate form of discrimination.

Further examples of his overly zealous championing of big business include the following:

- Leading the opposition to an OSHA rule that would have regulated workplace conditions to prevent musculoskeletal disorders (MSDs)—repetitive motion injuries that can be crippling. Although the rule would have protected an estimated one million workers, Scalia led the fight against the rule, writing numerous articles and public comments dismissing years of science-based data on the effects of ergonomics as "quackery" and "junk science." He also argued that employers should not be responsible for MSD prevention.
- Defending Walmart when the State of Maryland attempted to establish a law that would make it mandatory for companies to either pay a portion of their payroll on healthcare or contribute to Medicaid.
- Defending Wynn Las Vegas Casino when it fought for the "right" to steal dealers' tips so that it could redistribute them to other workers, rather than paying those workers decent wages in the first place.
- Defending SeaWorld when the Occupational Safety Health Administration (OSHA) cited the theme park after a trainer was killed by an orca whale at one of their facilities.
- Defending the Boeing corporation when it tried to relocate jobs from Washington State in order to avoid recognizing a union duly elected by its workers.

These are but a few examples of the kinds of interests and employers uniformly represented by Mr. Scalia. While as a private citizen he has every right to pursue the type of legal career he chooses, his choices prove beyond any doubt that his sympathies lie strictly within the interests of corporations and employers, not workers. A Labor Secretary who has built his career on the backs of everyday working people is the wrong choice to lead the Department of Labor. I urge you to reject Eugene

Scalia's nomination as the next Secretary of Labor as an act of solidarity with working people.

Sincerely,

NICOLE MARQUEZ, SENIOR STAFF ATTORNEY,
Worksafe

AFL-CIO,
815 16TH ST., NW WASHINGTON, DC,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the AFL–CIO, I am writing to express our strong opposition to the nomination of Eugene Scalia to be Secretary of Labor.

The Department of Labor is critical to the rights and well-being of millions of workers in this country, and working people need a Secretary of Labor who has demonstrated a commitment to the Department's mission. The Department has the critical task of ensuring fair payment of wages and overtime, safeguarding workers' benefits, protecting workers from harassment and discrimination, guaranteeing their health and safety, and providing opportunities for job training through high quality registered apprenticeships. We need a Secretary of Labor whose top priority is protecting the health, safety and economic security of working people.

By contrast, Eugene Scalia has spent his entire career representing corporate interests and fighting against the interests of working people. He has spent decades defending corporate interests such as Wal-Mart, the Chamber of Commerce, Wall Street banks, and Boeing. As AFL–CIO President Richard Trumka said when Scalia's nominations was previewed back in July:

> Eugene Scalia has spent his entire career making life more difficult and dangerous for working people. We opposed him in 2002 for Solicitor of Labor based on his anti-worker record, and his disdain for working people has worsened, not improved. His extreme views are in direct conflict with what America deserves from a secretary of labor.

In 2001, President Bush nominated Scalia to be Solicitor of Labor. Unions and other workers advocates strongly opposed Scalia's nomination in large part because of his opposition to the Clinton administration's efforts to adopt a standard to protect workers from repetitive motion injuries (the so-called "ergonomics" rule). Speaking on behalf of the employers, Scalia had dismissed ergonomics as "junk science" and "quackery." In a Wall Street Journal opinion piece, he had written "that ergonomic regulation will force companies to give more rest periods, slow the pace of work, and then hire more workers (read: dues-paying members) to maintain current levels of production."

After leaving the Labor Department in 2003, Scalia returned to the law firm of Gibson, Dunn and Crutcher, where he continued defending corporations against worker lawsuits and opposing regulations that provide protections for workers and consumers. He has earned a reputation as the "go-to" lawyer to attack worker-protective regulations.

As demonstrated by his entire career, Eugene Scalia is the antithesis of what is required from a Secretary of Labor and what working people deserve to expect from the Department of Labor. Corporations and the rich already have abundant representation in the Trump administration. Working people cannot afford to have yet another corporate defender representing them at the Labor Department.

For these reasons, the AFL–CIO strongly opposes this nomination.

Sincerely,

WILLIAM SAMUEL, DIRECTOR, GOVERNMENT AFFAIRS

ALLIED PROGRESS,
1875 CONNECTICUT AVENUE, NW WASHINGTON, DC,
September 9, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER:

On behalf of Allied Progress, a leading consumer watchdog group, I am writing to urge you to reject the President's nomination of Eugene Scalia for U.S. Labor Secretary when the matter comes before you in the Senate Health, Education, Labor and Pensions, Committee. We know everything we need to know about Scalia's record to conclude today that he is too extreme and too conflicted for this role, including his troubling views that companies shouldn't be held responsible for sexual harassment at the workplace.

The President has a history of appointing known enemies of Federal agencies to lead them, whether it was Scott Pruitt's corruption-soaked tenure at the EPA or Mick Mulvaney's 'bull in a china shop' turn as Acting Director of the CFPB. Eugene Scalia would be no different as someone who regularly criticized and litigated against Labor Department policies. As a typical example, Scalia represented the U.S. Chamber of Commerce in 2017 as it was challenging the U.S. Labor Department's Fiduciary Rule, the Obama-era consumer protection that required financial advisers and their firms provide retirement investment advice that is in their clients' best interests.[1] The Fifth Circuit Court of Appeals ultimately ruled in Scalia's client's favor,[2] allowing unscrupulous Wall Street brokers to continue grifting their own clients out of billions of dollars of retirement savings without any consequences.[3]

The Labor Secretary is supposed to be the Advocate-in-Chief for America's hard-working men and women. Instead, Trump chose a high-powered corporate attorney who built a career on representing powerful interests at the expense of everyday workers, including cases involving workplace safety and sexual harassment. It is your responsibility to consider whether someone who put themselves in an adversarial role against workers time and again is able to 'flip a switch' and advocate on behalf of all the Nation's working families, even when their interests come up against those of his long list of former corporate clients. We firmly believe he is not capable of making that transition.

It is the kind of bad corporate behavior he was willing to defend that we believe is most disqualifying for this post. For instance, Scalia represented a major auto manufacturer as it was sued for harboring a culture of sexual harassment, racial discrimination, and retaliating against employees who spoke out against the hostile work environment.[4] Scalia also represented the same company after its retirement plan allegedly "violated its fiduciary duties" and shortchanged and employee's retirement benefits.[5] Scalia represented a package delivery company as it was accused of a "pattern or practice of unlawful discrimination" in violation of the Americans With Disabilities Act.[6] Scalia defended a major airline company as it was accused of illegally threatening a union and attempting to force it to agree to a "No-Strike Clause" in its Labor Agreement.[7] Scalia represented a major retail corporate chain as it fought lawsuits accusing it of illegally firing corporate whistleblowers, and again as the corporation fought against a Maryland Law requiring it to help cover its employees' healthcare costs. And Scalia represented an electronic component distributor when employees sued the company for allegedly denying them overtime compensation by misclassifying them as "'administrative'" workers.[8]

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[1] *Chamber of Commerce of the U.S. v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017).
[2] *"Fifth Circuit Vacates Labor Department's "Fiduciary Rule" "In Toto" In Chamber Of Commerce Of U.S.A., Et Al. V. U.S. Dep't Of Labor."* *Gibson, Dunn, & Crutcher*, March 19, 2018.
[3] Scheiber, Noam. *"Trump's Labor Pick Has Defended Corporations, and One Killer Whale."* *The New York Times*, July 19, 2019.
[4] Kanu, Hassan A. *"Ford Turned to Trump Labor Pick Scalia to Fight Harassment Suits."* *Bloomberg Law*, August 19, 2019.
[5] *Jennifer Strang v. Ford Motor Company General Retirement Plan et al.*, (6th Cir. 2017), cert. denied, (U.S. June, 25, 2018) (No. 16–2090).
[6] *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009).
[7] Haberman, M., Scheiber, N., and Crowley, M. *"Trump to Nominate Eugene Scalia for Labor Secretary Job."* *The New York Times*, July 18, 2019.
[8] *Colson V. Avnet, Inc.*, 687 F.Supp.2d 914 (D. Ariz. 2010).

The list of cases of this kind goes on and on. For any corporation accused of violating workers' rights or defrauding consumers that is in need of legal representation, they could not do much better than Eugene Scalia. It is clearly what he is good at. But it is these same deep relationships with corporate America that makes him perhaps the most conflicted choice Trump could have made to be the next Labor Secretary.

What is also deeply concerning is the extremes Scalia was willing to go to defend companies in conflict with workers. Consider:

- **Scalia Argued That Companies Shouldn't Necessarily Bear Legal Responsibility for Bosses Who Sexually Harass or Threaten Employees**. In 1998, Scalia argued that companies should be let off the hook in sexual harassment cases in the Harvard Journal of Law & Public Policy, offering these scenarios: "One supervisor orders his assistant to accompany him on a business trip and gropes her on the plane, at dinner, and in the hotel. A second supervisor does the same and tells her that's what he did with her predecessors. I believe the employer should not be liable in any of these scenarios unless it endorsed the conduct." Scalia also opined: "Saying 'You're an incompetent stupid female bitch' a single time is not actionable environmental harassment."[9]
- **Scalia Argued the Federal Government Does Not Have A Leading Role in Occupational Safety and That Repetitive Stress Injuries on the Job are Medical "Quackery"**. Scalia fundamentally disagrees that one of the most important responsibilities of the Labor Department is enforcing the laws that protect the health and safety of the Nation's workers, writing in 2005: "The Government does not have the sole-or even primary-role in furthering occupational safety and health or compliance with the employment laws."[10] Scalia's opposition to Federal workplace oversight made him a natural fit to represent a number of corporate interests in their 2001 fight to undo the Clinton-era ergonomics rule—a regulation designed to prevent injuries among workers who perform repetitive tasks. Scalia called it "the most costly and intrusive regulation in (OSHA's) history"[11] and often trashed the science of ergonomics as "quackery."[12] Scalia changed his tune, however, when he was nominated to be Labor Solicitor during the Bush administration, admitting that "ergonomic pain is real" when a promotion was on the line.[13]

Workers deserve a Labor Secretary who is always on their side, not just when it is politically convenient. Someone who believes the government should have minimal say in keeping workers safe may be a great choice to represent corporations that like to cut corners, but they are a dangerous choice to be enforcing laws as Labor Secretary.

There is no mystery what Eugene Scalia stands for. When there is a dispute, Scalia believes corporate CEOs are always right, and workers are always wrong. This is not someone who would take his responsibility to uphold the Family And Medical Leave Act[14] seriously after repeatedly defending corporations against lawsuits from workers who claimed they were fired for taking leave.[15, 16] This is not someone who will be concerned about fair wages or the income inequality crisis in America after publicly deriding even a modest proposal for raising the minimum wage for Federal workers. This is not someone interested in helping workers hoping to climb into the middle class if it in any way impacts the corporate bottom line.[17]

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[9] Scalia, Eugene. "Article: The Strange Career of Quid Pro Quo Sexual Harassment." *Harvard Journal of Law & Public Policy*, Spring 1998, 307–25.

[10] Scalia, Eugene. "Inspection and Enforcement Strategies at the U.S. Department of Labor." *University of Pennsylvania Journal of Labor & Employment Law*, Spring 2005

[11] Gearan, Anne. "SUPREME COURT NOTEBOOK: Marksman Scalia bags a buck." *Associated Press*, May 1, 2001.

[12] Benton, James C. "Bush Upsets Unions by Choosing Scalia." *Congressional Quarterly Weekly*, August 10, 2001.

[13] Jackson, Robert. "Split panel approves Scalia for Labor post." *The Chicago Tribune*, October 17, 2001.

[14] "*Major Functions of the U.S. Department of Labor*." *Congressional Research Service*, September 7, 2018.

[15] *King v. Ford Motor Co*., 872 F.3d 833 (7th Cir. 2017).

[16] *Buckman v. MCI World Com Inc*., 374 Fed. Appx. 719 (9th Cir. 2010).

[17] Scalia, Eugene & Mondl, Rachel. "*Obama's minimum-wage increase is on shaky legal ground*." *The Washington Post*, February 20, 2014.

Eugene Scalia may be a gifted legal mind when it comes to defending big businesses, but he has no business leading the Labor Department. America's working families deserve far better. I strongly encourage you to oppose this nomination on its face.

Respectfully,

KYLE HERRIG, SENIOR ADVISOR,
Allied Progress

BLUEGREEN ALLIANCE,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

As members of the BlueGreen Alliance, a coalition of the Nation's largest labor unions and environmental organizations collectively representing millions of members and supporters, we urge you to oppose the confirmation of Eugene Scalia as Secretary of Labor. Mr. Scalia has built his career endangering, dismissing, and cheating American workers. His nomination is an offense to the Department of Labor (DOL), its mission, and our Nation's workforce.

Mr. Scalia is a partner at Gibson, Dunn & Crutcher where he specializes in defending corporate clients on employment and labor law issues. Scalia has built his practice by sustaining an assault on government efforts to protect American workers and communities.

Oil Refinery Safety at Risk

In the wake of catastrophic refinery fires in Houston, Texas; Philadelphia, Pennsylvania; and Superior, Wisconsin, Mr. Scalia—rather than taking steps to improve the safety of the Nation's refineries—has instead chosen to file lawsuits in both Federal and state courts on behalf of Chevron, Shell, Phillips 66, PBF, BP, Valero, Marathon, and other refiners to obstruct the Nation's first modern refinery safety regulations. These regulations were adopted in California in 2017, after a catastrophic explosion and fire in 2012 at the Richmond, California Chevron refinery, which nearly killed 19 refinery workers and caused 15,000 residents to seek medical attention for symptoms related to exposure to the smoke and fire gases.

Another catastrophic explosion in 2015 at the ExxonMobil refinery in Torrance, California threatened a tank containing tens of thousands of pounds of hydrofluoric acid (HF). Given the 330,000 residents, 71 schools, and eight hospitals located within three miles of the plant, the U.S. Chemical Safety and Hazard Investigation Board (CSB) concluded that had the tank ruptured, the resulting HF release—which vaporizes when released from its container—had "the potential to cause serious injury or death to many community members." [1]

California's 2017 refinery safety regulations represent the Nation's first successful update to refinery safety since 1992, and Mr. Scalia is going to court to stop them, despite the continuing record of 150 major industrial chemical fires, explosions, and releases that occur each year, on average, in communities across the Nation.

Bulldozing Basic Workplace Protections

In his legal practice, Mr. Scalia has focused on cynically attacking the safety and economic security of American workers and their families. For example, he has:

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[1] U.S. Chemical Safety Board (CSB), *U.S. Chemical Safety Board Finds Multiple Safety Deficiencies Led to February 2015 Explosion and Serious Near Miss at the Exxon Mobil Refinery in Torrance, California*, January 2016. Available online: *https://www.csb.gov/us-chemical-safety-board-finds-multiple-safety-deficiencies-led-to-february-2015-explosion-and-serious-near-miss-at-the-exxon-mobil-refinery-in-torrance-california/*.

- Fought to overturn rules that require employers to pay for workers' protective equipment, such as hardhats, respirators and gloves;[2]
- Fought OSHA for SeaWorld, arguing that the company did not need to follow OSHA regulations after a trainer was killed on the job by an Orca whale;[3]
- Stopped a Maryland law that would have required Walmart and other employers with more than 10,000 workers to spend 8 percent of payroll on their workers' health insurance, or contribute to the state's Medicaid fund;[4]
- Fought for Boeing against NLRB charges that the company illegally retaliated against striking workers in its unionized Seattle plant by transferring work to South Carolina; and[5]
- Successfully led the U.S. Chamber of Commerce effort to stop OSHA's ergonomic regulations, which would have protected millions of workers from disabling injuries caused by unsafe workplace design.[6]

Scalia's virulent attack on the proposed Ergonomics Standard was enough to stop the Senate from confirming his 2001 appointment as solicitor of the Labor Department. President Bush later used a recess appointment to give him that job.

Taking Us Back 100 Years

Safety regulations are borne out of tragedy. They reflect "lessons learned" and seek, albeit imperfectly, to protect workers and communities from industrial hazards. The historical record illustrates that regulations also protect industry from its own excesses and shortsightedness.

From the fire exit rules that resulted out of the Triangle Shirtwaist fire of 1911 to California's 2017 refinery regulations in the wake of the Richmond Chevron fire, safety is a thin line drawn out of public concern and shaped by public officials who respond to that concern with new laws and regulations. Mr. Scalia will be charged with enforcing those protections, including the Occupational Safety and Health Act, the Fair Labor Standards Act, the Family and Medical Leave Act and others that American workers and their families have come to depend on.

Mr. Scalia has devoted his career to demolishing these basic protections. The signatories to this letter urge you in the strongest possible terms to oppose his appointment.

Sincerely,

BLUEGREEN ALLIANCE,
International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART)
International Union of Bricklayers & Allied Craftworkers
Natural Resources Defense Council
Sierra Club
Union of Concerned Scientists
United Steelworkers Union
Utility Workers Union of America

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[2] Court of Appeals of Michigan, *United Parcel Service Inc V. Bureau Of Safety And Regulation*, November 2007. Available online: *https://caselaw.findlaw.com/mi-court-of-appeals/1469254.html*.

[3] United States Court of Appeals, District of Columbia Circuit, *Seaworld Of Florida Llc V. Perez,* April 2014. Available online: *https://caselaw.findlaw.com/us-dc-circuit/1663286.html*.

[4] Casetext, "Retail Indus., v. Fielder," January 17, 2007. Available online: https://casetext.com/case/retail-indus-v-fielder.

[5] National Labor Relations Board (NLRB), NLRB v. *The Boeing Company*, Case 19-CA–32431. June 2011. Available online: *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node–3347/mot.19-ca–032431.rs-opp-to-agcs-mot-to-strike-boeings-14th-aff-def.pdf*.

[6] Eugene Scalia, OSHA's *Ergonomics Litigation Record: Three Strikes and It's Out*, August 2016. Available online: *https://documents.pub/document/oshas-ergonomics-litigation-record-three-strikes-and-its-out.html*.

ECONOMIC POLICY INSTITUTE,
September 6, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

The EPI Policy Center strongly opposes the nomination of Eugene Scalia for U.S. Secretary of Labor, and we strongly urge you to vote against his confirmation. The mission of the Department of Labor is to enforce labor law and improve the wages and working conditions of everyday Americans. In contrast, Mr. Scalia has built a career representing corporations, financial institutions, and other business organizations while fighting against worker protections like health and safety regulations, retirement security, and collective bargaining rights.

This is not Mr. Scalia's first nomination for a role in the Department of Labor. In 2001, President George W. Bush nominated him for Solicitor of Labor, an appointment that was swiftly blocked because of Mr. Scalia's extreme views against worker health and safety protections. President Bush circumvented the Senate and installed Mr. Scalia as Solicitor through a recess appointment. Since leaving the Labor Department in 2003, Mr. Scalia has represented powerful corporations and financial institutions—such as HSBC, Boeing, and Walmart—in labor cases while working as a partner at the Washington, DC-based law firm Gibson, Dunn & Crutcher. Mr. Scalia's reputation as the go-to lawyer for corporations looking to avoid worker protections is so infamous that the headline for a profile piece on Mr. Scalia in *Bloomberg Businessweek* read "Suing the Government? Call Scalia!"[1]

This nation's workers deserve a Labor Secretary who will look out for their interests, establish and enforce strong health and safety standards, and safeguard their retirement security. As a corporate attorney, Mr. Scalia has fought against the Department of Labor and the interests of working people in his representation of major corporations ranging from Walmart to Wall Street banks. Mr. Scalia also led the legal challenge to the Department of Labor's April 2016 fiduciary rule, which safeguarded workers' retirement security by ensuring financial advisers are acting in the best interest of workers and do not have conflicts of interest. And he represented SeaWorld when it unsuccessfully tried to avoid responsibility and an Occupational Safety and Health Administration (OSHA) citation and fine for failing to protect Dawn Brancheau, a trainer at SeaWorld who was killed on the job by a killer whale. Simply put, Mr. Scalia is the wrong person for the job.

We are not alone in our concerns about Mr. Scalia. As of September 6, 2019, more than 93,000 people have signed a petition opposing Mr. Scalia's confirmation,[2] and that number is growing.

Signed,
CELINE MCNICHOLAS, DIRECTOR OF GOVERNMENT AFFAIRS AND LABOR COUNSEL,
MARGARET POYDOCK, POLICY ASSOCIATE,
EPI Policy Center

JOBS WITH JUSTICE,
1616 P STREET, NW WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of Jobs With Justice, I write to you to oppose the nomination of Eugene Scalia to be the U.S. Secretary of Labor. Jobs With Justice is a national network expanding people's ability to come together to improve their workplaces, their com-

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[1] Robert Schmidt, "*Suing the Government? Call Scalia!*," *Bloomberg Businessweek*, January 26, 2012.

[2] Action Network, "*Sign Now: Reject a Labor Secretarcy Who Sides with Big Business over Working People*" (online petition), accessed September 4, 2019.

munities, and their lives. We create solutions to the problems working people face by leading campaigns, changing the conversation and moving labor, community, student and faith voices to action.

The Secretary of Labor is responsible ensuring that the rights and dignity of working people in the United States are respected in our economy. In particular, at a time in which we as a nation are finally coming to grips with the systematic gender-based violence, harassment, and discrimination suffered by women of color and white women on the job, and after the previous Secretary of Labor was forced to resign for the actions he took that protected a sexual predator, the new Secretary of Labor must have a demonstrated commitment to supporting working women and standing against gender-based violence, harassment, and discrimination. Unfortunately, far from demonstrating such a commitment to working women, Mr. Scalia has repeatedly sought to protect businesses from the consequences of their discriminatory and unsafe workplaces.

In addition to protections against gender-based violence, harassment, and degradation, the Secretary of Labor is responsible for overseeing laws requiring that working people receive fair pay, be safe on the job, be supported as they join the workforce and learn new skills, and be protected when they blow the whistle on lawbreaking bosses. Working families demand a Labor Secretary who will look out for them. But Mr. Scalia has spent his career both within and outside government, looking out for the richest CEOs and Wall Street investors and has undermined the rights of working people whenever they get in the way of corporate profits.

Eugene Scalia Holds Extreme Views on Sexual Harassment

Mr. Scalia's views on gender-based violence and sexual harassment in the workplace are outside the legal mainstream. He believes that in most circumstances, companies have no legal duty to stop their supervisors from demanding sex acts from the employees they supervise even if the bosses explicitly threaten to fire employees who do not comply. The Supreme Court has unanimously held and repeatedly reaffirmed the basic principle that sexual harassment violates Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination in employment.[1] And contrary to Scalia's view, the Court has further held that when an employee's boss sexually harasses an employee he or she supervises, the company for which they both work bears a special responsibility for this sexual harassment.[2]

This rule takes a small step toward dealing with the power dynamics embedded in our society. While both women and men can be perpetrators and victims of sexual harassment, eighty percent of sexual harassment and employment discrimination complaints filed with Federal regulators were filed by women.[3] When a boss harasses an employee, not only is he imbued with the economic power of our capitalist country—likely he has more money, greater job security, and the ability to fire the victim—he also is imbued with the social power given to men in our patriarchal country. Companies that let this power dynamic flourish to such an extent that a boss felt free to engage in sexual harassment or gender-based violence against a person he supervised should bear the costs associated with that boss's actions.

For Mr. Scalia, however, even this modest step is too much. Mr. Scalia argued in a law review article that a company is not responsible even if a boss orders someone he supervises to go on a business trip, gropes her in public and in private and tells her that she'll be fired if she doesn't submit unless the employer "endorsed the conduct."[4] Such a rule would immunize the vast majority of companies from sexual harassment liability, further endanger the millions of women who experience sexual harassment on the job, and take away one of the few mechanisms that exist in our law to deal with the inequality and lack of collective power that women have in our economy.[5]

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[1] *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. city of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

[2] *See Ellerth*, 524 U.S. at 753–54; *Faragher*, 524 U.S. at 807–08.

[3] *See Elyse Shaw, et al.*, Sexual Harassment & Assault at Work: Understanding the Costs, Institute for Women's Policy Research, Oct. 15 2018 (available at *https://iwpr.org/publications/sexual-harassment-work-cost/*).

[4] Eugene Scalia The Strange Career of Quid Pro Quo Sexual Harassment, 21 *Harv. J.L. & Pub. Pol'y* 307, 323 (1998).

[5] *See* Paula A. Johnson, et al., *Sexual Harassment of Women* at 28, The National Academies Press (2018) ("Numerous studies have demonstrated that more than half of working women report experiencing sexually harassing behavior at work. . . .") available at *https://www.ncbi.nlm.nih.gov/books/NBK507206/pdf/Bookshelf_NBK507206.pdf*.

Mr. Scalia's actions as a lawyer underscore his problematic views on sexual harassment. In private practice, Mr. Scalia took on the giant bank HSBC as a client when an employee filed a lawsuit against it based on its response to a sexual harassment claim. *The American Prospect* reported that, as part of his defense, he took the deposition of the harassment victim and during that deposition, he "repeatedly brought her to tears, not so subtly accusing her of promiscuity and scheming to extract money from the bank."[6] Mr. Scalia's actions went far beyond lawyers' obligations to zealously represent their clients, and veer toward an unethical attempt to intimidate a sexual harassment victim into recanting her story.

Mr. Scalia's views on sexual harassment are particularly problematic because the U.S. Department of Labor (DOL) has a special role in ensuring that U.S. workplaces are free from gender-based violence and harassment. DOL's Office of Federal Contract Compliance Programs is the government agency tasked with ensuring that all government contractors comply with anti-discrimination law, including the prohibition against sexual harassment.[7] In addition, DOL's Civil Rights Center investigates complaints of sexual harassment and other discrimination by DOL's own employees and by grantees of DOL programs.[8] Furthermore, DOL oversees an array of programs dedicated to ensuring that working people are able to gainfully participate in our economy, including the Office of Apprenticeship, Job Corps, and the Women's Bureau. All of these programs would be negatively impacted by a Secretary of Labor with such an extreme view of sexual harassment laws. And finally, the Nation's working people and business community look to DOL to set the standard for fair treatment of working people because DOL's mission is to "foster, promote and develop the well-being of wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights."[9]

Scalia Sought to Weaken Protections for Whistleblowers While he was the Labor Department's top Lawyer

As the Solicitor of Labor, DOL's chief lawyer, Mr. Scalia fought to weaken whistleblowing protections. In 2002, Mr. Scalia filed a brief before DOL's Administrative Review Board that was considering a case filed by a Department of Justice employee who claimed the Department of Justice had retaliated against him for blowing the whistle on the Justice Department's decision not to go after a polluter.[10] In the brief, Mr. Scalia argued that whistleblowing protections did not apply to contacts with individual Members of Congress unless they were conducting official investigations.[11] Senators Charles Grassley (R-IA) and Patrick Leahy (D-VT) stated in response to the brief that Mr. Scalia's view would deter whistleblowing in a number of contexts, with Senator Grassley stating that "If this is the way the Labor Department intends to enforce the new law, then most corporate whistle-blowers won't be protected,"[12] The Washington Post reported that advocates for whistleblowers said that Mr. Scalia appeared to be trying "to establish a precedent that would undermine whistle-blowers in cases against corporations."[13]

This is particularly troubling, because much of DOL's enforcement depends on whistleblowers. DOL solicits complaints for workplace health and safety violations, minimum wage and overtime violations, retirement fund fraud, civil rights complaints, and for violations of many other statutes within its jurisdiction. If potential whistleblowers have to face a hostile Secretary of Labor, it would seriously harm DOL's ability to enforce the laws protecting working people.

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[6] David Dayen, Eugene Scalia Once Represented a Big Bank in a Sexual Harassment Case. It Got Ugly," *The American Prospect*, July 22, 2019, available at *https://prospect.org/article/eugene-scalia-once-represented-big-bank-sexual-harassment-case-it-got-ugly*.

[7] *See* About Us page of DOL's Office of Federal Contract Compliance Programs, available at *https://www.dol.gov/ofccp/aboutof.html*.

[8] *See* About Us page of DOL's Civil Rights Center, *https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/about*.

[9] 29 U.S.C. § 551.

[10] *See* Brief for the Assistant Secretary for Occupational Safety & Health, *Sasse v. Office of the U.S. Attorney*, ARB Case No. 02–077, Sep. 12, 2002, available at *https://www.peer.org/assets/docs/dol/scalia-amicus-brief.pdf*.

[11] *See id*. at 23.

[12] Christopher Lee, Whistle-Blower Case at Issue, *Wash. Post*, Oct. 25, 2002.

[13] *Id*.

Scalia has Repeatedly Fought to Weaken Protections for Working People

As a private attorney, Mr. Scalia has uniformly fought to decrease the responsibility that corporations have to ensure that working people are paid a decent wage for their labor, that worksites are safe and that workplaces are free from discrimination. He has systematically worked to decrease the ability of working people to exercise their collective power and participate in our economy in a fair way. At every turn, he has chosen to maximize profits for corporate CEOs, Wall Street investors, and the corporations they control at the expense of the working people for whom the Secretary of Labor is supposed to look out.

Some examples of the anti-working people positions Scalia has taken in private practice include his opposition to the ergonomics rule put out by DOL's Occupational Safety and Health Administration in the 1990's,[14] his opposition to increasing the minimum wage for Federal contractors,[15] and his legal work to defend large corporations from violations of the Americans With Disabilities Act and other anti-discrimination laws,[16] in addition, Scalia has strongly defended corporate union-busting,[17] leading a strategy that created widespread, unprecedented attacks in the media and by elected officials against the National Labor Relations Board's General Counsel for trying to uphold working people's right to organize.[18] As a private attorney, he even an attempt to blame the victim when a SeaWorld employee was killed by an orca.[19]

Conclusion

For the reasons discussed above, Jobs With Justice opposes the nomination of Eugene Scalia to be Secretary of Labor and asks all Senators to stand with working people and vote against his nomination.

Sincerely,

ERICA SMILEY, EXECUTIVE DIRECTOR,
Jobs With Justice

MOMSRISING.ORG

Leading Moms Group Urges U.S. Senate to Reject Eugene Scalia to Serve as U.S. Secretary of Labor, Calling His Record on Sexual Harassment, Worker and Consumer Protections 'Disqualifying'

Statement from Kristin Rowe-Finkbeiner, executive director and CEO of MomsRising, an online and on-the-ground organization of more than one million mothers and their families, on the nomination of Eugene Scalia to serve as U.S. Secretary of Labor:

"President Trump demonstrated contempt for the health and safety of America's workers by nominating Eugene Scalia to serve as U.S. Secretary of Labor. Confirming Scalia would be akin to positioning a fox to guard a henhouse. Scalia's life's work has been to undermine the U.S. Department of Labor's mission to 'foster, promote, and develop the well-being of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.' His record as an advocate for big businesses that trample on the rights and safety of working people is, quite simply, disqualifying.

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[14] *See* Maggie Haberman, et al., Trump to Nominate Eugene Scalia for Labor Secretary Job, *N.Y. Times*, July 18, 2019.

[15] *See* Eugene Scalia & Rachel Mondl, Obama's minimum-wage increase is on shaky legal ground, *Wash. Post*, Feb. 20, 2014.

[16] *See* Noam Scheiber, Trump's Labor Pick Has Defended Corporations, and One Killer Whale, *N.Y. Times*, July 19, 2019.

[17] *See* Haberman, et al., *supra*, note 9.

[18] *See, e.g.*, Hardeep Dhillon, Fox Wildly Misrepresents Allegation That Boeing Engaged In Unlawful Union Busting, Media Matters for America, June 16, 2011, available at *https://www.mediamatters.org/lou-dobbs/fox-wildly misrepresents-allegation-boeing-engaged-unlawful-union-busting*; Adam Shah, Experts Say Allegations Against Boeing Represent "Classic" Case Of Labor Law Violations, Media Matters for America, May 13, 2011, available at *https://www.mediamatters.org/breitbart-news/experts-say-allegations-nlrb-complaint-against-boeing-represent-classic-case-labor?redirect-source=/research/2011/05/14/experts-say-allegations-in-nlrb-complaint-again/179638*; Keving Bogardus, Dems defend NLRB Against GOP pushback on Boeing suit, *The Hill*, June 10, 2011.

[19] *See* Scheiber, *supra*, note 11.

"Eugene Scalia has spent his career defending corporations that undermine the health, safety and rights of working people. A vote to confirm him would be a vote to give those who experience sexual harassment and discrimination no recourse, to subject many more people to on-the-job hazards, to deny consumers the protections they need and deserve, to turn the Federal agency charged with protecting workers' rights into an agency that works to undermine them. It would be a vote to intensify the Trump administration's assault on the rights of working people—a vote to make our country less fair.

"Scalia's record is very clear. When he represented a bank, HSBC, that was charged with retaliating against an employee who reported that a manager was sexually harassing co-workers, Scalia's questioning of a victim was aggressive and insensitive. He represented casinos that forced workers to share their tips with supervisors, denying them the right to sue for their wages. Scalia convinced an appeals court to reverse class certification for United Parcel Service workers who were denied reasonable accommodations for their disabilities, which were caused by on-the-job injuries. For the U.S. Chamber of Commerce, Scalia led a fight against regulations that experts estimated would prevent some 600,000 injuries caused by unsafe workplace design each year. He led the legal work that blocked the Labor Department's fiduciary rule, which would have protected consumers from investment advisors who put their personal profits ahead of their client's best interests. And Scalia helped Walmart and other big businesses strike down a Maryland law that required employers to make minimum contributions to their workers' health insurance coverage.

"The U.S. Senate must reject Eugene Scalia to serve as our country's Secretary of Labor."

NATIONAL DOMESTIC WORKERS ALLIANCE,
1301 CONNECTICUT AVENUE, WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

Thank you for the opportunity to offer our organizational statement regarding Eugene Scalia, President Donald Trump's nominee for the position of Secretary of the U.S. Department of Labor.

The National Domestic Workers Alliance represents domestic workers—the hard-working house cleaners, nannies and homecare workers who provide crucial assistance in millions of homes across the U.S. every day. Our members do the work that makes all other work possible—ensuring the safety and independence of seniors and people with disabilities; caring for children; and keeping homes clean and healthy. Domestic workers are mostly women, women of color and immigrants. Domestic workers are especially vulnerable to wage theft; harassment and injury on the job; severe labor exploitation and labor trafficking.

The U.S. Department of Labor ("U.S. DOL") has the responsibility to administer and enforce more than 180 Federal laws, covering many workplace activities for about 10 million employers and 125 million workers. The U.S. DOL's mission is to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights. For domestic workers, robust enforcement of these worker protections is crucial to ensure worker safety and economic well-being.

As Secretary, Mr. Scalia would be responsible for guiding the U.S. DOL toward success in this mission. Mr. Scalia is unfit for this role. He has represented corporations, financial institutions and business interests to the detriment of workers. Going directly against the U.S. DOL's mission, he has fought worker protections such as health and safety regulations, retirement security, wage security, and collective bargaining rights. Mr. Scalia has suggested that the government should not have a main role in ensuring occupational safety and health standards or compliance of other labor laws.

The Department of Labor needs a bold leader at the helm of innovation, standing strongly on the side of workers, and working to solve the problem of dangerous and

exploitative conditions. We need someone who will harness the potential of care work, which makes up one of the fastest growing industries in the country. Without investing in care work, our Nation will continue to face dire consequences which impact both domestic workers and the communities that they serve.

For all these reasons, we oppose the appointment of Eugene Scalia to the position of Secretary of the U.S. Department of Labor.

Thank you for your consideration of this statement,

MARIANA VITURRO, DEPUTY DIRECTOR,
National Domestic Workers Alliance

THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,
1875 CONNECTICUT AVENUE, NW WASHINGTON, DC,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

The National Partnership for Women & Families writes to register our opposition to the confirmation of Mr. Eugene Scalia as the next Secretary of Labor. As an organization dedicated to promoting policies that achieve fairness in the workplace, we find Mr. Scalia's background working to extend corporate and employer power as being in conflict with the mission of the Department of Labor and problematic for millions of American workers.

The National Partnership for Women & Families is a non-profit, non-partisan advocacy organization with nearly 50 years of experience promoting fairness in the workplace, reproductive health and rights, access to quality and affordable health care and policies that help women and men meet the demands of their jobs and families. Since our founding as the Women's Legal Defense Fund in 1971, we have fought for every major Federal policy advance that has helped women and families, including having a leading role in the passage of the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993.

Throughout his career, Mr. Scalia has shown repeatedly that he is not interested in protecting workers but in putting corporations and employers first. Mr. Scalia has a long record of putting corporate interests above workers' rights and undermining worker protections for the benefit of his corporate clients and their profits. He has opposed past efforts to raise the minimum wage for Federal contract workers and defended employers who fired their workers for taking leave under the Family and Medical Leave Act. He has argued that the government does not have a role in furthering the occupational safety and health for workers and defended employers who allegedly denied women equal access to overtime shifts and denied workers overtime wages. Mr. Scalia has also expressed seriously concerning views on workplace sexual harassment, stating in a 1998 article written for the Harvard Journal of Law & Public Policy that "quid pro quo" sexual harassment should not be categorized as a separate form of discrimination and that in instances where a supervisor repeatedly gropes his assistant during a business trip, employers should not be liable. [1]

Workers deserve a labor secretary who will uphold the Department's mission "to foster, promote, and develop the welfare of the wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." Mr. Scalia's background does nothing to suggest that he will champion wage earners or uphold protections for workers. As such, we urge the Committee to reject Mr. Scalia's nomination as the next Secretary of Labor and stand with working people.

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[1] Eugene Scalia, "Article: The Strange Career of Quid Pro Quo Sexual Harassment," Harvard Journal of Law & Public Policy, 307, Spring 1998.

We thank you for the opportunity to submit this letter. If you have any questions, please contact Alex Baptiste, Workplace Policy Counsel.

Sincerely,

THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES

NATIONAL EDUCATION ASSOCIATION,
1201 16TH ST., NW WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the 3 million members of the NEA who teach and support students in 14,000 communities across the Nation, we appreciate the opportunity to provide comments for the Committee's hearing on the nomination of Eugene Scalia as Secretary of the Department of Labor.

The Department of Labor's mission is to "foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; to improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." Eugene Scalia, however, has devoted his entire career to undercutting workers' rights, protecting corporations at the expense of employees and consumers, and threatening workers' retirement security.

Workers' rights. Mr. Scalia has:

- Represented businesses that threatened employees for attempting to organize a union, and, specifically, defended Boeing after it retaliated against employees for past strike activity by placing a manufacturing operation at a non-union facility;
- Opposed card check and the Employee Free Choice Act;
- Defended companies that have fired or in other ways retaliated against corporate whistleblowers.

Worker safety and OSHA protections. Mr. Scalia has:

- Opposed regulations intended to protect workers from repetitive stress injuries;
- Opposed what he calls "intrusive safety regulations," including those protecting workers against dangerous exposures to beryllium, a cause of disabling or fatal lung disease;
- Sought to narrow workers' protections under the Americans with Disabilities Act; and
- Sought to protect businesses from exposure to sexual harassment and sexual discrimination lawsuits.

Retirement security and consumer protection. Mr. Scalia has:

- Defended employers when retirement plan participants have been required to pay excessive administrative and recordkeeping fees, violating ERISA requirements of reasonable fees; and
- Defended overturning an Obama administration rule that required financial advisers to put their clients' interests ahead of their own in making recommendations.

Recently, Mr. Scalia has even represented the e-cigarette industry in its efforts to market products to teenagers and argued against additional regulation of the vaping industry. His work directly conflicts with the administration's announced plan to crack down on teenage vaping, and is a threat to students' health. Studies have shown that young people are uniquely at risk from using e-cigarettes, which expose their developing brains to nicotine levels that can cause addiction, mood disorders, and affect concentration.

In addition, Mr. Scalia is a board member of several organizations that wish to reduce the role of teachers in determining how best to teach and support students in public schools, even though educators have the experience and expertise to make such recommendations. He is also a member of the board for the New Civil Liberties

Alliance, which exists to reduce the role of the Federal Government in society—yet Mr. Scalia is the nominee to lead a Federal agency.

We must protect workers' right to organize, which is essential to educators' ability to advocate for their students. We must also protect retirement security, an important factor in recruiting and retaining the committed educators students deserve. Last, America deserves a Labor Secretary who will put the health and well-being of consumers—especially vulnerable youth, the workforce of the future—first. For these reasons, we strongly urge you to oppose this nomination. Do not provide Eugene Scalia with the opportunity to inflict his anti-worker, anti-union, anti-public sector agenda on our Nation.

Sincerely,

MARC EGAN, DIRECTOR OF GOVERNMENT RELATIONS,
National Education Association

NATIONAL EMPLOYMENT LAW PROJECT,
1350 CONNECTICUT AVE., NW WASHINGTON, DC,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the National Employment Law Project, a non-profit law and policy organization with 50 years of experience advocating for the employment and labor rights of our Nation's workers, I write to register our opposition to the confirmation of Eugene Scalia as the next Secretary of Labor. Mr. Scalia has spent virtually his entire legal career working to expand corporate and employer power, and narrow protections for workers. He is, quite simply, not someone who is suitable to serve as this country's chief advocate for working people.

The mission of the Department of Labor is to "foster, promote and develop the well-being of wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." We do not believe that Mr. Scalia, whose greatest accomplishments have included defeating rules that would have protected millions of workers from musculoskeletal disorders and required that retirement investment advisors put a client's financial interests ahead of their own, will be able to fulfill this critical mission.

If confirmed, Mr. Scalia will be among the most conflicted Labor Secretaries in the agency's history. His list of potential recusals is extensive, undescoring that he consistently engages in work that is at odds with what is in the best interest of our Nation's workforce.

His views about sexual harassment are also far outside the mainstream of both law and public consensus. In a controversial 1998 article written for the Harvard Journal of Law & Public Policy, Mr. Scalia argued that "quid pro quo" sexual harassment on the job should not be categorized as a separate form of discrimination.

Further examples of his overly zealous championing of big business include the following:

- Leading the opposition to an OSHA rule that would have regulated workplace conditions to prevent musculoskeletal disorders (MSDs)—repetitive motion injuries that can be crippling. Although the rule would have protected an estimated one million workers, Scalia led the fight against the rule, writing numerous articles and public comments dismissing years of science-based data on the effects of ergonomics as "quackery" and "junk science." He also argued that employers should not be responsible for MSD prevention.
- Defending Walmart when the State of Maryland attempted to establish a law that would make it mandatory for companies to either pay a portion of their payroll on healthcare or contribute to Medicaid.
- Defending Wynn Las Vegas Casino when it fought for the "right" to steal dealers' tips so that it could redistribute them to other workers, rather than paying those workers decent wages in the first place.

- Defending SeaWorld when the Occupational Safety Health Administration (OSHA) cited the theme park after a trainer was killed by an orca whale at one of their facilities.
- Defending the Boeing corporation when it tried to relocate jobs from Washington State in order to avoid recognizing a union duly elected by its workers.

These are but a few examples of the kinds of interests and employers uniformly represented by Mr. Scalia. While as a private citizen he has every right to pursue the type of legal career he chooses, his choices prove beyond any doubt that his sympathies lie strictly within the interests of corporations and employers, not workers. A Labor Secretary who has built his career on the backs of everyday working people is the wrong choice to lead the Department of Labor. I urge you to reject Eugene Scalia's nomination as the next Secretary of Labor as an act of solidarity with working people.

Respectfully,

CHRISTINE OWENS, EXECUTIVE DIRECTOR

NATIONAL WOMEN'S LAW CENTER,
11 DUPONT CIRCLE, NW WASHINGTON, DC,
September 18, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

The National Women's Law Center (the Center), an organization that has advocated on behalf of women and girls for more than 45 years, writes to express its strong opposition to the nomination of Eugene Scalia to be Secretary of the U.S. Department of Labor.

The Secretary of Labor is the Nation's most senior official tasked with ensuring the well-being and rights of working people and advancing their employment opportunities. The Secretary of Labor directs the Department of Labor's interpretation and enforcement of a number of laws vital to women's economic security and right to be free from workplace discrimination, such as the Fair Labor Standards Act; the Occupational Safety and Health Act; the Family and Medical Leave Act; the Affordable Care Act's requirement of break time for nursing mothers; the executive orders prohibiting sex discrimination and other forms of discrimination by Federal contractors; and a range of executive orders setting labor standards for Federal contractors' employees, including a $10.60 minimum wage and a right to earn paid sick days, in addition to overseeing a range of workforce training initiatives. These policies are essential to closing the gender wage gap: they remove barriers to women's employment opportunity, including sex discrimination; raise women's wages; allow women to meet caregiving responsibilities without sacrificing their employment; and ensure women's health and safety so they can continue to support their families. Women and their families deserve a Secretary of Labor devoted to advancing the rights of workers and committed to robust enforcement of the laws that protect them.

When Mr. Scalia was nominated by President George W. Bush as Solicitor of the Labor Department in 2001, the Center raised "serious concerns" about his nomination. His career over the almost 20 years that have followed has only affirmed and deepened those concerns. Mr. Scalia's record is marked by a consistent focus on weakening worker protections and avoiding corporate accountability. This record of hostility to labor and employment rights renders him unfit to lead the Department of Labor.

For decades, Eugene Scalia has worked to enable employers to escape responsibility for, and to limit the recourse available to working people subject to, workplace discrimination-including sexual harassment, race discrimination, and disability discrimination.

Sexual Harassment

Mr. Scalia has advanced troubling views on employer liability for supervisor sexual harassment that would insulate employers from liability for workplace sexual harassment in almost all circumstances.

In 1998, Mr. Scalia authored a law review article in which he argued that courts should abandon the *quid pro quo* theory of sexual harassment, asserting the category to be "redundant and ambiguous in theory, and cumbersome and confusing in practice." [1] Quid pro quo harassment occurs when a person's submission to or rejection of sexual advances is used as the basis for employment decisions or is made a condition of employment. In his article, Mr. Scalia asserted that employers should not be liable for certain types of supervisor harassment—including instances where a supervisor repeatedly gropes a subordinate on a business trip, or a supervisor threatens to fire a subordinate if she doesn't submit to his advances—unless the employer "endorsed the conduct."

Mr. Scalia's proposal would represent a significant narrowing of the current legal standard of employer liability for sexual harassment. Under the test set forth by the Supreme Court in *Burlington Indus., Inc. v. Ellerth* [2] and *Faragher v. city of Boca Raton*, [3] an employer is vicariously liable for harassment by a supervisor with authority over the employee. If the supervisor takes a "tangible employment action" against the employee, such as firing her because she does not sleep with him, the employer is strictly liable. If no "tangible employment action" is taken against the employee, the employer can mount an affirmative defense by showing that it has taken steps to address harassment and an employee has unreasonably failed to avail herself of the process available.

In neither situation is an employer insulated from liability because it did not specifically endorse the harassment. Such a rule would radically re-envision sexual harassment law and create a system in which employers are almost never accountable for harassment enabled by the authority vested in supervisors. This would facilitate serial harassers and leave countless victims of workplace sexual assault and other forms of harassment without recourse. Mr. Scalia's alarming views on employer liability are incompatible with the position of Secretary of Labor given the Department's obligation to enforce prohibitions against workplace harassment by Federal contractors. This is particularly so in the context of the current national reckoning with sexual harassment engendered by #MeToo.

In his private practice, Mr. Scalia has represented corporate defendants in high profile sexual harassment lawsuits involving egregious facts. For instance, until the announcement of his pending nomination, Mr. Scalia defended Ford Motor Company in a lawsuit in which numerous plaintiffs allege sex and race discrimination in violation of Title VII, including widespread sexual harassment and assault by Ford managers, supervisors and employees, such as groping, forced sexual contact and sexual assault, unwelcome requests for grotesque sexual acts, regular use of expletives to refer to female employees, and retaliation. [4] In 2004, Mr. Scalia successfully represented DaimlerChrysler in an appeal of a Michigan case involving the largest jury award to an individual sexual harassment plaintiff. [5] The plaintiff, the plant's first female millwright (a person who maintains industrial machinery), alleged her male coworkers displayed explicit photos and left notes and urine in her work area, and that management failed to take sufficient action when she reported the harassment; the jury awarded her $21 million. When Mr. Scalia joined as defense counsel during the appeal, the Michigan Supreme Court subsequently reversed the verdict and remanded the case.

Race Discrimination

Mr. Scalia defended a corporation in a Title VII race discrimination case involving an issue of growing national prominence: the disproportionate impact of dress and grooming policies on people of color. In 2016 Mr. Scalia successfully represented Catastrophe Management Solutions, an insurance claims company, against the EEOC's allegation that the company's policy prohibiting "excessive" hairstyles was racially discriminatory. A Black job applicant's employment offer was rescinded when she refused the company's request to cut off her locs. The Eleventh Circuit ruled in favor of the company, holding that the EEOC failed to show that locs are an "immutable trait" of Black individuals and that the EEOC erroneously conflated the disparate treatment and disparate impact theories. [6]

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[1] Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J. L. & PUB. POL'Y 307 (1997–1998).
[2] 524 U.S. 742 (1998).
[3] 524 U.S. 775 (1998).
[4] *Van v. Ford Motor Co.*, No. 14-CV-8708, 2016 WL 1182001 (N.D. Ill. Mar. 28, 2016).
[5] *Gilbert v. DaimlerChrysler Co.*, 685 N.W.2d 391 (Mich. 2004).
[6] *Equal Emp. Opportunity Comm'n v. Catastrophe Mgm't Solutions*, 852 F.3d 1018 (11th Cir. 2016).

However, states and cities increasingly recognize,[7] and the Center's research has shown,[8] that certain dress or grooming policies have a disproportionate negative effect on Black people, reflect gender and racial stereotypes, and are a vehicle for race and sex discrimination. For example, California recently passed a law that explicitly protects workers from discrimination based on their natural hair, and prohibits enforcement of grooming policies that disproportionately affect Black people, including bans on locs.[9] New York State passed a similar law in July 2019,[10] and New York City has updated guidance for its Human Rights Law to explicitly protect the right of all New Yorkers to maintain natural hair closely associated with racial and other identities, including specifically providing Black people the right to maintain locs.[11]

Disability Discrimination

Mr. Scalia was part of legal teams defending corporations in several cases that sought to deny employees accommodations under the Americans with Disabilities Act (ADA), to narrow the legal definition of disability, and to weaken workers' ability to come together as a class to challenge disability discrimination. For example, in 2014, Mr. Scalia successfully defended Ford Motor Company in a lawsuit brought by the EEOC alleging Ford discriminated against an employee with irritable bowel syndrome by refusing to allow her to telecommute as an accommodation, and retaliating against her for going to the EEOC.[12] Although Ford allowed telecommuting, including for the employee's position, they asserted that she needed to be at work.

Mr. Scalia also successfully defended UPS against a class action brought by UPS workers who were returning to work following medical leave for on-the-job injuries.[13] The workers alleged that the company had illegally failed to provide reasonable accommodations for their disabilities, and successfully won certification of a national class of similarly situated workers to pursue their claims. Mr. Scalia, on behalf of UPS, obtained a reversal of class certification on appeal.

Throughout his career, Eugene Scalia has shown persistent hostility to the worker and consumer protections the Department of Labor is charged with upholding.

Mr. Scalia has spent a significant portion of his career opposing and undermining workplace safety and health rules—largely overseen by the Occupational Health and Safety Administration (OSHA) within the Department of Labor—and defending employers alleged to have violated these regulations. For example, Mr. Scalia led the U.S. Chamber of Commerce's challenge to the Labor Department's 1999 ergonomics regulations to prevent injuries among workers who perform repetitive tasks. Despite a robust body of evidence supporting the need for the regulations, Mr. Scalia characterized ergonomics as "questionable science."[14]

Mr. Scalia's regulatory and litigation efforts have focused on absolving employers of responsibility to provide a safe workplace. For instance, he co-authored comments on behalf of UPS opposing a rule proposed by OSHA in 1999 to clarify that employers, and not individual workers, are required to pay for personal protective equipment to be used on the job, such as hard hats, goggles, and chemical protective equipment. Those comments said that there was no safety and health rationale to require employers to pay for such equipment—a view that OSHA rejected in the final rule issued in 2007, which affirmed that requiring employers to pay for this

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[7] *See, e.g.*, Janelle Griffith, *New York Is Second State to Ban Discrimination Based on Natural Hairstyles*, NBC NEWS (Jul. 15, 2019), *https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931*.

[8] *See* NAT'L WOMEN'S LAW CTR., *DRESS CODED: Black Girls, Bodies, and Bias in D.C. Schools* (Apr. 2018), *https://nwlc.org/resources/dresscoded/*, and NAT'L WOMEN'S LAW CTR., *DRESS CODED II: Protest, Progress, and Power in D.C. Schools* (Sept. 2019), *https://nwlc.org/resources/dresscoded-ii/*.

[9] *See* Phil Willon and Alexa Dϕaz, *California Becomes First State to Ban Discrimination Based on One's Natural Hair*, L.A. TIMES (July 3, 2019), *https://www.latimes.com/local/lanow/la-pol-ca-natural-hair-discrimination-bill–20190703-story.html*.

[10] *See* Janelle Griffith, *New York is Second State to Ban Discrimination Based on Natural Hairstyles*, NBC NEWS (July 15, 2019), *https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931*.

[11] *See* NYC Comm'n on Human Rights, *Legal Enforcement Guidance on Race Discrimination on the Basis of Hair* (Feb. 2019), *https://www..nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf*.

[12] *Equal Emp. Opportunity Comm'n v. Ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014), *reh'g en banc, opinion vacated*, 782 F.3d 753 (6th Cir. 2015).

[13] *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009).

[14] *See* Eugene Scalia, *OSHA's Ergonomics Litigation Record: Three Strikes and It's Out*, CATO INST. (June 7, 2000), *https://www.cato.org/publications/commentary/oshas-ergonomics-litigation-record-three-strikes-its-out*.

equipment "is directly related to protecting the safety and health of employees and will result in substantial safety benefits." [15]

In 2014, Mr. Scalia defended SeaWorld in its unsuccessful attempt to challenge an OSHA citation in a workplace safety case. After a whale trainer was killed by an orca during a live show, SeaWorld fought OSHA's citations in a lawsuit. The majority of the D.C. Circuit panel denied SeaWorld's petition for review, holding that SeaWorld could reasonably be required to take measures to abate the hazards created by work with orcas. The majority rejected Mr. Scalia's argument that SeaWorld's trainers accepted and controlled their exposure to risk and that the job therefore fell outside the reach of OSHA, stating that such an argument fundamentally "contravenes Congress's decision to place the duty to ensure a safe and healthy workplace on the employer, not the employee." [16]

Mr. Scalia also published an article in Harvard Law Review in 2001 which argued that unionized workplaces should be exempt from Federal workplace laws, specifically the Occupational Safety and Health Act and the Fair Labor Standards Act, and also potentially Title VII. This policy change would substantially burden unions by forcing them to bargain for basic rights which all other workers already have, would leave unionized workers without recourse in the courts, and would likely have the effect of depressing union membership.

In addition to fighting workplace safety and health laws and regulations, Mr. Scalia has advanced efforts to limit workers' access to justice. He has defended corporations' use of forced arbitration agreements that include workers' waiver of the ability to proceed as a group or as a class to challenge violations of workplace rights. For example, Mr. Scalia represented UBS in a 2018 case in which laid-off workers were forced to release claims against the company in order to receive deferred compensation and incentives, which allegedly disproportionately affected older workers. UBS's attempt to dismiss or force arbitration of the proposed class claims was rejected by a Federal district court. [17]

Mr. Scalia not only opposed the Obama administration's effort to mandate a $10.10 minimum wage for Federal contract workers, [18] he also successfully argued in support of Wynn Casino's policy forcing casino dealers making minimum wage to share their tips with floor supervisors who were making four to five times as much money each year. [19]

Finally, Mr. Scalia is largely responsible for overturning the Labor Department's 2016 fiduciary rule, which merely sought to require investment brokers to provide advice in the best interest of their clients—and to prevent the estimated $17 billion that retirement savers lose each year as a result of receiving conflicted advice. [20] Scalia represented business interests, including the U.S. Chamber of Commerce and the Financial Services Roundtable, in a lawsuit in which the Fifth Circuit Court of Appeals vacated the regulation. [21]

As Secretary of Labor, Eugene Scalia will be charged with protecting working people—and in his career he has shown no propensity, sympathy or even interest in upholding, much less advancing, their rights.

Mr. Scalia's litigation and regulatory efforts on behalf of his corporate clients, as well as his public statements and publications, demonstrate that as Secretary of Labor he would seek to undermine critical workplace protections to the detriment of working people. As a leader in the fight for workplace rights for women, the Cen-

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[15] U.S. Dep't of Labor, Occupational Safety and Health Admin., *Employer Payment for Personal Protective Equipment, Final Rule*, 72 Fed. Reg. 64342, 64380 (Nov. 15, 2007) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917 at al.).

[16] *SeaWorld of Florida LLC v. Perez*, 748 F.3d 1202, 1211 (D.C. Cir. 2014).

[17] *Zoller v. UBS Sec. LLC*, No. 16-CV-11277, 2018 WL 1378340, (N.D. Ill. Mar. 19, 2018).

[18] Eugene Scalia and Rachel Mondi, *Obama's minimum-wage increase is on shaky legal ground*, WASH. POST (Feb. 20, 2014), *https://www.washingtonpost.com/opinions/obamas-minimum-wage-increase-is-on-shaky-legal-ground/2014/02/20/16509b42-09999c-0911e3-b931-0204122c514b-story.html?noredirect=on*.

[19] Brief for Petitioner at 5, *Wynn v. Baldonado*, 311 P.3d 1179 (Nev. 2013) (No. A-10-622879-J).

[20] *See, e.g.*, Heidi Shierholz & Ben Zipperer, ECON. POL'Y INST., Here Is What's at Stake with the Conflict of Interest ("Fiduciary") Rule (May 2017), *https://www.epi.org/files/pdf/129541.pdf*.

[21] *Chamber of Commerce of United States v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

ter strongly opposes the confirmation of Eugene Scalia as Secretary of Labor and urges the Committee to reject his nomination.

Sincerely,
EMILY MARTIN, VICE PRESIDENT FOR EDUCATION & WORKPLACE JUSTICE

PUBLIC CITIZEN,
1600 20TH ST. NW WASHINGTON, DC,
September 19, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

Public Citizen, a public interest organization with more than 500,000 members and supporters, strongly opposes the nomination of Eugene Scalia as Secretary of Labor. Mr. Scalia has spent his career in private practice, representing the interests of big business at the expense of workers and investors. He is a partner at Gibson, Dunn & Crutcher, where he has cashed in on representing the Chamber of Commerce and other high-profile corporate clients since 2003. Last year he earned over $6.2 million from the firm.[1] Disturbingly, he is one of the most conflicted Labor Secretary nominees in recent history.[2]

After his nomination, the AP News reported, "Scalia's record drew unqualified praise from the chamber."[3] Glenn Spencer, the Chamber's senior vice president for employment policy, said Mr. Scalia is "an excellent choice precisely because he has the skills to issue regulations that will stand up to court challenge."[4] Based on his "successful" track-record rolling back fundamental worker and investor protections, the public should be alarmed about the power he could wield over regulations as Secretary and his inherent conflict of interest in several matters.

The following are a sampling of cases in which Mr. Scalia has represented the Chamber:

I. Anti-Retaliation Provision of Electronic Recordkeeping Rule

Purpose of Rule: OSHA's rule to "Improve Tracking of Workplace Injuries and Illnesses", also known as the "electronic recordkeeping rule" prohibits employers from discouraging workers from reporting an injury or illness, and it requires education around and enforcement of anti-retaliation rights. The rule's anti-retaliation provisions went into effect in 2016.

Actions Taken to Undermine Rule: The Chamber and other industry groups filed a lawsuit against the Labor Department regarding the electronic recordkeeping rule, citing regulatory overreach and concerns over the anti-retaliation portion of the rule. In June, Mr. Scalia served as counsel for amici curiae the National Association of Manufacturers, Great American Insurance Company, and Associated Builders and Contractors, in opposition to the anti-retaliation provision of the rule. As grounds for its opposition, the brief argued that it would "allow OSHA to micromanage how certain safety programs are structured" and cited in part, "the costs to employers of having to modify their programs to comply with OSHA's newly minted restrictions."[5] After he was nominated, Mr. Scalia filed a Motion to Withdraw from his role as counsel on September 10, 2019.

II. Fiduciary Rule

Purpose of Rule: Under Obama, the Labor Department established this rule to ensure that individuals are legally entitled to retirement investment

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[1] Dan Packel, *Labor Appointee Eugene Scalia Earned $6.2M as Gibson Dunn Partner*, LAW.COM (Aug. 30, 2019), *https://bit.ly/2kGHkde*.

[2] Eugene Scalia's Corporate Client List Makes Him the Most Conflicted Labor Secretary in Recent History, Allied Progress (Aug. 8, 2019), *https://bit.ly/2kU1VL5*.

[3] Mark Sherman, et al.., *Labor nominee Scalia has long record of opposing regulations*, AP (Jul. 19, 2019), *https://bit.ly/2klSYK8*.

[4] Mark Bocchetti, Scalia, *Skilled at Upending Rules, May Soon Write Them at the Department of Labor*, ROLL CALL (Aug. 5, 2019), *https://bit.ly/2mnDOF0*.

[5] *Brief of Amici Curiae, The National Association of Manufacturers, Great American Insurance Company, And Associated Builders and Contractors in Support of Plaintiffs' Motion for Summary Judgment*, No. CIV-17-0009-PRW (OK Western District Court, Jun. 12, 2019).

advice that serves their best interests. Specifically, when dealing with accounts connected to the Internal Revenue Service, it required all Wall Stress specialists to prioritize client interests over their own financial interests, charge reasonable fees, and refrain from making misleading statements. [6]

Actions Taken to Undermine Rule: On June 21, 2018, the U.S. Fifth Circuit Court of Appeals vacated the rule in a 2–1 decision. With Mr. Scalia serving as Counsel, the Chamber and leading trade associations brought the case, arguing that the rule is "arbitrary, capricious, unreasonable, and contrary to law." [7]

III. Exchange Act Rule 14a–11

Purpose of Rule: In 2010, the SEC adopted Rule 14a–11, which mandated proxy access at all public companies, empowering certain shareholders to have more power over the nomination of the board of directors. Specifically, it required public companies to provide shareholders with a mechanism to nominate one or more nominees to stand for election as board director. [8]

Actions Taken to Undermine Rule: In 2010, Mr. Scalia served as counsel for The Business Roundtable and the Chamber in opposing the rule. He argued that corporations' opposition to proxy access has "long been linked with the fact that the most activist shareholders are union pension funds, government pension funds, and other 'institutional interests'," notwithstanding the fact that structural aspects of the rule made it very difficult, even illegal, for those any shareholder to use this mechanism under fraudulent conditions. [9] In 2011, the U.S. Court of Appeals for the DC Circuit vacated the rule on the grounds that the cost benefit analysis was inadequate. [10]

IV. SEC's Mutual Fund Governance Rule

Purpose of Rule: In 2004, the SEC developed the Mutual Fund Governance Rule to require mutual fund companies to put independent overseers on their boards of directors. It was part of a larger package of reforms to address abuses in the mutual fund industry.

Actions Taken to Undermine Rule: In 2005 and 2006, Mr. Scalia represented the Chamber on two challenges to the rule. Specifically, it challenged provisions that required the boards of mutual fund companies to have an independent chair and 75 percent independent membership. It argued in part that the SEC did not have the authority to regulate "corporate governance" and that is did not undertake a rigorous review of the costs. Although the U.S. Court of Appeals for the DC Circuit held in 2005 that the SEC had the authority to promulgate the rule, it remanded the case to the SEC to seek additional public comments on the rule's costs, and in 2006 the court vacated the rule. [11]

V. OSHA High Injury/Illness Rate Targeting and Cooperative Compliance Program

Purpose of Rule: Established in 1997, the High Injury/Illness Rate Targeting and Cooperative Compliance Program, established by a directive, was aimed at reducing workplace injuries and illnesses by focusing onsite-specific data. OSHA sought to leverage its limited resources by focusing on establishments with high illness and injury rates. Those employers that adopted a comprehensive safety and health program would qualify for placement on a lower priority inspection targeting list. [12]

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[6] Press Statement, Bart Naylor, Public Citizen, *Fiduciary Rule Would Stop Financial Advisors from Misleading Americans Saving for Retirement* (Apr. 5, 2016), *https://bit.ly/2kpnC5o*.

[7] *U.S. Chamber of Commerce et al*., v. U.S. Department of Labor, No. 17-10238 (5th Circuit Court of Appeals, Jul. 20, 2017), *https://bit.ly/2ksKLE8*.

[8] *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals, Jul. 22, 2011), *https://bit.ly/2kpLPbT*.

[9] *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals, Nov. 30, 2011), *https://bit.ly/2kIktxW*.

[10] *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, No. 10-1305 (D.C. Circuit Court of Appeals, Jul. 22, 2011), *https://bit.ly/2kpLPbT*.

[11] The Federalist Society, *Eugene Scalia, https://bit.ly/2mk20rD; Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), and *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Circuit, 2006), *https://bit.ly/2m3t7Hf*.

[12] U.S. Department of Labor, *OSHA Instruction* (Nov. 25, 1997), *https://bit.ly/2kJhp4D*.

Actions Taken to Undermine Rule: In 1998, Mr. Scalia was part of a legal team for the Chamber that challenged the rule under the Administrative Procedure Act. Notwithstanding that an employer's participation in the program was strictly voluntary, the Chamber argued that OSHA should have conducted a notice and comment rulemaking proceeding prior to issuing the directive. In 1999 the U.S. Court of Appeals for the DC Circuit agreed and vacated the directive. [13]

These cases reflect Mr. Scalia's long track-record of putting corporate interests above worker and investor rights. Regrettably, his nomination is just the latest in the Trump administration's efforts to advance the Chamber's deregulatory agenda and systematically dismantle fundamental health and safety protections, and to undermine the very agency tasked with safeguarding America's workforce. Mr. Scalia cannot be trusted to lead the Labor Department, and we strongly urge your Committee to reject his nomination. If you have any questions about our position, please contact Shanna Devine, Worker Health and Safety Advocate for Public Citizen's Congress Watch Division.

Sincerely,

PUBLIC CITIZEN

UNITED STEELWORKERS (USW) DISTRICT 12,
695 JERRY STREET, CASTLE ROCK, CO,
September 17, 2019.

Hon. LAMAR ALEXANDER, *Chairman*,
Hon. PATTY MURRAY, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY:

On behalf of the National Employment Law Project, a non-profit law and policy organization with 50 years of experience advocating for the employment and labor rights of our Nation's workers, I write to register our opposition to the confirmation of Eugene Scalia as the next Secretary of Labor. Mr. Scalia has spent virtually his entire legal career working to expand corporate and employer power, and narrow protections for workers. He is, quite simply, not someone who is suitable to serve as this country's chief advocate for working people.

The mission of the Department of Labor is to "foster, promote and develop the well-being of wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." We do not believe that Mr. Scalia, whose greatest accomplishments have included defeating rules that would have protected millions of workers from musculoskeletal disorders and required that retirement investment advisors put a client's financial interests ahead of their own, will be able to fulfill this critical mission.

If confirmed, Mr. Scalia will be among the most conflicted Labor Secretaries in the agency's history. His list of potential recusals is extensive, undescoring that he consistently engages in work that is at odds with what is in the best interest of our Nation's workforce.

His views about sexual harassment are also far outside the mainstream of both law and public consensus. In a controversial 1998 article written for the Harvard Journal of Law & Public Policy, Mr. Scalia argued that "quid pro quo" sexual harassment on the job should not be categorized as a separate form of discrimination.

Further examples of his overly zealous championing of big business include the following:

- Leading the opposition to an OSHA rule that would have regulated workplace conditions to prevent musculoskeletal disorders (MSDs)—repetitive motion injuries that can be crippling. Although the rule would have protected an estimated one million workers, Scalia led the fight against the rule, writing numerous articles and public comments dismissing years of science-based data on the effects of ergonomics as "quackery" and "junk

[13] *U.S. Chamber of Commerce v. U.S. Dep't Labor*, 174 F.3d 206 (D.C. Circuit, 1999), *https://bit.ly/2kTah5E*.

science." He also argued that employers should not be responsible for MSD prevention.

- Defending Walmart when the State of Maryland attempted to establish a law that would make it mandatory for companies to either pay a portion of their payroll on healthcare or contribute to Medicaid.
- Defending Wynn Las Vegas Casino when it fought for the "right" to steal dealers' tips so that it could redistribute them to other workers, rather than paying those workers decent wages in the first place.
- Defending SeaWorld when the Occupational Safety Health Administration (OSHA) cited the theme park after a trainer was killed by an orca whale at one of their facilities.
- Defending the Boeing corporation when it tried to relocate jobs from Washington State in order to avoid recognizing a union duly elected by its workers.

These are but a few examples of the kinds of interests and employers uniformly represented by Mr. Scalia. While as a private citizen he has every right to pursue the type of legal career he chooses, his choices prove beyond any doubt that his sympathies lie strictly within the interests of corporations and employers, not workers. A Labor Secretary who has built his career on the backs of everyday working people is the wrong choice to lead the Department of Labor. I urge you to reject Eugene Scalia's nomination as the next Secretary of Labor as an act of solidarity with working people.

Respectfully,

ROBERT LAVENTURE, DIRECTOR,
United Steelworkers (USW) District 12

QUESTIONS AND ANSWERS

RESPONSE BY EUGENE SCALIA TO QUESTIONS OF SENATOR BRAUN, SENATOR COLLINS, SENATOR ENZI, SENATOR MURKOWSKI, SENATOR ROBERTS, SENATOR SCOTT, SENATOR MURRAY, SENATOR SANDERS, SENATOR CASEY JR., SENATOR BALDWIN, SENATOR MURPHY, SENATOR WARREN, SENATOR KAINE, SENATOR HASSAN, SENATOR SMITH, SENATOR JONES AND SENATOR ROSEN.

SENATOR BRAUN

Question 1. **Joint-Employer Rule**

The last administration greatly altered the Fair Labor Standards Act by issuing a rule of a joint-employer that endangered business growth in the United States and reversed thirty years of precedent. I wanted to echo the remarks made by Senators Alexander and Isakson at your live hearing that I am pleased by the roll back of this rule by the Trump administration. However, it is troubling to me that uncertainty exists as administrations change.

I joined Senators King and Cornyn when they introduced the Trademark Licensing Protection Act, which would clarify the joint employer rule to some degree to ensure the use of a trademark product or logo cannot be used to define a joint employer. Where else in U.S. Code can we work to ensure joint-employer is defined in a way that does not discourage business growth?

Could you explain the disadvantages to productivity a company would face if the term joint employer is loosely defined and liberally applied?

Answer 1. Your question addresses ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

Question 2. **Apprenticeships and Workforce Development**

When I ran my distribution company, we consistently had openings for positions that required advanced training but not a four-year degree, including truck drivers. In fact, it has been estimated that the United States will reach a worker shortage of 11 million by 2020 if we do not do more to address the skills gap.

My colleague from Indiana, Senator Young, has introduced the DRIVE-Safe Act, which would allow for those under the age of 21 with a commercial drivers license

to cross state lines to engage in commerce, addressing the massive truck driver shortage we have in the United States.

I also introduced the Pell Flexibility Act of 2019 to create a pilot program for Pell money to be used for short-term programs.

These bills address workforce development in the commerce and transportation and education spaces. How can we improve labor laws to close the skills gap? Multiple Senators at your live hearing, including Democratic Senator Rosen mentioned the need for flexible apprenticeship models for various industries, including construction. How do you plan to promote this flexibility through Industry Recognized Apprenticeship Programs (IRAPs)?

Answer 2. I share your belief that high quality apprenticeship programs are a valuable and effective job training tool; expanding access to effective apprenticeship programs is an important element of positioning our workforce to meet the needs of a changing economy. Apprenticeships and other work-based learning models that offer workers the opportunity to earn while they learn are critical to training the American workforce. If confirmed, one of my priorities will be to ensure that apprenticeship programs are accessible in more communities and to displaced workers who need to transition to new and growing industries.

With respect to IRAPs specifically, your question addresses ongoing rulemaking. I understand that the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest, in addition to assessing all ways in which the Department can contribute to closing the skills gap.

SENATOR COLLINS

Question 1. **Job Corps**

Job Corps has provided great opportunities for disadvantaged youth and employers in Maine. Maine's two Centers—Loring Job Corps Center and Penobscot Job Corps Center—serve more than 500 young adults and rank among the best in the Nation.

Earlier this year, I congratulated Adais Viruet-Torres on earning a nursing degree with honors from Husson University. I first met Adais in 2008, when she was enrolled in Job Corps. She had previously experienced homelessness, but ended up making her way to the Loring Job Corps Center. Because of Job Corps and her hard work, she is on the path to a truly rewarding career. Hers is one of the many amazing stories that Job Corps makes possible.

If confirmed, what would be your vision for workforce development programs like Job Corps that are aimed at disadvantaged youth?

Answer 1. If confirmed, I look forward to learning more about the Loring and Penobscot Job Corps centers in Maine as well as others. Job Corps has been and continues to be an important employment and training option for at-risk youth. My focus, if confirmed, will be on helping Job Corps centers better provide students the services and training central to their mission.

Question 2. **Older Americans at Work**

As our Nation's demographics shift, we are seeing many older Americans stay in the workforce. Adults age 65 and older are twice as likely to be working today compared with 1985. In the Aging Committee, which I chair, we have focused on the opportunities and challenges older workers face.

Older Americans stay in the workforce for many reasons, but as they do so they can face challenges. Some older workers face discrimination. Workers who find themselves unemployed in their fifties may want to keep working, but can face an uphill climb in being hired for a new job.

How can the Department help address these demographic realities, particularly in ensuring that older Americans can remain productive in the workforce?

Answer 2. If confirmed, I will work to ensure that the growth in our economy can be shared by American workers of all ages. I share your belief in the dignity of work, and your concern that older workers are often the targets of invidious discrimination. In fact, older workers possess the skills needed by countless employers across the country, and can make important contributions to closing the "skills gap." For those older workers looking to go back into the workforce, the Department of Labor can help guide adult learning at community colleges, onsite training, and through apprenticeships. The Department can also help address discrimination

against older workers through its Civil Rights Center's administration of the non-discrimination provisions of the Workforce Innovation and Opportunity Act of 2014.

Question 3. **Retirement Security Work**

As Chairman of the Senate Aging Committee, I have heard about the challenges faced by older workers when their pensions are mismanaged. As Solicitor of Labor, you ensured that an independent party would manage the 401(k) and pensions plans for 40,000 Enron workers. At the time, you indicated that Enron executives could not be trusted to administer these plans.

Can you please explain why you fought for this new oversight and how it protected retirees?

Answer 3. Protecting retirement savings and worker health benefits is among the Department of Labor's most important responsibilities. When I served as Solicitor of Labor, the Department career staff and I determined that the fiduciaries to Enron's pension plans could no longer be trusted with oversight of the plans, given their failure to protect retirees' investments in company stock from the company's collapse. We therefore sought, obtained, and enforced Enron's agreement to have the company's pension plans controlled by an independent fiduciary (State Street Bank and Trust Company) that had no connection to the company or to its officers or directors. I personally worked with my staff to obtain and enforce this agreement, and later worked with the staff to prepare an influential amicus brief that successfully opposed attempts to dismiss the fiduciary breach litigation that Enron workers brought against the company and plan fiduciaries. If I am confirmed as Secretary of Labor, I would continue to forcefully protect America's workers and retirees.

SENATOR ENZI

Question 1. **Voluntary Protection Program (VPP)/Safety and Health Achievement Recognition Program (SHARP)**

As a former small business owner, I understand both the importance of maintaining a safe workplace as well as the burdens that can be imposed by Federal regulations. During our meeting in my office, I discussed that one of my priority programs is the Voluntary Protection Program or VPP that is administered by OSHA. The program helps reduce OSHA's inspection burden on workplaces that have a proven commitment to safety and a record of compliance with OSHA standards. I also discussed my desire to have a similar program for small businesses.

I understand that OSHA's Safety and Health Achievement Recognition Program (SHARP) is similar to VPP, but for small and medium-sized businesses. However, it was brought to my attention that SHARP is underutilized due to the lack of trust among small and medium-sized businesses to engage with OSHA.

They fear being cited for violations. Neither of these programs are enacted into law, but were created by OSHA. I have introduced legislation to codify the VPP to create a statutory framework to maintain the program. I may do the same for SHARP.

- What are your ideas and priorities for these programs? How can OSHA and the DOL instill more trust in these programs for better relationships with small and medium-sized businesses?
- How can OSHA and the DOLimprove these programs?
- How does OSHA promote and market these programs or rather, how can we better promote these programs, particularly to small and medium-sized businesses, to ensure that they are aware of them, and that these programs are more readily utilized?
- As I mentioned, these are priority programs for me and I would like to have legislation enacted by the end of this Congress to codify and make improvements to them for their long-term stability. I look forward to having the opportunity to work with you on these issues.

Answer 1. For employers working to exceed the minimum standards of the Occupational Safety and Health Act, the Voluntary Protection Program (VPP) and Safety and Health Achievement Recognition Program (SHARP) are excellent ways to increase safety in the workplace. According to OSHA's website, the average VPP worksite has a "Days Away Restricted or Transferred" case rate of 52 percent below the average for its industry. VPP work sites must engage workers and labor, where representation exists, to create a safety and health management plan to identify hazards and means to prevent them. SHARP is similarly valuable for small businesses working to improve safety in the workplace.

If confirmed, I would welcome the opportunity to work with you on these issues, and to identify ways to increase participation by small and medium-sized businesses.

Question 2. **Association Health Plans**

It can be a real struggle for small business owners to afford to offer their employees comprehensive health insurance plans because they have limited ability to pool risk and lack leverage in the market. I've long thought that one family shoe store might not be able to get an insurance company to play ball, but one thousand family shoe stores probably could. Last year, the Trump administration issued a new rule that made it easier for small businesses to band together like that for the purposes of offering an Association Health Plan, subject to the same consumer protection requirements that apply to large employers offering similar coverage. It did not disrupt state authority, which is important, so we don't need to build another Washington bureaucracy and consumers can be assured of better help if they need it.

I know that rule is the subject of continued litigation, but can you talk a little bit about your thoughts on Association Health Plans in general and what DOL can continue to do to promote this option for comprehensive and affordable health insurance coverage?

Answer 2. I did not participate in adoption or implementation of the Association Health Plan regulation, which represents an innovative attempt to expand employer-provided health coverage by facilitating small employers' ability to band together to pool risk and reduce costs. I understand there is a legal challenge to the regulation currently pending before the U.S. Court of Appeals for the District of Columbia Circuit. If confirmed, I look forward to learning more about Association Health Plans in addition to exploring other options for comprehensive and affordable health insurance coverage within the purview of the Department of Labor.

SENATOR MURKOWSKI

Question 1.

Based on your long and detailed experience with Federal labor laws and regulations, are there any regulations that you would, if confirmed, particularly like to rescind or re-write or any statutes you would particularly like to see amended and why?

Answer 1. The Department periodically publishes its regulatory agenda, which highlights the priorities of the Department and its agencies. If confirmed, I plan to thoroughly review the agenda and work with Department leadership to determine if there are additional regulatory actions that would serve the public interest. Additionally, I plan to review and consider regulatory recommendations from Congress, the administration, and Departmental stakeholders.

Question 2.

Secretary Acosta committed to me and to Alaskan union leaders during his visit that he would get Wage and Hour investigators to Fairbanks and Anchorage. This commitment has been difficult to completely fulfill. Will you pledge to continue to keep working to fulfill this commitment?

Answer 2. I understand there has been some increase in Wage-Hour staffing in Alaska since your discussion with Secretary Acosta, and if confirmed, I look forward to learning more about this issue and steps that may be taken. I am committed to the mission of the Wage and Hour Division to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce.

Question 3.

Secretary Acosta visited the Job Corps center in Palmer when he came to Alaska. He noted that it was one of the most successful Job Corps centers in the Nation in terms of outcomes, but noted that in measuring the effectiveness of Job Corps, the Department did not place as much weight on outcomes as on inputs. Outcomes like placing students in jobs they were trained for, where they were making good wages. He planned to change that. He was also interested in closing Job Corps centers with poor outcomes and poor safety records. Do you agree with those positions?

Answer 3. If confirmed, I look forward to learning more about the Alaska Job Corps Center in Palmer as well as others. Job Corps has been and continues to be an important employment and training option for at-risk youth. I agree that assessment of program outcomes is important, and my focus will be on helping Job Corps centers better provide students the services and training that are central to their mission.

Question 4.

During your tenure at Gibson, Dunn & Crutcher, you represented the financial industry's lawsuit that resulted in the 5th Circuit vacating the Obama administration's fiduciary rule. At the time, you were quoted in one interview as saying, "This is a matter that ought to be addressed by the SEC; Dodd-Frank made clear that the question of a uniform fiduciary standard is under the SEC's purview." The Department's regulatory agenda notes the plan to propose a revised fiduciary rule by the end of this year. Apart from your representation of your clients' position, what are your views on the fiduciary rule and how would you guide the Department? Or, would you recuse yourself from this issue?

Answer 4. As an attorney in private practice, I had a professional obligation to serve as a zealous advocate for my clients. If confirmed, I will have new clients, new responsibilities, and a public trust. I am acutely mindful of the Labor Department's central role in protecting employee retirement savings.

I am encouraged that the SEC has undertaken steps of its own to address broker-dealers' servicing of retirement accounts. At this time, I have not examined the details of those steps, and as a nominee, I am not familiar with the status of the Department's plan to propose a revised fiduciary rule. If confirmed, I would consult with the Department's ethics officials regarding whether I should recuse myself from various matters, including deliberations over the new fiduciary rule. I deeply appreciate the vital importance of promoting retirement security for Americans, and if it is appropriate for me to take an active role in the Department's future efforts concerning the fiduciary rule, I would look forward to working with the Department's staff to understand those efforts and facilitate efficient and effective policies that serve the interests of retirement savers.

SENATOR ROBERTS

Question 1.

Mr. Scalia, in Kansas, we have 34 organizations employing 2,200 workers with severe disabilities thanks to section 14 (c) of Fair Labor Standards Act, the provision which allows qualified employers to pay sub-minimumwage. Will you commit to maintaining employment opportunities, like those offered under 14 (c), for workers with severe disabilities?

Answer 1. If confirmed, I look forward to learning more about the Fair Labor Standards Act Section 14(c) exemption. I recognize that this exemption is statutory, and is an area of interest and concern for many Members of Congress. While I would need to thoroughly review any particular program before committing to support or oppose it, I do support increasing the labor force participation rate of individuals with disabilities, and helping those individuals lead successful and self-sustaining lives.

Question 2.

H1B Visas is an important issue in Kansas for both landscapers and other summer camps. Do you see value in this program and will you commit to a better partnership with USCIS on the application process?

Answer 2. I agree that the H–2B program plays a vital role in our Nation's economy and directly employs a significant number of workers in the United States. I also recognize that obtaining a reliable workforce is critical to meeting the temporary and seasonal labor needs of Kansas employers. Through questions such as yours and discussions with you and your colleagues, I have come to better appreciate the depth of interest and some of the concerns with this program. If confirmed, I will continue the collaborative work of the Department with the Departments of Homeland Security and State and seek input from Congress and other stakeholders, as appropriate, to ensure the H–2B program is as accessible, transparent, and efficient as possible to enable Kansas employers to meet their temporary and seasonal workforce needs.

Question 3.

The administration's recent budgets have proposed ending the U.S. Forest Service-operated Job Corps Civilian Conservation Center program. In May, the Department of Labor (DOL) announced it would close some of these centers and turn others into demonstration projects or contract centers before rescinding that proposal. Is DOL continuing to explore the closure, piloting, or contracting out of any of the Job Corps Civilian Conservation Centers? If so, which centers?

Answer 3. Given the USDA's intention to continue to operate Job Corps Civilian Conservation Centers, I expect that, if I am confirmed, the Department will work in collaboration with the USDA to help provide students vital services and training.

Question 4.

Employee Stock Ownership Plans (ESOPs) provide an opportunity for workers to own a part of the companies for which they work, and these empowering arrangements drive economic growth, create jobs, and encourage employee savings. They have also been shown time and again to improve employee productivity, and help the company's bottom line. Congress has, on a bipartisan basis, gone to great lengths to encourage ESOPS. However, the Department of Labor (DOL) has never issued guidance on key issues such as valuation of stock that is bought or owned by the ESOP, which has created ambiguity and made it difficult for companies to make business decisions. The lack of guidance has additionally led to what many ESOP companies perceive as unfair enforcement activities by DOL against ESOPS. Do I have your commitment that you will work to issue official guidance on valuation rules and other key ESOP issues?

Answer 4. Employee Stock Ownership Plans (ESOPs) provide retirement benefits and give workers a direct stake in their companies. If confirmed, I will be committed to assuring meaningful retirement savings for participants in ESOPs, and to providing additional guidance to ESOP sponsors where it is practicable and appropriate to do so.

SENATOR SCOTT

Question 1.

Mr. Scalia, recognizing that you will understandably want to consult with staff, stakeholders, experts, and policymakers before coming to a definitive decision on any important policy matter before the Department, and that you have expressed support for the importance of the notice-and-comment rulemaking process, I will not ask that you commit to any particular course of action on the issues at hand. I will, however, ask that you fully and carefully consider the following areas, which I see as vitally important as we seek to bolster our economy, facilitate its growth, adapt to its changes, and continue to unleash the innovation at the core of our Nation's culture. Only then can we ensure that Americans from all walks of life can continue to pursue and achieve opportunity.

Answer 1. If confirmed, I will consult with the Department staff and seek input from Congress and other stakeholders and agencies as appropriate on these important issues, in an effort to ensure that the Department can properly achieve its mission.

Question 2. **The Promise of the Gig Economy:**

The sharing, or "gig," economy holds tremendous promise for American workers, who increasingly seek out independence, flexibility, and ownership in their work. Research by the McKinsey Global Institute, for instance, found that a sizable majority of so-called "gig" workers worked independently by choice, including nearly 70 percent of those who relied upon independent work for their primary income, along with more than 70 percent of those relying upon this type of work for supplemental income. Along the same lines, a survey of Uber driver-partners found that while 91 percent reported driving to make more money for themselves and their families, as we might expect to see for any job, the next most common response, which captured 87 percent of respondents, reflected a desire "to be my own boss and set my own schedule."

Unfortunately, flexible work arrangements like those leveraged by Uber, Lyft, and other consumer-friendly platforms are currently under attack in states like California, where a recently passed law, known as AB–5, would codify the unprecedented and ludicrously narrow "A-B-C" test for independent contractor status, forcibly reclassifying scores of workers and strangling the innovative models that have redefined a whole host of services. These types of laws will mean less independence and flexibility for American workers, less game-changing innovation, and less access to affordable goods and services for American consumers.

For this reason, I plan to introduce legislation that would clarify the definition of "employee" under the Fair Labor Standards Act by harmonizing it with the common-law test currently enforced under the Internal Revenue Code. I am hopeful that bills like this one can generate bipartisan support and ensure certainty, clarity, and commonsense across the Nation, in contrast with the unworkable patchwork that laws like California's would seek to create. I hope that the Labor Department gives the dynamism of the sharing economy due consideration as it considers potential action on this front and others, particularly given the regulatory tripwires that firms often face as they seek to serve and assist the independent contractors with whom they partner.

Answer 2. The Department has an important role in ensuring that employers receive clear guidance on their compliance obligations. If confirmed, I look forward to being briefed on matters pertaining to the classification of employees and will enforce the law fully and fairly. I also look forward to developing a deeper understanding of the opportunities, and challenges, presented by the "gig" economy.

Question 3. **Bridging the Skills Gap through Apprenticeships:**

In terms of bridging the skills gap, apprenticeships play a pivotal role. While some states have struggled to adapt registered apprenticeship programs to meet their workforce needs, South Carolina employers, educational institutions, and workers have harnessed this model to great effect. In 2007, when our state first launched Apprenticeship Carolina, only 90 companies in the Palmetto state had apprenticeship programs, and we had fewer than 800 apprentices.

Twelve years later, the landscape has transformed. Since 2007, South Carolina has served more than 32,000 apprentices, more than 50 percent higher than our initial goal for 2020. We have seen more than 1,000 programs registered, across virtually every sector.

Employers ranging from automakers like BMW, Mercedes-Benz, and Volvo to pharmaceutical companies like Nephron have embraced apprenticeship programs, and economic engines like Boeing have spearheaded promising efforts in the sphere of youth apprenticeships, just to name a few compelling examples.

That being said, we hear from some employers that the registered model includes undue regulatory barriers, compliance burdens, and associated costs that constrain their ability to either utilize or expand apprenticeship programs. For that reason, I applaud the administration for pursuing a parallel track under the Industry-Recognized Apprenticeship Program (IRAP) model, and I would encourage any final rulemaking along those lines to include the full spectrum of industries that might benefit from the flexibilities ideally offered by these programs. In the case of construction, for instance, despite the fact that we've seen success with the registered model, it's worth noting that even if the nearly 18,000 apprentices who completed registered apprenticeship programs in construction in fiscal year 2018 all accepted jobs in the sector, they would only supply roughly 4 percent of the nearly 450,000 additional workers that will likely be needed in 2019 alone to meet existing project backlogs. Denying construction a seat at the table for any industry-recognized model finalized would mark a missed opportunity.

Along the same lines, the Department could greatly facilitate and expand existing industry-driven workforce training models by revisiting regulatory interpretations of components of Davis-Bacon that force contractors to treat non-registered apprentices as journeymen for compliance purposes, artificially inflating costs and deterring valuable training opportunities for aspiring workers.

In terms of IRAP, I have also heard from some employers that additional regulatory flexibilities would ensure that these programs can serve as a useful tool and can truly embrace the "industry-recognized" element at their core, rather than replicate some of the more burdensome components that we sometimes see in the registered model. I hope that any final rule on this issue can address additional flexibilities and ensure that diverse industries can approach this model in a manner that meets their particular strengths and needs.

That said, even putting IRAP to the side, the registered apprenticeship model can work extremely well, as we have seen time and time again in South Carolina, but there are undoubtedly avenues for improvement through regulatory relief. I hope that, regardless of how any final IRAP rule emerges, the Department can engage with stakeholders and seek out enhancements that allow and encourage more employers to adopt apprenticeship programs, as well as to expand existing programs.

With all of that being said, my question is simply, with regards to the above, can you commit to reviewing the issues at hand and carefully considering the best course of action, from the perspective of the Department of Labor?

Answer 3. Yes, apprenticeships play an important and growing role in the American economy, and I commit to carefully consider issues such as you have raised.

Ranking Member Patty Murray Questions for the Record to DOL Secretary Nominee Scalia

1. If confirmed, do you commit without reservation to comply with any request or summons to appear and testify before committees of Congress?

   ANSWER: If confirmed, I commit to carefully review and evaluate any request or summons to appear and testify before committees of Congress. I will consult with appropriate Department officials and congressional committees with respect to testifying and appearing before Congress.

2. If confirmed, do you commit without reservation to respond in a timely manner to all congressional inquiries and requests for information from Members of Congress including request from Members in the minority?

   ANSWER: If confirmed, I commit to respond to congressional inquiries and requests for information from any Members of Congress in a timely manner.

3. If confirmed, do you commit without reservation to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

   ANSWER: If confirmed, I would take reasonable steps in an effort to comply with deadlines established for requested information.

4. If confirmed, do you commit without reservation to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings, or communications with Members of Congress?

   ANSWER: If confirmed, I would not tolerate unlawful retaliation. I would follow appropriate legal guidance that protects subordinate officials or employees from reprisal or retaliation.

5. During your confirmation hearing you consistently responded to questions about your policy positions by highlighting that it is Congress' role to enact laws and that it would be your role, if confirmed as Secretary of Labor, to enforce those laws. Do you believe nominees' personal opinions on what the law should be is not relevant information for the Senate as we consider your nomination?

   ANSWER: The American people have entrusted the power of advice and consent to their elected representatives in the Senate. I can only defer to the Senate to carry out that constitutional responsibility in the manner it deems lawful and appropriate. I have not, of course, had the honor of serving in the Senate, but for my part I believe I would appreciate that the personal opinions of nominees, while potentially relevant in some circumstances, would not invariably align with the personal opinions of all members of

the Senate on all issues. I believe I would therefore place paramount importance on a nominee's competence, integrity, and commitment to the faithful execution of the law. I expect that I share the views of the Committee on a wide of important issues, and I welcome different viewpoints when personal opinions diverge. Importantly, I hope and believe I have demonstrated that I have the experience, dedication, and integrity necessary to carry out the weighty responsibilities of the Secretary of Labor. Moreover, if I am fortunate enough to be confirmed, I will commit to enforce the law fully and fairly.

6. Earlier this year, the President signed into law (P.L. 115-435) a bill I co-wrote with former Speaker Paul Ryan called the "Foundations for Evidence-Based Policymaking Act of 2018" ("Evidence Act"), which implements roughly half of the unanimous recommendations presented to Congress by the bipartisan Commission on Evidence-Based Policymaking ("Commission") to improve the supply, privacy and security, and usefulness of evidence and data in decision-making.

   The Department of Labor has been a leader in the use of evaluation and evidence, with its Chief Evaluation Office serving as a model for the Commission. Unfortunately, time and again, the Trump administration—particularly when it comes to the rights, health, and priorities of women, minorities, disabled, and LGBTQ populations—has favored ideology and partisanship over data, research, and evidence.

   a. If confirmed, will you commit to supporting a truly independent Chief Evaluation Officer and Chief Evaluation Office, as well as ensure the proper implementation of the Evidence Act's requirements for, among other things, developing a multi-year learning agenda, coordinating data governance across the Department, and improving the accessibility of the Department of Labor's data?

   b. Given the Department did not include a request for additional resources to support implementation in its FY20 request, how would you ensure the Department has sufficient capacity to implement the Evidence Act?

   c. Finally, if confirmed, will you also commit to protecting the independence of the Bureau of Labor Statistics from political pressure, including from the White House?

ANSWER: If confirmed, I look forward to reviewing the Evidence Act's requirements and the progress of the Chief Evaluation Office (CEO) towards meeting those requirements. I believe the CEO should be in full compliance with the Evidence Act, the Department's Evaluation Policy, the Constitution, and all other relevant laws.

As a nominee, I did not participate in the budget process, so I am unfamiliar with any specific budget proposals. The President proposes the budget, and Congress ultimately determines funding. If confirmed, I look forward to participating in that process, so I can understand the goals, performance, and resource needs of programs such as these and help the President develop budget proposals that will advance the Department's mission and deliver the greatest value to the American people.

If confirmed, I also commit to working with the Bureau of Labor Statistics to ensure that it operates in a non-partisan manner to provide information that is accurate, objective, relevant, timely, and accessible. I would expect to be briefed on the Department's program evaluation efforts and implementation of the Evidence Act.

7. The Registered Apprenticeship program is a highly effective training program that has a significant imprint in my home state of Washington, as well as long-standing bipartisan support in Congress. I have been deeply concerned by the Trump Administration's efforts to undermine the Registered Apprenticeship program by creating a duplicative, lower-quality program, known as industry recognized apprenticeship programs (IRAPs). If confirmed, will you commit to ensuring the funds appropriated for the Registered Apprenticeship program are only used for the Registered Apprenticeship Program?

   ANSWER: I share your belief that quality apprenticeship programs are a valuable and effective job training tool and that expanding access to effective apprenticeship programs is a major facet of positioning our workforce to meet the needs of a changing economy.

   If confirmed, I commit to using appropriated funds as required by Congress.

8. Earlier this year, the U.S. Department of Labor announced a plan to terminate the role of the U.S. Department of Agriculture's Forest Service in administering Job Corps Civilian Conservation Centers (CCCs). If this plan had moved forward, it would have resulted in the closure of nine CCCs and the contracting out of fifteen other CCCs. This plan, which was launched without Congressional consultation, was met with strong bicameral, bipartisan resistance and ultimately withdrawn.

   a. Do you intend to undertake a restructuring of the CCC program during your tenure that would result in either the closure or contracting out of CCC facilities?

   b. Do you commit to consulting with the authorizing and appropriations congressional committees with jurisdiction over Job Corps before any restructuring plans are undertaken during your tenure?

   ANSWER: Given the U.S. Department of Agriculture's (USDA) intention to continue to operate Job Corps Civilian Conservation Centers, if confirmed, I will ensure the Department works in collaboration with the USDA to help it provide students with vital services and training.

   I will also seek input from Congress and other agencies as appropriate on these issues in an effort to ensure that Job Corps can achieve its mission.

9. Do you plan to use Job Corps demonstration authority for any further demonstration projects? How you will ensure any decisions with regard to this authority are evidence-based?

   ANSWER: If confirmed, I look forward to learning more about existing as well as any potential demonstration projects associated with the Job Corps program.

10. I am troubled by the lack of oversight for the nongovernmental Standards Recognition Entities (SREs) within the Department's proposed rule related to industry-recognized apprenticeship programs (IRAPs). These entities, which can include for-profit colleges and industry groups, will replace the role of either the U.S. Department of Labor or state apprenticeship offices in ensuring the quality of apprenticeship programs. Under the proposed rule, there is little accountability for SREs to ensure non-registered apprenticeships are providing high-quality training to apprentices. For example, non-registered apprenticeships do not need to meet the same health and safety requirements, the same anti-discrimination requirements, or the same wage progression requirements. Equally concerning, under the proposed rule, non-registered apprenticeships only have to pay the minimum wage. Assuming this proposed rule is finalized with minimal changes, please outline the steps you will take to hold SREs accountable and the outcomes measures you will put in place to ensure SREs are following the law.

    ANSWER: Your question addresses ongoing rulemaking. I understand the Department has obtained input from the public. I believe that public comment is an essential component of the regulatory process. If confirmed, I look forward to reviewing and considering the points developed in the rulemaking comments carefully and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

11. Under the proposed rule related to industry-recognized apprenticeship programs (IRAPs), Standards Recognition Entities (SREs) have to report certain information about industry-recognized apprenticeships, but the proposed rule does not seem to require the Department to aggregate this data and report it publicly as the Department does for the Registered Apprenticeship program. Should this proposed rule be finalized, will you commit to ensuring the Department compiles the information reported out by SREs on an annual basis on a publicly accessible website in an easy to understand format?

    ANSWER: Your question addresses ongoing rulemaking. I understand the Department has obtained input from the public. As explained above, I believe that public comment is an essential component of the regulatory process. If confirmed, I look forward to reviewing and considering the points developed in the rulemaking comments carefully and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

12. Congress continues to invest in the bipartisan Workforce Innovation and Opportunity Act (WIOA), which authorizes the nation's public workforce system and provides investments in job training opportunities around the nation. As Labor Secretary, will you continue to invest in worker training and expand upon the current level of investment in the public workforce system?

    ANSWER: If confirmed, I will work closely with the Employment and Training Administration and seek input from Congress and other agencies on what is working and what could be done better in the nation's public workforce system. As the Workforce Innovation and Opportunity Act nears reauthorization, it is important to foster a public

workforce system that is attentive and responsive to the needs and demands of both employers and employees.

13. What is your view on the government's role in workforce training?

ANSWER: As I stated in my testimony to the Committee, the Department of Labor is a "venerable agency with an important mission," a core part of which includes offering programs that help prepare Americans for a lifetime of productive work while also helping supply the skilled workforce needed by our businesses.

14. What role do you see for the Department of Labor in providing opportunities for the millions of disconnected youth in our nation's urban, suburban, and rural areas?

ANSWER: The Department's mission in part is to "foster, promote, and develop the welfare of the wage earners." YouthBuild, Job Corps, and the Workforce Innovation and Opportunity Act's Title I Youth Program help young Americans from all backgrounds enrich and develop their work-related skills.

15. During the process of formulating rules and other policies, will you commit to advocating for and ensuring that senior Department leadership meet with all affected stakeholders, including groups that represent workers and retirees?

ANSWER: If confirmed, I commit to working with all stakeholders in an effort to ensure that the Department meets its objectives. I would support and encourage the involvement of other senior Department leadership in this process.

16. The Employee Benefits Security Administration (EBSA) at the Department of Labor devotes substantial resources to protecting the contributions made by employees and the matching contributions promised by their employers to employer-sponsored benefit plans, including 401(k)s and health plans. Workers have had their contributions to their pension or health plans withheld from their paychecks without their employers depositing the money in the plans in a timely manner—or even at all in some cases. Instead, these employers kept the workers' contributions and used them for their own purposes or for other unrelated purposes. What should the Department do to protect working people against employers' misuse of their retirement and health money?

ANSWER: The Department has a long history of working to ensure that employees' contributions go to plans on time and are not diverted for non-plan uses. Its approach to this issue combines enforcement, compliance assistance, outreach, and education. If confirmed, I will fully and fairly enforce the law to protect workers saving for retirement in employer-sponsored benefit plans.

17. As Secretary of Labor, you will serve as the Chairman of the Board of the Pension Benefit Guaranty Corporation (PBGC). The PBGC's multiemployer program reported in its FY2018 Annual Report that its deficit is $53.9 billion and it is likely to become insolvent in 2025. What do you believe should be done to address the continuing solvency of the PBGC's multiemployer program?

ANSWER: It is critical to address the security of our pension system. I believe we need a bipartisan legislative solution to address the current deficit for the PBGC's multiemployer program, and other issues that the PBGC is facing. If confirmed, I look forward to working with Congress to find such a solution, and to ensure that the PBGC can operate a financially sustainable and viable manner to ensure that the beneficiaries are protected.

18. Do you believe that the PBGC should set its own premiums for its multiemployer and single-employer programs? Please explain why or why not.

ANSWER: If confirmed, I expect to be briefed on the PBGC's authority over premiums. I am committed to working with Congress on the role of premiums in addressing the PBGC's long-term solvency. Please see my response to Question 17 above.

19. Do you believe the current premiums for the PBGC's single-employer and multiemployer programs are sufficient? Please explain why or why not. If you do not believe they are sufficient, please discuss what you believe a sufficient premium range would be.

ANSWER: The PBGC premium rates are set by Congress. If confirmed, I look forward to working the Congress to explore proposals regarding PBGC premiums. Please see my response to Question 17 above.

20. Do you believe that the current structure of the PBGC Board (the Secretaries of Commerce, Labor, and Treasury) is the most effective management structure for the PBGC?

ANSWER: If confirmed, I would look forward to being briefed on the role of the Board of Directors and how it operates. I also would look forward to working with Congress on any proposed improvements to the PBGC's governance. Please see my response to Question 17 above.

21. Do you believe the PBGC should be given greater authority to work with distressed multiemployer and single-employer plans? If so, what authority do you believe is needed?

ANSWER: If confirmed, I would look forward to being briefed on the PBGC's authority under existing law to work with distressed multiemployer and single-employer plans. I also would look forward to working with Congress on the ways to improve the prospects of these plans. Please see my response to Question 17 above.

22. We have a retirement crisis in this country. I believe the Obama Administration's fiduciary rule would have made a huge difference by helping consumers and investors. DOL is in the process of revising the rule and is expected to propose a new rule before the end of the year. What protections do you think retirement savers deserve in seeking investment advice?

ANSWER: It is important that the retirement savings of working Americans be protected. Working Americans should have access to sound financial advice at fair and transparent prices, and the law requires those who are fiduciary advisers to give advice that serves the

best interest of plans, their participants, and beneficiaries. If confirmed, I look forward to being briefed by the Department on the present status of its work in this area.

23. Do you believe the advice given to a retirement saver when contemplating a rollover from a qualified plan to an individual retirement account (IRA) could have a long-lasting financial impact?

ANSWER: I have not examined data regarding when financial advice affects retirement savers most, and I am not in a position to express a view on this issue at this time. I do not doubt that advice given when a retirement saver is contemplating a rollover could have a long-term financial impact in many circumstances. I view it as an important priority to protect the retirement savings of working Americans. If confirmed, I would be committed to doing so.

24. Do you believe that a retirement saver who is contemplating a rollover from a qualified plan into an IRA deserves advice that is in their best interest? Please explain why or why not.

ANSWER: I believe that retirement savers should have the ability to obtain advice that is in their best interest when they consider a rollover. I also believe that working Americans should have access to sound financial advice at fair and transparent prices, and that fiduciary advisers should provide advice that is solely in the interest of plans, participants, and beneficiaries.

25. Former Securities and Exchange Commission (SEC) chair Mary Jo White stated that "the SEC and DOL are separate agencies with separate statutory mandates," which means that a coordinated rule does not guarantee it will be an identical rule.

    a. Do you believe DOL and SEC are charged with different responsibilities from their respective statutes?

    b. Do you believe DOL and SEC should have identical conflict of interest rules?

    c. How do you envision that DOL and SEC should work together?

ANSWER: I agree with former SEC Chair White that the Department of Labor and the SEC are separate agencies with separate statutory mandates and different governing legislation. For example, the purview of the SEC is the federal securities laws, which includes the Securities Exchange Act of 1934. The Employee Retirement Income Security Act of 1974 (ERISA) authorizes the DOL to, among other things, promulgate requirements that govern private pension plans, and fiduciaries of those plans.

The DOL and the SEC should promulgate their regulations consistent with the statutory authority that Congress has bestowed upon them.

I respect the separate mission and function of the SEC; however if confirmed I would look forward to working with the Chairman of the SEC to coordinate as appropriate.

26. Do you believe SEC's authority to oversee and regulate financial advisors to ERISA plans, participants, and IRA owners is superior to DOL's authority? If yes, why?

ANSWER: I would not characterize the role of either agency as "superior"; rather, each agency has the role and authorities that Congress determined to be appropriate. If confirmed, I would work with the SEC, as necessary, to strike the proper balance between SEC's regulation of the securities marketplace and the Department's special statutory role in protecting pension and workers' retirement benefits.

27. One argument you made, in litigation and in your personal capacity, regarding the DOL fiduciary rulemaking, is that DOL was the inappropriate regulator to regulate advice to retirement investors, even though Congress clearly delegated that authority to DOL in ERISA. Now that you are seeking to be confirmed as Secretary of Labor, has your view changed? Do you think DOL should regulate the firms you have represented at all or do you still view that as the job for other regulators, such as SEC and state insurance regulators?

ANSWER: This question refers to a matter I handled as an attorney in private practice. In that role, I had a professional obligation to serve as a zealous advocate for my clients. I would not regard the Department, or myself, as bound by any views I may have expressed on these matters while a private citizen. If I am fortunate enough to be confirmed, I will have new clients, new responsibilities, and a public trust. I am grateful for the opportunity to be considered for a role that would enable me to serve our Nation and its people.

In the litigation referred to in the question, I did not argue that DOL is not an appropriate agency to regulate advice to retirement investors. I acknowledged that DOL has extensive authority to regulate such advice with respect to employer-sponsored retirement plans that are within scope of Title I of ERISA. I further acknowledged that DOL has additional authority related to other types of retirement advice beyond the scope of such plans, but I explained the ways in which those authorities differ. DOL, the SEC, and state insurance regulators all play important roles in the regulation of retirement advice and the protection of retirement savers. DOL has a central role with respect to a range of retirement products, plan participants, and those who offer and manage retirement-related financial products. If confirmed, I will be acutely mindful of this central DOL role and the participants and beneficiaries who depend on the DOL's performance of those responsibilities. As I noted at the hearing, should I be confirmed, I would fully and fairly enforce the laws under the jurisdiction of DOL.

28. You have made a career out of challenging regulations on the basis of inadequate cost-benefit analyses as required under the Administrative Procedure Act (APA). In other words, the government did not provide enough justification for, or miscalculated the estimated cost of, the regulation it was adopting.

    a. How high do you view the bar that the government needs to clear regarding the estimated cost to businesses to adopt a regulation to protect workers and retirees?

b. It seems there is always some counterargument that the evidence the government relied upon was flawed. Does the cost-benefit analysis and underlying evidence need to be perfect? What is the appropriate standard for a cost-benefit analysis?

c. Can you name any examples of regulations constraining private industry that were passed during the Obama Administration that you thought had a legally sufficient cost-benefit analysis under the APA?

d. In developing a robust cost-benefit analysis to support a regulation, do you think the costs and benefits of regulation to workers and retirees should be considered? How should the costs and benefits to industry be weighed against the costs and benefits to workers and retirees?

e. If confirmed, do you believe that rules you will propose to deregulate are subject to the same high cost-benefit analysis hurdles that you have argued for in the past?

ANSWER: The consideration to be given regulatory costs and benefits is determined in the first instance by Congress, in the terms of the statute or statutes governing the rulemaking at issue. The long-standing presidential Executive Order on cost-benefit analysis is also often a salient consideration. Under the Administrative Procedure Act (APA), the "appropriate" degree of consideration an agency must give the costs and benefits of a regulatory action—or stated more broadly, the "pros" and "cons"—is governed by the Act's arbitrary and capricious standard as articulated in *State Farm* and other Supreme Court decisions. Any "costs" to workers and retirees are certainly an important consideration, particularly in DOL rulemakings; those "costs" are not simply monetary, of course; and the particular weight to be given various costs and benefits (again, "pros and cons") depends on the evidence in the record, the statute and regulation at issue, and lies, often to a significant degree, within the discretion of the regulatory agency. I am not aware of a statute under which a "perfect" analysis is required; I challenged in court only a minute handful of all the regulations adopted in the last presidential Administration, and have no basis to believe that there were significant flaws in the cost-benefit analyses in a range of Obama Administration rules. I have great respect for President Obama's first OIRA Administrator, Cass Sunstein.

If confirmed, I will continue to regard regulatory costs and benefits as an important consideration in rulemaking, subject to the standard(s) set by Congress, articulated by the courts, and set forth in presidential Executive Order.

29. You represented the Business Roundtable (BRT) in a number of matters. The BRT recently issued a statement that "the purpose of a corporation" should not focus solely on advancing the interests of shareholders but its new focus must also be on investing in its employees, protecting the environment, and dealing fairly and ethically with its supply chains. This new mission is a rebuke of the notion—and BRT's past position—that corporations must maximize profits at all costs—a philosophy that has been in place for

over 50 years. What type of cost-benefit analysis should be conducted for regulations that would reflect these values, where costs may not be easily quantifiable?

ANSWER: The type of cost-benefit analysis to be conducted in a rulemaking is described in my answer to the preceding question. Generally, costs to be considered typically include non-monetary costs (in many DOL rulemakings, non-monetary costs are a paramount consideration), as well as costs that "may not be easily quantifiable."

If I am confirmed I will not regard myself bound by the positions of the BRT or any other former client. Rather, I will administer the laws that Congress has enacted fully and fairly.

30. Do you believe ERISA's civil enforcement provisions allow ERISA plan sponsors or ERISA plan provisions to require mandatory arbitration? Please explain why or why not.

ANSWER: It is my understanding that Title I of Employee Retirement Income Security Act includes a statutory right for participants, beneficiaries, and plan fiduciaries to bring court actions. If confirmed, I look forward to reviewing the relevant federal court decisions and working with the Employee Benefits Security Administration on this issue.

31. The White House directed DOL to conduct a comprehensive examination of ERISA's retirement plan disclosure rules.

    a. How should DOL ensure participants and beneficiaries continue to receive information necessary to inform them about their plan and their rights under the plan, such as an annual benefit statement?

    b. What types of disclosures do you think are amenable to streamlining, while still ensuring that participants and beneficiaries receive the information they need?

    c. Will the Department commit to full public input into any proposed changes regarding retirement plan disclosures?

ANSWER: If confirmed, I look forward to being briefed by the Department on the directions provided by the White House and the present status of its work in this area. If the Department proposes any rule, I would welcome public input, and I would work to ensure that the rulemaking process is transparent, allows full stakeholder input, and complies with the Administrative Procedure Act.

32. Several DOL agencies have announced significant internal reorganizations.

    a. Are you aware of any purported need for these reorganizations?

    b. Do you agree with the reorganizations that have been proposed or are underway, including within EBSA, the Wage and Hour Division (WHD), and the Mine Safety and Health Administration (MSHA)?

c. Can you explain the problems these reorganizations are designed to solve and how they achieve these goals?

d. Do you believe separating policy and regulatory functions from enforcement is effective? Please explain why or why not.

ANSWER: It is my understanding that MSHA has made some changes to inspectors' responsibilities so that it may deploy agency resources more flexibly and effectively, and thereby enhance its inspection capabilities. Apart from that, I am not aware of the rationale for any recent internal changes at the Department, and cannot address any problems such changes were meant to address (or improvements they were intended to achieve). Likewise, I am not in a position at this time to express agreement or disagreement with these decisions. Should I be confirmed, I would look forward to discussing the need for reorganization or other changes that would optimize the structure and function of each agency and increase the efficiency and effectiveness of the Department in meeting the needs of the nation's workforce.

Policymaking and enforcement are ultimately overseen jointly within an agency. I do not have views at this time regarding the level within an agency at which that oversight should become joint. The proper balance may vary from agency to agency. Should I be confirmed, I would look forward to learning more about how these issues are handled and how the Department can operate most effectively.

33. In issuing Form 5500 revisions, DOL stated that the changes would "improve publicly available information about employee benefit plans and reinforce for plan fiduciaries" their duties under ERISA to "operate plans prudently and monitor service providers." Many in the industry felt the costs outweighed the benefits with respect to the changes and would like for DOL to hold hearings, revise its cost-benefit analysis, and revise certain changes. Particularly in light of your views on the importance of public input into administrative actions, do you agree? Please explain why or why not.

ANSWER: The Form 5500 Series is an important compliance, research, and disclosure tool for the Department of Labor; a disclosure document for plan participants and beneficiaries; and a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies. As I stated in the hearing, the "process of hearing from the public about what they think of a proposal and what effects it's going to have is a really important way of looking far down the road" to assess regulatory proposals and impacts. Changes to the Form 5500 must be carefully considered and adopted in accordance with statutory and Executive Order requirements related to public input and regulatory impact analysis. If confirmed, I would look forward to reviewing and considering the points developed in the rulemaking comments carefully and working with the Department's staff to decide on the best course of action.

34. Richard Thaler won a Nobel Prize in economics for his work in behavioral economics. His ideas around human inertia spurred retirement innovations like automatic enrollment and making participation in a retirement plan the default option, which have been incredibly effective in getting more people to save for retirement. There are many

programs seeking to capitalize on that success. Do you believe there is a limit to automating features, such as enrollment and escalation, in order to protect the individuals whose decisions are being automated from benefits or policies they do not need or want?

ANSWER: Creating effective avenues for retirement savings and encouraging worker participation in those programs is critical. Automatic features can play a part in this endeavor, and room also should be left for other innovative and entrepreneurial solutions that will enable workers to best prepare for retirement. If I am fortunate enough to be confirmed, I look forward to learning more about these matters and discussing them further with Congress and the President to ensure that Americans' retirement plans are protected.

35. Do you think it is appropriate that President Trump has refused to divest his holdings? Please explain why or why not.

ANSWER: I have no personal knowledge of these issues, which are outside the scope of the Department of Labor's responsibilities.

36. Since President Trump continues to be actively engaged in business, policies you would enact as Secretary of Labor would affect the President's personal finances. Are you concerned that official actions you take as Secretary of Labor may adversely affect the President's businesses?

ANSWER: I have no personal knowledge of these issues, which are outside the scope of the Department of Labor's responsibilities. If confirmed, I would enforce the law fully and fairly.

37. Proper enforcement of the Mental Health Parity and Addiction Equity Act (MHPAEA) is vital to ensuring patients have access to mental and behavioral health care. Will you commit to requesting additional budgetary resources to audit plans and issuers pursuant to the final guidance that was issued on September 5, 2019 as required by the 21st Century Cures Act?

ANSWER: As a nominee, I did not participate in the budget process and am unfamiliar with the Department's current assessment of its needs and available resources. If confirmed, I expect to be briefed on the Mental Health Parity and Addiction Equity Act and the resources necessary for the Department in enforcing this Act.

The President proposes the budget, and Congress ultimately determines funding. If confirmed, I look forward to participating in that process, so I can understand the goals, performance, and resource needs of programs such as these and help the President develop budget proposals that will advance the Department's mission and deliver the greatest value to the American people.

38. In light of concerns regarding compliance under MHPAEA, patient, health care provider, and health plan advocacy organizations agree that DOL should issue opinion letters on what constitutes compliance and noncompliance under the parity law. Will you commit to issuing such letters? If not, why not?

ANSWER: Benefits for mental health and substance use disorder services are an essential and often lifesaving component of health coverage. If confirmed, I will work to ensure that plans and issuers have the guidance they need, so that individuals receive the benefits to which they are entitled, and plans and service providers operate in compliance with the law.

39. If confirmed as Secretary, you will be in charge of a wide-ranging set of non-pension plans. In the group health plan area, aside from enforcing the ACA, the Employee Benefits Security Administration (EBSA) also has enforcement responsibility regarding a number of other federal laws, including the health insurance continuation provisions of COBRA, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Mental Health Parity and Addiction Equity Act (MHPAEA). While regulatory and administrative activities with respect to those laws require joint action among the Departments of Labor, Health and Human Services, and the Treasury, the primary responsibility for enforcement of group health plans lies with EBSA.

    a. If confirmed, would you commit to vigorously enforce these rules, not simply provide compliance assistance to the regulated community?

    b. Which of these laws are you most familiar with?

ANSWER: I have done work in connection with each of these laws. I am probably most familiar with COBRA. If confirmed, I look forward to further briefing on all of them, and I also look forward to working with Congress and the President to ensure that these statutes are faithfully executed and their goals fulfilled.

If confirmed, I would enforce the law fully and fairly. Compliance assistance can be valuable in ensuring that employers and employees understand their rights and responsibilities. It should not, however, be conducted at the expense of overall enforcement.

40. On June 21, 2018, EBSA published a final rule in the Federal register on the "Definition of 'Employer' Under Section 3(5) of ERISA-Association Health Plans."[1] Among other changes, this rule broadened the criteria for determining when the Department of Labor would treat an association of employers as the "employer" sponsor of a single group health plan and broadened the "commonality of interest" test for the members of the association. Eleven states and the District of Columbia filed suit in the District Court for the District of Columbia in July of 2018, arguing that the final rule was an attempt to redefine the term "employer…in an unprecedented way that is contrary to ERISA and the ACA…" in order to undermine consumer protections adopted by Congress in the ACA.[2] On March 28, 2019, Judge John Bates of the D.C. District Court found that the rule's new standards for bona fide associations, commonality of interest, and working owners were

[1] https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans
[2] https://ag.ny.gov/sites/default/files/complaint_as-filed.pdf

inconsistent with ERISA and remanded the rule to DOL.[3] In his ruling, Judge Bates writes that the final rule is an "end-run" around the Federal consumer protections enacted in the ACA.[4] Do you agree with Judge Bates that the final rule is an end-run around federal consumer protections for group health plans enacted in the ACA?

ANSWER: I did not participate in adoption or implementation of the Association Health Plan regulation. I am aware of the legal challenge that is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit. If confirmed, I look forward to learning more about Association Health Plans and the ongoing litigation, in addition to exploring other options for comprehensive and affordable health insurance coverage within the purview of the Department of Labor. As this case remains in litigation, it would be inappropriate for me to comment further at this time.

41. Should you be confirmed as Secretary of Labor, will you reconsider the Department's final rule on Association Health Plans (AHPs)? If yes, will your objective be to expand the number of such plans that are able to skirt the consumer protections provided in the individual and small group market established by the ACA?

ANSWER: As noted, I did not participate in adoption or implementation of the Association Health Plan regulation. I am aware of the legal challenge that is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit. If confirmed, I look forward to learning more about Association Health Plans in addition to exploring other options for comprehensive and affordable health insurance coverage within the purview of the Department of Labor. As this case remains in litigation, it would be inappropriate for me to comment further at this time.

42. Prior to the passage of the ACA, individual and small group plans often lacked coverage for critical benefits. For example, a study by the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services (HHS) conducted in 2011 found that, of surveyed plans in the individual market, 62 percent of enrollees did not have coverage for maternity care, 34 percent did not have coverage for substance use disorder services, 18 percent did not have coverage for mental health, and nine percent did not have coverage for prescription drugs.[5] Plans were also able to charge unaffordable premiums based on risk factors like health status on an individual or small group basis. Do you agree that a key problem with the U.S. health insurance market prior to passage of the ACA was the asymmetry in benefits and protections provided by large and small employers?

ANSWER: I agree that many small businesses and their employees have struggled with access to quality, affordable health coverage. I understand that the Department is helping working Americans gain access to quality, affordable health insurance for themselves and their families, and I support expanding access to more comprehensive health coverage options for small employers. President Trump issued an Executive Order in 2017 directing the Department to expand access to health coverage options. If I am confirmed, I look

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[3] https://www.healthaffairs.org/do/10.1377/hblog20190329.393236/full/
[4] https://affordablecareactlitigation.files.wordpress.com/2019/03/5940153-0-12659.pdf
[5] https://aspe.hhs.gov/basic-report/essential-health-benefits-individual-market-coverage

forward to reviewing ways to improve access to affordable, comprehensive health care options for small businesses and their employees.

43. A Government Accountability Office (GAO) study found AHPs to be fraught with problems—"a source of regulatory confusion, enforcement problems, and in some instances, fraud."[6]

    a. Do you have any plans to avoid these problems that have plagued AHPs in the past?

    b. How will you ensure that insurance coverage sold through AHPs will not charge higher premiums to individuals with preexisting conditions?

    c. How will you ensure that insurance coverage sold through AHPs include critical consumer protections, including coverage of essential health benefits?

ANSWER: I did not participate in adoption or implementation of the Association Health Plan regulation. If confirmed, I look forward to learning more about Association Health Plans in addition to exploring other options for comprehensive and affordable health insurance coverage within the purview of the Department of Labor**.**

44. The Trump Administration finalized rules in November 2018 that expanded exemptions for providing contraception coverage, effective immediately. Those rules are currently enjoined. EBSA, which you would oversee as Secretary, is responsible for ensuring that employers, universities, and issuers are still in compliance with ERISA.

    a. Do you believe the Trump Administration's birth control rules are appropriate and allowable under existing law?

    b. Do you believe the Trump Administration's birth control rules discriminate against women?

    c. In light of your views on the value of notice and comment rulemaking, do you believe the Administration had good cause, pursuant to the Administrative Procedure Act (APA), for issuing these final rules without first publishing a notice of proposed rulemaking?

ANSWER: I did not participate in the promulgation of the rules discussed in the question, but I am aware there is pending litigation concerning the Affordable Care Act's contraceptive-coverage mandate. I understand that the Department of Labor is represented by the Department of Justice in the litigation, and is working with the Departments of Health and Human Services and Treasury with regard to this matter. If confirmed, I look forward to being briefed on this matter. As this case remains in litigation, it would be inappropriate for me to comment further at this time.

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[6] https://www.gao.gov/assets/220/215647.pdf

45. You are on the Board of Directors of the Ethics and Public Policy Center, which submitted an amicus brief to the Supreme Court in the *Zubik v. Burwell* case. The brief argued that the federal government could not have a compelling interest in making sure people have access to birth control. Do you agree with that position?

ANSWER: I became a member of EPPC's board in March of this year and to date have performed no responsibilities in connection with that position, which I will resign if confirmed. I am not familiar with the amicus brief described in this question, and have never considered, researched, or evaluated the legal question posed above—for example, I do not know the extent to which the Supreme Court already has addressed the question. Respectfully, therefore, I do not consider myself to be in a position to answer the legal question posed above.

46. On November 1, 2017, the President's Commission on Combating Drug Addiction and the Opioid Crisis released a report that included recommendations for the Department of Labor.

    a. Do you agree with the Commission's recommendations?

    b. The Commission recommended that DOL—along with HHS, VA/DOD, FDA, and ONCDCP—"work with stakeholders to develop model statutes, regulations, and policies that ensure informed patient consent prior to an opioid prescription for chronic pain." Do you agree with this recommendation?

    c. The Commission recommended that Congress provide DOL with "increased authority to levy monetary penalties on insurers and funders, and permit DOL to launch investigations of health insurers independently for parity violations." Do you agree with this recommendation?

    d. Do you believe DOL needs additional authority to monitor and enforce mental health parity?

    ANSWER: The opioid crisis poses a great challenge to our workforce and our country. Should I be confirmed, I would look forward to further briefing on this issue. I am not yet in a position to comment on the merits of any particular recommendation, but I commit that, if confirmed, I would endeavor to work closely with other cabinet agencies and with this Committee to find effective ways to combat this crisis. Treatment for mental health issues and addiction can save lives, and I would work to enforce the laws under the Department of Labor's jurisdiction fully and fairly to combat this crisis.

47. You have represented Juul Labs in litigation, for instance *American Academy of Pediatrics, et al. v. Food and Drug Administration, et al.*, Case No. 8:18-cv-883-PWG (District of Maryland). Please answer the following questions regarding JUUL and other tobacco companies.

    a. What tobacco companies, including e-cigarette, cigar, smokeless, cigarette, or other tobacco product companies, have you have you ever represented, billed time, or received payment from?

b. Please produce for the Committee any briefs that were filed in litigation or regulatory comments you worked on with or on behalf of these companies.

c. JUUL is under investigation by the House Oversight and Reform Committee. That Committee's documents reveal that Juul operated a division, referred to internally as "Youth Prevention and Education," with the purpose of recruiting schools to allow JUUL to present to students. What's more, these documents show that the schools recruited were paid by JUUL.

   For example, documents reveal that JUUL paid a charter school $134,000 to set up a 5-week summer camp for 80 children from grades 3 through 12. In exchange for this payment, JUUL provided the programming for a "holistic health education program, helping student participants create a personal 'healthy lifestyle plan'… and engaging low-income youth at risk of making poor health decisions."

   Did you provide any legal review of this or any Juul youth program or youth outreach program? If so, what were your findings?

d. In addition to the youth school and camp outreach programs, the House Committee investigation also found that Juul used social media strategies targeted at youth. They used an "influencer" program designed and targeted to youth specifically to "curate and identify 280 influencers in Los Angeles and New York to seed JUUL product". They also identified "buzzmakers," individuals with a minimum of 30,000 followers, to attend events and to develop "influencer engagement efforts to establish a network of creatives to leverage as loyalists for JUUL."

   Did you provide any legal review of the Juul influencer or buzzmaker program or any other social media promotion efforts?

e. On September 9, 2019, FDA issued a warning letter to JUUL after determining the company had marketed its products as modified risk tobacco products without authorization from the agency. According to FDA, "JUUL's labeling, advertising, and/or other activities directed to consumers represent, or would be reasonably expected to result in consumers believing, that the products 1) present a lower risk of tobacco-related disease or are less harmful than one or more other commercially marketed tobacco products; 2) contain a reduced level of a substance or present a reduced exposure to a substance; and/or 3) do not contain or are free of a substance or substances."

   Did you provide any legal review of any JUUL ads, including implicit or explicit claims that JUUL products help users stop smoking, or any other claims about the benefits of switching from cigarettes to JUUL products, or references to switching from cigarettes to JUUL?

ANSWER: In addition to JUUL Labs, Inc., I have represented Swisher International, Inc. I am not aware of any other tobacco companies (as defined in subsection a) that I have represented, billed, or received payment from. With my answers to these Questions, I am providing copies of the substantive legal filings and rulemaking comments that I filed or provided assistance with for JUUL and Swisher. The work I did for these clients did not include the review of any advertisements, "youth" or "outreach" programs, or other "social media promotion efforts."

48. Will you commit to fully resourcing efforts to enforce the break time for nursing mothers rule from the Affordable Care Act?

ANSWER: If confirmed, I will enforce the law fully and fairly.

49. The Office of Disability Employment Policy (ODEP), which you mentioned in your confirmation hearing, sponsors and disseminates valuable research into effective practices of employment for people with disabilities, including information regarding federal funding of supported employment services to increasing employment for people with disabilities.

    a. Will you preserve and strengthen this research by advocating for funding?

    b. How would you support ODEP in advancing its mission?

    c. Will you support ODEP by using your political capital to advance its policy recommendations?

    d. In his 2018-2022 strategic plan, former Secretary Acosta indicated he wanted to reduce the unemployment rate of persons with disabilities. Given that supported employment is an evidence-based practice shown to increase the rates of employment for people with disabilities, how will you leverage the resources at ODEP to promote that policy?

ANSWER: While I would need to thoroughly review any particular program before I committed to supporting or opposing it, I support increasing the labor force participation rate of individuals with disabilities and helping these individuals lead successful and self-sustaining lives. Such efforts contribute to our economy, and as important, to individual self-esteem. If confirmed, I will work with the Office of Disability Employment Policy on the areas where it can be most effective.

50. Disability claims make up the largest number of litigated benefit claims. In order to reduce litigation, the Department of Labor final rule on claims adjudication of disability claims under welfare and retirement plans requires a number of important changes in the way internal claims procedures are handled, thus providing greater protection, transparency, and fairness for individuals who are disputing benefit denials. Most of the changes merely conform the disability claims procedures to changes that were made to the claims processing procedure involving group health plans under the ACA a number of years ago. Although the regulated entities vigorously opposed those changes at the time, implementation has occurred without major problems. The

insurance industry has raised similar objections to these changes, arguing that since disability claims are different from health claims, general conformance of the claims processing rules in the two settings is inappropriate. Do you agree? Please explain why or why not.

ANSWER: If confirmed, I will be open to hearing from stakeholders, including insurers, employer groups, and employee and consumer groups about whether implementation of a regulation has presented major problems, imposes unnecessary regulatory burdens, or significantly impairs workers' access to benefits. I do recognize the importance of claims being processed in a fair, accurate, and efficient manner.

51. In August 2019, the labor force participation rate for people with disabilities was 34.7 percent.[7] This is compared to a labor force participation rate for people without disabilities of 77.4 percent. Overseeing policies and priorities that impact our nation's workforce development system is among the many responsibilities of the Secretary of Labor. One of the target areas of Public Law 113-128 (the bipartisan Workforce Innovation and Opportunity Act or WIOA) was to expand opportunities for people with disabilities to enter the workforce by creating a more accessible workforce system and expanding opportunities for training or apprenticeships. How will you as Secretary build on the opportunities created by WIOA to empower more people with disabilities to enter the workforce?

ANSWER: I support increasing the labor force participation rate of individuals with disabilities and helping them lead successful and self-sustaining lives. Doing so contributes to our economy, and as important, to individual self-esteem. If confirmed, I expect to be briefed on programs at the Department which furthers these goals, such as those administered by ETA the Office of Disability Employment Policy.

52. Section 501 of the Rehabilitation Act prohibits employment discrimination against people with disabilities in the federal sector. President Trump has stated that it is important that the final regulations under Section 501 are enforced. What will you do to ensure that people with disabilities have increased opportunities for employment in the federal government?

ANSWER: As noted, if confirmed, I will enforce the law fully and fairly. I support increasing the labor force participation rate of individuals with disabilities, including in federal employment, and helping them lead successful and self-sustaining lives. These efforts contribute to our economy, and as important, to individual self-esteem. If confirmed, I expect to be briefed on programs at the Department, such as those administered by the Office of Disability Employment Policy.

53. Section 14(c) of the Fair Labor Standards Act, enacted in 1937, authorizes employers to pay subminimum wages to workers who have disabilities. In your confirmation hearing, you were briefly asked your opinion and plans for addressing this law.

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[7] https://kesslerfoundation.org/press-release/ntide-august-2019-jobs-report-tight-labor-market-benefits-americans-disabilities

a. What is your opinion of this nearly 80 year-old provision of the Fair Labor Standards Act?

b. What are your plans for subminimum wage employment for people with disabilities?

c. What will you do to address the underemployment and wage gaps experienced by people with disabilities, especially people with the most significant disabilities?

d. Will you commit to increasing the number of people with disabilities in competitive integrated employment?

ANSWER: If confirmed, I look forward to learning more about the Fair Labor Standards Act Section 14(c) exemption. I recognize that this exemption is statutory and is an area of concern and interest for many Members of Congress. If confirmed, I want to ensure that individuals with disabilities have access to good jobs. While I would need to thoroughly review any particular program or statutory exemption before I committed to supporting or opposing it, I support increasing the labor force participation rate of individuals with disabilities and helping them lead successful and self-sustaining lives.

54. In the hearing you briefly discussed the pro-bono case of Ms. Cecilia Madan. As her letter sent to the Committee on your behalf states, she was facing a hostile work environment in 1998. Without knowing all the specifics of the case, it appears she had a number of issues of discrimination regarding race, gender, and disability. The following questions are focused on one aspect – the Americans with Disabilities Act (ADA). It was challenging to find businesses that understood the rights of workers with disabilities in 1998 as the ADA was still a relatively new law. This is why lawsuits were so important and helped clarify protections for workers with disabilities.

a. It seems Ms. Madan welcomed your help and appreciated the support you provided her. However, it was just four years later that you successfully defended UPS in a case against the EEOC, in which you stripped away rights for workers with disabilities in the workplace and narrowed the protections of the ADA. Please explain how the *EEOC v. UPS* case did or did not undermine the work you did for Ms. Madan.

b. Throughout the hearing you made the assertion you are not just a corporate lawyer—that you stand for workers and their rights. Yet, you were willing to file lawsuits on companies' behalf, but only press for "firm negotiations" on behalf of workers. Can you explain why you chose to only negotiate for workers yet file lawsuits for companies in cases regarding the ADA, especially when those cases undermined protections for workers?

ANSWER: My work in EEOC/UPS had no adverse effect on Ms. Madan. However, this question is correct in suggesting that simultaneously handling cases in court for employers and for employees can produce "positional conflicts" in which legal arguments advanced for one client or group of clients can adversely affect the interests of another client or group of clients. It is partly for this reason (in response to

subsection b) that firms doing employment litigation often, as a matter of policy, limit the work they do in court to primarily representing either employers or employees. Gibson, Dunn & Crutcher LLP has such a policy. (It has similar policies with respect to litigation in other practice areas, too.) That said, I have done litigation work for employees. Employee-side litigation I have handled includes assisting and briefly supervising a colleague in representation of an African-American police officer who was accused of off-the-job misconduct and sought to retain her position with the police department. *Tonia Taylor v. Baltimore Police Dept.*, Sept. Term 2011, Case No. 732 (Md. Ct. Spec. App., May 24, 2012).

55. The Be HEARD Act, which I introduced earlier this congress, would require the Bureau of Labor Statistics (BLS) to conduct an analysis of the economic impacts of workplace harassment. Do you believe BLS is currently collecting all the data necessary to assess the economic impacts of workplace harassment, including intersectional harassment? If not (or if you do not believe you currently have the information necessary to answer that question accurately) will you commit to improving the data collection performed by BLS?

ANSWER: Harassment is a serious problem in some workplaces, harming workers professionally, emotionally, and sometimes physically. If confirmed, I look forward to consulting with the Bureau of Labor Statistics on this issue.

56. A person experiencing workplace harassment does not always know why they have been targeted. For example, a Black woman with a disability may be targeted for race, sex, or disability status. Do you believe current federal laws and regulations adequately protect against harassment in these types of cases? If not, what steps are necessary to improve protections for workers?

ANSWER: Workplace harassment based on race, sex, disability status, or any other protected characteristic is illegal and wrong. As noted in my hearing, if confirmed, I would enforce the laws Congress has written fully and fairly, including harassment and discrimination in the workplace laws. I would also look forward to further briefing on whether current federal laws and regulations are sufficient, and to working with this Committee and the President to help ensure that the statutes that this body has enacted are adequately protecting America's workers.

57. In 1997, you wrote an op-ed in *The Washington Times* suggesting courts have struggled with "line-drawing" regarding sexual harassment and at times have swept in "behavior that is foolish, malicious, or even tortious, but that does not warrant invoking the civil rights laws."

    a. Please provide an example of behavior that a court has found violates civil rights law, but that you believe is merely "foolish," yet not a violation of civil rights law.

    b. Please provide an example of behavior that a court has found violates civil rights law, but that you believe is merely "malicious," yet not a violation of civil rights law.

c. Please provide an example of behavior that a court has found violates civil rights law, but that you believe is merely "tortious," yet not a violation of civil rights law.

d. You defended Ford Motor Company in a class action suit brought by more than 30 employees alleging sexual harassment and retaliation at Ford assembly plants. In a 2017 *New York Times* article, women who worked in Ford assembly plants described their experiences with harassment. One woman said that a male co-worker "bit her on the buttocks." Do you believe biting a colleague on the buttocks could be considered sexual harassment? Please describe any circumstances you believe would contribute to that behavior not being sexual harassment.

ANSWER: Workplace harassment based on race, sex, disability, or any other protected characteristic is illegal and wrong. With respect to questions a-c, it was my assessment—at the time I wrote the article as a law firm associate, 22 years ago—that at least some of the conduct directed toward the workers in the case I described was, under the case law at the time, "foolish, malicious, and tortious," but not "because of" sex within the meaning of Title VII. With respect to subsection d, certainly the conduct described would ordinarily be considered sexual harassment, except in the unlikely event it were consensual.

58. The Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that federal contractors and subcontractors do not discriminate on the basis of race, sex (including sexual orientation and gender identity), religion, national origin, or disability. You stated at your hearing that you believe employment discrimination against LGBTQ people is wrong, and you oppose discrimination generally.

    a. Will you commit to preserving and strengthening enforcement mechanisms for OFCCP to protect workers from harassment and discrimination?

    b. What additional actions will you require OFCCP to take to protect workers?

ANSWER: OFCCP enforces existing laws and regulations requiring federal contractors and subcontractors to take affirmative action and not discriminate (which includes a duty not to allow harassment) on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discharging or otherwise discriminating against applicants or employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. If confirmed, I will enforce these protections. If confirmed, I look forward to being briefed on the agency's work and identifying ways it can more effectively fulfill its mission

59. OFCCP has proposed a rule to expand religious exemptions in hiring for federal contractors. You stated at your hearing that you had read my letter opposing this rule. How will you ensure that OFCCP enforces contractors' legal requirement to not discriminate against LGBT workers, women, people with disabilities, and individuals from all religions?

ANSWER: Your question addresses an ongoing rulemaking. I understand that the Department has received many comments, including your letter, on this proposed rule. Public comment is a valuable, essential component of the regulatory process. If confirmed, I would look forward to carefully considering points developed in the rulemaking comments to identify an approach that properly furthers the terms and purposes of Executive Order 11246.

60. In 2016, OFCCP updated its sex discrimination rules to implement EO 11246 for the first time in more than a generation. The rules now explicitly address important forms of sex discrimination, including sexual harassment and pregnancy discrimination, for the first time.

    a. If you are confirmed, will you commit to supporting and enforcing those regulations and the protections described in them?

    b. Will you commit that OFCCP will implement and enforce all of these critical protections for employees of federal contractors?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246.

61. Earlier this year, you joined the Board of the New Civil Liberties Alliance (NCLA). The New Civil Liberties Alliance submitted comments to the Department of Education regarding its proposed rule on sex discrimination under Title IX.

    In that comment, NCLA indicated that "the concept of sexual harassment as sex discrimination only comes about through interpretation."

    a. Do you believe sexual harassment is a form of sex discrimination? Why or why not?

    That comment also states that Title IX's prohibition on sex discrimination does not address sexual harassment by students or other third parties.

    a. Do you believe workers can experience sexual harassment based on the behavior of clients, customers, or non-supervisory co-workers? Why or why not?

    b. Do you believe EO 11246 requires federal contractors to address sexual harassment claims that are based on the behavior of clients, customers, or non-supervisory co-workers?

ANSWER: I am not familiar with the NCLA comment letter described in this question. Sexual harassment is a form of sex discrimination, and an employer can (under Title VII, for instance) be liable for harassing conduct by clients, customers, and non-supervisory co-workers. I have not studied the requirements of Executive Order 11246 with respect to harassing behavior by clients, customers, and co-workers; if confirmed, I will familiarize myself with these requirements. I certainly agree, however, that contractors should address such harassment. I look forward to further briefing on these matters and further conversations with the members of this Committee to ensure that Congress's laws outlawing discrimination and harassment are fully and fairly enforced.

62. Women in workplaces where women are historically underrepresented report higher than average rates of harassment and discrimination. In turn, such harassment and discrimination can lead to fewer women entering those industries. Requirements in federal contracts can play an important role in incentivizing employers to provide more opportunities to women. Will you commit to ensuring strong protections against harassment and discrimination in federal contracting to help improve opportunities available to women in industries where they are currently underrepresented?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246. I appreciate the importance of addressing workplace harassment, and if confirmed will explore ways that the Department can further pursue this objective.

63. During your confirmation hearing, you said that you are struck by the amount of mistreatment in the workplace. However, you said the laws and protections in place against workplace harassment are already strong. You indicated that what is really needed is not stronger laws, but stronger education.

    a. Do you believe the Department of Labor has a duty to educate employers about their responsibility and workers about their rights in order to address the amount of mistreatment?

    b. If confirmed, what specific actions would you take within DOL's existing authority to reduce the amount of harassment in the workplace?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibition on unlawful discrimination (including unlawful harassment) by federal contractors. Compliance assistance is one useful means for ensuring that employees and employers understand their rights and obligations. Compliance assistance should not, however, be conducted at the expense of overall enforcement.

64. In 2018 President Trump announced a reorganization plan that proposed consolidating the Department of Education and the Department of Labor into one Department of Education and Workforce (DEW). What are your thoughts on leading an agency that your future boss proposes to eliminate? If confirmed, would you encourage the President to re-think this proposal as it relates to the elimination of the Department of Labor?

ANSWER: I believe that Federal agencies should be structured in the way that best enables them to fulfill their mission and serve the American people. As a nominee, I have not been briefed on the government reform plan, so I am unfamiliar with the specific elements of any such proposal. If confirmed, I expect to be briefed on the reform plan and its different proposals. I look forward with working the President and Congress to find the most efficient and effective ways to advance the Department's mission and deliver the greatest value to the American people.

65. It has been reported that political staff in the Office of the Assistant Secretary for Policy (ASP) have supplanted the role of expert career attorneys in the Office of the Solicitor (SOL), and that under former Secretary Acosta "an expanded policy office reporting to [the Secretary] has consolidated power and effectively sidelined top lawyers and career civil servants at agencies that write rules and enforce laws protecting American workers…." In a July 2019 memorandum to all DOL agency heads, Acting Secretary Pizzella affirmed that, pursuant to a 1940 administrative order issued by then-Secretary Frances Perkins ("the Perkins Memo"), "only attorneys employed in the Office of the Solicitor (SOL) are authorized to practice law on behalf of and provide legal advice to the Secretary of Labor."

    a. Given your previous role as Solicitor of Labor, do you agree with Acting Secretary Pizzella that "SOL is solely responsible for providing legal services to program agencies in the Department"?

    b. What is your position on the proper role of the career attorneys in the Solicitor's Office versus political appointees in other DOL agencies who may happen to have law degrees?

ANSWER: I agree that the Solicitor's Office (SOL)—with both its career and non-career attorneys—is responsible for providing legal services to program agencies in the Department. The stated mission of SOL is to meet the legal service demands of the entire Department of Labor. SOL fulfills its mission by representing the Secretary and client agencies in litigation; by assisting in the development of regulations, standards, and legislative proposals; and by providing legal opinions and advice concerning all the Department's activities. Having these critical functions centralized in a single organization, reporting to the Solicitor of Labor, ensures accountability, consistency, and accuracy in the legal services provided to the Department.

66. Will you commit to using your authority as Secretary of Labor to advise Congress on deficiencies in the laws you would be charged with enforcing and advocate for the changes necessary to ensure those laws adequately protect workers?

ANSWER: I am committed to protecting workers' work-related rights and benefits. I look forward to working with the Administration and Congress to ensure that workers are adequately protected, including by offering the Department's expertise and technical assistance for any potential legislative changes that Congress considers.

67. What steps will you take and what concrete mechanisms will you put in place to hold your own appointees and senior staff accountable for ensuring that there is no political interference in the work of the Department?

ANSWER: I believe all incoming political and senior career appointees receive mandatory ethics training and annual ethics training thereafter. If confirmed, I will enforce the law fully and fairly without regard to improper pressures or considerations. I will expect the same from all Department personnel.

68. People who experience intimate partner violence, stalking, or sexual assault, often need to take time off from work to seek assistance.

    a. Do you support federal legislative proposals to create job-protected safe leave for survivors of gender-based violence?

    b. Do you think DOL has a role to play in providing protection and support to assist women with remaining in the workforce when they experience gender-based violence?

    c. Are there any specific steps that you would take within DOL's existing authority that you would take to support people who experience gender-based violence?

    d. What will you do to ensure that survivors of domestic or sexual violence have access to job-protected safe leave to seek services related to gender-based violence?

ANSWER: Gender-based violence is abhorrent. I believe expanding job-protected leave would require congressional action, and understand that Congress is currently considering legislation. If the legislation passed and signed by the President—and I am confirmed—DOL will fully enforce the law. The Department can also provide assistance and support in this area by furthering compliance with the Family and Medical Leave Act.

69. In your hearing, you indicated you believe labor unions are important and valuable.

    a. Do you agree that labor unions are important to achieving and maintaining fairness and balance in our economy?

    b. Please confirm, as you indicated in your hearing, your belief that workers should have the right and opportunity to bargain collectively for higher wages and better working conditions through organizing with their coworkers.

    c. If confirmed, will you advocate for, support, and defend workers' right to advocate for workplace improvements and bargain collectively?

    d. Do you think the federal government should take action to foster collective bargaining?

ANSWER: Employees have a legal right to form or join a union, or to refrain from doing so. The decision should be left to the individual. And yes, it is appropriate for the

government to foster collective bargaining including through enforcement of the protections of the National Labor Relations Act and involvement as needed by the Federal Mediation and Conciliation Service—a role I energetically supported as Solicitor during the dispute at the West Coast Ports. The Department of Labor's Office of Labor Management Standards also can play a valuable role in supporting rights under the federal labor laws.

70. The House of Representatives passed the Raise the Wage Act, which the President threatened to veto.

    a. Do you believe Congress should raise the federal minimum wage?

    b. If so, to what dollar amount and by what year? If not, how do you respond to working families who are long overdue for a pay raise?

    c. Should future increases be indexed to increase automatically in the future?

    ANSWER: I support the federal minimum wage, which is set by Congress and enforced by the Department. I recognize that costs of living and other economic factors vary greatly across the United States, and as a result, many states and localities have set their own minimum wages above the federal floor. Ultimately, the appropriate federal minimum wage is a decision to be made by Congress, and, if confirmed, I commit to enforcing fully and fairly the federal minimum wage as enacted by Congress.

71. Do you believe employers should pay a wage sufficient for their workers to live on without needing to rely on government benefits? Is it fair for employers to pay wages so low that their workers are eligible for government benefits like food stamps?

    ANSWER: A fair playing field for American workers is important, and I strongly support promoting free markets for the benefit of workers generally. At the federal level, the appropriate federal minimum wage is a decision to be made by Congress, and, if confirmed, I commit to enforcing fully and fairly the federal minimum wage as enacted by Congress.

72. The federal minimum wage for tipped workers is only $2.13 per hour and it has been frozen at that level since 1991. Do you support phasing out the subminimum wage for tipped workers?

    ANSWER: As noted, I support the federal minimum wage, which is set by Congress and enforced by the Department. I recognize that costs of living and other economic factors vary greatly across the United States, and as a result, many States and localities have set their own minimum wages above the Federal floor. Ultimately, the appropriate federal minimum wage—including any special wage for tipped workers—is a decision to be made by Congress. If confirmed, I commit to enforcing the federal minimum wage as enacted by Congress fully and fairly.

73. On several occasions, I have expressed serious concerns about the Wage and Hour Division's (WHD) Payroll Audit Independent Determination (PAID) program. First

announced in March 2018 as a limited, six-month pilot program to allow employers to self-audit and self-report violations of overtime and minimum wage requirements, the pilot has been extended without any evaluation. The PAID program enables employers to violate minimum wage and overtime protections, avoid legal action, and circumvent paying employee's interest or damages for their stolen wages. At your hearing, I asked whether, if confirmed, you would commit to abandoning the PAID program. You responded that you could not make that commitment, but indicated you would review the program.

a. What is your view of the PAID program?

b. If confirmed, will you commit to immediately ceasing accepting employers into the program and closing out all open audits until you conduct a thorough evaluation of the program's effectiveness and impact, and provide my office with the data I have repeatedly requested?

ANSWER: If confirmed, I look forward to being briefed on the PAID program. I understand that a report on the PAID program is due to Congress in the near future and I look forward to reviewing this report and learning more about the PAID program.

74. The joint-employer issue has been at the forefront of conversations about workers' rights over the past several decades. Given the evolving structure of the workplace and the increasing reliance on franchising and subcontracting to shield major corporations from union organizing and liability for violating workers' rights, this trend will continue. Unfortunately, despite this reality, the WHD proposed an unjustifiably weak standard that will let major corporations and large businesses off the hook for violations of workers' rights to the minimum wage, overtime pay, child labor protections, and equal pay under the FLSA. In your hearing, you declined to commit to abandoning this proposal if confirmed.

a. Do you agree that the fissuring of the workplace has left workers vulnerable to exploitation?

b. Do you see this fissuring as an enforcement challenge for DOL? If not, why not? If yes, how do you plan to address this issue?

ANSWER: Your question addresses ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to considering carefully the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

75. Large numbers of workers are hired through a staffing agency, yet report to work at another company's premises every day.

a. Do you acknowledge that employers are increasingly relying on labor staffing firms, temporary work arrangements, and outright misclassification in order to evade responsibility to the people who perform work for them?

b. Given today's fissured workplace, how do you plan to enforce existing employment laws, such as the FLSA's minimum wage and overtime protections?

ANSWER: As a nominee, I have not reviewed detailed data regarding labor staffing firms or how they treat their employees. If confirmed, I will consult with the Wage and Hour Division and seek input from Congress and other agencies, as appropriate, on these important issues in an effort to ensure that the Wage and Hour Division can achieve its mission.

76. The Department of Labor is poised to issue a final rule rescinding the 2016 Obama overtime rule—which raised the salary threshold for eligibility for overtime pay under the FLSA from its previous level of $23,660 up to $47,476—and replace it with a new rule that would set the salary threshold at the far lower rate of $35,308. By DOL's own calculations, the NPRM would deprive 2.8 million workers of overtime protections. In your hearing, I asked whether, if confirmed, you would commit to abandoning this proposed rule.

a. Do you believe workers in this country who work 50, 60, and even 70 hours a week should live in poverty?

b. Do you agree that the $35,308 proposed by the Department is woefully inadequate?

c. Do you think the Department of Labor abdicated its role in protecting workers by failing to defend the Obama-era rule in court?

ANSWER: Your question addresses ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

77. The Wage and Hour Division (WHD) previously abandoned the use of opinion letters—essentially "get out of jail free cards" used by employers that have been accused of violating wage and hour laws—but the Trump Administration reinstituted them.

a. Do you think that it is a valuable use of limited Wage and Hour resources to provide a roadmap to employers on how to skirt the law?

b. During your time in private practice, how many times did you use or rely on a Wage and Hour opinion letter in defending your clients?

c. Please provide a list of those cases, the arguments you made, and the final determination by the court.

ANSWER: I support giving guidance to employers to encourage compliance with the law. The Wage and Hour Division issues opinion letters pursuant to Congressional authorization. The specific forms of such guidance may change over time and between administrations.

I do not recall how often I used or relied upon wage-hour opinion letters in defending clients in litigation, and there is no feasible means for me to conduct such a search. I do believe that, in private practice, I have used opinion letters more often as a basis to advise clients regarding their obligations than as a means of opposing claims in litigation.

78. The Fair Labor Standards Act (FLSA) has been the law since 1938. It is needed to guarantee basic wage and hour standards like minimum wage and overtime pay for American workers and to prevent child labor abuse. Do you believe any existing FLSA rules should be repealed or weakened? If so, which ones?

ANSWER: If confirmed, I look forward to being briefed on the Wage and Hour Division's policies and priorities. I believe it is the Department's role to enforce the laws under its jurisdiction fully and fairly. The Department is in the process of considering revisions to several rules under the Fair Labor Standards Act and, if confirmed, I look forward to being briefed on and considering these matters carefully.

79. Section 213 of the FLSA exempts various employees from the provisions of section 206, the law's minimum wage and overtime provisions. Would you use your statutory authority to interpret section 213 broadly, thereby exempting more employees from protection of the FLSA's minimum wage and overtime provisions, or narrowly, thereby requiring employers to pay the minimum wage and overtime to more employees?

ANSWER: The Supreme Court recently held in *Encino Motorcars, LLC v. Navarro* that to determine the scope of an exemption under the Fair Labor Standards Act, the statutory text must be given a "fair (rather than a narrow) interpretation." 138 S. Ct. 1134, 1142 (2018). If confirmed, I will enforce the law fully and fairly.

80. Do you believe enforcing the FLSA and preventing wage theft improves the U.S. economy? Why or why not?

ANSWER: I believe that properly enforcing the FLSA and other labor and employment laws is a responsibility of the Department that benefits employees and our economy. If confirmed, I will enforce the law fully and fairly.

81. In a 2014 op-ed in *The Washington Post*, you wrote disapprovingly of President Obama's Executive Order establishing a minimum wage of $10.10 for workers on federal contracts. Specifically, you wrote that the President was "misusing" federal procurement authority as the legal basis for the policy. You further criticized as "not credible" the President's explanation that "[a] higher wage 'increases [workers'] morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs" and "yield 'savings and quality improvements' that would improve 'economy and efficiency' in government procurement." Do you believe contractors receiving federal tax dollars should be required to pay middle class wages?

ANSWER: In my 2014 op-ed, I expressed skepticism regarding President Obama's stated rationale for establishing a new minimum wage for federal contractors (just as I questioned President George W. Bush's expressed rationale for one of his employment-related Executive Orders); the op-ed did not take a position on the appropriate minimum wage for American workers.

It is my understanding that the Department sets wage rates on federal contracts based on congressional mandate and statistical formulas by sector that flow from those mandates. Congress has the authority to make a decision to increase those rates across the board, and if I am confirmed, I will enforce the statutes Congress passes as well as provide any information that may be useful to Congress in advancing a discussion on this issue. I look forward to working with Congress on this matter.

82. In addition to responding to individual complaints, recent enforcement strategy at the Wage and Hour Division has emphasized targeted investigations of industries with high numbers of wage and hour violations—including the fast food, restaurant, hotel, and garment manufacturing industries—which also employ significant numbers of low-wage workers and women. Under your leadership, will the Department of Labor continue to pursue proactive, targeted enforcement strategies to protect the workplace rights of large numbers of vulnerable workers in high-violation industries at similar rates as during the last two years and during the previous Administration, and not rely primarily or solely on a complaint-driven enforcement strategy?

ANSWER: If confirmed, I look forward to learning about the Wage and Hour Division's enforcement efforts in this area. As Solicitor, I prioritized enforcement efforts targeted at low-wage workers.

83. The National Institutes of Health has reported that agriculture is the most dangerous industry for children in the United States. A 2018 GAO report found that since 2003, the majority of work-related child fatalities were in agriculture. Yet under lax labor laws, hundreds of thousands of children work long hours in US agriculture, risking pesticide poisoning, heat illness, injuries from knives, heavy equipment, and machinery, falls, exposure to toxic gases, and more—all of which can lead to severe injury, life-long disabilities, or fatalities. Children working in tobacco farming also risk acute nicotine poisoning. Exemptions for agriculture under the Fair Labor Standards Act (FLSA) allow child farmworkers to work at younger ages, for longer hours, and under more hazardous conditions than other working youths. Teens have to be at least 14 to work in an office or fast-food restaurant, and can only work for three hours on a school day. But in agriculture, children can work at age 12 with no limit on the number of hours that they work, as long as they do not work during school hours. While other employment sectors prohibit hazardous work before age 18, child farmworkers can perform hazardous duties at age 16. In 2014, the Unites States' largest tobacco companies recognized the dangers of nicotine exposure and other hazards in tobacco farming by adopting policies prohibiting children under age 16 from working on farms in their supply chains. Yet federal law and regulations provide no special protections for children working in tobacco farming.

a. What action will you take to address the double standards in the Fair Labor Standards Act that allow children working in agriculture to work at younger ages, for longer hours, and under more hazardous conditions than other working youth?

b. Will you propose updating the Child Labor Hazardous Orders to include protections for children in the tobacco industry?

ANSWER: The Fair Labor Standards Act provides important protections regarding the safety and health of children and young workers. If confirmed, I look forward to being briefed by the Wage and Hour Division on these issues.

84. Paid leave policies that only apply to birth mothers are inadequate for today's workforce, where more women are working, fathers are providing more care for children, and the population is aging rapidly. Creating a policy solution that applies only to women who give birth would create barriers to women's employment and promote stereotypes, and undermine progress toward gender equality. Would you oppose a maternity-leave only policy and instead encourage the president to consider addressing paid leave for both women and men? For both parental as well as family and personal medical needs?

ANSWER: I understand the importance of time at home for parents of a new child. I also understand that the President's budgets have called for a nationwide paid parental leave plan for both new mothers and fathers. If confirmed, I commit to enforcing any paid leave law enacted by Congress within the jurisdiction of the Department fully and fairly. I also would look forward to working the President and Congress as appropriate to address this important issue.

85. In addition to these paid family and medical leave laws, paid sick days laws are now in effect in 11 states and the District of Columbia, and 21 localities. Research on the longest-standing laws shows that they are working well and are not burdensome for employers. For example, both Seattle and San Francisco saw positive job growth after their paid sick days laws took effect. In San Francisco, the first city with a paid sick days standard, the local Chamber of Commerce's vice president stated that its impact on businesses was "minimal" and that "[b]y and large, [paid sick days] has not been an employer issue."[8] Evidence from other localities has similarly found low costs to businesses and positive benefits for workers. If confirmed, in light of the research on the economic and health benefits of paid sick days, will you encourage or discourage other states and localities from adopting paid sick days laws? Would you support or oppose a national standard like the Healthy Families Act?

ANSWER: If confirmed, I commit to enforcing any paid-leave law enacted by Congress within the jurisdiction of the Department fully and fairly. As discussed above, I understand the importance of time at home for parents of a new child. I also understand that the President's budgets have called for a nationwide paid parental leave plan for both new mothers and fathers. I recognize that cost of living and other economic factors vary

[8] https://www.americanprogress.org/issues/economy/news/2014/04/17/88243/the-business-case-for-paid-leave-and-paid-sick-days/

greatly across the United States and that many States and localities have set their own paid-leave policies that reflect those differences.

86. Federal laws do not mandate paid annual leave, paid time off for illness or family care, or paid parental leave. The absence of such policies makes it difficult for employees to balance work and family, which can negatively impact productivity, inhibit the healthy development of children, and make recovery from major illnesses or injuries difficult. Would you propose any policies guaranteeing earned sick days or paid parental leave?

    a. What specifics would you like to see enshrined in law to help protect all workers, regardless of income?

    b. How do we incentivize all companies to provide these benefits, not just provide tax breaks for companies that are already doing the right thing?

ANSWER: I understand that the President's budgets propose a plan for paid parental leave. If confirmed, I commit to enforcing any paid leave law enacted by Congress within the jurisdiction of the Department fully and fairly. I look forward to being briefed by Department staff on these issues, and to working with Congress in developing the Department's policies and priorities.

87. In order to crack down on violations of equal pay laws, the National Equal Pay Enforcement Task Force made several recommendations, including that the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM) coordinate the responsibilities of enforcing the laws prohibiting pay discrimination. Do you think interagency coordination and enforcement efforts including communication among the agencies, coordinating investigations and litigation, identifying areas in which they can issue joint guidance to employers and employees, and conducting joint training as appropriate have made a positive impact on enforcement of equal pay laws? Do you believe these efforts deserve more or less support through funding and staffing? Please include specific examples of where there should be more or less coordination between these agencies.

ANSWER: If confirmed, I look forward to being briefed on the National Equal Pay Enforcement Task Force's recommendations and the current status of the Department of Labor's interagency efforts to combat pay discrimination; I recognize that interagency coordination can further effectiveness, efficiency, and clarity. Unlawful pay discrimination is wrong, and if confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors.

88. As a sports editor at U-High, you wrote an article entitled "All Things Being Equal…but crowds" where you argued that the equal rights provided to women through Title IX would improve the resources women athletes have, which would in turn improve their performance, which in turn would lead to more crowds supporting them—and, thus, true equality. Do you believe crowd attendance should be the sole factor when it comes to equal pay between men and women's sports teams? Do you believe the U.S. Women's Soccer Team should be paid the same amount as the U.S. Men's Soccer Team?

ANSWER: I do not believe that, under the law, attendance at games would be the sole factor in determining whether pay is discriminatory. I do not have the information or background needed to assess the appropriate pay for men and women soccer players.

89. If confirmed, what steps would you take to ensure equal pay for women across industries?

ANSWER: Unlawful pay discrimination is wrong, and if confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors. I will look forward to being briefed by the Office of Federal Contract Compliance Programs on its efforts to resolve findings of unlawful pay discrimination among federal contractors, and to receiving the input and insights of the Women's Bureau.

90. There has been a lot of discussion about worker classification as "independent contractors" in the so-called "gig" economy, with some arguing that these workers are self-employed, even though 1) their work is in large part dictated by the companies, 2) wages are often set by the companies, and 3) they can be disciplined for poor performance or for refusing jobs. How do you view these workers and these jobs, in the context of the broad definitions of "employee" found in the laws you will be expected to enforce, especially the Fair Labor Standards Act?

ANSWER: This question identifies a trend in the economy that can provide welcome flexibility and autonomy for some workers, but which should not serve as a means for circumventing the law's requirements. If confirmed, I look forward to being briefed on matters pertaining to the classification of employees and will enforce the law fully and fairly.

91. The Department you have been nominated to lead is responsible for setting health, safety, and fairness standards for many construction projects and construction apprenticeships. It is well documented that women working in construction face extreme rates of sexual harassment and denigration. Indeed, a study cited by the Department of Labor reported that 88 percent of women construction workers experience sexual harassment at work. Construction has often been referred to as "the industry that time forgot" due to the overt discrimination faced by women who try to get hired into this field and the overwhelming hostility and harassment they face on the job if they are hired. As a result, the percentage of constructions jobs held by women has been stuck at less than three percent for more than a generation. Many federal contracts are for construction work, and the Labor Department has played an important role in addressing harassment and discrimination by federal construction contractors and opening opportunities for women and people of color. Given President Trump's expressed commitment to infrastructure, federal construction contracts could increase—which means the Labor Department's role in enforcing these protections against harassment and discrimination will be more important than ever. Can we expect you to implement and enforce critical anti-harassment protections for construction projects and apprenticeship programs, and continue the efforts begun during President Obama's administration to ensure that mega construction projects funded by federal dollars provide real opportunities to women?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors and in federally assisted construction contracts.

92. Accurate data is crucial to measuring the health of the economy, including unemployment rates, as well as shedding light on pay practices and discrimination, yet during his campaign then candidate-Trump criticized the Bureau of Labor Statistics. Do you believe that BLS produces data that accurately reflects the unemployment rate?

ANSWER: The Bureau of Labor Statistics has a proud history of collecting and timely and accurately reporting data on employment, working conditions, prices, and productivity. If confirmed, I look forward to becoming more familiar with BLS's programs and services.

93. What would you do to ensure that the government continues to collect and distribute accurate, timely, actionable data from businesses?

ANSWER: As a Federal statistical agency, the Bureau of Labor Statistics is obligated to adhere to the Office of Management and Budget's Statistical Policy Directives. I appreciate the importance of the non-partisan objectivity of the Bureau of Labor Statistics and, if confirmed, I will support its adherence to all Statistical Policy Directives.

94. The statutory mandate of the Women's Bureau at the Department of Labor is to "formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment." This mandate is even more pressing today as women's labor force participation rate has grown. However, women, especially low-income women continue to experience significant barriers including low wages and unequal pay, uneven access to critical work supports such as child care and paid leave, and pregnancy and sex discrimination. All these barriers impact the economic security and well-being of women and their families.

    a. Do you believe the Women's Bureau is meeting its statutory mandate?
    b. Do you believe that women are currently treated equally in the workforce and have the same ability as men to provide for the economic security for themselves and their families? If no, what proactive efforts will you take to make sure that employers are complying with the law?
    c. Will you continue to support the Women's Bureau as a critical agency within the Department of Labor?
    d. How will you support its work and mandate?
    e. Based on your experience working in DOL, what changes would you recommend to improve the Women's Bureau?
    f. Will you defend against any attempts to reduce its budget, or staffing level, or otherwise undermine its ability to do its work, and commit to advocating for the resources necessary, including for the Women's Bureau, to ensure women are treated equally in the workforce?

ANSWER: In my opening statement, I discussed the pressures on working men and women striving to meet the demands of work and home, pressures that often are borne more heavily by women. If confirmed, I will work with the Women's Bureau to achieve its mission.

95. A 2012 GAO report found that on average it takes the Occupational Safety and Health Administration (OSHA) nearly eight years to develop and finalize needed safety and health standards. The most recent standards issued took much longer. The final standard to protect workers against deadly silica dust took nearly 19 years from start to finish, and the rulemaking to protect workers in general industry from fall and slip hazards—leading causes of injury and death—took nearly 40 years. Do you agree that taking 10 to 20 or even 40 years to develop and issue safety and health rules on major hazards is way too long?

ANSWER: I fully support the Department's mission, which includes protecting workers against workplace hazards. If confirmed, I expect to be briefed on the Department's standards setting process. I look forward to working with Congress, the Administration, and the Department's employees to develop regulatory policies and priorities that allow the Department to achieve its mission.

96. As Secretary of Labor, will you commit to seeing that the standards setting process can be made more timely and effective to protect workers against workplace hazards?

ANSWER: I fully support the Department's mission, which includes protecting workers against workplace hazards. If confirmed, I expect to be briefed on the Department's standards setting process. I look forward to working with Congress, the Administration, and the Department's employees to develop regulatory policies and priorities that allow the Department to achieve its mission.

97. On April 4, 2017, President Trump signed Joint Res. 83, which was a "Congressional Review Act" resolution to block OSHA's Volks Rule, a regulation that would have enabled OSHA to hold employers accountable for failing to keep accurate records of workplace injuries and illnesses that harm workers. Did you support the Volks Rule? If OSHA cannot hold employers accountable for failing to keep accurate records, how can OSHA help protect workers from the risk of serious injury or death on the job?

ANSWER: The D.C. Circuit has ruled that the Occupational Safety and Health Act's (OSH Act) six-month statute of limitations precludes a citation for the failure to record an injury or illness more than six months after the obligation to record arose. OSHA responded to this decision by amending its recordkeeping regulations to make clear that the failure to record an injury or illness is an ongoing violation. Congress passed House Joint Res. 83 invalidating the regulation, and OSHA may not adopt a rule that is "substantially the same." 5 U.S.C. § 805(b)(2). (I took no position regarding the rule.) Should Congress wish to revisit the six month statute of limitations in the OSH Act, which is within its purview, I would enforce the law.

98. Do you think it should be illegal for an employer to retaliate against a worker for exercising her rights under the Occupational Safety and Health Act, the Fair Labor Standards Act, or other labor and employment laws? What about the Sarbanes Oxley Act, or any of the other more than 20 whistleblower provisions of various federal statutes enforced by the Occupational Safety and Health Administration? Will you commit to maintaining a vigorous enforcement program to protect workers against illegal retaliation?

ANSWER: Yes. Under 23 statutes delegated to the Occupational Safety and Health Administration, it is illegal to retaliate against workers. These laws help protect employees, and further federal law enforcement efforts. If confirmed, I would enforce the law to protect workers from adverse employment actions.

99. Workers often do not report injuries to their bosses due to fear of retaliation. OSHA's final electronic recordkeeping rule, which OSHA began enforcing on December 1, 2016, includes a provision prohibiting employers from discouraging workers from reporting their injuries or illnesses. Do you support laws protecting whistleblowers from retaliation in the workplace?

ANSWER: Yes. Under 23 statutes delegated to the Occupational Safety and Health Administration, it is illegal to retaliate against workers. Congress has passed these whistleblower protections, and I would enforce the law to protect workers from illegal adverse employment actions.

100. In March 2016, OSHA released a final rule to reduce workers' exposure to respirable crystalline silica. The rule, which became enforceable last year, is expected to save over 600 lives, prevent more than 900 new cases of silicosis each year, and generate net benefits of $7.7 billion each year. As Secretary of Labor, will you be committed to implementing this life-saving rule?

ANSWER: The Department of Labor successfully defended a lawsuit in July 2017 challenging the regulation. Currently, the Occupational Safety and Health Administration (OSHA) is inspecting workplaces for silica exposure. If confirmed, I will consult with OSHA staff as appropriate on this important issue in an effort to ensure OSHA achieves its mission of protecting worker safety and health.

101. Do you agree with the many offensive statements and policies issued by President Trump and his Administration about immigration and immigrant workers? How will you work with President Trump if you are in opposition to one another in this regard—and in general?

ANSWER: I understand that some members of the Committee disagree with certain statements and policies of the President, but I am not certain which particular matters this question refers to. In any event, if confirmed, I will seek to work with the Administration on all matters within the Department of Labor's jurisdiction in an effort to benefit all American workers.

102. Undocumented workers are especially vulnerable to wage theft and exploitation, and are often reluctant to report violations for fear of retaliation. Do you believe that all working people, regardless of their immigration status, should be afforded the same wage and hour protections, health and safety protections, and options for recourse if they are injured on the job?

ANSWER: The Department has a long-standing commitment to administering and enforcing all applicable federal workplace protections without regard to immigration status. If confirmed, I will enforce all laws under the Department's jurisdiction fully and fairly to protect all workers' rights.

103. Do you commit that under your leadership DOL will not scale back or limit its enforcement efforts as they relate to all workers, including immigrant workers, and that you will defend against any attempts to undermine the Department's ability to conduct robust investigation and enforcement on behalf of these workers?

ANSWER: The Department has a long-standing commitment to administering and enforcing all applicable federal workplace protections without regard to immigration status. If confirmed, I will enforce all laws under the Department's jurisdiction fully and fairly to protect all workers' rights.

104. Immigration enforcement is often used by exploitative employers as a tool to intimidate and retaliate against guest workers and other immigrant workers. This depresses wages and working conditions for all workers, and sometimes leads to forced labor and human trafficking on American soil. There have been numerous instances of Immigration and Customs Enforcement (ICE) agents impersonating OSHA officials in order to target immigrant workers, and the recent immigration enforcement surge has included worksite raids and the legal but problematic identification of ICE agents as police officers. The best way to prevent this misuse of ICE resources is to de-conflict and maintain a separation between immigration enforcement and labor enforcement.

a. Do you agree with the principle that immigration and labor enforcement activities should be kept separate?

b. If so, will you maintain or expand the interagency policy established with DHS to de-conflict worksite enforcement activities?

ANSWER: I understand that there is a Memorandum of Understanding (MOU) between DHS and the Department of Labor that is designed to enable the agencies to avoid interfering in each other's enforcement responsibilities. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities. I also would look forward to further conversations with members of Congress on these issues.

105. In August of 2016, Time Magazine reported that President Trump contracted with a company that employed undocumented immigrants from Poland to work on the site of his flagship Trump Tower in New York City and had them work 12-hour shifts without

paying them overtime. According to Time magazine, when the people building the Trump Tower complained that he was stealing the wages they had earned, President Trump had his lawyer threaten to call immigration officials and get the people working on the site deported. While President Trump has denied some of these facts, it is indisputable that some corporations exploit undocumented immigrants who work for them and then threaten to call immigration authorities to silence whistleblowers. Not only does this put undocumented immigrants in an extremely vulnerable position, it ends any chance to ferret out unscrupulous corporations who disregard the law, do not pay overtime, put the people who work for them in dangerous working conditions, and even sexually abuse or traffic their employees. If whistleblowers are deported, after all, the government cannot investigate charges of exploitation or abuse.

ANSWER: If confirmed, I look forward to learning about the Department's enforcement efforts and how best to support and enhance such efforts. I also commit to enforcing the laws fully and fairly.

106. Will you ensure that DOL investigators protect whistleblowers from their boss making a retaliatory call to immigration authorities?

ANSWER: Many of the laws that the Department of Labor enforces, including the Occupational Safety and Health Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Employee Retirement Income Security Act, and the Mine Safety and Health Act, include protections against retaliation for workers for exercising rights under those laws. Additionally, the Occupational Safety and Health Administration enforces not only the anti-retaliation protections in section 11(c) of the Occupational Safety and Health Act, but also the employee protection provision of the Sarbanes-Oxley Act and the anti-retaliation protections in more than 20 other federal statutes. In providing these protections, Congress has repeatedly recognized that whistleblowers are vital to identifying and controlling hazards to employee and public safety, health, and well-being. If confirmed, I will maintain a vigorous program to protect workers against illegal retaliation.

107. Will you commit to working with the Department of Homeland Security (DHS) to ensure it does not initiate deportation proceedings against immigrants during ongoing investigations over workplace labor law violations or for exercising their rights as workers in the United States?

ANSWER: As noted, I understand that there is an MOU between DHS and the Department of Labor that is designed to avoid interfering in each other's enforcement responsibilities. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with DHS staff to help ensure that both agencies can continue to fulfill their statutory responsibilities. I also commit to enforcing the laws fully and fairly, while recognizing as well that the removal from the United States of dangerous or violent aliens is a high priority for the federal government.

108. Will you train Department of Labor investigators to be aware that investigations into labor law violations should take precedence over immigration proceedings absent extraordinary circumstances, such as national security?

ANSWER: If confirmed, I look forward to learning about these matters. I also commit to enforcing the laws fully and fairly.

109. Will you instruct Department of Labor investigators to de-conflict DOL investigations with DHS enforcement activity to prevent a raid against a worksite at which a labor investigation or action is occurring?

ANSWER: As noted, I understand that the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. I also understand that there is an MOU between DHS and the Department of Labor, although I do not know the MOU's terms. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

110. Will you work with DHS to ensure its officials know whom to call to determine if there is an open Department of Labor investigation before initiating a workplace immigration investigation?

ANSWER: I will ensure that the Department of Labor and the Department of Homeland Security work to collaborate and have open and consistent lines of communication. As noted, if confirmed I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

111. Since President Trump entered office, the press has repeatedly reported about immigrant workers being afraid to go to DOL to pick up settlement checks for unpaid wages because they fear deportation, and similarly, that immigrant workers, even some that have documentation, fear complaining about unsafe conditions or wage theft. Advocates report that this is the case as well. As you know well, we must vigorously enforce the employment rights of those workers most vulnerable to exploitation not only to protect their basic human rights, but also so we don't allow unscrupulous employers to undercut the documented and citizen workforce by hiring and abusing undocumented workers. Indeed, the single best thing we can do to protect all American workers, is to protect all who work in America. But these well-founded fears threaten to sideline the DOL in these important matters, undercutting the rights of the entire low-wage workforce.

ANSWER: As noted, I believe that the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. I also understand that there is an MOU between the Department and DHS. If confirmed, I will familiarize myself with the MOU and will discuss this issue with Department of Labor staff and ask them to work with DHS staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

112. If you are Secretary, what will you do to ensure that DOL remains open to undocumented workers who are being exploited?

ANSWER: The Department has a long-standing commitment to administering and enforcing all applicable federal workplace protections without regard to immigration

status. If confirmed, I will enforce all laws under the Department's jurisdiction fully and fairly to protect all workers' rights. I also will remain mindful that worker exploitation is an affront to U.S. law and the dignity of work, and that illegal immigration can serve as a powerful tool to undercut wages and abet the exploitation of workers.

113. Will you engage in targeted investigations in industries that tend to hire them and if so, what will you do to protect them from workplace raids?

ANSWER: As noted, the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. If confirmed, I will familiarize myself with the Department's MOU with DHS and will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

114. Will you vigorously enforce the current Memorandum of Understanding between DOL and DHS detailing how DHS must defer to DOL's investigations and enforcement actions?

ANSWER: I have not reviewed the MOU, but if confirmed I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

115. Will you fight to maintain this MOU if others want to abandon it?

ANSWER: As explained above, I have not reviewed the MOU, but if confirmed I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

116. The Department's Bureau of International Labor Affairs (ILAB) leads the U.S. government's efforts to improve working conditions by enforcing trade commitments, combating international child labor, forced labor and human trafficking. Pursuant to the Trade and Development Act of 2000, ILAB is mandated to report the Department of Labor's annual *Findings on the Worst Forms of Child Labor*. The Department currently assesses countries on their progress, identifies positive efforts and remaining challenges, and issues recommendations to address the identified challenges. This is a critical tool the Department uses to raise awareness about the problem of child labor and engage with other governments to address the issue.What will you do to ensure the report is a useful tool for countries to combat the problem of child labor?

ANSWER: I understand that the Department of Labor's Bureau of International Labor Affairs (ILAB) has been reporting on international child labor and forced labor issues for over 25 years. Promoting a fair playing field for American workers is a priority for me, and I have reviewed the annual *Findings on the Worst Forms of Child Labor* in the past. If confirmed, I look forward to discussing the report's visibility and impact with ILAB, and to understanding how ILAB engages with trading partners covered in the report to ensure they are living up to their commitments to eliminate the worst forms of child labor.

117. If confirmed, will you immediately update my office on the expected release date of the 2018 edition of the *Findings on the Worst Forms of Child Labor*?

ANSWER: If confirmed, and if the report has not yet been issued, I will familiarize myself with it and update your office.

118. The Department of Labor's Bureau of International Labor Affairs (ILAB), in coordination with the Office of the U.S. Trade Representative (USTR), is responsible for the monitoring and enforcement of labor provisions of free trade agreements. A GAO report concluded that there is an overall lack of effective monitoring and enforcement of the labor provisions in our trade agreements. How will you strengthen ILAB's efforts to effectively monitor and enforce labor provisions of free trade agreements–especially given the drastic cuts to ILAB the Trump Administration has consistently proposed?

ANSWER: As a nominee, I did not participate in the budget process and am unfamiliar with the specific analyses or assumptions underlying the Administration's budget proposal. If confirmed, I look forward to being briefed on the activities of Bureau of International Labor Affairs (ILAB) and the performance of each of its offices.

I do recognize that a fair playing field where U.S. workers and businesses can fairly compete in trade is a priority, and that ILAB plays an important role in monitoring and enforcing the labor commitments of U.S. trade partners. If confirmed, I look forward to working work with ILAB, using whatever resources are available, on efforts to assure fair trade.

119. Under former Secretary Acosta, DOL directed more significant resources than usual toward helping employers comply with the laws that DOL administers, including establishing an Office of Compliance Initiatives within the Office of the Assistant Secretary for Policy (ASP). While compliance assistance must be part of any DOL enforcement agenda, a 2009 GAO investigation and report revealed the flaws in a strategy that put so much emphasis on compliance assistance, to the detriment of enforcement. The GAO report documents how phone complaints were routinely ignored and how investigations were often pro forma at best. And without targeted enforcement in high violation industries, where workers are justifiably afraid to complain for fear of retaliation, there is very little chance these employers will get caught. In your hearing, you discussed the importance of enforcement of DOL's worker protection laws. What is your plan for ensuring that all of the enforcement agencies at DOL vigorously enforce the laws they are charged with overseeing?

ANSWER: If confirmed, I look forward to being briefed on the Department's various efforts to enforce and further compliance with the law; to explore ways in which both may be enhanced; and to achieving the appropriate balance between vigorous enforcement and supplying employers and workers the material they need to understand these rights and obligations.

120. At your hearing, you briefly discussed the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). As you may know, since the enactment

EEOICPA and subsequent creation of the compensation Program, the Department of Labor and the Department of Energy have worked to process the claims of former employees and contractors who were exposed to radiation and toxins during their service at nuclear weapons facilities across the country. As a senator from Washington state, this is a very important issue to me because we have thousands of workers and their families at the Hanford Nuclear Reservation located in the Tri-Cities who helped America win WWII and the Cold War and continue to support a critical cleanup mission at Hanford. For years, I have been battling the slow and complex process that these heroes deal with in trying to secure the compensation and care promised them in a fair and timely manner. In addition, in 2005, I along with my colleagues worked to move this compensation program to the Department of Labor under the premise that it would do much better in processing claims. Indeed, I asked this very question of your predecessor, former Secretary Acosta, two years ago. Yet, even today, I hear from workers who face a slow claims process, continuing program inefficiencies, endless obstacles to complete their process, and difficulties in receiving the health care and benefits they earned through their dedicated service to the United States.

a. What steps will you take improve this critical program?

b. If confirmed, will you commit to a comprehensive review of the operations of the Division of Energy Employees Occupational Illness Compensation (DEEOIC) and the Office of Workers' Compensation Program (OWCP)?

c. Will you commit to reporting to this Committee the findings of such a review within 90 days of its completion?

ANSWER: If confirmed, I will look into your concerns regarding the administration of EEOICPA, and will explore what enhancements may be warranted to meet the needs of the workers who served, and continue to serve, this country at nuclear weapons facilities. I will consult with Department staff in order to determine the proper scope of any review, timing, and steps needed.

Senator Bernard Sanders Questions for the Record to DOL Secretary Nominee Scalia

1. You have spent your career representing broker-dealers, insurance companies, annuity companies, mutual fund advisers, swaps dealers, and the Chamber of Commerce. All of these financial services firms have fought financial regulations and you have been their go-to lawyer. And you have been quite successful in representing them. But now, should you be confirmed, you will be interacting with many of these financial services firms in a different capacity. Given all your prior work on behalf of these firms and trade associations, do you believe you can remain fair and impartial should those firms come before the Department?

   ANSWER: If confirmed, I commit to fully and fairly enforcing the laws that Congress has enacted. As I noted at the hearing, I have served in the Department before and demonstrated that I could fully carry out my obligations to a new set of clients and faithfully steward the public trust. If confirmed, I will also consult with the Department's ethics counsel as appropriate to ensure that I properly discharge my responsibilities.

2. Do you believe that the final Obama-era conflict of interest rule demonstrated insufficient coordination between the SEC and DOL? Please explain why or why not. If not, please specify what you believe would demonstrate sufficient coordination.

   ANSWER: I believe that agencies that regulate overlapping entities and activities benefit from coordination. If confirmed, I look forward to being briefed by the Department on the present status of its work in this area. In areas where the activities or responsibilities of DOL and the SEC may overlap, DOL staff and I would work with the SEC, as necessary, to strike the proper balance between SEC's regulation of the securities marketplace and the Department's special statutory role in protecting pension and workers' retirement benefits.

3. President Donald Trump has not divested himself from the numerous companies in which he has financial stakes. Trump has been sued at least 60 times for nonpayment by employees and contractors and according to DOL data, he has been cited for at least 24 violations of the Fair Labor Standards Act since 2005 for failing to pay overtime or minimum wage.
   a. Are you committed to not using your role to influence the outcome of any investigations in companies President Trump has a financial stake in and to ensuring that DOL's investigations are conducted to the highest of ethical standards?

   ANSWER: If confirmed, I would enforce the law fully and fairly. I would expect the same commitment from Department staff.

4. Unpaid internships often limit opportunities for young people from low income families, who either cannot afford to take an unpaid internship, or are forced to work second jobs to support themselves during their internships. Furthermore, internships are often treated as entry level jobs, not opportunities for interns to learn about the field.
   a. Under your leadership, will DOL commit to paying all of its interns? If not, why not?
   b. Do you support providing civil rights protections to unpaid interns in the federal

government against discrimination and harassment?
c. Do you support the Federal Intern Protection Act of 2019?
d. What would you do at DOL to ensure that unpaid interns in the private sector get an educational experience and are not just being exploited for free labor? How does the DOL plan on enforcing its "primary beneficiary test" as outlined in the Wage and Hour Division's Fact Sheet 71?

ANSWER: If confirmed, I look forward to learning about internship programs at the Department and ensuring that they comply with applicable laws. I also commit to enforcing the laws under the jurisdiction of the Department with respect to employees and interns fully and fairly, and to engage with members of this Committee and the Administration as they consider possible legislative proposals to benefit American workers.

5. You wrote in a 1998 article for the *Harvard Journal of Law and Public Policy* that "saying 'you're an incompetent stupid female bitch' a single time is not actionable environmental harassment." Do you still support that statement?

ANSWER: In that 1998 article, my point was that the above-quoted statement was highly discriminatory and offensive, yet under the courts' decisions at the time, would not be regarded as sufficiently "severe or pervasive" to be actionable. Although I have not researched the matter thoroughly, I believe it would still be difficult to bring a successful Title VII case where the offensive, discriminatory statement above were the sole harassing action.

6. In the same 1998 article, you wrote that employers should only be held responsible for harassing behavior that they have endorsed or knew about and so the strict liability standard for quid pro quo harassment is inappropriate. More recently, you represented Ford Motors in a class action sexual harassment suit in which you argued that Ford was not responsible for sexual harassment because it was outside the scope of the managers' duties.
   a. Do you agree that managers have a duty to their employees to protect them from sexual harassment and assault?
   b. Under what circumstances could a corporation be held responsible for sexual harassment?

ANSWER: Sexual harassment is abhorrent and illegal; if confirmed, I would enforce the law fully and fairly, including sexual harassment laws within DOL's jurisdiction. Managers have a duty to protect employees from sexual harassment and assault, and corporations will be liable for sexual harassment when, among other things, it is committed by a supervisor and the employee makes a complaint, as provided in the Supreme Court's *Faragher/Ellerth* decisions, or when it is committed by a non-supervisory employee and the employer is negligent with regard to the misconduct. For the record, I feel I must note that this question does not accurately summarize the content of my 1998 law review article, which was cited favorably by the Supreme Court and commended by Justice Ruth Bader Ginsburg, nor the arguments made by Ford Motor Company in the putative class action that I handled.

7. In a 2009 piece for *The Federalist Society*, you questioned the need for unions as employers are "more benign." And in 2011, you defended Boeing in its efforts to bring an anti-strike clause in a union contract. Yet in 2018, the country saw the highest number of U.S. workers striking in three decades, an exemplification of widespread dissatisfaction in working conditions. Do you believe workers should have a right to strike or protest unacceptable working conditions?

   ANSWER: Yes, American workers have, and should have, a legal right to engage in protected concerted activities, including a statutory right to strike.

   For the record, this question is not an accurate description of my work for Boeing (I played no role with respect to a no-strike clause), nor of my submission in that 2009 debate. That article did not question the need for unions, it noted the research suggesting that employees' "demand" for unionization is lower than at the time of the NLRA's enactment, in part because there are many more statutes supplying the protections that historically had been obtained through collective bargaining.

8. Right now, millions of Americans are working full time but still stuck in poverty. I believe we need to increase the minimum wage to help American workers. What are your views on increasing the minimum wage? Do you think it's right that someone works full time but still lives in poverty?

   ANSWER: The federal minimum wage is set by Congress and enforced by the Department. I recognize that costs of living and other economic factors vary greatly across the United States, and as a result, many States and localities have set their own minimum wages above the federal floor. Ultimately, the appropriate federal minimum wage is a decision to be made by Congress, and if confirmed, I commit to fully and fairly enforce the wage as enacted by Congress. A fair playing field for American workers is certainly a priority for me, and I strongly support free markets for the benefit of workers generally.

Senator Bob Casey Jr. Questions for the Record to DOL Secretary Nominee Scalia

1. The Mine Safety and Health Administration has a statutory mandate under the Federal Mine Safety and Health Act to inspect every underground mine four times per year and every surface mine two times per year. Will you commit to ensuring that MSHA will implement this mandate to carry out these inspections every year?

   ANSWER: The Mine Act requires the Mine Safety and Health Administration (MSHA) to inspect every underground mine at least four times per fiscal year, and every surface mine at least twice. It is my understanding that MSHA has completed all mandatory inspections during this Administration. If confirmed as Secretary, I will expect MSHA to continue completing all such inspections each year.

2. Under the Federal Mine Safety and Health Act, MSHA may utilize Pattern of Violation notices to protect miners when mine operators have demonstrated repeated disregard for the safety and health of miners by violating mandatory safety standards. According to your understanding of statute and regulation, what preconditions must be met for a POV notice to be terminated?

   ANSWER: My understanding is that the Pattern of Violations (POV) provision of the Mine Act is intended for mines that pose the greatest risk to the health and safety of miners, and is meant to drive improvements in compliance with laws and regulations administered by MSHA more broadly. As you may know, MSHA's 2013 Pattern of Violations final rule remains in litigation in the federal district court in the Southern District of Ohio. I further understand that the United Mine Workers of America has challenged it in federal district court. If I am confirmed, I will look forward to being briefed on this matter.

3. President Trump has made deregulation a priority. Will you pledge to continue tough enforcement of laws and regulations that protect miners and commit to not gutting or undoing these regulations?

   ANSWER: I believe in rigorous enforcement of the law against noncompliant companies, particularly in hazardous workplaces. And while I believe that unnecessary regulatory burdens should be eliminated where practicable, I am confident that this can and must be done in a manner that does not "gut" or otherwise compromise essential worker protections.

4. Under the Federal Mine Safety and Health Act of 1977, the Secretary of Labor, through the Mine Safety and Health Administration, must promulgate standards to assure that miners won't suffer a material impairment of their health if exposed to a hazard for the entirety of their working lives. As was raised in your nomination hearing, OSHA has already established that exposure to respirable silica dust in concentrations above 50 micrograms per cubic meter, averaged over an eight-hour shift, imposes a serious danger to worker health and issued a final rule to protect workers from this risk. Yet MSHA regulations continue to allow miners to be exposed to up to 100 micrograms per cubic meter, averaged over an eight-hour shift, meaning that miners are being provided

significantly less protection than workers in other industries. Do you believe this discrepancy is in any way justifiable?

ANSWER: Your question addresses an ongoing rulemaking. I understand the Department has obtained input from the public. I believe that public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to reviewing and carefully considering the points developed in the rulemaking comments, and to working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

5. Miners that report health and safety issues to MSHA may face retaliation from mine operators. Fear of retaliation may prevent many miners from reporting unsafe conditions or exercising their rights under the Mine Act, including becoming a representative of miners or exercising Part 90 rights. If confirmed, how will you protect whistleblowers and ensure that MSHA is enforcing Section 105(c) of the Mine Act?

ANSWER: I am aware that that federal law prohibits persons from discriminating against miners, applicants for employment, and representatives of miners for exercising statutory rights, such as identifying hazards, asking for MSHA's inspections, or refusing to engage in unsafe acts.

If confirmed, I commit to protecting miners' right to report unsafe conditions without fear of retaliation, and to promptly investigating discrimination complaints where the miner requests temporary reinstatement. I also commit to protecting the rights of Part 90 miners whose x-ray findings show evidence of pneumoconiosis, and to working with MSHA to encourage miners to participate in this important program without fear of retaliation.

6. The United Mine Workers of America and the United Steelworkers wrote to MSHA on June 19, 2019, calling for DOL to take action to reduce miners' exposure to respirable silica dust. Will you commit to taking action to reduce miners' exposure to respirable silica dust if you are confirmed?

ANSWER: Your question addresses an ongoing rulemaking. I understand the Department has obtained input from the public. I believe that public comment is a valuable, essential component of regulatory process. If confirmed, I look forward to reviewing and carefully considering the points developed in the rulemaking comments, and to working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

7. Will you commit to aggressively working to further reduce the amount of time it takes to process black lung benefit claims and to reducing the amount of time claimants must wait to receive decisions from Administrative Law Judges in a manner that ensures the process is fair to workers?

ANSWER: If confirmed, I will look into your concerns regarding the time it takes to process black lung benefit claims and for claimants to receive decisions. I will consult with Department staff in order to determine the proper scope of any review.

8. How will you align this administrations stated trade goals of leveling the playing field for American workers, with our domestic policy to support workers' rights?

ANSWER: An even playing field where U.S. workers and businesses can fairly compete in trade is a priority. It is my understanding, for instance, that the new United States, Canada, Mexico Agreement (USMCA) will require many Mexican factories to pay higher wages as a condition of trading with the United States. I also understand that as part of USMCA, Mexico would be obligated to overhaul its labor laws to combat union corruption and enable Mexican workers to elect independent unions that represent their interests, not those of the firm they work for. As these examples reflect, it is in the economic interest of the United States to ensure that the labor provisions of U.S. trade agreements and in trade preference programs are enforced. If confirmed, I look forward to working with the Bureau of International Labor Affairs, Congress, and other agencies as appropriate on this issue. I also would vigorously enforce the statutes DOL administers to protect workers' rights.

9. Do you believe low wages can be an unfair trade practice? If so, what factors would indicate that a low wage is an unfair trade practice?

ANSWER: As noted, a level playing field where U.S. workers and businesses can fairly compete in trade is a priority. If confirmed, I look forward to being briefed on these issues and to working with the Bureau of International Labor Affairs to monitor and, with the Office of the U.S. Trade Representative, to enforce trade partner labor commitments.

10. Do you believe that if workers in Mexico have the right to be represented by a labor union which represents their interests rather than the interests of the firm they work for, U.S. workers will benefit as well?

ANSWER: It is my understanding that the United States-Mexico-Canada Agreement (USMCA) includes a labor chapter annex that committed Mexico to make historic reforms to its labor structure. If confirmed, I look forward to working with interagency colleagues, Congress, and the Bureau of International Labor Affairs to assure the faithful implementation of these labor enhancements.

11. How will you support and defend the rights of workers in Mexico to form and join labor unions?

ANSWER: As noted, I understand that the USMCA includes a labor chapter annex that committed Mexico to make historic reforms to its labor structure. It is in the economic interest of the United States to ensure that the labor provisions of U.S. trade agreements and in trade preference programs are enforced. If confirmed, I look forward to working with the Bureau of International Labor Affairs, Congress, and other agencies, as appropriate, on this issue.

12. Do you agree that when trading partners fail to enforce labor laws and do not uphold high- standard protections for workers, it can create a competitive disadvantage for U.S. workers?

ANSWER: Yes, when U.S. trading partners fail to enforce their trade commitments, U.S. workers and businesses are placed at a competitive disadvantage. If confirmed, I look forward to working with the Bureau of International Labor Affairs, Congress, and other agencies as appropriate to monitor, and enforce where necessary, the labor commitment of our trade partners.

13. The Department of Labor is responsible for helping to enforce labor and human rights provisions of our trade agreements. In the past, DOL has provided direct technical assistance, particularly for significant problematic areas, such as anti-union discrimination, forced overtime and gender- based violence and harassment in the workplace. If confirmed, will you continue to provide robust technical assistance to countries that fall short of international standards?

ANSWER: A fair playing field for American workers is important, and I fully support promoting the enforcement of the labor provisions of U.S. trade agreements. If confirmed, I will consult with the Bureau of International Labor Affairs and seek input from Congress, and other agencies as appropriate on the most effective ways to assure compliance from trade partner countries on labor commitments.

14. If confirmed, will you vigorously investigate and enforce the labor obligations of our trading partners and hold them accountable when they violate their obligations to protect workers?

ANSWER: As explained above, I support promoting the enforcement of the labor provisions of U.S. trade agreements and in trade preference programs. If confirmed, I look forward to working with the Bureau of International Labor Affairs and other agencies, as appropriate, to assure our trading partners' compliance with their labor commitments.

15. Will you support the strong engagement by the United States at the ILO to encourage countries to adhere to international labor standards?

ANSWER: The Department's Bureau of International Labor Affairs (ILAB) is responsible for engagement with the International Labour Organization (ILO). If confirmed, I look forward to working with ILAB and ensuring the United States has a strong voice at the ILO.

16. What specifically will you do at the Department of Labor to help workers who have lost their jobs to technology or trade?

ANSWER: Technology will continue to reshape the workforce, and some worker dislocations can be expected. The same is true for workers displaced as a result of trade. Americans need access to the knowledge and skills essential to pursue their educational and career goals while, at the same time, helping businesses grow by filling jobs with the skilled workforce they are seeking.

If confirmed, I will endeavor to ensure that the Department continues to partner with employers, technology innovators, and educators to develop job-driven workforce

strategies and provide services to displaced workers through American Job Centers. In particular, the Trade Adjustment Assistance for Workers program provides valuable aid and opportunities to U.S. workers who have lost their jobs as a result of foreign trade.

17. If confirmed as Labor Secretary, you will not only serve as the Chair of the Board of the PBGC, which serves as the backstop for pension plans, but you will also be consulted on any applications to Treasury to cut benefits. Will you commit to a vigorous review of any application to cut pension benefits and be thoroughly engaged in the process in order to provide opinions and suggestions when called upon for consultation as required by law?

    ANSWER: If confirmed, I look forward to briefings on the Treasury applications, and I commit to vigorous review of any applications and engagement in the process as required by law.

18. What do you believe should be done to address the solvency issues for multiemployer pension plans, like Central States among other plans, that applied to Treasury to cut benefits under the Multiemployer Pension Reform Act of 2014 (MPRA) and were rejected?

    ANSWER: It is critical to address the security of the multiemployer pension system. If confirmed, I will be Chair of the Pension Benefit Guaranty Corporation's (PBGC) Board of Directors and expect to be briefed on the issue of underfunded multiemployer pension plans. I am committed to working with Congress and the President on evaluating proposed solutions that address multiemployer program underfunding, including the continuing solvency of PBGC's multiemployer program.

19. Do you believe that federal money is necessary to solve the multiemployer pension crisis? If not, how would you propose we address this issue?

    ANSWER: The security of our pension system should be addressed. As noted, if confirmed, I expect to be briefed on the issue of underfunded multiemployer pension plans. I am committed to working with Congress and the President on evaluating proposed solutions to multiemployer program underfunding, including the continuing solvency of PBGC's multiemployer program.

20. If confirmed, how will you make it easier for Americans to save for retirement?

    ANSWER: On August 31, 2018, President Trump issued Executive Order 13847, "Strengthening Retirement Security in America," which states that "[i]t shall be the policy of the Federal Government to expand access to workplace retirement plans for American workers." If confirmed, I look forward to engaging with stakeholders and Department staff on those initiatives as well as on other areas in which the Department's regulations, guidance, and outreach can help America's workers and employers expand access to workplace retirement plans and improve retirement income security.

21. The Department of Labor has played an important role in enhancing protections for LGBT Americans. This includes the Wage and Hour Division's steps to interpret the Family and Medical Leave Act in a way that recognizes LGBT relationships. Can you

assure us that, if confirmed, you will continue to enforce these orders and protect LGBT Americans?

ANSWER: If confirmed, I will enforce the law fully and fairly. I am not familiar with the Wage-Hour interpretation mentioned in the question, but will familiarize myself with it if confirmed.

22. The Department of Labor has provided support to states studying systems to provide paid family leave. If confirmed, will you provide financial and technical assistance to states seeking to implement paid family leave?

ANSWER: If confirmed, I look forward to being briefed on the role the Department has in providing support to state studies and I would welcome the opportunity to provide appropriate technical assistance to states on the implementation of laws and regulations.

23. Do you believe companies have the right to make hiring decisions based on pregnancy status or family plans?

ANSWER: Title VII, as amended by the Pregnancy Discrimination Act, prohibits employers from making hiring decisions based on a woman's intentions regarding pregnancy. Title VII also prohibits employers from treating men and women differently based on their family status or their intention to have children. The Office of Federal Contract Compliance Programs generally follows Title VII principles in its enforcement of Executive Order 11246. Its regulations addressing the prohibition against sex discrimination provide that it is unlawful pregnancy discrimination to refuse to hire pregnant people or people of childbearing capacity, or otherwise subject such applicants or employees to adverse employment treatment because of their pregnancy or childbearing capacity.

24. Do you believe companies have the right to ask questions related to pregnancy status or family plans during the hiring process?

ANSWER: Title VII, as amended by the Pregnancy Discrimination Act, prohibits employers from making hiring decisions based on a woman's intentions regarding pregnancy. Title VII also prohibits employers from treating men and women differently based on their family status or their intention to have children. The Office of Federal Contract Compliance Programs generally follows Title VII principles in its enforcement of Executive Order 11246. Its regulations addressing the prohibition against sex discrimination provide that it is unlawful pregnancy discrimination to refuse to hire pregnant people or people of childbearing capacity, or otherwise subject such applicants or employees to adverse employment treatment because of their pregnancy or childbearing capacity. If confirmed, I will enforce these restrictions.

25. If confirmed, will you make the enforcement of equal pay laws a priority?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors.

26. Do you think that the Department of Labor's past enforcement of equal pay laws have been beneficial to women and their families?

ANSWER: Enforcement of these laws does benefit working women and their families. It is my understanding that in the past two calendar years, OFCP has remedied several pay disparities that were based on sex.

27. If confirmed, how will you fight sexual harassment and discrimination in the workplace?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors. I will also seek to understand whether there are additional appropriate steps the Department might take to better apprise employers and employees of their rights and obligations.

28. How specifically will you ensure thorough investigation and enforcement of violations of the Fair Labor Standards Act?

ANSWER: If confirmed, I will enforce the law fully and fairly.

29. Do you believe the federal minimum wage should be increased above $7.25 an hour? If so, what do you believe the federal minimum wage should be?

ANSWER: The federal minimum wage is set by Congress and enforced by the Department. I recognize that costs of living and other economic factors vary greatly across the United States, and as a result, many States and localities have set their own minimum wages above the federal floor. Ultimately, the appropriate federal minimum wage is a decision to be made by Congress. If confirmed, I commit to fully and fairly enforcing the federal minimum wage as enacted by Congress. A fair playing field for American workers is certainly a priority for me, and I strongly support free markets for the benefit of workers generally.

30. Many law-abiding employers are at a disadvantage because they are being undercut by other companies that misclassify their workers as independent contractors. Do you agree this is a problem? If confirmed, what will you do to crack down on the misclassification of workers as independent contractors?

ANSWER: The Department has an important role in ensuring effective enforcement, and that employers receive clear compliance guidance. If confirmed, I look forward to being briefed on matters pertaining to the classification of employees, and will enforce the law fully and fairly.

31. Do you believe that employers should be able to include forced arbitration clauses in employment contracts?

ANSWER: Since the original passage of the Federal Arbitration Act in 1925, Congress has expressed a national policy favoring arbitration as a less burdensome and less expensive alternative to litigation. If confirmed, and if Congress was to forbid forced arbitration clauses in employment contracts, I would follow the law.

32. Do you support the use of registered apprenticeships to help provide workers the skills they need and to provide employers the skilled workers that they need? What specifically will you do to increase utilization of registered apprenticeships?

ANSWER: The apprenticeship model has worked well in many American industries. With over 7 million open jobs and employers and others searching for skilled workers, apprenticeship expansion will continue to close the skills gap and strengthen the American workforce. Registered Apprenticeships are a key part of this effort. Apprenticeships and other work-based learning models that share strong public-private partnerships, active employer engagement training, and offer workers the opportunity to earn while they learn are critical to training the American workforce. If confirmed, my priorities will include working to ensure that apprenticeship programs can be accessed in more communities and by displaced workers who need to transition to new and growing industries.

33. If confirmed, will you support continued investment in worker training programs? How do you believe the effectiveness of worker training programs overseen by the Department of Labor can be maximized?

ANSWER: If confirmed, I will support continued investment in worker training programs. Through the Employment and Training Administration, the Department works to enhance the quality of skills training for workers in America. State workforce agencies, community colleges, and other talent-building organizations can help the Department provide a pipeline of skilled, quality workers to meet the demand of this growing economy.

34. The Department of Labor has provided competitive grants to successful programs at community colleges to train workers. Will you work to secure funding for similar competitive grants?

ANSWER: If confirmed, I will support grants that help train American workers, including those at community colleges. It is my understanding that the Employment and Training Administration works closely with community colleges to ensure that those looking for work or training can receive the skills they need.

35. Do you support the proposal in President Trump's budget that would eliminate the Senior Community Service Employment Program, a program designed to help older workers find employment?

ANSWER: As a nominee, I did not participate in the budget process and am unfamiliar with the budget and analyses and assessments that underlie the Administration's budget proposal. If confirmed, I expect to be briefed on the Senior Community Service Employment Program and the bases for the proposal to eliminate funding.
I will also aim to understand the goals, performance, and resource needs of programs such as these and to help the President develop budget proposals that advance the Department's mission and deliver the greatest value to the American people.

36. Do you support increased OSHA penalties in order to provide a more effective deterrent to violations that jeopardize the health and well-being of workers?

ANSWER: In 2015, Congress included an annual increase in OSHA penalties based on the Consumer Price Index, as part of the Budget Reconciliation Act. In addition, under OSHA's "egregious policy," the agency exercises its enforcement discretion in appropriate circumstances to cite employers for willful disregard of employee safety which has caused a fatality or other severe event. I was supportive of this policy as Solicitor, and if confirmed and Congress enacts increased penalties, I would implement that law.

37. Will you commit to maintaining the independence of the Bureau of Labor Statistics and the integrity and quality of the data BLS produces?

ANSWER: If confirmed, I commit to working with the Bureau of Labor Statistics to ensure that it operates in a non-partisan manner to provide information that is accurate, objective, relevant, timely, and accessible.

38. In 1938 the Fair Labor Standards Act created a subminimum wage program for veterans and people with disabilities. At the time the policy rationale was that people with disabilities and veterans needed a limited period of time to learn work skills and then would transition to employment that paid minimum or compensatory wages. While veterans are no longer paid subminimum wages, people with disabilities are. In the spring of this year, the Department released data that indicated approximately 175,000 people with disabilities are paid subminimum wages by approximately 7,000 employers with certificates allowing them to pay subminimum wages. Some of those employees earn pennies an hour. Employers are required to assess the skills of employees to complete job tasks and to support employees paid subminimum wages to develop skills to move out of subminimum wage employment into positions that pay at least minimum wage. Oversight of the employers who hold certificates is lax and the number of on-site and desk monitoring visits from DOL has been limited.

    a. What will you do to ensure monitoring and oversight of the employers holding subminimum wage certificates meets the requirements of the FLSA?
    b. How will you promote the transition of people paid subminimum wages to competitive integrated employment?
    c. How will you support employers who use a subminimum wage certificate to change their business model to one that pays employees with disabilities at least minimum wage or compensatory wages?
    d. Will your Department of Labor continue to issue new subminimum wage certificates to employers who wish to pay subminimum wages to people with disabilities?

ANSWER: If confirmed, I commit to enforcing the Fair Labor Standards Act fully and fairly. I look forward to being briefed by the Wage and Hour Division on the Fair Labor Standards Act Section 14(c) exemption, which I appreciate is a subject of interest to many stakeholders. I will seek the input of the Office of Disability Employment Policy as well.

39. Over the past ten years, data collection for the FLSA subminimum wage program has been lacking in specificity with huge numbers of missing data about individual programs, the employees and their movement to full paid employment. DOL has not tracked the wages paid to individuals and has not issued reports about the length of time employees have been paid subminimum wages nor the number of individuals with disabilities who have moved from subminimum wage employment to competitive integrated employment. Twice during your nomination hearing you said you would be willing to examine the program. In order to do so we need accurate, robust data.

    a. How will you examine the program, and with whom will you consult regarding the program?
    b. Will you agree to collect and publish data about the subminimum wage employers and the wages they pay, in the aggregate, to employees?
    c. Will you commit to collect and publish the number of employees paid subminimum wage by each employer holding a subminimum wage certificate?
    d. Will you commit to collect and publish data regarding the number of people employers holding a subminimum wage certificate transition from subminimum wage work to competitive integrated employment?
    e. Will you commit to increasing oversight of the employers using subminimum wage certificates to ensure compliance with the law and regulations related to subminimum wage program?
    f. Will you continue to issue certificates to employers to pay people with disabilities subminimum wages?

ANSWER: As noted, if confirmed, I look forward to being briefed by the Wage and Hour Division on the Fair Labor Standards Act Section 14(c) exemption, and will seek the input of the Office of Disability Employment Policy as well. I look forward to working with Congress and the Administration on this statutory provision should changes be beneficial to American workers. If confirmed, I will enforce the law fully and fairly.

40. According to the Bureau of Labor Statistics, the workforce participation rate of people with disabilities is half that of the population of working-age individuals without disabilities. A 2014 HELP Committee report indicated that people with disabilities who are working full time earn one third less than their peers without disabilities who work full time and have a comparable level of education.

    a. What will you do to increase the workforce participation rate of people with disabilities?
    b. What will you do to increase the wages and salaries paid to individuals with disabilities who are in the workforce?

ANSWER: I support increasing the labor force participation rate of individuals with disabilities and helping them lead successful lives in family-sustaining careers. These efforts contribute to our economy, and as important, to individual self-esteem. If confirmed, I expect to be briefed on programs at the Department, such as those administered by the Office of Disability Employment Policy (ODEP), that serve the Americans with disabilities in order to understand how they are succeeding in

accomplishing their mission. I will consult with the ODEP and seek input from Congress and other federal agencies as appropriate on these important issues in an effort to ensure that I focus the expertise and resources of ODEP on the areas where it can be most effective.

41. The Trump Administration has often stated they would like to create apprenticeship programs to increase the training of individuals to obtain jobs needed in their communities. Will you support including individuals with disabilities in apprenticeship programs? Will you ensure that apprentices with disabilities are not discriminated against when applying for the programs and receive the accommodations required to be successful in the programs.

ANSWER: Apprenticeship programs are a valuable and effective job training tool. Expanding access to effective apprenticeship programs—including to jobseekers with disabilities—is an important part of positioning our workforce to meet the needs of a changing economy. Discrimination on the basis of disability is illegal, and, if confirmed, I would enforce the law fully and fairly. As I noted in my hearing, ODEP is dedicated to helping with research and, in some circumstances, outreach and education on accommodating individuals with disabilities.

42. The Department of Labor is responsible for enforcing Sec. 503 of the Rehabilitation Act, which requires federal contractors to set a goal to hire people with disabilities. DOL can only enforce that requirement with the necessary resources. Will you commit to requesting of Congress and committing the necessary resources to enforce Sec. 503?

ANSWER: If confirmed, I will enforce the law fully and fairly, including Section 503 the Rehabilitation Act.

Senator Tammy Baldwin Questions for the Record to DOL Secretary Nominee Scalia

1. Do you think the current monetary penalty levels for OSHA are an appropriate deterrent to violating worker health and safety laws?

   ANSWER: In 2015, Congress included an annual increase in OSHA penalties based on the Consumer Price Index, as part of the Budget Reconciliation Act. In addition, under OSHA's "egregious policy," the agency exercises enforcement discretion in certain circumstances to cite employers for willful disregard of employee safety which has caused a fatality or other severe consequences. I was supportive of this policy as Solicitor, and if I am confirmed and Congress enacts increased penalties, I would implement that law.

2. Mr. Scalia, as we discussed during our meeting, in its 2013 decision in *Vance v. Ball State University*, the Supreme Court significantly undercut protections for employees who face harassment at the hands of supervisors, by ruling that employers could only be held liable when the harasser had hiring and firing authority. In reality, many workers face harassment at the hands of individuals who make decisions about their shifts, job responsibilities, and other daily aspects of work – and they need to have recourse.

   - Do you believe that supervisors who do not have hiring and firing authority should be held liable for workplace harassment?

   ANSWER: After our meeting, I re-read *Vance v. Ball*, which I had not read in some time. I agree with you that there are circumstances where a company should be liable for harassment by a supervisor or executive who lacks the authority to hire or fire.

3. You defended Ford in a number of discrimination and harassment claims including a class action suit brought by more than 30 female employees alleging sexual harassment and retaliation while employed at Ford assembly plants. The employees claim they were victims of unwanted touching, unwelcome sexual advances, requests for sexual favors, male colleagues showing them pictures of their genitals and attempted rape. You and your team argued these cases should be dismissed on technical grounds.

   - Do you think exposure to pornographic images and demands for sex in exchange for career benefits is acceptable behavior in the workplace?
   - Do you think refusing sexual advances is not legally considered opposition to discrimination under Title VII of the Civil Rights Act?
   - In your opinion what constitutes retaliation in a sexual harassment case?

   ANSWER: As a private attorney, I had a professional obligation to serve as a zealous advocate for my clients. The arguments I presented in that capacity were an appropriate discharge of that responsibility. I am mindful that if confirmed, I will have new clients, new responsibilities, and a public trust. I would be grateful for this opportunity to serve our Nation and the American people.

   I certainly do not believe that the sorts of demands and conduct described in the question are acceptable, and have written that *quid pro quo* harassment is "especially contemptible."

Although I have not reviewed the question recently, I believe the courts currently are divided on the question whether, under the terms of Title VII as enacted by Congress, refusing sexual advances falls within the Act's "opposition" clause. Finally, the Supreme Court has said that under Title VII, an act is retaliatory if it is "materially adverse," "'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006).

4. Mr. Scalia, if confirmed, you will Chair the Board of Directors of the Pension Benefit Guaranty Corporation. PBGC's multiemployer program is nearing insolvency and requires strong and stable leadership to ensure that it continues to meet its obligations to workers and retirees.

    - Do you commit to making your participation on the PBGC's Board of Directors a priority?

ANSWER: Yes, I commit to making my participation on the Pension Benefit Guaranty Corporation's (PBGC) Board of Directors a priority, and I am committed to working with Congress and the President on evaluating proposed solutions to multiemployer program underfunding and to ensure the solvency of PBGC's multiemployer program.

5. Mr. Scalia, the Butch Lewis Act is the only bill in Congress to address the multiemployer pension crisis. It protects the retirement security of over a million hard-working Americans, including 25,000 Central States retirees and workers in my state. Butch Lewis passed the House in July with the support of 29 Republicans. It is a bipartisan solution to an urgent problem.

    - Do you support the Butch Lewis Act, yes or no?

ANSWER: As noted, it is critical to address the security of the multiemployer pension system, and if confirmed, I am committed to working with Congress and the President to address multiemployer program underfunding and the solvency of PBGC's multiemployer program. This would include consideration of the Butch Lewis Act.

6. In your previous role as Labor Department Solicitor you filed a friend-of-the-court brief to overturn punitive damages awarded to a whistleblower who was retaliated against at work for his whistleblowing actions. And, in your role as a private attorney you were hired by WalMart to fight the first federal whistle-blower lawsuits filed against them. Actions like these prompted Sen. Chuck Grassley's office, who is considered by some to be champion of whistleblowers, to publically state that: "Grassley feels that Scalia is openly hostile to whistle-blowers."

    - As Secretary, what concrete actions would you take to prioritize OSHA's Whistleblower Protection Program?

ANSWER: I have written and spoken about the importance of whistleblowers and whistleblower protections, and as Solicitor implemented measures to bolster whistleblower

protections. *See* the discussion in my article titled *Inspection and Enforcement Strategies of the U.S. Department of Labor*, 7 U. PA. J. LAB. & EMP. L. 529, 535 (2005).

If confirmed, I will consult with the OSHA staff and seek input from Congress and others to ensure that the Whistleblower Protection Program can perform its mission.

7. Mr. Scalia, in May, USDA and DOL announced the closure or alteration of 25 Job Corps Civilian Conservation Centers (CCC) including the closure of one in Laona, Wisconsin.

   I spoke with former Secretary Acosta about this and fortunately, DOL and USDA reversed course and didn't close the facilities. But the facility in Laona could use some help because the proposed closure created uncertainty that is hurting their ability recruit new students.

   - Mr. Scalia, will you commit to:
     1) Not close these job training centers?

     2) Work with me and USDA to improve the Laona facility's recruitment efforts?

   ANSWER: If confirmed, I look forward to learning more about the Blackwell Job Corps Center in Laona, as well as others. Given the USDA's intention to continue to operate Job Corps Civilian Conservation Centers, I will—if confirmed—ensure the Department works in collaboration with the USDA to help it provide students vital services and training.

8. Mr. Scalia, I am aware of at least eight instances in which you worked—often successfully—to prevent workers or their surviving family members from collecting retirement or death benefits. Furthermore, in 2008 you penned an op-ed in the Wall Street Journal that chastised unions for using their powers as shareholders to support pro-worker objectives rather than "simply increasing shareholder value" at companies in which their members' retirement savings are invested.

   - How can American workers trust you to oversee their retirement savings when you have repeatedly worked to deny benefits for workers and prevent workers from exercising their significant powers as shareholders?

   ANSWER: If confirmed as Secretary of Labor, I would bring to the position a firm understanding of ERISA and the role of the PBGC, and a proven record as Solicitor of acting vigorously to protect retirement benefits, including at the Enron pension plans, as well as a record of effective and sometimes innovative efforts to protect workers under the FLSA, OSH Act, and other laws administered by the Department. I understand the critical role the Department of Labor plays in protecting retirement benefits, and would support it fully if confirmed.

9. Mr. Scalia, recently, the Business Roundtable—historically no champion of workers' rights—announced that its members—CEOs of nearly all the largest corporations in the country—would no longer primarily focus on shareholder maximization and instead support a stakeholder model of capitalism. In order to move to a stakeholder model, I believe workers

must be given a voice: at their company—by getting seats on the board—and as shareholders, by influencing how their retirement shares are voted at public companies.

- As Secretary you will oversee laws regulating retirement savings and protecting worker's rights, are these reforms something you would support?

ANSWER: The Department's mission and the Secretary's priority historically has been to ensure the security and promote the availability of workplace retirement benefits. With respect to retirement plans under ERISA, it has been the Department's position that fiduciaries must handle the voting rights associated with plan investments the same way as all other plan assets. The Department's position also has been that fiduciaries must use these assets exclusively to provide plan benefits and defray plan expenses.

10. Mr. Scalia, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a proposed regulation, entitled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," on August 15, 2019. The proposed rule seeks to limit the scope of Executive Order (EO) 11246, which prohibits federal contractors and subcontractors from discriminating "against any employee or applicant for employment because of race, color, religion, sex, or national origin," by dramatically expanding the religious exemption from EO 11246's requirements. I have been deeply concerned about actions the Administration has taken to date that undermine the rights of the LGBTQ community, and I am concerned that this rule could allow federal contractors to discriminate against their employees based on sex, sexual orientation and gender identity.

    - Mr. Scalia, if confirmed by the Senate, will you commit to ensuring that federal contractors will not discriminate against anyone on the basis of their sexual orientation or gender identity?

    ANSWER: Your question addresses an ongoing rulemaking. I understand that the Department has obtained input from the public. I believe that public comment is an essential, valuable component of the regulatory process. If confirmed, I look forward to reviewing and carefully considering the points developed in rulemaking comments, and to working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest. If confirmed, I also will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors.

11. OSHA's Whistleblower Protection Program faces many structural and financial shortfalls, making it difficult to enforce the more than 20 whistleblower statutes that it administers. An audit by the Department of Labor Office of Inspector General in September 2015 concluded: OSHA did not consistently ensure complaint reviews under the Whistleblower Programs were complete, sufficient, and timely; 70 percent of investigations were not conducted within statutory timeframes; and OSHA did not adequately and timely communicate the violations alleged by whistleblowers internally to OSHA's enforcement units or to other federal agencies with jurisdiction to investigate the allegations.

    - As Secretary, what concrete actions would you take to prioritize OSHA's

Whistleblower Protection Program?

- As Secretary, what actions would you take to ensure that OSHA whistleblower investigators are in compliance with the updated manual?

ANSWER: Under 23 statutes delegated to the Occupational Safety and Health Administration (OSHA), it is illegal to retaliate against workers. As I said in my testimony, "If I were confirmed I would view my job as following Congress's lead." Congress has passed these whistleblower protections, and I would enforce these laws to protect workers from adverse employment actions. If confirmed, I will also consult with the OSHA staff on the issues highlighted by the Department's Office of Inspector General report to ensure that OSHA can achieve its mission.

12. In Wisconsin, OSHA cited a company named Mid-America Steel Drum for 15 'serious' violations at its Milwaukee facility. The penalties were made possible by a courageous Wisconsin whistleblower who shared information that showed the company's leadership put workers at risk. Unfortunately, the OSH Act's whistleblower protections are woefully outdated and might not protect him from retaliation.

In the last 40 years the Occupational Safety and Health Act has never been significantly amended or strengthened including the whistleblower protections in Section 11(c) which have fallen far behind other worker protections, in public health, and environmental laws.

Notable weaknesses in Section 11(c) compared to more recently updated whistleblower statutes are the lack of preliminary reinstatement of worker employment during claims processing, no right of appeal or right of private action should DOL does not pursue the claim, and the inadequate time for employees to file complaints within 30 days statute of limitations as opposed to the 180 days provided to file under 5 more recent statutes including the Sarbanes-Oxley Act, the Consumer Product Safety Improvement Act, the FDA Food Safety Modernization, the Affordable Care Act, the Consumer Financial Protection Act.

- Mr. Scalia would you support aligning the 11C statute of limitations with other more recently updated statutes so whistleblowers have adequate time to file a claim?
- When we met in my office you said one of your proud accomplishments was helping a New York garment worker get her back wages and get reinstated. Would you support the reinstatement of whistleblower claimants while their case is pending?
- Under current anti-retaliation provisions workers are entirely dependent on the Secretary of Labor to pursue their cases and cannot bring their own case in federal court. Would you support an 11C whistleblower right to appeal their case or pursue it privately if DOL chooses not to?

ANSWER: I appreciate your highlighting the concerns you have with Section 11(c). If confirmed, I would support pursuing interim reinstatement of whistleblowing employees where appropriate and authorized by statute; would (as stated above) fully and fairly enforce the whistleblower protections enacted by Congress; and would provide assistance to Congress if it evaluates changes to the existing whistleblower statutes. I would also welcome the opportunity to discuss this matter with you further.

13. California enacted new Process Safety Management (PSM) rules establishing a greater requirement for employee involvement, but unions have had difficulty getting companies to abide by the requirements. In fact, the state is now seeking fines to four refineries over the matter.

    - As Secretary of the Department of Labor, will you direct the Department to enforce PSM employee participation requirements and encourage companies to work with labor unions to ensure worker concerns are addressed?

    ANSWER: California is one of 27 states that operates its own safety and health program. The Occupational Safety and Health Administration's (OSHA) process safety management standard requires employers to consult with employees and their representatives in process hazard analyses and other aspects of process management covered by the standard. If confirmed, I would work with OSHA to ensure that provision is enforced. In addition, I understand that OSHA currently has very active nonregulatory initiatives to include worker participation in safety such as the Voluntary Protection Programs and the Safe + Sound campaign; I would look forward to working with OSHA staff to ensure the effective implementation of those programs.

14. Personal Protection Equipment (PPE) is essential to many workers, including those in the chemical, health care, hospitality, and oil industries. For some workers in our nation's chemical sector, coming into contact with hazardous substances like hydrochloric acid is a daily task. If this acid is breathed in or makes direct contact with the skin, it can cause immediate irreversible lung damage, third degree burns and even death if a worker is not wearing the proper PPE.

    And the equipment necessary to protect the lives and health of workers in these sectors can be an expensive undertaking. A cartridge respirator can start at $200.00, not including the air filter cartridges needed for use. A full-face supplied air respirator can start around $800.00. And that does not include the supplied air, hose or protective suit that can also be required to perform a job where a respirator is required.

    Yet you fought against regulations aimed at requiring employers to provide this necessary and often expensive safety equipment needed for employees to simply do their jobs.

    - Do you think it's fair for workers to be faced with deciding between a new pair of shoes for their children or a new respirator filter to save their lungs?
    - Do you think employers have a responsibility to protect their workers?
    - Do you think employers need to provide workers with the protective equipment necessary to perform their jobs?

    ANSWER: The Occupational Safety and Health Administration's current regulations require employers to pay for respirators and other specialized personal protective equipment. As I stated in my testimony, if confirmed, I would enforce the law fully and fairly.

15. Both the Bush Administration and the Obama Administration developed special inspection programs to further direct scarce agency inspection resources to target the worst violators—those employers who demonstrate indifference to the OSHA law by committing willful, repeated or failure to abate violations. These programs for severe violators include inspection activities such as mandatory follow up inspections and increased company awareness of OSHA enforcement.

    - Do you support special enforcement initiatives for the worst violators with follow up inspections and company-wide enforcement for similar hazards?

    ANSWER: I understand that the Occupational Safety and Health Administration launched its renewed Site Specific Targeting Program last year. This enforcement program is aimed at establishments reporting higher than industry average injury and illness rates. If confirmed, I would examine this initiative and others such as the Severe Violator Enforcement Program to determine if the agency's resources are targeting the employers who are not upholding their legal obligations to protect workers. I previously have supported OSHA programs that seek to target the workplaces most likely to be in violation of the law. *See Inspection and Enforcement Strategies at the U.S. Department of Labor*, 7 U. PA. J. LAB. & EMP. L. 529, 531-34 (2005).

16. Worker exposure to extreme heat can result in occupational illnesses and injuries, as severe as heat stroke and death if not promptly treated. In 1972, the National Institute for Occupational Safety and Health (NIOSH) issued criteria for a heat standard. NIOSH updated its criteria in 1986 and again in 2016. Last summer, over 130 organizations and former administrators of the Occupational Safety and Health Administration (OSHA) petitioned the agency to promulgate a heat stress standard. Meanwhile, the U.S. Military has issued heat guidance and three states have implemented heat stress standards. In the absence of a federal standard on heat, OSHA must rely on its general duty clause to hold employers accountable for heat violations, which is more difficult to enforce than a dedicated standard. It is likely to become even more difficult to protect workers from heat stress under the general duty clause as a result of the 2019 Occupational Safety and Health Review Commission's decision in Secretary of Labor v. A.H. Sturgill Roofing, Inc. In a split decision, the Commission reversed the agency's heat citation in that case. The majority asserted, "The Secretary's failure to establish the existence of an excessive heat hazard here illustrates the difficulty in addressing this issue in the absence of an OSHA standard."

    - As Secretary, would you support OSHA adopting a heat stress standard for workers?

    ANSWER: Under the Obama Administration, OSHA denied a petition to promulgate a heat stress standard. If confirmed, I would examine the reasons why the previous Administration denied the petition and determine if circumstances had changed. In addition, I understand that OSHA continues to issue general duty citations to employers for failing to take adequate measures to protect their employees against unsafe levels of heat. If confirmed, I would seek to further understand OSHA's efforts to address this issue.

Senator Chris Murphy Questions for the Record to DOL Secretary Nominee Scalia

The Department of Labor recently issued a proposed rule that would greatly expand the ability of federal contractors to discriminate against LGBTQ people, women, people with disabilities, and religious minorities.

1. Do you believe that employers should be able to discriminate against workers on the basis of their sexual orientation or gender identity?

ANSWER: I do not believe that employers should discriminate against workers on the basis of their sexual orientation or gender identity. I also believe in respect for religious liberty. Your question addresses an ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to reviewing and carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

Senator Elizabeth Warren Questions for the Record to DOL Secretary Nominee Scalia

Fiduciary Rule

1. In 2016, the Labor Department finalized its Conflict-of-Interest Rule, also known as the Fiduciary Rule, which required that any paid financial advisers do what is in the best interest of their customers, even if it results in lower fees for the advisers. As an attorney representing the U.S. Chamber of Commerce, you played a leading role in overturning the Conflict-of-Interest Rule in court.[9] The Department of Labor's regulatory agenda says that the Department will the propose a new rule defining "who is a fiduciary under section 3(21)(A)(ii) of the Employee Retirement Income Security Act.[10]"

    a. In your Appellate Brief filed in the 5th Circuit in *Chamber of Commerce v. Department of Labor,* you compared broker dealers and insurance agent to car dealers, suggesting that retirement savers see them as salespersons rather that advisers or confidents.[11] Is that a view you hold personally?

    b. Many broker dealers and others that you describe in your briefing as akin to salespeople, including one of your clients in the case,[12] hold themselves out as advisors, not salespeople; they refer to their services as "advice" and "retirement planning", not sales pitches; and they cultivate relationships of trust and confidence with their customers, not arms-length sales relationships.[13] In the new version of the fiduciary rule, will you prohibit non-fiduciaries from using language that suggests they are in positions of trust and will act in the best interest of the customer?

    c. According to reports, investment services that are tainted by prizes and other noncash compensation incentives for broker deals lower investors' returns by about $17 billion per year. At the same time DOL estimated that the rule you played a crucial role in getting struck down would have saved investors $40 billion over ten years.[14] As Labor Secretary, what actions, would you take to prevent large investment professionals from continuing to take advantage of customers and put perks and potentially higher commissions ahead of the best interest of investors?

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[9] *Chamber of Commerce of the United States v. U.S. Department of Labor*, No. 17-10238, 5th Circuit, Brief for Chamber of Commerce Plaintiffs-Appellants, May 2, 2017.
[10] Office of Information and Regulatory Affairs, "Fiduciary Rule and Prohibited Transaction Exemptions,"
[11] *Chamber of Commerce of the United States v. U.S. Department of Labor*, No. 17-10238, 5th Circuit, Brief for Chamber of Commerce Plaintiffs-Appellants, May 2, 2017. ("A broker, insurance agent, or other financial-sales professional may make 'individualized solicitations much the same way a car dealer solicits particularized interests in its inventory.'")
[12] FSI, "About Us" https://financialservices.org/about/ ("At FSI, everything we do starts and ends with working to create a healthier, more business-friendly regulatory environment for our members – the independent financial services firms and independent financial advisors who provide affordable, unbiased advice to hard-working Main Street Americans.")
[13] See https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf
[14] AARP, "New Rules to Improve Retirement Investing," Eileen Ambrose, May 2016, https://www.aarp.org/money/investing/info-2016/rules-protect-retirement-investments.html.

d. Have you spoken with any of your former clients from the litigation over the fiduciary rule since the end of the litigation about standards of conduct of their priorities for a new fiduciary rule?

    i. Have you consulted or worked with the Chamber of Commerce as they have considered a challenge to a lawsuit that was brought by seven state attorneys general against the SEC over its "best interest" regulation for investment advice? If so, please provide information regarding your role.

e. Given your past opposition to the Labor Department's Conflict-of-Interest Rule and previous work to overturn the rule, will you recuse yourself from deliberations over the new fiduciary rule?

ANSWER: It is important that the retirement savings of working Americans be protected. Working Americans should have access to sound financial advice at fair and transparent prices, and the law requires those who are fiduciary advisers give advice that is solely in the interest of plans, their participants, and beneficiaries. As a nominee, I am not yet familiar with the details of a potential new proposed fiduciary rule. If confirmed, I would consult with the Department's ethics officials regarding whether I should recuse myself from various matters, including deliberations over a new fiduciary rule. To the extent I do participate in such a rulemaking, I would be committed to reviewing any new rule and considering it carefully in light of the administrative record, including public comments, and in light of all considerations relevant under ERISA and other applicable laws. I would do so without regard to positions that my clients or I have articulated previously when I served as an attorney in private practice. I would also consult with the Department's Staff to consider the appropriate measures to further retirement security.

The comparison between salespeople and brokers cited in the question is drawn from a decision of the U.S. Court of Appeals for the Seventh Circuit. I do not personally hold the view that retirement savers always view broker-dealers merely as salespeople. An important point in our brief was that assessments of how broker-dealers are "see[n]" by customers should be based in part on how specific broker-dealers present and characterize their services.

I have provided no legal services or advice regarding the potential contents of a new DOL fiduciary rule, or regarding a lawsuit challenging the SEC's "Regulation Best Interest." In any event, I would not regard the Department, or myself, as bound by any views I may have expressed on these matters while a private citizen.

2. In your lawsuit challenging the Labor Department's fiduciary rule, you argued that DOL was not the appropriate regulator to address the issue of conflicted investment advice to retirement investors. In making that argument, you cited to the authority that Congress gave to the SEC in section 913(g) of the Dodd-Frank Act to promulgate a uniform fiduciary standard. In its opinion vacating the DOL fiduciary rule, the Fifth Circuit cited to section 913(g) of Dodd-Frank four times. Neither you nor the Court ever cited section 913(f) as providing alternative authority to the SEC to promulgate a rule on this matter. Yet, that is the authority that the SEC used in its recent so-called "Regulation Best

Interest." Now, the members of the industry that you represented are thrilled that the Trump SEC has used this apparently hidden authority to provide a less-than-fiduciary standard to their activities, effectively allowing business as usual.

a. Do you agree that if the SEC was going to regulate here, they were required to regulate under Section 913(g), not 913(f)? Please explain why or why not.

b. Is this the argument you made in your signed court papers just a few years ago? Please explain.

c. Do you believe it is legally necessary for DOL to defer to the SEC regarding the regulation of financial advisors to ERISA plans? If so, what is the legal basis for this opinion?

d. What is your view of DOL's role in regulating financial advisors to ERISA plans?

ANSWER: The question concerns, in part, litigation I handled in private practice. Respectfully, I did not argue that DOL was not the appropriate regulator to address conflicted investment advice to retirement investors. I acknowledged that DOL has extensive authority to regulate such advice with respect to employer-sponsored retirement plans that are within scope of Title I of ERISA. I further acknowledged that DOL has additional authority with respect to other types of plans, but I identified ways in which those authorities differ.

That case centered on the scope of DOL's authority to promulgate certain regulations, and the arguments presented on behalf of my clients noted that Congress had authorized the SEC to regulate certain activities that DOL had undertaken to address. As is conventional in legal briefing, we provided citations for the SEC authority we described, but the briefing did not require, and we did not undertake, a comprehensive examination of other potential sources of similar SEC rulemaking authority.

I have not read Regulation Best Interest or the preamble to the proposed or final rule, and therefore am not in a position to state whether I agree or disagree with the asserted statutory basis for that regulation or how that compares to the analysis in a brief I filed on behalf of clients regarding DOL's Fiduciary Rule.

I do not believe that it is legally necessary for DOL to defer to the SEC regarding regulation of financial advisors to ERISA plans. DOL has a central, often preemptive, role in regulating fiduciaries to ERISA plans.

3. Labor Department officials, including then-Secretary Alexander Acosta, have stated that the Department will create new fiduciary regulations that will align with the

Security and Exchange Commission's (SEC) recently-approved Regulation Best Interest rule.[15][16]

a. The SEC rule left "best interest" – the key term that describes the standard of conduct for broker-dealers – undefined. Will DOL define the relevant standards of conduct in its rule?

b. In your view, what if any distinction exists between the "best interest" standard of conduct set forth in the new SEC rule and the "suitability" standard established by FINRA that predated it?

c. Throughout your career, you've often been successful challenging rules promulgated by executive agencies by challenging their cost-benefit analyses. In response to the SEC's proposal for Regulation Best Interest, a bipartisan group of eleven former SEC Senior Economists wrote in a comment, "[w]e find it worrisome that the proposals' economic analysis does not fully consider some potentially-important dimensions of the retail client-adviser relationship.[17]" Is the cost-benefit analysis that supports Regulation Best Interest sufficient?

ANSWER: As a nominee, I am not yet familiar with the details of any DOL prospective rulemaking on this topic, the SEC's "Regulation Best Interest," or how the two would or would not relate. If confirmed (and if my recusal is not required), I would look forward to being briefed by the Department on the present status of its work in this area, and if any proposed rule is issued, I will work to ensure that the rulemaking processes is transparent, allows full stakeholder input, and complies with the Administrative Procedure Act. I also have not examined and am not familiar with the distinctions between the SEC's new rule and the FINRA's "suitability" standard, although my understanding has been that the SEC rule intends to impose a higher standard. If confirmed, I would welcome the opportunity to examine these issues in consultation with DOL's staff.

Finally, because I have not read Regulation Best Interest or the preamble to the final rule, and have not reviewed the rulemaking record, including regarding the SEC's cost-benefit analysis, I do not consider myself to be in a position to answer the legal questions posed above.

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[15] ThinkAdvisor, "Fiduciary Rule Questions Linger as Trump Picks Scalia to Head Labor," Melanie Waddell, August 27, 2019, https://www.thinkadvisor.com/2019/08/27/fiduciary-rule-questions-linger-as-trump-picks-scalia- to-head-labor/.

[16] InvestmentNews, "Acosta says Labor Department will revive fiduciary rule," Mark Schoeff, Jr., May 1, 2019, https://www.investmentnews.com/article/20190501/FREE/190509987/acosta-says-labor-department-will-revive-fiduciary-rule.

[17] SEC, "Public comment regarding SEC File Number 57-07-18," February 6, 2019, https://www.sec.gov/comments/s7-07-18/s70718-4895197-177769.pdf.

Whistleblowers

1. The Occupational Safety and Health Administration (OSHA), in the Labor Department, enforces the whistleblower protections of more than 20 whistleblower statutes.[18] These safeguards protect workers from retaliation for reporting workplace violations, including those that threaten safety, health, and consumer protection. You, however, have a long history of working to ensure that corporations can more easily retaliate against whistleblowers, both in and out of your time in government.

    a. In your previous tenure at the Labor Department, you worked to undermine protections for whistleblowers who report violations to Members of Congress. In 2002, as Labor Department Solicitor, you filed a brief that sought to overturn damages in a whistleblower case against the Justice Department by arguing that only contacts with authorized committees, and not even the individual Members of Congress who serve on those committees, are protected.[19] Your interpretation received bipartisan criticism, including criticism by both the most senior Democrat and Republican the Senate today, and the Bush Administration reversed your argument after you resigned from your position.[2021]

        i. Do you still agree with your past argument that if a federal employee wished to report wrongdoing in the federal government by privately contacting my office to inform me of these activities, then this individual should not be protected from retaliation?

    b. You have also been highly critical of whistleblower protections enforced by the Securities and Exchange Commission (SEC). In a 2015 op-ed, you criticized a 2011 rule to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act that would incentivize workers to report violations of securities laws and protect them from retaliation.[22] You have also criticized the SEC's efforts to crack down on firms that try to silence whistleblowers as overly aggressive by stating, the SEC may not "tell employees that federal law enforcement have open access to company secrets."[23]

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[18] Occupational Safety and Health Administration, "Directorate of Whistleblower Protection Programs (DWPP) Whistleblowers Statutes Summary Chart," February 26, 2019, https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower_acts-desk_reference.pdf.
[19] Washington Post, "Whistle-Blower Case at Issue," Christopher Lee, October 25, 2002, https://www.washingtonpost.com/archive/politics/2002/10/25/whistle-blower-case-at-issue/640a013c-3a86-4efc- 894f-ab017ac60f37/.
[20] *Id.*
[21] Washington Post, "Labor Dept. Shifts Whistle-Blower View," Christopher Lee, January 28, 2003, https://www.washingtonpost.com/archive/politics/2003/01/28/labor-dept-shifts-whistle-blower-view/a3bfea87-e1f3-44a6-ae6d-b23fb50c0a10/.
[22] Wall Street Journal, Opinion, "Blowing the Whistle on the SEC's Latest Power Move," Eugene Scalia, April 5, 2015, https://www.wsj.com/articles/eugene-scalia-blowing-the-whistle-on-the-secs-latest-power-move-1428271250.
[23] Wall Street Journal, "Regulators Rap Firms Using Severance to Silence Whistleblowers," Andrew Ackerman, December 20, 2016, https://www.wsj.com/articles/regulators-rap-firms-using-severance-to-silence-whistleblowers-1482267305.

i. Do you still agree with your past position that employees are not entitled to report possible illegality to federal law enforcement and regulatory agencies and that the SEC's protections against retaliation are too burdensome on corporations? If so, please explain why the privacy of corporate activities supersede the safeguards of workers who wish to report possible illegal activities.

c. As an attorney, you have also argued against corporate whistleblower protections. Given the role of the Labor Department in protecting workers' rights and enforcing various whistleblower protection statutes, the public deserves to know whether you will continue to hold the views for which you argued if confirmed as Labor Secretary.

i. As an attorney for Wal-Mart, you defended the company against claims that it illegally fired corporate whistleblowers.[24] Wal-Mart's attorneys, including you, were criticized for using forceful tactics against the employee's claims, which some have argued may discourage workers who have discovered wrongdoing from coming forward.[25]

In several other cases, you have argued to dismiss whistleblower complaints, defended employers against wrongful termination cases that included whistleblowing, and otherwise argued in favor of corporations accused of retaliating against workers who sought to report wrongdoing and potential violations.[26][27][28][29][30][31][32][33][34]

1. Do you still agree with the aggressive arguments and tactics you pursued against whistleblowers in defense of corporate interests? If so, why should workers entrust you to protect them against the same

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[24] SFGATE, "Wal-Mart hires Justice Scalia's Son for whistle-blower suits," Michael Barbaro, July 10, 2005, https://www.sfgate.com/news/article/Wal-Mart-hires-Justice-Scalia-s-son-for-2656789.php.

[25] https://advance.lexis.com/document/?pdmfid=1000516&crid=90f01119-25b9-4684-ac6f-cf8fa7ad98bd&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4GFF-3YD0- TWJ8-J2FH-00000-00&pddocid=urn%3AcontentItem%3A4GFF-3YD0-TWJ8-J2FH-00000-00&pdcontentcomponentid=149305&pdteaserkey=sr4&pditab=allpods&ecomp=9f4Lk&earg=sr4&prid=8e2c3edc-c7b2-4784-aded-5a66ca6a0da9

[26] *Hafer v. U.S. Department of Labor Administrative Review Board*, 2008

[27] *Barker v. UBS AG*, 2011, 2012

[28] *Stone & Webster Construction, Inc. v. U.S. Department of Labor*, 2012

[29] *Lawson v. FMR LLC*, 2014

[30] *Wiest v. Lynch*, 2013

[31] *Jordan v. Sprint Nextel Corporation*, 2014

[32] Reuters, "In defeat for UBS, Connecticut top court finds broad whistleblower rights," Jonathan Stempel, October 5, 2015, https://www.reuters.com/article/ubs-group-connecticut-whistleblower/in-defeat-for-ubs-connecticut-top- court-finds-broad-whistleblower-rights-idUSL1N1251EU20151005

[33] *Berman v. Neo@Ogilvy LLC*, 2015

[34] Law360, "Jury Gives Ex-UBS Analyst Nearly $1M In Whistleblower Row," Cara Bayles, December 21, 2017, https://www.brostul.com/wp-content/uploads/2017/12/Jury-Gives-Ex-UBS-Analyst-Nearly-1M-In-Whistleblower-Row-Law360.pdf .

activities that were allegedly conducted by corporations you defended?

ANSWER: Whistleblower protections are a crucial means of ensuring that those who lawfully disclose wrongdoing will be protected from retaliation. I am committed to strong, fair, and impartial enforcement of all congressional statutes that protect whistleblowers and that encourage reporting of unlawful conduct. I do not believe that whistleblower protections are as narrow as suggested in this question. Respectfully, moreover, most of the views attributed to me by this question are ones that I have not stated and do not hold, and the question's characterization of my past work in this area is inaccurate. I do agree, however, that law enforcement ordinarily does not enjoy "open access to company secrets" —or to the "secrets" of individual Americans—including, for example, in circumstances where those secrets are protected by the attorney-client privilege or the Fourth Amendment. In all events, the arguments I made on behalf of clients in whistleblower-related litigation were well within the bounds of my obligations, as a lawyer, to zealously represent my clients' interests.

If confirmed, I can be trusted to vindicate employees' interests because I have an established reputation for acting vigorously on behalf of those it is my duty to defend, including in my prior tenure as Solicitor of Labor, where I energetically and effectively advanced a range of arguments on behalf of employees, including whistleblowers. As Solicitor, I played an important role in overseeing effective implementation of the Sarbanes-Oxley whistleblower requirements, beginning with a planning meeting in my office days after that law was enacted that included the Department's Chief Administrative Law Judge and other career and non-career personnel with responsibilities for the Act's implementation. One of my first acts as Solicitor was to institute, together with the head of the Mine Safety and Health Administration, new timetables and procedures for more expeditiously handling whistleblower retaliation cases. I also filed a preliminary injunction motion in federal court, that to my knowledge was unprecedented in the Department's history, successfully seeking reinstatement of a worker who had been terminated for reporting wage-hour violations at her place of work. That case was *Chao v. Danmar Finishing Corp*, 02-CV-3492 (E.D.N.Y 2002), and was reported in the New York Daily News. *See* Bob Port, *Sweatshop Backs Down: Return to work is victory for a B'klyn Norma Rae*, N.Y. Daily News (Aug. 26, 2002), https://www.nydailynews.com/archives/news/sweatshop-backs-return-work-victory-b-klyn-norma-rae-article-1.509820.

If confirmed, it would be my honor to meet with members of Congress to discuss ways in which the Department of Labor could more effectively advance whistleblower protections, and to provide support and assistance to Congress in its consideration of potential legislation to strengthen whistleblower protections.

Dodd-Frank

1. A 2016 Wall Street Journal article declared that you had "taken an ax to the Dodd-Frank Act since its 2010 implementation," using a "federal law requiring financial regulators to do a cost benefit analysis.[35] In your legal work, you argued in multiple cases that the cost-benefit analyses conducted by federal agencies were inadequate.[36][37][38][39]

    a. What role do you believe that qualitative costs and benefits have when being considered throughout the regulatory process?

    b. If confirmed, how would you handle potential rulemakings that are consistent with DOL's mission to promote the welfare of wage earners, job seekers, and retirees, but you are unable to quantify the effects of the rule?

    c. To what extent do you believe that the distributional effects of policy should be considered when evaluating its potential costs and benefits?

        i. Do you believe it is appropriate to give equal weight to the economic impact of a rule on an individual whose household income lies in the first percentile of the income distribution and an individual whose income is in the 99th percentile of the income distribution?

ANSWER: Qualitative costs and benefits are among the costs and benefits—stated more broadly, the "pros and cons"—that properly are considered in rulemaking. If confirmed, I would regard it as very important to assess a rule's potential impact, and would regard quantifiable impacts as an important (though not always decisive) element of that assessment. However, I would not regard an inability to quantify as a reason to withhold regulatory action, particularly action that furthers the purpose of the statute that new rule (or rule amendment) is meant to implement.

The weighing of costs and benefits should be conducted in a fair, impartial manner, and it is appropriate for agencies to take special care in considering the impact that proposed regulations may have on the most vulnerable Americans.

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[35] Wall Street Journal, "MetLife Ruling the Latest Win for a Son of Justice Scalia," March 30, 2016, Sara Randazzo, https://www.wsj.com/articles/metlife-ruling-the-latest-win-for-a-son-of-justice-scalia-1459364864.

[36] *American Petroleum Institute, et al v. Chamber of Commerce of the United States of America*, No. 12 cv-1668, United States District Court, District of Columbia, Plaintiffs' Motion for Summary Judgement, May 2013.

[37] *MetLife Inc. v. Financial Stability Oversight Council (FSOC),* No. 16-5086, United States Court of Appeals, District of Columbia Circuit, Brief for Appellee, August 2016.

[38] *International SWAPS and Derivatives Association,, Inc. and Securities Industry and Financial Markets Association v. United States Commodity Futures Trading Commission,* No. 11-CV-2146, United States District Court, District of Columbia, Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgement, April 2012.

[39] *Securities Industry and Financial Markets Association, International SWAPS and Derivatives Association, an Institute of International Bankers v. United States Commodity Futures Trading Commission,* No. 1:13CV01916., United States District Court, District of Columbia, Complaint, December 2013.

2. You have previously expressed skepticism regarding the process by which Financial Stability Oversight Council (FSOC) designates an institution as systemically important (SIFI designation). You previously testified in front of the House Financial Services Committee and the Senate Banking, Housing and Urbana Affairs Committee regarding FSOC's designation process. You have stated that you believe an activities-based approach to regulation would generally be more effective than the designation of individual companies.[40]

    a. Do you believe that an activities-based approach is sufficient to address systemic risk at distressed large firms?

    b. Do you believe that there are certain individual institutions whose failure would present a systemic risk to the economy?

        i. If yes, do you believe these institutions should be subject to some form of enhanced prudential regulation?

        ii. If no, why not?

    c. Do you believe a non-bank can ever be successfully designated a SIFI using the current framework?

ANSWER: I do not regard myself as an expert with regard to systemic financial risk, and therefore do not believe I am in a position to address the limits to an activities-based approach to systemic risk. Subject to the same caveat, I accept what I understand to be the prevailing consensus that there are certain financial institutions that could pose systemic risk, and that accordingly should be subjected to enhanced oversight. And, I believe it may be possible for a nonbank financial institution to be designated a SIFI under the current statutory and regulatory standards, depending on that institution's characteristics.

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[40] Written Testimony of Eugene Scalia to the U.S. Senate Committee on Banking, Housing, and Urban Affairs, July 8, 2015, https://www.banking.senate.gov/imo/media/doc/ScaliaTestimony7815.pdf.

Senator Tim Kaine Questions for the Record to DOL Secretary Nominee Scalia

1. The majority of minimum wage workers are women and over one quarter have children to support. In Virginia, women earn 80 cents to every dollar that men earn. This information is concerning, but specifically for those of us who want to see women thrive and not be held back. Women make up two-thirds of the minimum wage workforce and women are the sole or co-breadwinner in half of families with children. Do you believe gender pay discrimination exists?

   ANSWER: Yes, gender-based pay discrimination exists, and if confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors.

2. What do you believe is a fair minimum wage? In your view, do you believe that raising the minimum wage is a way to close the gender pay gap between men and women?

   ANSWER: The federal minimum wage is set by Congress and enforced by the Department. I recognize that costs of living and other economic factors vary greatly across the United States, and as a result, many states and localities have set their own minimum wages above the federal floor. Ultimately, the appropriate federal minimum wage is a decision to be made by Congress, and, if confirmed, I commit to enforcing the federal minimum wage as enacted by Congress fully and fairly.

3. You've made a number of comments in the past that you believe the SEC should regulate investment advice. Do you believe that the Department of Labor has the authority to propose and enforce a fiduciary standard to protect retirement savers?

   ANSWER: The law requires those who are fiduciary advisers to give advice that is solely in the interest of plans, their participants, and beneficiaries, and the Department has long enforced that requirement and its exemptions. The Department does have authority to adopt and enforce fiduciary standards, and if confirmed, I look forward to being briefed by the Department on the status of its work in this area.

4. What kinds of protections do you think need to be put in place to ensure that hardworking individuals and retirees receive retirement advice that is solely in their best interest?

   ANSWER: It is important that Americans' retirement savings be protected and that working Americans have access to sound financial advice at fair and transparent prices; the law requires those who are fiduciary advisers give advice that is solely in the interest of plans, their participants, and beneficiaries. If confirmed, I look forward to being briefed by the Department on the status of its work in this area.

5. The Obama-era conflict of interest rule was promulgated after a lengthy rulemaking process that included extensive stakeholder outreach, review of thousands of public comments, and a significant regulatory impact analysis. In your view, what new information must be produced or uncovered in a new regulatory impact analysis in order to support changes to the fiduciary rule?

ANSWER: As a nominee, I am not yet familiar with the details on a potential new fiduciary rule. What information would be necessary would depend largely upon those details. Furthermore, I believe that public comment is an essential component of the regulatory process and that the public can often assist regulators in identifying issues and crafting effective regulations. If confirmed (and if my recusal is not required due to my past work in the area), I look forward to being briefed by the Department on the status of its work in this area. Furthermore, if any proposed rule is issued, I will work to ensure that the rulemaking processes is transparent, allows full stakeholder input, and complies with the Administrative Procedure Act.

6. Given your prior legal advocacy on behalf of clients opposed to worker and investor protections, what assurances will you give the committee that if you are confirmed, you will advocate on behalf of ERISA plan participants and retirees at least as vigorously as you opposed their interests while you were in the private sector?

   ANSWER: I recognize that retirement plans are of the utmost importance to working men and women. As I noted at the hearing, if confirmed, I will work to fully and fairly enforce all laws committed to the Department of Labor. This would be my fourth time in government, where I have consistently demonstrated my ability to carry out my duties vigorously and effectively. As Solicitor, I evaluated the tools the Department possessed to enforce the rights of workers and increased the use of creative and strong enforcement mechanisms that previously had not been frequently employed. If confirmed, I would approach my duties in the same manner.

7. Miners in my state are getting diagnosed with black lung disease at alarmingly higher rates. According to NIOSH, the biggest cluster of pneumoconiosis or black lung disease continues to be found at Stone Mountain Health Clinic in Southwest Virginia. In 2015, Office of the Inspector General at the Department of Labor found a large processing backlog for miners with black lung to get their benefits. While this backlog has improved, the Department still needs to make improvements so miners can get the health benefits they are entitled to. Currently when submitting black lung claims, clinics must submit x-rays via three hard disks rather than using an efficient, secure method of transferring these files electronically. Additionally, the Department is using outdated health billing codes that not even consistent with the codes that the Centers for Medicare or Medicaid Services (CMS) are using. If confirmed, will you commit to improving the processing of miners' black lung benefits claims and look into these two reforming these two specific issues?

   ANSWER: If confirmed, I will look into your concerns regarding the time it takes to process black lung benefit claims and the procedures currently being used and will examine whether there are areas where this system can be improved.

8. The National Apprenticeship Act requires the Secretary of Labor to cooperate with State apprenticeship agencies like the one in my state of Virginia on apprenticeship standards, yet the Department of Labor's proposed Industry Recognized Apprenticeship Program or IRAPs regulation ignores this requirement – ignoring the authority of the State agencies as required by law. The regulations also ignore the statutory requirements for apprenticeship contracts that provide for important protections for apprentices and things

like wage progression. Will you confirm that any IRAP regulations that move forward include these statutory requirements of cooperation with State Apprenticeship Agencies and apprenticeship contracts?

ANSWER: As discussed at my hearing, apprenticeship programs are an important responsibility of the Department of Labor, and an area where I believe opportunities exist for consensus and enhancements. Your particular question addresses ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

Senator Maggie Hassan Questions for the Record to DOL Secretary Nominee Scalia

1. Nearly 30 years after Congress passing the Americans with Disabilities Act, our country continues to have a disproportionately high rate of unemployment of individuals who experience disabilities. How do you believe the Department of Labor can work to address this?

   ANSWER: I support reducing the unemployment rate and increasing the labor force participation rate of individuals with disabilities and helping these individuals lead successful and self-sustaining lives. Such efforts contribute to our economy, and as important, to individual self-esteem. Serving Americans with disabilities in search of employment is an important part of the Department's mission, and, if confirmed, I will work with the Office of Disability Employment Policy on the areas where it can be most effective.

   In addition, the Department's Office of Federal Contract Compliance Programs (OFCCP) is entrusted with enforcement of Section 503 of the Rehabilitation Act. OFCCP provides compliance assistance and uses neutrally scheduled compliance reviews, as well as complaint investigations, to enforce this law. I understand that OFCCP recently directed additional resources towards compliance reviews that focus exclusively on Section 503 at 500 corporate headquarters across the country and is providing additional guidance and compliance assistance to ensure comprehensive compliance by contractors and subcontractors with Section 503. If confirmed, I will commit to continued enforcement of Section 503.

2. Federal contractors and subcontractors are prohibited from discriminating against individuals based on disability under Section 503 of the Rehabilitation Act of 1973. Contractors are also required to take affirmative action to recruit, employ, train and promote qualified individuals who experience disabilities under the act. If confirmed, what will you do as Secretary of Labor to increase the hiring rates of individuals who experience disabilities within the department – including in senior leadership positions – and how will you work with other federal agencies to increase this important hiring practice?

   ANSWER: If confirmed, I will enforce the law fully and fairly, including Section 503's prohibitions on unlawful disability discrimination. I look forward to being briefed on the Department's hiring plans and practices, including outreach to individuals with disabilities.

3. During our meeting, we discussed the importance of the Office of Disability Employment Policy (ODEP). Should you be confirmed as Labor Secretary, will you fight for increased funding for this office?

   ANSWER: As a nominee, I did not participate in the budget process, and am unfamiliar with the Administration's budget proposal. If confirmed, I look forward to participating in that process, so I can understand the goals, performance, and resource needs of programs such as these, and help the President develop budget proposals that will advance the Department's mission and deliver the greatest value to the American people. If confirmed, I also will be briefed further on the analyses and assessments that underlie the

Office of Disability Employment Policy and the programs this agency manages. I recognize the Office's importance to you, and to those it is intended to serve.

4. Direct support professionals (DSPs) that provide daily supports and employment training to individuals who experience disabilities are currently facing a dire workforce shortage, despite being one of the fastest growing occupations according to the Bureau of Labor Statistics (BLS). Direct Support Professionals have a 45% turnover rate annually and are compensated at an average of about $11 an hour nationally. If you are confirmed, as Secretary of Labor will you work to find solutions to address this workforce crisis? And can you share any ideas you have to stabilize this important workforce?

   ANSWER: If I am confirmed, I look forward to being briefed on this issue and working with the Department and Congress to find ways to ensure that this valuable part of our workforce is stabilized.

5. OSHA has about 45% fewer inspectors than it had in 1980, when the national workforce was about half its current size. I appreciate your committing in the hearing to filling open inspector vacancies, but also want to ensure that OSHA is prioritizing the most high risk cases.

   Earlier this year, the National Employment Law Project released a report documenting that the agency is doing less overall enforcement in the most high-impact and complicated enforcement actions. If confirmed, will you commit to prioritize the more complicated and impactful inspections that the current administration has neglected, including those to related to chemical exposure, workplace violence, heat and musculoskeletal disorders?

   ANSWER: I understand that the Occupational Safety and Health Administration launched its renewed Site Specific Targeting Program last year. This enforcement program is aimed at establishments reporting higher than industry average injury and illness rates. If confirmed, I would examine this initiative and others such as the Severe Violator Enforcement Program to determine if the agency's resources are properly targeting the employers who are not upholding their legal obligations to protect workers.

6. Do you believe safety measures at a job site should be negotiated, or should there be common standards required of all employers?

   ANSWER: I believe the best way to optimize safety standards includes a combination of national standards and context-specific rules. If confirmed, I would look forward to working with the Department and Congress to ensure the safety of all workers.

7. You submitted an amicus brief on behalf of Juul Labs arguing that the removal of electronic cigarettes from the market would pose a danger to public health. Please provide the data, including the source of such data, that you relied on in order to substantiate your claim that electronic cigarettes pose less risks to consumers than combustible cigarettes. Additionally, please provide the data you relied on in

order to determine that any public health benefit in the form of harm reduction resulting from consumers switching from combustible cigarettes to electronic cigarettes outweighs the National Youth Tobacco Survey data showing that over one in four high school students self-reports to be a regular user of electronic cigarettes, and that over 5 million pediatric patients are addicted to nicotine, almost entirely due to the rise in availability of electronic cigarettes.

ANSWER: I helped author an amicus brief submitted on behalf of numerous industry actors affected by the FDA's deeming rule. The brief cited the sources it relied on, including, for example, a declaration from the National Policy Director for the Consumer Advocates for Smoke-Free Alternatives Association and a declaration of a JUUL employee. *See* Amicus Curiae Brief of John Middleton, Co. *et al.*, *Am. Acad. of Pediatrics v. FDC*, No. 8:18-cv-883 (D. Md.), Dkt. 113, at 6-7. On the same day, the FDA filed its own amicus brief stating that it would be harmful to adult smokers and former smokers if electronic cigarettes were forced off the market in the manner proposed by the plaintiffs in that case.

8. Do you think collective bargaining is an appropriate means of increasing the share of the nation's wealth that goes to middle class Americans?

ANSWER: Collective bargaining rights are clearly established in law, as is the right of workers to decide whether to join a union or to refrain from joining a union. I support and respect those rights. If workers believe collective bargaining would improve their share of the nation's wealth, they should pursue their right to do so.

9. What steps will you commit to take to continue to vigorously enforce the Fair Labor Standards Act, including violations relating to wage theft, and ensure that there is no political interference with the Wage and Hour career staff?

ANSWER: If confirmed, I will enforce the law fully and fairly and in an ethical manner, as when I was Solicitor of Labor.

10. As Secretary of Labor, would you enforce the Lilly Ledbetter Fair Pay Act?

ANSWER: The Lilly Ledbetter Fair Pay Act of 2009 (Act) is a federal statute that was signed into law on January 29, 2009. The Act amends Title VII of the Civil Rights Act of 1964 and thus is enforced by the Equal Employment Opportunity Commission (EEOC). I am committed to the full and fair enforcement of that law.

11. US businesses say they can't find the qualified workers they need; skills attainment is vital to our country's economic competitiveness. Today's manufacturing jobs require skills that were not necessary even five years ago. As Secretary, how would you enhance America's competitiveness by upskilling our workforce?

ANSWER: If confirmed, I would support continued investment in worker training programs. Through the Employment and Training Administration, the Department works to enhance the quality of skills training for workers in America. State workforce agencies, community colleges, and other talent-building organizations can help the Department

provide a pipeline of skilled, quality workers to meet the demand of this growing economy.

12. Do you think an employer should be able to take punitive action against a woman because of her reproductive health decisions? Yes or No.

ANSWER: Title VII, as amended by the Pregnancy Discrimination Act, prohibits employers from making hiring decisions based on a woman's intentions regarding pregnancy. Title VII also prohibits employers from treating men and women differently based on their family status or their intention to have children. OFCCP generally follows Title VII principles in its enforcement of Executive Order 11246. Its regulations addressing the prohibition against sex discrimination provide that it is unlawful pregnancy discrimination to refuse to hire pregnant people or people of childbearing capacity, or otherwise subject such applicants or employees to adverse employment treatment because of their pregnancy or childbearing capacity. If confirmed, I will enforce these prohibitions.

13. Do you think an employer should be able to deny a woman insurance coverage of birth control? Yes or No.

ANSWER: I am aware that there is on-going litigation concerning the Affordable Care Act's contraceptive-coverage mandate. I understand that the Department of Labor is represented by the Department of Justice and is working with the Departments of Health and Human Services and Treasury. If confirmed, I look forward to being briefed on this litigation.

14. Do you think an employer should be able ask a female job applicant about whether she intends to become pregnant? Yes or No.

ANSWER: Title VII, as amended by the Pregnancy Discrimination Act, prohibits employers from making hiring decisions based on a woman's intentions regarding pregnancy. Title VII also prohibits employers from treating men and women differently based on their family status or their intention to have children. OFCCP generally follows Title VII principles in its enforcement of Executive Order 11246. Its regulations addressing the prohibition against sex discrimination provide that it is unlawful pregnancy discrimination to refuse to hire pregnant people or people of childbearing capacity, or otherwise subject such applicants or employees to adverse employment treatment because of their pregnancy or childbearing capacity. If confirmed, I will enforce these prohibitions, including in circumstances where employment is refused based on questioning about an applicant's intentions regarding pregnancy.

15. Do you think an employer should be able to fire, demote or otherwise take a punitive employment action against, an unmarried woman who becomes pregnant? Yes or No.

ANSWER: As noted, Title VII, as amended by the Pregnancy Discrimination Act, prohibits employers from making hiring decisions based on a woman's intentions regarding pregnancy. Title VII also prohibits employers from treating men and women differently based on their family status or their intention to have children. OFCCP

generally follows Title VII principles in its enforcement of Executive Order 11246. Its regulations addressing the prohibition against sex discrimination provide that it is unlawful pregnancy discrimination to refuse to hire pregnant people or people of childbearing capacity, or otherwise subject such applicants or employees to adverse employment treatment because of their pregnancy or childbearing capacity. If confirmed, I will enforce these prohibitions.

16. New Hampshire is home to a vast number of small businesses. Millions of American workers face retirement insecurity because the current employer-sponsored structure disadvantages small businesses. The Department's Association Retirement Plan rule providing for open Multiple Employer Plans or "open MEPs" is a step in the right direction toward helping more small businesses offer retirement plans for their employees, but we know there is more work to do to expand employee access to retirement plans. If confirmed, what steps will you take to ensure workers have access to a quality and affordable workplace retirement plan?

ANSWER: If confirmed, I look forward to working with Congress, and continuing the Administration's efforts, to expand access to quality and affordable workplace retirement plans, especially among small employers. If confirmed, I look forward to being briefed on and engaging in this important work.

Senator Tina Smith Questions for the Record to DOL Secretary Nominee Scalia

1. Under current law, are employers required to protect workers from workplace violence? If so, what steps are an employer be required to take? Specifically, what is an employer required to do to address the risk of workplace violence in a health care facility or residential facility?

   ANSWER: As I stated in my testimony, there are times when the employer is on notice and should take steps to protect against workplace violence. There is a role for the Occupational Safety and Health Administration (OSHA) in that context. Under current law, OSHA uses the general duty clause to bring enforcement actions against employers that fail to address workplace violence in accordance with that clause of the statute. OSHA also has a webpage dedicated to providing materials to employers regarding ways to protect workers against violence in the workplace. If confirmed, I would further explore this subject and the use of the general duty clause.

2. Do you support the Davis-Bacon Act's prevailing wage provisions? What will you do to ensure covered employers comply with Davis-Bacon and other prevailing wage requirements?

   ANSWER: Davis-Bacon is the law, and if confirmed, I will enforce it fully and fairly.

3. Do you support collective bargaining rights for federal employees? If so, what will you do to foster a fair and productive collective bargaining process?

   ANSWER: As a nominee, I am not yet directly involved with the labor-management relationship between the Department of Labor leadership and its unions. If confirmed, I expect to be briefed on the collective bargaining process at the Department and will abide by the statutes, regulations, and policies that govern that process and federal service labor-management relations. Further, as Solicitor I sought to promote a collegial, collaborative relationship with Department career staff, and will strive to do the same if confirmed as Secretary.

4. According to a 2017 Wall Street Journal analysis, approximately 40% of public comments on the Department of Labor's fiduciary rule included false identities. Do you believe that false or fraudulent comments are a significant concern? If confirmed, what steps would you take to preserve the integrity of the public comment process? Were you involved with or have knowledge of any efforts to generate comments on the fiduciary rule? If so, please describe the nature of your involvement. Were you aware that some comments included false identity information?

   ANSWER: I believe that robust public participation in the rulemaking process is essential to effective regulation, and agree that manipulation and falsification of public comments is a concern. I advised clients with regard to lawful comments on the fiduciary rule, but I was not aware of any comments that had false identity information. If confirmed, I would support the Department's staff in an effort to understand the scope and sources of this problem, and to devise solutions to protect the integrity of the public comment process.

5. In January 2019, I wrote to Secretary Acosta to express my concern about the practice of employers using threats of retaliation related to workers' immigration status to deter them from reporting violations of their rights under worker safety and wage laws. I appreciated Acting Assistant Secretary Wheeler's March 2nd response to my letter, in which he asserted that the Department of Labor (DOL) "has a long-standing commitment to administering and enforcing all applicable federal workplace protections without regard to immigration status."

   If you are confirmed as Secretary of Labor, can you make the same commitment to enforce workplace protections irrespective of a worker's immigration status?

   ANSWER: I understand that the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. I also understand that there is a Memorandum of Understanding (MOU) between the Departments of Labor and Homeland Security (DHS) that is designed to avoid interfering in each other's enforcement responsibilities, although at present I am not familiar with the details of this interagency relationship between DOL and DHS. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with DHS staff to help ensure that both agencies can continue to fulfill their statutory responsibilities. I also commit to enforcing the laws fully and fairly, while recognizing as well that the removal from the United States of dangerous or violent aliens is a high priority for the federal government. If I am confirmed, I look forward to further conversations with members of Congress on these issues.

6. It is unlawful for employers to use immigration related threats to deter reporting of federal employment law violations. If confirmed as Secretary of Labor, what actions will you take to enforce workers' rights and ensure that employers do not use immigration-related threats to deter reporting of workplace violations?

   ANSWER: As noted, I understand that the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. I also understand that there is an MOU between DHS and the Department that is designed to avoid interfering in each other's enforcement responsibilities. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

7. Can you commit to enforcing labor protections for undocumented immigrants as established under workers' rights laws, including the FLSA, MSPA, and OSH Act?

   ANSWER: Yes, if confirmed, I will fully and fairly enforce all laws under the Department's jurisdiction—including the Fair Labor Standards Act, the Migrant and Seasonal Protection Act, and the Occupational Safety and Health Act—in order to protect all workers' rights.

8. If confirmed as Secretary of Labor, what steps, if any, will you take to ensure that all workers—regardless of immigration status—feel comfortable reporting unsafe working conditions, wage theft and other violations of federal worker protection laws?

ANSWER: As noted, I understand that the Department has a longstanding commitment to ensuring that all workplace protections are enforced regardless of workers' immigration status. I also understand that there is an MOU between DHS and the Department that is designed to avoid interfering in each other's enforcement responsibilities. If confirmed, I will discuss this issue with Department of Labor staff and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

9. If confirmed as Secretary of Labor, do you commit to abiding by the practices established in the 2011 revised memorandum of understanding between the DOL and the Department of Homeland Security (DHS) concerning activities at worksites?

ANSWER: As noted, I have not reviewed the MOU, but if confirmed I will discuss this issue with Department of Labor staff and ask them to work with DHS staff to help ensure that both agencies can continue to fulfill their statutory responsibilities.

10. If confirmed as Secretary of Labor, do you commit to working with DHS to ensure that workplace raids related to immigration status are not instigated by unscrupulous employers aiming to retaliate against workers for raising concerns about workers' rights violations?

ANSWER: As noted, I understand that there is an MOU between the two cabinet departments that is designed to avoid interference by the departments in one another's enforcement responsibilities. If confirmed, I will familiarize myself with the MOU, discuss this issue with Department of Labor staff, and ask them to work with Department of Homeland Security staff to help ensure that both agencies can continue to fulfill their responsibilities.

11. If confirmed, how will you prioritize enforcement of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008?

ANSWER: Since the enactment of the MHPAEA, the Department has been committed to enforcing the law, promoting compliance, assisting consumers, and conducting investigations. Treatment for mental health issues and addiction can save lives, and I support affordability and access to those services. As noted at my hearing, if confirmed, I will work to enforce the laws under the Department of Labor's jurisdiction fully and fairly, including with regard to mental health and addiction coverage. If confirmed, I look forward to learning more about the Department's responsibilities under the Act and, as discussed in our meeting, to the opportunity to work with you on this important matter.

12. Do you have recommendations on how Congress can partner with the Department of Labor to improve enforcement of mental health parity?

ANSWER: It is my understanding that the Department has worked with Congress to improve the implementation and enforcement of mental health parity. If confirmed, I look forward to learning more about the Department's responsibilities pursuant to the Act and will ensure that the Department continues to work with Congress to further the implementation and enforcement of this important law. As noted, I also would welcome the opportunity to meet with you and your staff to discuss ways the Department can further mental health parity.

13. Do you support granting the Department of Labor the authority to impose civil monetary penalties for MHPAEA violations as a means to improve the Department's ability to enforce parity?

ANSWER: I understand that among the recommendations of the President's Commission on Combating Drug Addiction and the Opioid Crisis was that Congress provide DOL increased authority to levy monetary penalties. I also understand that in its most recent Report to Congress, the Department concurred with these recommendations as positive changes that will enable the Department to more effectively enforce MHPAEA. If confirmed, I will work with Congress to implement whatever legislative changes Congress deems appropriate to ensure that the Department has the tools it needs to enforce the law effectively, so that individuals receive the full parity protections under the law.

14. How do you believe the Departments of Labor, Treasury, and Health and Human Services can work together to better promote compliance with parity laws?

ANSWER: It is my understanding that the Departments of Labor, Treasury and HHS (the Departments) share interpretive jurisdiction over MHPAEA and regulations and guidance related to MHPAEA will generally be developed and issued jointly to ensure consistency and promote compliance with the law. If confirmed, I will work to ensure that the Departments continue to work together to promote compliance so that individuals receive the full protections of parity under the law.

15. With respect to wage theft, should the Fair Labor Standards Act be amended to require repayment of the full amount of wages that employers failed to pay (as compared to current federal law, which in many cases only requires employers to repay wages up to the federal minimum wage)?

ANSWER: If confirmed, I commit to enforcing the Fair Labor Standards Act fully and fairly, however Congress may amend it.

16. The maximum civil penalty DOL can require a company to pay under the FLSA is $2,000, even for repeat and willful violations. Is that level sufficient to deter wage theft? Should it be increased?

ANSWER: If confirmed, I look forward to being briefed on the Department's enforcement efforts with regard to wage theft, and how best to support and enhance such efforts. I also would welcome the opportunity to meet with you and your staff to further discuss these issues.

17. When the Department of Labor identifies wage theft cases in which employers act with true disregard for workers by willfully stealing wages, falsifying records to hide the theft, or retaliating against workers, will you refer all such cases to the Department of Justice to review for potential criminal prosecution?

ANSWER: If confirmed, I look forward to learning the current processes of the Department, including the Wage and Hour Division's criminal referral procedures when it uncovers potential criminal conduct.

18. It is unlawful for federal contractors to discriminate in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The Department of Labor has recently proposed a rule that would enable federal contractors to claim broad religious exemptions from this legal requirement. If confirmed, how will you advance the Department's mission to foster, promote, and develop the welfare of workers by ensuring that the employees of federal contractors are protected against unlawful discrimination?

ANSWER: Your question addresses an ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest. Additionally, if confirmed I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination by federal contractors.

19. A few months ago, there was widespread public outcry about DoorDash and Amazon's tipping practices. Reportedly, the companies would routinely decrease the amount the company paid a worker if the worker received tips from customers. As a result of this practice, tips effectively ended up going to the bottom line of the company, and drivers were made no better off. With respect to driver pay, do you believe this practice is fair? Do you believe this practice is unfair or deceptive to customers who reasonably expected their tips would provide at least some marginal benefit to their drivers? If confirmed, would you investigate this practice to determine if it violates any federal laws?

ANSWER: Your question touches upon issues related to ongoing rulemaking. I understand the Department has obtained input from the public. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and to working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest. More generally, if confirmed I will fully and fairly enforce the wage-hour laws, including those relating to tips, the tip credit, and minimum wage.

20. As you noted in your hearing, there is broad agreement about how valuable our apprenticeship programs are—and these are programs that work very well. Workers who complete a registered apprenticeship, get good jobs with average annual wages of $60,000 a year. Over a lifetime this can add up to about $300,000 in more wages and benefits compared to their peers.

Some of the key features of the Registered Apprenticeship program are: 1) classroom instruction with on-the-job learning and mentorship for apprentices, 2) incremental wage increases as apprentices' skills improve, and 3) quality control through registration.

Contrast this with what the Administration is proposing with a so-called "industry-recognized apprenticeship program" where: 1) there are weak requirements on mentorship, structured training, and classroom instruction for apprentices, 2) employers are allowed to pay apprentices minimum wage ($7.25/hr), with no graduated wage increases over time, and 3) there is lax quality control, through a vague new recognition system.

This Administration is taking something that has very good outcomes and instead of expanding and modernizing it—they are engaging in a duplicative effort to create a second-rate version. Registered apprenticeships are the gold-standard for a reason, we should build off that success, not create a poor imitation with IRAPs.

Questions:
a) Do you know how many public comments DOL received on this proposed rule?
b) If confirmed, do you pledge to thoroughly review these public comments?
c) If confirmed, and on the basis of this feedback will you consider stopping this initiative and starting over with a more consensus-based approach?

ANSWER: Your question addresses ongoing rulemaking. I understand the Department has received a large volume of comments in the rulemaking. Public comment is a valuable, essential component of the regulatory process. If confirmed, I look forward to carefully considering the points developed in the rulemaking comments and to working with the Department's staff and the Committee, as appropriate, to decide on the course that best serves the public interest.

Senator Doug Jones Questions for the Record to DOL Secretary Nominee Scalia

As 5G networks begin to be built, the pace of workforce development is a serious concern in the face of such rapidly developing technology. 5G networks will require wide-ranging cloud, privacy, safety, and security capabilities, along with business process development. Military services, artificial intelligence services, and smart infrastructure are all integral to our society.

However, such technologies will put a strain on existing resources. I am aware of the Telecommunications Industry Registered Apprenticeship Program, or TIRAP. The TIRAP is credentialed by the Department of Labor, and trains the telecommunications workforce for 5G deployment needs. The gap between 5G network and workforce developments could lead to thousands of jobs going unfilled and potentially slow the U.S. down as a leader in the global development of 5G network.

The Department of Labor should bolster efforts to train a 5G workforce. What plans do you have for the Department to ensure a 5G trained workforce, and do you view 5G apprenticeship programs as a priority for the Department?

ANSWER: It is my understanding that the Department currently supports various workforce training and employment investments in the information technology industry, including in telecommunications, broadband, and cybersecurity. The Department's attention to and investments in apprenticeships expand opportunities for employment and career growth across industries, including opportunities related to 5G services and infrastructure. If confirmed, it will be a priority for me to foster and encourage apprenticeships in areas of expected job growth and increased economic importance and expansion.

Senator Jacky Rosen Questions for the Record to DOL Secretary Nominee Scalia

1. Mr. Scalia, on the Department of Labor's website, there is a page called "Apprenticeship Programs for Veterans," attached here. It's a single page with only three options: construction, piping, and finishing trades like painting. According to the Department's own figures, there were 326,000 unemployed veterans in the U.S. in 2018, and nearly 60% were ages 45 and over. The employment and apprenticeship programs for our veterans need to be more diverse to ensure that every veteran has an opportunity to work in a field that best fits their skill set and background. The Department of Energy, for example, has a program called Solar Ready Vets, which prepares skilled veterans for careers in the solar energy industry.

    - Are you aware of the Solar Ready Vets program at the Department of Energy?
    - There are hundreds of registered apprenticeship programs in the country, but only three specifically for veterans. This is unacceptable and is something we can change. Registered apprenticeships are a proven model that helps train working Americans for good-paying jobs. Given this, will you commit to examining the Solar Ready Vets program and others like it to develop more diverse apprenticeship opportunities for veterans seeking employment in a manner that respects the high-quality structure of registered apprenticeships?

    ANSWER: I share your belief that employment training programs, including apprenticeship programs, are valuable to veterans reentering the workforce. Apprenticeships and other work-based learning models that involved strong public–private partnerships, active employer engagement training, and offer workers the opportunity to earn while they learn are critical to training the American workforce of today and tomorrow. If confirmed, I will familiarize myself with the Solar Ready Vets program, and will explore making apprenticeship programs more accessible to veterans who are seeking to transition to new and growing industries.

2. The Me Too movement has shown that our current legal structure and workplace culture are wholly inadequate to address the pervasive, systemic problem of workplace harassment. I'm particularly troubled by the prevalence of harassment in certain in industries where workers are particularly vulnerable, such as low-wage workers in service industries like restaurants, fast food, and the hospitality industry.

    If confirmed, what specific policy priorities would you seek to implement at DOL to help workers who have experienced workplace harassment and to strengthen protections in the law?

    ANSWER: If confirmed, I will enforce the law fully and fairly, including Executive Order 11246's prohibitions on discrimination and harassment by federal contractors. I also will consult the leadership of the Women's Bureau on strategies to address workplace harassment, and will explore other ways the Department can deter this corrosive behavior.

3. Mr. Scalia, given your history in opposing the federal OSHA ergonomics rule of 2001 and your comments then that the science supporting the rule was "quackery" and "junk science par excellence," will OSHA under your leadership of the U.S. Department of Labor uphold the law and thoroughly investigate complaints about ergonomic-related injuries in the workplace filed under OSHA's General Duty Clause?

ANSWER: I believe that my past tenure as Solicitor of Labor convincingly demonstrates my ability to act vigorously in support of workers and worker protections. That is reflected in actions I took with respect to enforcement of the Occupational Safety and Health Act, ERISA, the wage-hour laws, and other statutes. With respect to ergonomics specifically: The concerns I identified with OSHA's ergonomic regulatory efforts in the 1990s were widely shared, and caused a bipartisan majority of Congress to repeal the ergonomics rule adopted by the agency. Once I was at the Department, however, I worked closely with some of the same DOL lawyers who had been across the table from me in the ergonomics rulemaking. I even worked with them to draw on past experience to identify ways the Department could bring ergonomics cases more effectively in the future. If confirmed, I will again embrace the role, responsibilities, and public trust that come with holding a senior position at the Department of Labor, including with respect to ergonomics-related workplace injuries.

Case 8:18-cv-00883-PWG Document 113 Filed 06/12/19

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

AMERICAN ACADEMY OF PEDIATRICS, *et al.*, Plaintiffs, v. FOOD AND DRUG ADMINISTRATION, *et al.*, Defendants.	Case No. 8:18-cv-883-PWG

AMICUS CURIAE BRIEF OF JOHN MIDDLETON, CO., ITG BRANDS LLC, JUUL LABS, INC., THE CONSUMER ADVOCATES FOR SMOKE-FREE ALTERNATIVES ASSOCIATION, NJOY LLC, THE AMERICAN E-LIQUID MANUFACTURING STANDARDS ASSOCIATION, THE AMERICAN VAPING ASSOCIATION, THE ARIZONA SMOKE FREE BUSINESS ALLIANCE, THE INDIANA SMOKE FREE ASSOCIATION, IOWANS FOR ALTERNATIVE TO SMOKING AND TOBACCO, THE KENTUCKY SMOKE FREE ASSOCIATION, THE MARYLAND VAPOR ALLIANCE, THE NEW YORK STATE VAPOR ASSOCIATION, THE OHIO VAPOR TRADE ASSOCIATION, THE RIGHT TO BE SMOKE-FREE COALTION, THE SMOKE FREE ALTERNATIVES TRADE ASSOCIATION (SFATA), SFATA-CALIFORNIA, SFATA-CONNECTICUT, SFATA-HAWAII, SFATA-LOUSIANA, SFATA-RHODE ISLAND, SFATA-TEXAS, SFATA-WISCONSIN, THE TENNESSEE SMOKE FREE ASSOCIATION, AND THE TEXAS VAPOR COALITION

TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set forth in the letters they filed expressing their intent to move to intervene. *Amici* are manufacturers of cigars covered by the Deeming Rule, and manufacturers, retailers, and users of electronic nicotine delivery system (ENDS) products also covered by that Rule. For most cigar products, the pathway to FDA approval is through Substantial Equivalence (SE) Reports, *i.e.*, applications establishing substantial equivalence to products already on the market. For ENDS products, the path involves Premarket Tobacco Applications (PMTAs), *i.e.*, applications establishing that the product is appropriate for the protection of public health. *Amici* have direct, substantial, and varying interests that will be affected by any remedy the Court imposes. It is also "abundantly clear" that *amici* are knowledgeable about the practical realities of the "filing and approval processes" that any remedy will affect. May 31, 2019 Letter Order.[1]

INTRODUCTION

For years, FDA has issued, then extended, deadlines for when ENDS and cigar manufacturers must submit premarket review applications to keep existing products on the market. That iterative process did not happen because FDA sat on its hands. Rather, one of the cornerstones of the Deeming Rule—the rule that subjected ENDS and cigars to FDA's powers under the Tobacco Control Act (TCA)—was FDA's flexibility to extend enforcement timetables so it could lay out regulatory stepping stones that would instruct manufacturers what tests to undertake, what studies to provide, and what other information FDA needs to assess their applications. This process turned out to be staggeringly complicated, especially due to a host of

[1] *Amici* submit this joint brief pursuant to the Court's May 31, 2019 Letter Order, Dkt. No. 84, without prejudice to their rights to appeal the denial of intervention or their ability to make arguments in further proceedings based on their own interests. As the accompanying declarations illustrate, *amici* are disparate entities in disparate industries with multiple disparate interests.

novel and disparate technical issues affecting ENDS products and cigars. FDA has made progress: in April 2019, it issued a notice of proposed rulemaking to clarify the contents of SE Reports, and it recently announced that a proposed rule for PMTAs is under review at the Office of Management and Budget (OMB). Just yesterday, FDA issued 52-page final guidance to ENDS manufacturers regarding what their PMTA applications should include. *See* FDA Guidance, Premarket Tobacco Product Applications for ENDS (June 11, 2019), available at https://tinyurl.com/yybbk93z (Final Guidance). But all along the way, FDA has assured manufacturers that they would be given both the guidance and the time necessary to successfully navigate its premarket approval process. Manufacturers can hardly be faulted for having taken FDA at its word.

All agree that this Court's holding invalidating FDA's August 2017 Guidance cannot suddenly subject ENDS and cigar products to TCA enforcement actions for failure to file the very applications that FDA authorized manufacturers to file later. Remanding that Guidance to FDA without vacatur would avoid upending FDA's massive existing regulatory efforts and causing unwarranted harm to consumers and manufacturers. Such a remand would allow FDA to continue fleshing out parameters for premarket applications and would give manufacturers sufficient time to prepare the technical data necessary for quality applications that include the kind of information that Plaintiffs themselves claim to want and need. Such a remand would also provide FDA sufficient time to resolve each completed application without products being forced off the market in the interim. A remand is the customary remedy in these circumstances.

By contrast, any court-fixed timetable would defy black-letter law prohibiting judicial intervention in the substance of agency rulemaking. Dictating a timetable to FDA would risk invalidating the Deeming Rule itself, which presupposed that FDA retains the flexibility to ensure that newly deemed products have the time and means to successfully navigate premarket review.

Plaintiffs' unrealistic proposed timetable would also cause this Court to preside over a regulatory train wreck that would unlawfully deprive manufacturers of a meaningful ability to submit thousands of anticipated PMTA applications and SE Reports and would short-circuit FDA review. To satisfy Plaintiffs' timelines, FDA would be forced to act precipitately, without regard for the law, public health, FDA's pending rulemakings, or devastating economic consequences.

Make no mistake: *amici* share the Court's concerns about youth usage, which they are strongly combatting and consider unacceptable at any level. Youth cigar usage continues to decline. And ENDS manufacturers have taken a number of steps, and spent tens of millions of dollars on programs, to prevent youth usage. But the answer is not to force from the market products on which millions of American adults rely in their efforts to quit smoking cigarettes.

ARGUMENT

I. This Court Must Remand for FDA to Complete Essential Regulatory Steps

A. FDA Must Fill Significant Regulatory Gaps, and Allow the Time Necessary for Manufacturer Testing and Applications, Before It Can Review Applications

1. As FDA has frequently acknowledged, it must undertake a host of preliminary regulatory actions to ensure that manufacturers know what to file and have time to prepare their applications. Starting in 2011, FDA acknowledged (with respect to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco) that "interested parties need clarity as to FDA's expectations regarding [SE] reports," pledging to "initiate a rulemaking that would establish requirements and standards for SE." Guidance for Industry and FDA Staff (Jan. 2011) at 1–2. FDA's initial efforts focused on the four tobacco product types identified in the TCA; FDA only began devoting comparable efforts to the SE requirements for newly-deemed products after FDA issued the 2016 Deeming Rule. Time and again, FDA has insisted that further regulatory action

is imperative before ENDS and cigar manufacturers face compliance deadlines.[2] And rightly so. FDA could not conceivably satisfy the APA by requiring applicants to submit applications without first telling them what rules applications must follow. Yet despite FDA's decision to deem cigars and ENDS products subject to the TCA, manufacturers remain in dire need of clarity to this day.

2. For ENDS products, significant pieces of the application puzzle are still missing. ENDS products generally require PMTAs. But manufacturers have had little to go on in preparing them. FDA has approved *two* PMTAs ever, and has never approved a PMTA for an ENDS product. Bauersachs Decl. ¶ 20; FDA, Premarket Tobacco Product Marketing Orders (June 11, 2019), https://tinyurl.com/yyxfqzdw (approval of two PMTA applications comprising 12 products). The estimated timeframe to prepare a PMTA for any type of tobacco product is at least two years. Bauersachs Decl. ¶ 23; Engelke Decl. ¶ 20; Benson Decl. ¶ 25.

Fleshing out the rules for ENDS products has proven particularly challenging given the newness of those products and the dearth of existing studies. For starters, until only yesterday,

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[2] *See* Guidance for Industry and FDA Staff: Demonstrating Substantial Equivalence for Tobacco Products (Jan. 2011) at 1–2, https://tinyurl.com/y4x3dd62 (pledging to initiate a "[new] rulemaking that would establish requirements and standards for [SE]"); FDA Comm'r S. Gottlieb, Protecting American Families: Comprehensive Plan for Nicotine and Tobacco (Jul. 28, 2017), https://tinyurl.com/y5lsxn4o ("One area of emphasis will be to make sure we have the foundational regulatory architecture to ensure proper oversight of ENDS . . . . Part of this will be developing regulations that we have not yet pursued because the Agency's tobacco program itself is so new."); FDA Comm'r S. Gottlieb, Address at National Press Club (Nov. 3, 2017), https://tinyurl.com/y5hdqbu3 (33:15) ("The foundational regulations for the tobacco program were never put in place and so we're going to take the time to put those in place so we have a firm foundation from which to regulate."); FDA, *Advancing Tobacco Regulation to Protect Children and Families* (Aug. 2, 2018) (stating that "foundational proposed rules" are needed "regarding the basic rules of the road, especially when it comes to what's expected in premarket applications."), https://tinyurl.com/yysms73g; FDA Comm'r S. Gottlieb, Testimony to House Approp. Subcomm. for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Feb. 27, 2019), https://tinyurl.com/y62ps5pe (1:51:05) (August 2017 Guidance is needed "to give [FDA] the time to put in place the implementing regulations and guidance that would . . . provide the rules of the road for how to effectively traverse the PMTA process[.]").

FDA had not issued final guidance on what PMTAs for ENDS products should include, and it had expressly warned that its draft guidance did not necessarily reflect FDA's current thinking. *See* Draft Guidance, Premarket Tobacco Product Applications for ENDS, 81 Fed. Reg. 28,781 (May 10, 2016). Manufacturers have barely had time to digest that 52-page "nonbinding" document, but it plainly does not resolve many open questions. The guidance contemplates the need for further rulemaking, *see, e.g.*, Final Guidance at 1, 11, and that PMTAs will not be a one-size-fits-all process. FDA still has not specified the kind of testing (if any) ENDS manufacturers should conduct to produce reliable data regarding product characteristics or public health consequences. The Final Guidance identifies a wide variety of studies or materials that "should" or "could" be conducted or included, but acknowledges limits on what is actually feasible, and encourages manufacturers to meet with FDA before submitting an application to discuss what to include. *Id.* at 3, 50–52. That reflects the reality that there is substantial variation among ENDS products, which come in different configurations and flavors and are sold or distributed in different ways. Woessner Decl. ¶¶ 4–8. What FDA requires for one product may prove different than for another.

FDA also appears poised to clarify what PMTAs for all tobacco products must include, but much work remains on that front as well. The government just announced that OMB is reviewing FDA's draft Notice of Proposed Rulemaking on PMTAs—but that notice is not expected to issue until at least September 2019. *See* OMB RIN 0910-AH44, HHS-FDA Proposed Rule, Premarket Tobacco Product Applications and Recordkeeping Requirements (May 31, 2019). Then would come the comment period, which would likely produce tens of thousands of comments—all of which FDA must carefully consider in its final rule to avoid invalidation. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010).

Even when manufacturers know what tests or studies FDA wants, that is just the first step

in a long process. FDA must allow manufacturers time to conduct and analyze those studies before they can be submitted. Human clinical studies are time-consuming. Determining whether and how the chemical composition of liquid in an ENDS pod changes during a year of shelf-life requires study preparation, then the required year of observation. Surveys tracking consumers' consumption patterns take time to set up. Engelke Decl. ¶¶ 37, 42–50; Graham Decl. ¶¶ 10, 14.

Finally, in determining what applications should include and when manufacturers should submit them, FDA must continue considering substantial reliance interests—not just of manufacturers who have been promised a path to demonstrate that their products should remain on the market, but of the millions of American adults who use ENDS products to help them quit smoking cigarettes. Manufacturers cannot be faulted for not prematurely committing resources to costly studies they may have to redo if they guessed wrongly as to what FDA would want. And forcing manufacturers into a process where they would lack a meaningful opportunity to submit applications would be quintessential arbitrary and capricious agency action given the reliance interests FDA has created. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

That said, ENDS manufacturers have not just sat around. They have done what they can to prepare for the PMTA process. Engelke Decl. ¶¶ 21–56; Graham Decl. ¶¶ 10–11, 16–17. But as the signatories to this brief reflect, ENDS manufacturers come in different shapes and sizes, with vastly different levels of resources to devote to trying to anticipate what FDA would require. For example, there are not enough accredited third-party laboratories qualified to conduct various types of testing, and small manufacturers lack the resources to do those tests themselves. Engelke Decl. ¶ 35; Woessner Decl. ¶¶ 9, 12; Anton Decl. ¶ 12; Benton Decl. ¶¶ 6, 24.

ENDS manufacturers have not been dilatory in addressing youth usage, either. *Amici* reject *any* youth use of nicotine-containing products, and ENDS manufacturers have been tackling youth

usage head-on. They have spent tens of millions of dollars on programs to prevent youth usage, have proposed limits on how their products can be sold, and have spearheaded youth education initiatives, among other efforts. Many have supported a nationwide increase in the minimum age for buying tobacco products. *E.g.*, Engelke Decl. ¶ 9. But as FDA has stated, ENDS products present fewer health risks than cigarettes and help many adult smokers move down the "continuum of risk" for nicotine use,[3] and the premarket review process must fully account for this.

3. Seeking approval for cigars poses its own challenges. FDA has substantially more experience with SE Reports, having received over 5,000 of these types of applications for other tobacco products. Folmar Decl. ¶ 6. But that experience does not bode well for efforts to prescribe a fixed timetable. FDA as of April 2018 has issued final orders for only about 191 provisional products, in no small part because FDA's current SE process involves a litany of time-consuming back-and-forth steps (including multi-disciplinary scientific review).[4]

Here, too, regulatory gaps abound. Cigars are different than cigarettes and present unique additional challenges. There are currently no standardized testing methodologies for cigar smoke; cigars do not fit standardized cigarette testing machines, and may have other unique attributes (like plastic tips that affect inhalation). As with ENDS products, FDA has not yet provided guidance as to which Harmful and Potentially Harmful Constituents ("HPHC") manufacturers should test for in cigars or how such testing should be conducted, *see* 21 U.S.C. § 387d(a)(3), and there is a lack of accepted HPHC testing standards, methods, and equipment for these products. Bauersachs Decl. ¶ 15; *see* Final Guidance at 28 & n.35. Nor has FDA grappled with how to standardize

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[3] *See* Protecting American Families: Comprehensive Plan for Nicotine and Tobacco, *supra* n.2; Engelke Decl. ¶¶ 6–7.

[4] *See* FDA, Substantial Equivalence: The Review Process, https://tinyurl.com/y3sm3lvt; Update on Provisional Substantial Equivalence Review (Apr. 5, 2018), https://tinyurl.com/yyrhcwjt.

testing results for cigar tobacco leaf, which displays much higher variability with respect to HPHC yields than cigarette tobacco. FDA thus instructed manufacturers to stop submitting applications on a trial-and-error basis pending further FDA action. Bauersachs Decl. ¶ 26.[5]

FDA is now amidst a rulemaking that may substantially affect all SE Reports. In April 2019, FDA issued a notice of proposed rulemaking to clarify what SE Reports should generally include. Content and Format of Substantial Equivalence Reports, 84 Fed. Reg. 12,740 (April 2, 2019). The comment period (which FDA is extending) will close on July 17, 2019. FDA then must decide how to finalize the rule in response to comments, as well as undergo OMB review. Those processes will take time. And the proposed rule does not elucidate what cigar manufacturers should submit for this unique product category, instead inviting "comments and information [regarding] the parameters that may be needed to support an SE Report." 84 Fed. Reg. 12,762. Meanwhile, FDA is still weighing comments submitted in response to advance notices of proposed rulemakings on "Regulation of Flavors in Tobacco Products," 83 Fed. Reg. 12,294 (Mar. 21, 2018), and "Regulation of Premium Cigars," 83 Fed. Reg. 12,901 (Mar. 26, 2018).

B. A Remand Is Necessary for FDA to Complete the Requisite Regulatory Steps

Given these considerations, the only proper remedy is a remand of the Guidance. FDA cannot lawfully enforce any application deadline before it takes needed steps to flesh out the premarket review process for ENDS and cigar products, and determines how much time is needed for acceptable applications to obtain approval. But that process defies any predetermined

[5] Trade associations have challenged the Deeming Rule's premarket authorization provisions for cigars and pipe tobacco. *Cigar Ass'n of Am. v. FDA*, No. 1:16-cv-1460, ECF No. 1 (D.D.C.). After FDA announced the August 2017 Guidance, the parties, with court approval, agreed to defer those challenges to give FDA time to act. *Id.*, ECF No. 51 at 2–3. That suit has proceeded on the understanding that FDA would undertake regulatory actions, including issuing a substantial equivalence rule, to clarify the premarket review process for newly deemed products. *Id.*, ECF Nos. 53, 110, 112, 115, 119. The Court should not interfere with that process.

timetable, not least because hard technical problems cannot be resolved at will. A remand is needed so that FDA is not straitjacketed into a timetable that precludes reasoned deliberations.

1. No one argues that invalidating the August 2017 Guidance means that ENDS and cigar products that were on the market as of August 8, 2016 (which are the only products to which that guidance applies) should suddenly be forced off the market. As the Court recognized, that Guidance replaced earlier guidance documents setting application deadlines that have already passed. Op. at 9–10, 53. And, as the Court noted, "[i]t is undisputed that the FDA has some discretion to adapt [TCA] provisions to the special circumstances of products that become subject to the TCA . . . by virtue of deeming and, to that end, to permit a compliance period for newly deemed products." *Id.* at 8. Even Plaintiffs' remedy presupposes that manufacturers and FDA must have *some* period to submit and review applications, respectively.

But FDA, not the courts, must set that timetable in the first instance. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004). If so, "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *Id.* at 66–67. But "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA." *Id.* at 67; *see City of New York v. DOD*, 913 F.3d 423, 429–31 (4th Cir. 2019) (similar).

2. A remand without vacatur is the only appropriate remedy under the APA. Black-letter administrative law dictates that "set[ting] aside" unlawful agency action under 5 U.S.C. § 706(2) is limited to either remanding the action to the agency (i.e., allowing the action to remain in effect

while the agency considers next steps) or vacating it (i.e., preventing the action from having further force or effect). *See Sierra Club v. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018). And courts have chosen remands when eliminating the agency action would leave a destabilizing void or uncertainty while the agency determines what further action to take. *E.g.*, *N. Carolina v. EPA*, 550 F.3d 1176, 1177–78 (D.C. Cir. 2008) (remanding without vacating an EPA rule despite having concluded that EPA could not lawfully re-enact virtually any of it); *see also Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (remanding without vacating rule with concededly flawed rationale where vacatur "could well delay a much needed power plant").

This case fits the same mold. The pre-Guidance deadlines cannot spring back into effect; they have since expired (and also were not issued by rulemaking). *See* Op. at 53. But the Court has concluded that any future timetable to replace the August 2017 Guidance likely must go through notice-and-comment rulemaking. *Id.* at 53–54. To avoid confusion over the vacuum created by vacating the existing Guidance in the interim, the Court should remand without vacatur. At a minimum, the Court should avoid "impairing the interim administration" of the Deeming Rule by staying any order to vacate the Guidance until FDA takes necessary next steps. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88–89 (1982).[6]

II. Plaintiffs' Proposed Remedy Is Unlawful

A. Plaintiffs' Timeframe Would Invalidate the Deeming Rule

Plaintiffs would give manufacturers a mere 120 days from the Court's order to submit applications, and would give FDA twelve more months to process those applications. Any proposed remedy that could force *amici*'s products off the market without a full and fair

[6] While the Court has indicated that it is vacating the Guidance, Op. at 53, courts have shifted from vacatur to remand in similar circumstances. *E.g.*, *N. Carolina*, 550 F.3d at 1177–78.

opportunity to obtain marketing orders would expose the Deeming Rule to legal challenge under the APA. The TCA does not empower FDA to summarily declare entire classes of tobacco (or "deemed tobacco") products illegal. *See, e.g.*, 21 U.S.C. § 387g(d)(3); H.R. Rep. No. 111–58, pt. 1, at 2 (2009) (Act does not grant authority to "ban[] a class of nicotine products, such as all cigarettes"). To the contrary, the TCA only gives FDA the power to deem products subject to the statute. And the TCA plainly anticipates a process by which manufacturers may submit applications seeking approval of those products—approval that FDA may deny only upon specific consideration and findings. *See, e.g.*, 21 U.S.C. § 387j(c)(2).

Cognizant of that reality, FDA did not contemplate in the Deeming Rule that it could force existing products from the market before PMTAs or SE Reports could be submitted, reviewed, and acted upon. Nor did that Rule address the impact of such a drastic outcome. Rather, one of FDA's core assumptions in that Rule was that FDA could consider and address these potential impacts during the application review process, and after FDA clarified what the application process should entail. *See* 81 Fed. Reg. 28,974, 29,010/1-2 (May 10, 2016). Indeed, when commenters emphasized the public health benefits of ENDS and "argued that restrictions on access to the newly deemed products would be detrimental to public health," FDA responded that its "consideration of [the] public health benefits" of the products "*will be included in FDA's review of PMTAs based on the evidence*." *Id.* at 28,995/1 (emphasis added).

If, as plaintiffs maintain, the Deeming Rule may be administered in a way that pulls thousands of products off the market without a real opportunity to seek FDA review, then the Rule violates the TCA and the APA's requirement that agencies consider an "important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—namely, the economic consequences of devastating multi-billion dollar industries, and the

attendant adverse effects on public health that FDA said it would assess before barring products.

Further, the Deeming Rule would fail for having "misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The Rule rests on FDA's legal view that "[a]gency compliance/ enforcement policies"—including "the relevant time periods" by which *amici* would be required to submit a PMTA—are "not subject to the requirements that govern notice-and-comment rulemaking," and that FDA could extend those periods as needed. 81 Fed. Reg. at 28,977. If FDA lacks the flexibility to allow products to remain on the market during the period needed to finalize the application process and for applications to be received and reviewed, an essential legal premise of the Rule is invalid, as is the Rule itself.

B. Plaintiffs' Remedy Would Otherwise Violate the APA

1. Plaintiffs' proposed court-imposed timetable would flout the APA by impermissibly dictating the outcome of notice-and-comment rulemaking. Under the Court's opinion, FDA cannot impose such a "compliance period" without "adher[ing] to the notice and comment requirements of the APA." Op. 53; *see id.* at 54 (contemplating "notice and comment period" for the adoption of "new Guidance"); Dkt. No. 84, at 2 (similar). Agencies cannot render the rulemaking process a sham by pre-judging the outcome before commenters can convey concerns. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Forcing FDA to adopt a fixed timetable would ensure that such a final rule is invalidated, which would only delay FDA.

2. Plaintiffs' proposed remedy would also be arbitrary and capricious, for several reasons. First, forcing manufacturers into a process where they would lack a meaningful opportunity to submit applications or were abruptly forced to pull their products from the shelves would be quintessential arbitrary and capricious agency action, particularly given the reliance interests FDA has created. *See Encino*, 136 S. Ct. at 2126. FDA, after all, deemed products before establishing

a process to review them, and assured manufacturers that they will have meaningful guidance and meaningful time to submit applications. Forcing FDA to abandon those assurances and adopt a timetable that makes a mockery of deliberation during the premarket review process would subject FDA's ensuing actions to invalidation.

Second, a key part of premarket review is what applications must contain for FDA to meaningfully review them. But, despite the new PMTA Guidance, FDA still has not made clear what it wants PMTAs to include, let alone filled gaps for SE Reports. In the next 120 days, FDA cannot conceivably fill all of those holes. But it would be arbitrary and capricious to order FDA to conduct premarket review in a manner that precludes it from considering centrally "important aspect[s] of" what it seeks to regulate. *State Farm*, 463 U.S. at 43.

Third, Plaintiffs' artificial 120-day deadline to file applications would ensure arbitrary and capricious determinations by depriving manufacturers of a meaningful opportunity to submit quality applications. ENDS products are novel and generally require time-consuming and exhaustive PMTA applications, which require population-level data beyond individual safety. The first PMTA for a smokeless tobacco product relied heavily on long-term (30+ year) epidemiology data from Sweden, and the most recent PMTA, for the IQOS Tobacco Heating System, involved about two million pages of submissions, over 35 studies, and over two years of FDA review (when no other application had been accepted for filing). Engelke Decl. ¶ 20; Benson Decl. ¶¶ 15–17; IQOS Briefing Document for Tobacco Prod. Sci. Advisory Comm. at 8 (Dec. 2017), https://tinyurl.com/yy63pdl4. Ordering ENDS manufacturers to submit PMTA applications with 120 days thus may force FDA to forgo requests for studies and tests that it otherwise would consider. Likewise, SE Reports involve amassing studies and technical data—but until FDA says what it wants, cigar manufacturers would have to either forgo the information or take a kitchen-

sink approach to their applications. Either way, this rushed process would unfairly hamper their chances of navigating the premarket review process for products that have been on the market in largely the same form for decades. Folmar Decl. ¶ 14; Bauersachs Decl. ¶¶ 2, 29, 31–33.

Fourth, Plaintiffs' compressed timetable would deprive FDA of any meaningful time to review applications. Plaintiffs would give FDA twelve months from receipt of an application to review FDA's existing backlog and all new applications, and would force any unapproved products off the market thereafter. But, to date, FDA has resolved only 5% of some 5,000 PMTA and SE Report submissions; any pending ENDS or cigar applications would apparently be swept into Plaintiffs' one-year timetable for an FDA decision. Folmar Decl. ¶ 6. There is reason to doubt even one ENDS PMTA could be resolved under Plaintiffs' schedule, let alone the thousands that would be expected were the Court to enter Plaintiffs' proposed remedial order. FDA has never resolved a PMTA for an ENDS product, and the most recent PMTA for a non-ENDS product took over two years to process (at a time when hardly any other PMTAs were pending). Engelke Decl. ¶ 20. Yet estimates of expected ENDS PMTAs range from 750 to *tens of thousands*. *See* Preamble, Deeming Rule, 81 Fed. Reg. 29,078 (May 16, 2016); Deeming Rule, 81 Fed. Reg. 29,091 (May 10, 2016). As for cigars, Plaintiffs' timetable similarly fails to allow for meaningful review given FDA's backlog of thousands of SE Reports and the agency's track record of processing such applications to date. Bauersachs Decl. ¶¶ 16–17; Folmar Decl. ¶¶ 6–8. But Plaintiffs' proposal would flood FDA with an unpreceded deluge of applications, all on a one-year clock.

III. Plaintiffs' Proposal Would Devastate Industry and Jeopardize Public Health

Plaintiffs' abrupt timetable would risk forcing ENDS products off the market and destroying the multibillion-dollar ENDS industry. Manufacturers have planned the onset and duration of long-term studies to correspond with FDA's deadlines in the August 2017 Guidance.

Hobbling manufacturers' ability to file adequate PMTAs, and forcing FDA to deny applications it fails to complete on an unrealistic timetable, could drive ENDS products off the market. Wiping out that industry would endanger public health, risking a significant reversal in the historic downward trend of cancer-causing cigarette consumption. Many of the roughly 14 million ENDS users have switched, or are transitioning, from very harmful cigarettes to ENDS products. Woessner Decl. ¶ 15; Engelke Decl. ¶¶ 6-7.

Plaintiffs similarly overlook the serious hardships their proposal would inflict on the cigar industry. Needless to say, forcing cigar products off the market if FDA could not complete its premarket review process within a year would significantly harm manufacturers, and that could translate into job losses, loss of tax revenue, and other unpredictable consequences. Bauersachs Decl. ¶¶ 32—33; Anton Decl. ¶ 19. Meanwhile, Plaintiffs have not even tried to assert that their proposal would somehow promote access to reliable public-health data, creating doubts about whether their proposal redresses the injuries they claim. *See Lewis v. Casey*, 518 U.S. 343 (1996).

CONCLUSION

This Court should remand the Guidance to give FDA the flexibility it needs—and which the APA demands—to clarify critical aspects of the TCA as applied to ENDS and cigar products and to complete pending rulemakings. If instead the Court orders vacatur, it should stay that ruling until FDA imposes another timetable, or otherwise make clear that deemed products may remain on the market as an orderly process is established for their application and review.

Respectfully submitted,

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Dated: June 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, I electronically filed the foregoing document with the Clerk of the Court of the District of Maryland by using the CM/ECF system, which filing will provide service to all parties and *amici*.

/s/ David J. Ryan
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April 30, 2019

Submitted via www.regulations.gov

Division of Dockets Management
Food and Drug Administration
5630 Fishers Lane, Rm. 1061
Rockville, MD 20852

Re: Docket No. FDA–2019-D-0661: Modifications to Compliance Policy for Certain Deemed Tobacco Products

Dear Sir or Madam:

The Cigar Association of America, Inc. ("CAA") is a leading national trade association representing the interests of cigar manufacturers, importers, distributors, retailers and major suppliers to the industry. CAA was founded in 1937 as a non-profit trade organization. Today, its members companies come from all sectors of the industry, and include manufacturers of both hand-made premium cigars and machine made cigars. CAA members manufacture a significant share of the large, premium, little and filtered cigars sold in the United States, and also include internet retailers of cigars, as well as leaf and other suppliers to the cigar industry. CAA is a key stakeholder in the implementation of any regulation of cigars as these regulations significantly affect its' members ability to conduct business.

On March 13, 2019, the Food and Drug Administration's ("FDA") Center for Tobacco Products issued a Draft Guidance document entitled "Modifications to

Compliance Policy for Certain Deemed Tobacco Products ("Draft Guidance")." The Draft Guidance focuses primarily on sales of certain e-cigarette products, but announced that FDA "is also modifying the August 2017 Compliance Policy for flavored cigars."[1] Specifically, FDA proposed that "beginning 30 days after issuance of a final guidance, FDA will prioritize enforcement of actions with respect to flavored cigars (other than tobacco flavored) that were on the market as of August 8, 2016, and that meet the definition of a new tobacco product."[2] CAA submits these comments on the proposed modified compliance policy outlined in the Draft Guidance relating to "flavored" cigars.[3] As set forth below, there are innumerable legal, factual, scientific, and practical problems with the proposal. In sum, FDA's intention to "prioritize enforcement" regarding "flavored" cigars is impermissible prohibition, not valid regulation based on demonstrated factual concerns. For the reasons set forth below, FDA should withdraw the portion of the Draft Guidance relating to "flavored" cigars.

I. Executive Summary

FDA impermissibly seeks to ban all non-grandfathered "flavored" cigars via the Draft Guidance. FDA cannot do so, for the following reasons:

First, there is no data supporting the need for a drastic, unprecedented change in the compliance policy relating to "flavored" cigars. Youth usage of cigars is declining.

Second, the Tobacco Control Act vests FDA with the authority to review various "new" tobacco products, and outlines the public health standards FDA is to use during its review. The

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[1] FOOD AND DRUG ADMINISTRATION, MODIFICATIONS TO COMPLIANCE POLICY FOR CERTAIN DEEMED TOBACCO PRODUCTS, DRAFT GUIDANCE FOR INDUSTRY 15 (Mar. 2019) [hereinafter DRAFT GUIDANCE].

[2] *Id.*

[3] CAA will not be commenting on the proposed revisions to the compliance policies for e-cigarettes.

Draft Guidance impermissibly seeks to redefine these public health standards in relation to new "flavored" cigars, by imposing the standard for premarket tobacco applications on products entitled to submit substantial equivalence reports.

Third, this action amounts to a legislative rule. As such, it must be enacted through appropriate notice and comment rulemaking and Office of Management and Budget ("OMB") review. FDA once before attempted this action in a rule, and was unsuccessful. In addition, any attempted flavored cigar ban must be done in accordance with the Product Standard provisions outlined in section 907 of the Tobacco Control Act. Congress was clear that it is through this authority that FDA may try to take any action as drastic as this. Finally, cigar companies have relied – clearly and heavily -- on the policies outlined previously by FDA. The Agency cannot simply revise them, to the great detriment of the industry.

Fourth, FDA's actions are – in numerous ways -- arbitrary and capricious. FDA does not define what a "flavored" cigar is. FDA did not examine any less restrictive alternatives to the actions outlined in the Draft Guidance. FDA relies on data that is incorrect and not publicly available. FDA relies on conjecture regarding possible future behavior. And FDA has not yet completed its rulemaking with regard to premium cigars. These shortcomings clearly render FDA's proposed actions arbitrary and capricious. The flavored cigar portion of the Draft Guidance suffers from numerous fatal defects. For these reasons, this portion of the Draft Guidance should be withdrawn.

II. Introduction

FDA is governed by, and must operate in accordance with, the procedures laid out in the Administrative Procedures Act ("APA"), governing the manner in which agencies regulate

private industry. In the case of the flavored cigar portion of the Draft Guidance, FDA has wholly failed to follow these legal requirements. Further, FDA is not regulating according to the Family Smoking Prevention Tobacco Control Act ("Tobacco Control Act") or the Final Rule,[4] any discernable public health standard, or its public acknowledgement of the continuum of risk. Critically, government surveys show a consistent, long term decline in youth usage of cigars, fatally undermining the purported factual basis for prioritized enforcement. In addition, the approach outlined in the Draft Guidance has a practical effect of favoring cigarettes – the products Congress originally instructed FDA to regulate. For example, the Draft Guidance proposes *no changes* regarding the sale of menthol cigarettes. Inexplicably, however, the Draft Guidance seeks to prohibit the sale, regardless of channel, of all new "flavored" cigars (*including* mint or menthol) without any articulated scientific basis for doing so. It further provides that flavored e-cigarettes (*excluding* mint, menthol and tobacco flavors) can be sold in any brick and mortar location that has an age gate at the door, or a segregated area with an age-gate. "Flavored" cigars cannot. Therefore, under the proposed Draft Guidance, cigars would be the *most stringently regulated tobacco product* despite the absence of any legal, factual, scientific, or practical basis. This goes against every principle of sound regulatory policy.[5]

The Draft Guidance inquires about two areas relating to "flavored" cigars: (i) "comments and/or data on the number of currently marketed flavored cigars that were on the market as of

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[4] Deeming Tobacco Products To Be Subject to the Federal Food, Drug and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81. Fed. Reg. 28,974 (May 10, 2016) (to be codified at 21 C.F.R. §§ 1100, 1140, 1143) [hereinafter Final Rule].

[5] *See* Exec. Order No. 12,886, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

February 15, 2007 (i.e. flavored cigars that are not considered "new tobacco products")," and (ii) "comments, including data, research results, and other information, on how FDA should prioritize enforcement of actions with respect to flavored cigars (other than tobacco-flavored) that were on the market on August 8, 2016, and that meet the definition of a new tobacco product."[6] CAA believes FDA should not and cannot "prioritize enforcement of actions with respect to flavored cigars" as set out in the Draft Guidance, and this comment addresses the legal, factual, and scientific basis for that position.[7]

CAA will organize this comment into four sections, addressing: (i) the complete lack of scientific basis for its proposed actions relating to "flavored" cigars; (ii) the incorrect public health standard FDA proposes to use to regulate "flavored" cigars; (iii) FDA's improper attempt to use guidance in taking this action against new "flavored" cigars; and (iv) the arbitrary and capricious nature of FDA's proposed actions in relation to new "flavored" cigars.

III. There is No Scientific Basis on Which to Ban "Flavored" Cigars

In July 2018, CAA submitted extensive comments, including two expert reports, to the docket for the Flavors ANPRM ("Flavors Comment").[8] The Flavors Comment demonstrated that FDA lacks a scientific basis to restrict availability of "flavored" cigars based on youth usage concerns – in part because such usage continues to decline. Moreover, as of the date of this

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[6] DRAFT GUIDANCE, *supra* note 1, at 19-20.

[7] CAA will not address FDA's request for comment on the number of "currently marketed flavored cigars that were on the market as of February 15, 2007." CAA fails to see the relevance of this information.

[8] *See* Advance Notice of Proposed Rulemaking, Regulation of Flavors in Tobacco Products, 83 Fed. Reg. 12,294 (proposed Mar. 21, 2018) (to be codified 21 C.F.R. §§ 1100, 1140, 1143) [hereinafter Flavors ANPRM]; CAA, Comment Letter on Flavors ANPRM (July 19, 2019) CAA's Comments to the Flavors ANPRM are attached hereto as Exhibit 1.

filing, a record **525,424** comments were submitted to that docket.[9] It is inconceivable that FDA has reviewed all of these comments and analyzed the relevant data submitted on flavors in cigars. Rather than do that exacting work, and propose a product standard through proper rulemaking, FDA has prejudged the issue: former Commissioner Gottlieb stated that "I don't believe any characterizing flavors should be in any combustible tobacco product."[10] To achieve that goal, FDA issued the Draft Guidance, apparently based solely on the results of the 2018 National Youth Tobacco Survey ("NYTS") data for e-cigarettes. That data, and FDA's baseless speculation that youth *might* migrate to flavored cigars in response to FDA's proposed regulation of e-cigarettes, are the **only** rationale FDA has offered in the Draft Guidance as a basis for the draconian and unprecedented action proposed on new "flavored" cigars. FDA speculated that such migration would be "similar to the migration that occurred when the Tobacco Control Act banned cigarettes with characterizing flavors."[11] FDA does not cite to a source for this bold statement. Youth Tobacco Survey ("YTS") data for the time period, however, makes apparent that the "migration" FDA references never occurred. Figure 1 below shows that FDA's contention is wrong. In fact, middle school student cigarette and cigar use peaked in 2009 and

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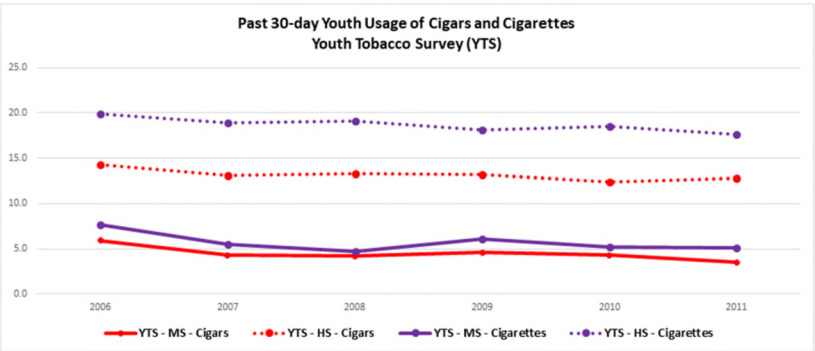
[9] REGULATIONS.GOV, Regulation of Flavors in Tobacco Products (July 19, 2018), https://www.regulations.gov/document?D=FDA-2017-N-6565-0001 (showing number of comments received).

[10] *Food and Drug Admin. Budget Request Before the H. Comm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies*, 116th Cong. (Apr. 3, 2019) (statement of Dr. Scott Gottlieb, Comm'r, Food and Drug Admin.). FDA has recently begun to characterize tobacco products as either "combustible" or "non-combustible." This however, is a false premise and an inappropriate effort to blur important differences among products. Cigarettes and cigars have different definitions based on physical components of the products (i.e. one is wrapped in paper and one is wrapped in tobacco), and should be treated differently. In addition, the cigar category is probably the most heterogeneous of any tobacco product category. Cigars come in innumerable sizes and shapes and, as has been acknowledged by FDA researchers countless times, there are at least three different and distinct categories of cigars based on the physical properties of the cigar, each with different usage patterns. FDA's attempt to divide the tobacco product categories into "combustible" and "non-combustible" categories is not scientifically rigorous.

[11] DRAFT GUIDANCE, *supra* at note 1, at 16.

then declined; in high school students, cigarette use stayed nearly constant while cigar use dropped.

Figure 1. YTS Percent of Middle School (grades 6-8) and high school (grades 9-12) current users of cigarettes and cigars 2006-2011[12]



In the Flavors Comment, CAA demonstrated that neither the scientific literature nor recent data from the PATH study provides a scientific understanding of why youth initiate use of flavored tobacco products, continue to use such products, or whether they would use tobacco products even without flavors.[13] What they do show, however, is that youth usage of flavored cigars is low and declining. Regarding youth usage of flavored cigars, Dr. Neil Roth, an epidemiologist who examined Wave 1 of the PATH data, concluded:

> [I]t is clear from the PATH data that the prevalence of youth smoking flavored cigars is extremely low (1.8%). Moreover, the total amount that current youth flavored cigar smokers' smoke is minimal. 94.5% smoked at most five cigars per day on days smoked, 64.8% at most five days per month, and 77.3% smoked at most 50 cigars in

[12] CAA Internal Analysis of Publicly Released YTS data.
https://www.cdc.gov/tobacco/data_statistics/surveys/yts/index.htm

[13] Exhibit 1, Comments to the Flavors ANPRM, *supra* note 8, at 14-15.

> their lifetime. In light of all of these results, any conclusions regarding youth or young adults and flavored cigars are not supported by the PATH data and are highly questionable.[14]

In addition, FDA relies on *unpublished* Wave 4 PATH data in its brief discussion of cigars. FDA provides the results of one question from the study, asked of "ever" cigar smoking youth. That population includes anyone who has taken even one puff of a cigar. The question asked was: "Was the first filtered cigar you smoked flavored to taste like menthol, mint, clove, spice, fruit, chocolate, alcoholic drinks, candy or other sweets?"[15] FDA failed to provide absolute numbers of "new baseline youth respondents, or continuing youth respondents who have initiated traditional cigars/cigarillos/filtered cigars smoking since their last completed interview," so CAA cannot verify or reproduce the FDA results. The table below, however, gives the percentages for each Wave of the PATH study for this question.[16]

Table 1. Responses of "Yes" to Question YG1108 Across all Waves of the PATH Study

Type of Cigar	Wave 1	Wave 2	Wave 3	Wave 4
Cigarillo	61.9%	49%	56.8%	56.8%
Filter	64.2%	49.3%	52.6%	33.5%
Traditional	48%	32.7%	28.6%	25.9%

FDA states incorrectly that the data from Wave 4 "illustrate the continued importance of flavors among first time cigar users."[17] What the Wave 4 data actually demonstrates is the ***decreasing***

[14] Exhibit 1, Comments to the Flavors ANPRM, *supra* note 8, at Exhibit C at 18.

[15] Office of Science, Center for Tobacco Products, FDA, Memorandum to The Docket: Summary of Internal Analyses from Wave 4 of the Population Assessment of Tobacco and Health (PATH) Study at 4.

[16] Internal analysis of the PATH Wave 1, 2, and 3 Codebooks and public raw datasets as well as the Wave 4 Codebook.

[17] DRAFT GUIDANCE, *supra* note 1, at 16.

importance of flavors to first time cigar users, looking across the Waves of the study. This stands in stark contrast with the *increasing* rates of youth usage of e-cigarettes, and the FDA report that 96.1% of youth first used a flavored e-cigarette in Wave 4 of the PATH study.[18] Other work supports this as well. A recent study examining 2014-2017 NYTS results of flavored tobacco use shows that, within the overall declining youth usage of cigars, youth usage of flavored cigars is also declining.[19] Moreover, it shows that in 2017, among the small percentage of youth who have used a cigar, fewer than half have used a flavored cigar.[20]

FDA has determined that the compliance policy for flavored e-cigarettes, and by extension "flavored" cigars, must change based on the 2018 NYTS results.[21] The Draft Guidance states:

> Data from the 2018 NYTS, as described throughout this guidance, documents a significant increase in youth use of ENDS products and revealed the magnitude of the problem. These data have prompted FDA to revise its compliance polices with respect to the continued marketing of deemed tobacco products that have not obtained premarket authorization.[22]

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[18] Office of Science, Center for Tobacco Products, FDA, Memorandum to The Docket: Summary of Internal Analyses from Wave 4 of the Population Assessment of Tobacco and Health (PATH) Study at 2.

[19] HONGYING DAI, *Changes in Flavored Tobacco Product Use Among Current Youth Tobacco Users in the United States, 2014-2017* (JAMA Pediatr. Jan. 7, 2019). This paper stated that from 2014-2016 there was roughly a 12% decline in youth usage of flavored cigars and an over 2% decline from 2016-2017.

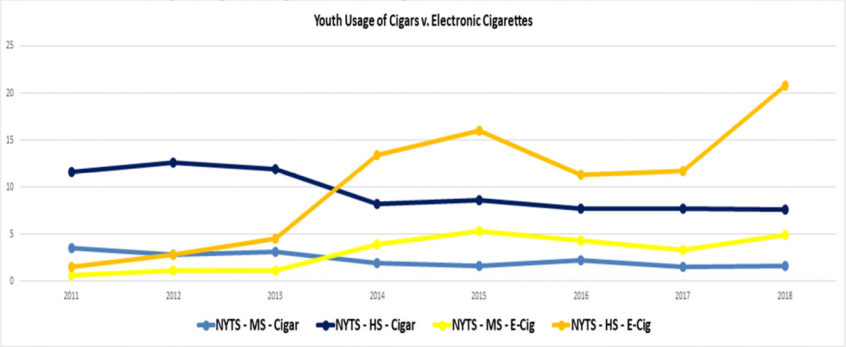
[20] *Id.*

[21] DRAFT GUIDANCE, *supra* note 1, at 6.

[22] DRAFT GUIDANCE, *supra* note 1, at 6 (emphasis added).

What FDA does not acknowledge is that youth usage of cigars has continued to significantly decline year over year.[23] The figure below shows the decline in youth cigar use, as well as the recent increase in youth e-cigarette use.

Figure 2. NYTS Percentage of Middle School (grades 6-8) and High School (grades 9-12) Students Past 30 Day Usage of Cigars and E-Cigarettes 2011-2018[24]



While not outlined as a reason for modifying the compliance policy for "flavored" cigars in the Draft Guidance, former Commissioner Gottlieb's recent testimony before Congress provided a rationale. In response to a question on FDA's proposed policy on flavored cigars and youth usage, he stated that "cigars are the largest growing segment of tobacco use among African-American teens. I don't know that it is going down overall but it is certainly not going down in the segments where we have deep public health concerns."[25] First, former Commissioner

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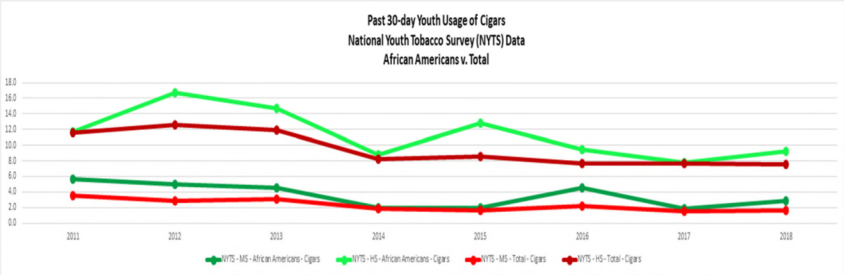
[23] GENTZKE A., ET AL., *Vital Signs: Tobacco Product Use Among Middle and High School Students – Untied States, 2011-2018* 68:160 (Morb. Mortal Wkly Rep. 6 Feb. 15, 2019).

[24] CAA Internal Analysis of Publicly Released NYTS data.
https://www.cdc.gov/tobacco/data_statistics/surveys/nyts/index.htm

[25] *U.S. Food and Drug Admin. Budget Request Before the H. Comm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies*, *supra* note 10.

Gottlieb's response suggests an unfamiliarity with the overall declining trend in youth usage of cigars. Second, his response does not address any youth usage, or specifically African-American youth usage, of "flavored" cigars. Instead, the former Commissioner made a bold statement that once again looks at isolated data. Similar to overall youth usage numbers, African-American youth usage of cigars has been declining. As Figure Three demonstrates, only from 2017 to 2018 has there been a slight increase in African-American youth usage of these products.

Figure 3. NYTS Past 30-day Youth Usage of Cigars 2011-2018, African American and All Youths[26]



FDA should not be proposing policies with huge ramifications on industry based on one year's worth of data in one segment of the youth population, when overall the trends in youth usage decline year over year. Instead, FDA should do targeted outreach to specific populations to reverse any population-specific trends.

As noted above, and in CAA's comments last summer on flavored products, much work remains to be done. To this end, certain CAA member companies engaged the Venebio Group

[26] CAA Internal Analysis of Publicly Released NYTS data.
https://www.cdc.gov/tobacco/data_statistics/surveys/nyts/index.htm

LLC ("Venebio") to perform a scoping project to determine what the relevant universe of scientific information is, and whether this universe has been fully examined, relating to the question "do flavored cigar products raise different questions of public health than unflavored cigar products?"[27] The Venebio Report concluded that "there is a considerable body of flavored cigar-related literature and there are several data analytic sources, neither of which appears to have been explored in a suitably thorough and transparent manner appropriate for developing policy based on scientific evidence."[28] Further, Venebio states "considerably more work should, and can, be done before FDA implements any sweeping policies that are intended to be evidence-based."[29] FDA needs to carefully evaluate the relevant universe of scientific literature and undertake additional research before determining whether it has an appropriate basis to impose a product standard that bans an entire category of products. It certainly cannot take such action through guidance.

IV. FDA is Improperly Attempting to Change the Public Health Standards Laid Out by Congress in the Tobacco Control Act

a. The Tobacco Control Act Standards for Premarket Review

The Tobacco Control Act has different public health standards for new products filing (i) a substantial equivalence report ("SE"), and (ii) a premarket tobacco product application ("PMTA"). FDA's adoption of the policies outlined in the Draft Guidance would impermissibly

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[27] VENEBIO GROUP LLC, Letter re Evaluation of Flavored Cigar Products as They Relate to Different Questions of Public Health (April 23, 2019) Attached as Exhibit 2. [hereinafter Venebio Report]. Founded in 2008, Venebio Group, LLC solves complex life sciences problems for a range of organizations including pharmaceutical companies, biotechnology and medical device manufacturers, and law firms, among others. Venebio's clients range from multi-billion dollar global pharmaceutical companies and other Fortune 500 companies to smaller, privately owned biotechnology companies (https://venebio.com/about/).

[28] *Id.* at 1.

[29] *Id.* at 4-5.

apply the PMTA standard to products entitled to SE review. To approve an SE report, FDA has to find that a new product is "substantially equivalent" to a predicate product and "do[es] not raise different questions of public health." To approve a PMTA application, FDA must find that that new product is "appropriate for the protection of the public health."[30] These are much different standards.

In passing the Tobacco Control Act in 2009, Congress did not intend to ban tobacco products, or to prevent adult consumers from purchasing them. Rather, the intention was to find a balance between recognizing adults' freedom of choice and preventing underage use.[31] Congress, therefore, created two different pathways for pre-market review – each with its own public health standard: (i) the substantial equivalence pathway, for new products with characteristics similar to products already in the marketplace, and (ii) the PMTA pathway, for products unable to demonstrate such a connection.

For a tobacco product on the market at the time the product's category became subject to regulation, it was contemplated that manufacturers would seek to demonstrate the substantial equivalence of a "new" tobacco product to a "predicate" tobacco product (i.e., a product on the market prior to February 15, 2007).[32] SE Reports have two paths and, therefore, two standards.

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[30] Family Smoking Prevention and Tobacco Control Act § 910(a), 21 U.S.C.A. § 387j (2009) [hereinafter Tobacco Control Act].

[31] *See* Tobacco Control Act § 3(7). If fact, Congress went so far as to ensure that FDA could not outright ban an entire category of tobacco products. Tobacco Control Act § 907(d)(3)(A).

[32] A "new tobacco product" is defined as "any tobacco product (including those in test markets) that was not commercially marketed as of February 15, 2007; or (B) any modification (including a change in design, any component, any part, or any constituent, or in the content, delivery or form of nicotine, or any other additive or ingredient) of a tobacco product where the modified product was commercially marketed in the United States after February 15, 2007." Tobacco Control Act § 910(a)(1)(A)-(B).

The "same characteristics" path requires a manufacturer to demonstrate that the "'new' product has the "same characteristics" as the predicate product."[33] The "different characteristics" path requires a manufacturer to demonstrate that the "new tobacco product does not raise different questions of public health."[34]

For a new tobacco product that cannot link to a predicate product, a manufacturer must file an "application" as opposed to a "report" – a Premarket Tobacco Product Application ("PMTA"). Although SEs and PMTAs are both detailed, time consuming filings, PMTA's are governed by the more rigorous, exacting public health standard. In order for FDA to approve a PMTA, the Agency must find the application "is appropriate for the protection of the public health" by "determin[g] with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product and taking into account – (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products."[35]

The differences between SE and PMTA standards are evident on their face, and have been discussed by a federal court that clearly described the significant differences in the public health standards of the two pathways. Judge Mehta astutely noted the differences between the two premarket review pathways in *Philip Morris, et al v. U.S. Food and Drug Administration et al.:*

> "The Act sets forth two pathways – one more rigorous than the other—by which a new tobacco product can secure such premarket approval. The less rigorous route

[33] Tobacco Control Act § 910(a)(3)(A)(i).

[34] Tobacco Control Act § 910(a)(3)(A)(ii).

[35] Tobacco Control Act § 910(c)(4).

> for a new tobacco product to receive premarket approval requires the tobacco product sponsor to file a "report" that the new tobacco product is 'substantially equivalent to an existing product.'"
>
> .....
>
> If a product cannot qualify for the substantial equivalence pathway, it must traverse a more rigorous pathway known as 'premarket review' to obtain FDA approval....If FDA decides to deny a premarket review application, it must be for one of four reasons delineated in the statute. Those reasons include: (1) a failure to show that the marketing of the product would be appropriate for the public health...."[36]

The Tobacco Control Act simply and clearly does not require products that may be able to use the SE pathway to meet the PMTA "appropriate for the protection of the public health" standard, a fact confirmed by Judge Mehta.

b. <u>The Draft Guidance Impermissibly Seeks to Change the Public Health Standard for a Determination of Substantial Equivalence</u>

The Draft Guidance states that the reason for limiting the ability of "flavored" cigars to use the SE pathway is that they "provide[s] no public health benefit."[37] In doing so, it goes beyond even the PMTA "appropriate for the public health" standard and comes to a conclusion that all but requires the products to come off the market. No other tobacco product has <u>*ever*</u> been measured by this standard, and this is not the standard imposed by Congress.

Further, FDA has stated repeatedly that it believes cigars will take the substantial equivalence pathway to market.[38] Despite the comments of former Commissioner Gottlieb to the contrary,

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[36] *Philip Morris, et al. v. U.S. Food and Drug Administration, et al.*, 202 F. Supp. 3d 31, 38-39 (D.D.C. 2016).

[37] DRAFT GUIDANCE, *supra* note 1, at 16. In fact, former Commissioner Gottlieb stated his feelings quite clearly on the subject by tweeting "FDA isn't asking for applications to approve flavors in cigars. We're issuing guidance to end enforcement discretion and then regulation to ban flavors in all cigars." Scott Gottlieb, M.D. (@SGottliebFDA), TWITTER (February 21, 2019) 11:49 a.m. https://twitter.com/SGottliebFDA/status/1098670986470309888

[38] DRAFT GUIDANCE, *supra* note 1, at 4.

FDA has confirmed that it will accept for review SE Reports for "flavored" cigars, but that these products will, in an unprecedented policy, not be able to remain on the market pending that review.[39] In the cost benefit analysis that accompanied the Final Rule, FDA estimated *0% of cigars* would use the PMTA pathway.[40] This makes clear that FDA never expected cigars would have to prove they are "appropriate for the protection of the public health."[41] It is inexplicable, therefore, that the Draft Guidance claims the removal of the compliance policy for "flavored" cigars is designed to limit minors' access to a tobacco product that "provides no public health benefit."[42] (Emphasis added). Absolutely *nowhere* in the Tobacco Control Act is this laid out as a standard for FDA's wholesale prohibition on products, or a justification to refuse to allow an entire category of products the same compliance periods offered to other products. Indeed, FDA specifically acknowledged this in the preamble to the Final Rule, stating "the SE pathway is a comparison between a new tobacco product and a predicate identified by the submitter, **not an evaluation of whether the product is appropriate for the protection of the public health** more generally as would be conducted under an application under section 910(b) (i.e. a PMTA)." (emphasis added)[43]

Additionally, the former Commissioner's comments, along with the policies outlined in the Draft Guidance lead to the unavoidable conclusion that FDA has prejudged any SE Report

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[39] DRAFT GUIDANCE, *supra* note 1, at 4, 15.

[40] Final Rule, *supra* note 4, at 29,025, 29,061; US FOOD & DRUG ADMIN., Final Regulatory Impact Analysis to the Final Rule, Docket No. FDA-2014-N-0189 (May 2016).

[41] Tobacco Control Act § 910.

[42] DRAFT GUIDANCE, *supra* note 1, at 16 (emphasis added).

[43] Final Rule, *supra* note 4, at 28,992 (emphasis added).

submitted for a flavored cigar. This is contrary to FDA's remit as a science-based agency, since "[d]ecisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."[44] FDA has never used the standard it is now trying to apply to flavored cigars. The "no public health benefit" language has never been applied, even to cigarettes -- the product Congress initially mandated that FDA regulate. FDA cannot create and apply a new public health standard to new "flavored" cigars.

V. It is Impermissible for FDA to Ban "Flavored" Cigars Through a Purported Guidance Document

a. The Draft Guidance Amounts to a Legislative Rule and Must Go Through Notice and Comment Rulemaking

The APA dictates that Notices of Proposed Rulemaking are to be published in the Federal Register so interested parties can comment.[45] The only exceptions to this are for interpretative rules and policy statements.[46] While FDA has characterized this as a "Guidance Document," it is in fact a "legislative rule because on its face it purports to bind both applicants and the Agency with the force of law."[47] The policy proposed in the Draft Guidance will have the force of law in relation to new "flavored" cigars.

In examining whether an agency action is a legislative rule the "ultimate factor of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it

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[44] *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F. 3d 476, 487 (D.C Cir. 2011).

[45] 5 U.S.C. § 553(b) (1966).

[46] *Id.*

[47] *General Electric Co. v. E.P.A.*, 290 F. 3d 377 (D.C. Cir. 2002).

has the force of law."[48] Here the decision to revoke a compliance period has a binding effect on the Agency and industry as it removes products from the market without an opportunity to change course. This is a classic example of something with the "force of law." As has been succinctly stated before:

> If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely on the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures.[49]

As the DC Circuit Court of Appeals has stated:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."[50]

As FDA intends to base enforcement actions on the polices outlined in the Draft Guidance, this makes it a legislative rule, and FDA must follow the notice and comment rulemaking procedures outlined by the APA in order to deprive cigar manufacturers of substantive legal rights. The "flavored" cigars at issue will, thirty days after the publication of the Final Guidance, automatically become subject to enforcement by FDA.[51] Further, even if a cigar manufacturer

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[48] *Id.* at 382 (citing *Molycorp Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

[49] *Id.* (quoting Robert A. Anthony, *Interpretative Rule, Policy Statements, Guidance's, Manuals and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1331, 1355 (1992)).

[50] *Appalachian Power Co. v. E.P.A*, 208 F. 3d 1015, 1021 (D.C. Cir. 2000).

[51] As discussed further below, not only will there be no recourse, but cigar manufacturers do not even know which "flavored" products will be subject to the new policy. First, FDA has not defined "flavored." Second, FDA intends to "prioritize enforcement actions with respect to flavored cigars" on a "case-by-case" basis. DRAFT GUIDANCE, *supra* note 1, at 6, 15.

managed to submit an SE Report in the month after publication of final guidance, FDA would still force the product off the market pending the outcome of its multi-year review. This is a legal determination of the status of the product.

b. By Using Guidance Rather than a Rule, FDA Improperly Bypasses OMB and Any Cost Benefit Analysis

It is a fundamental tenant of regulatory law that any Proposed Rule or Final Rule must be reviewed by the Office of Management and Budget ("OMB") and must be accompanied by a Regulatory Impact Analysis, a Regulatory Flexibility Analysis and an Unfunded Mandates Reform Analysis.[52] It is a principle of sound regulation that proposals "must take into account benefits and costs, both quantitative and qualitative."[53] It is for this reason that Executive Order 12,866 requires that for any "significant regulatory action" an Agency must provide OMB with an "assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities."[54] A "significant regulatory action" includes those that (i) have an annual effect on the economy of $100 million or adversely affect in a material way the economy…jobs"; (ii) create serious inconsistency…; (iii) materially alter the budgetary impact of …user fees; and (iv) raise novel legal or policy issues."[55] The Draft Guidance satisfies all four of the types of actions that constitute "significant regulatory action" and therefore the policies within it – even those only relating to cigars --

[52] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 3 C.F.R. §13563 (2012).

[53] Exec. Order No. 13,563, 3 C.F.R. §13563 (2012).

[54] Exec. Order No. 12,886, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[55] *Id.*

should have been proposed via notice and comment rulemaking that would have required OMB review.

OMB has recently reiterated the importance of such cost benefit analysis, and the requirements of Agencies, regardless of how they characterize their actions, to comply with the Congressional Review Act.[56] This recent OMB memo details that "Federal agencies must coordinate with OIRA regarding a major determination for all final, interim final and direct final rules, irrespective of whether a rule would otherwise be submitted for regulatory review."[57]

Even without the recent pronouncement from the White House, FDA is aware that OMB review is required for drastic action of the type the agency proposes to take against new "flavored" cigars. A draft of the Final Rule FDA sent to OMB for its review ("Draft Final Rule") included a provision mirroring the "compliance policy" outlined in the Draft Guidance. The Draft Final Rule proposed the following:

> …the Agency is not extending its compliance policy for premarket review to flavored new tobacco products. Retailers of flavored tobacco products will have an additional 90 days following the effective date of this rule to sell of any existing inventory. Consequently, as of 180 days after the publication of the rule, any non-grandfathered, newly deemed flavored tobacco products on the market will be subject to enforcement.[58]

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[56] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. M-19-14, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT (Apr. 11, 2019). Attached hereto as Exhibit 3.

[57] *Id.* at 3. "Rule" is defined as "the whole or a part of an agency statement of general….applicability and future effect designed to implement, interpret or prescribe law or policy describing the organization, procedure, or practice requirements of an agency." *Id.* at 2-3.

[58] The Draft Final Rule is attached hereto as Exhibit 4. It can also be found under Docket Number FDA-2014-N-0189 as Supporting and Related Material "TAB A 2014-850 Deeming Draft Final Rule as Submitted to OMB" https://www.regulations.gov/document?D=FDA-2014-N-0189-83191.

The Final Rule itself did not contain this provision, and it was struck in the prepared redline of the Final Rule.[59]

Further, as most recently outlined by OMB, it is critical that OMB review any agency action that can be considered "major." In order to do this, the agency must do "a screening analysis to determine whether a rule might be expected to place significant burdens on the economy."[60] If FDA had done this, it would have seen the huge and unreasonable impact the Draft Guidance will have on the cigar industry. In 2016, OMB review led to the removal of this regulatory provision before FDA could publish the Final Rule. It is arbitrary and capricious for FDA to now, after a previous attempt at the same action had been rejected by OMB, to try to push through the same policy without OMB review. The new memo from OMB is effective as of May 11, 2019, and requires any rule (regardless of whether an agency labels it a "guidance document" or "policy statement") to have a "major" determination by OIRA prior to publication in the Federal Register.[61] FDA, as it acknowledged previously, must comply with this requirement for OMB review before it issues final guidance on any policy outlined in the Draft Guidance.

c. Cigar Companies Have Detrimentally Relied Upon FDA's Continued Compliance Policies

Since passage of the Tobacco Control Act in 2009, **no tobacco product lawfully in commerce has been removed from the market without an opportunity for pre-market**

[59] The redline version of the Final Rule is attached as Exhibit 5. It can also be found under Docket Number FDA-2014-N-0189 as Supporting and Related Material "TAB B 2014-850 Deeming Final Rule Redline Change." https://www.regulations.gov/document?D=FDA-2014-N-0189-83193.

[60] Exhibit 3 at 7.

[61] *See id.*

review, and to stay on the market pending that review.[62] FDA is governed by the requirements of the APA, which

> require[s] an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'[63]

FDA has now announced three different compliance polices for premarket review of cigars – continually changing the regulatory environment for these products. First, the Final Rule outlined that "new deemed tobacco products" on the market prior to August 8, 2016 would have until February 8, 2018 to file an SE Report, and then the lesser of a decision by FDA or 1 year to stay on the market pending FDA review.[64] At that time, FDA had not (i) put out any specific guidance for what an SE Report for a cigar would need to contain; or (ii) publish even a proposed rule regarding SE Reports. Second, FDA acknowledged this deficiency in July 2017 and extended the deadline for SE Reports for "newly deemed new combustible tobacco products" until August 2021. This gave the agency time to promulgate "foundational rules and Guidance documents" necessary for industry to know exactly what an SE Report needed to contain.[65] Further, the July 2017 announcement not only **extended** the compliance deadlines for

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[62] The only possible exception to this was clove cigarettes, but as FDA notes in the Draft Guidance, manufacturers of those products had knowledge from 2007 when the first draft of the Tobacco Control Act was introduced into Congress that this action would occur.

[63] *Perez v. Mortgage Bankers Ass'n.*, 135 S. Ct. 1199, 2019 (2015).

[64] Final Rule, *supra* note 4, at 29,011.

[65] Scott Gottlieb, M.D., Comm'r, U.S. Food & Drug Admin., *Remarks on Protecting American Families: Comprehensive Approach to Nicotine and Tobacco* (July 28, 2017) (available at https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm).

SE Reports for all cigars, it also changed the "sunset policy." As former Commissioner Gottlieb stated:

> In addition, we'll also be revising the so-called "sunset policy" through additional guidance so that existing products under review remain on the market. The current policy could have forced existing products off the market. We'll also be working to put in place a more comprehensive, transparent, and vigorous regulatory framework that will make our regulatory efforts more sustainable.[66]

It appears that in 2017 FDA understood it could not arbitrarily decide to remove products from the market simply because FDA had not finished its review of the submitted materials, yet now the Agency seems to think it can force products off the market – without any review at all.

Third, FDA proposed the policy outlined in the Draft Guidance – namely that "flavored" cigars will *no longer have any compliance policy*, but "tobacco flavored" cigars will continue to be subject to the July 2017 compliance policies.

There is no logical explanation for this reversal of agency policy other than FDA's *ipse dixit* approach that there will be an increase in youth usage of these products – due to FDA's regulation of e-cigarettes, or "because the Agency says so."[67] The Draft Guidance does not outline any change in the use of these cigar products, any change in the scientific record relating to these products, or any change in the need for foundational rules or guidance relating to SE Reports. Instead, due to changes **in a different category of products, and based on hypothetical concerns**, FDA seeks to ban the sale of these products.

Cigar manufacturers have relied on FDA's statements that compliance periods for premarket review existed and FDA would provide additional guidance on SEs prior to the

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[66] *Id.* (emphasis added).

[67] *D&F Afonso Realty Trust v. Garvey*, 216 F. 3d 1191, 1196 (D.C. Cir. 2000).

deadline for submitting SE Reports. Indeed, FDA issued this Draft Guidance before it proposed a rule on SE Reports.[68] Based on these statements, cigar companies have not submitted SE Reports; therefore if the Draft Guidance is finalized, legally marketed cigars may be forced off the market without any opportunity for prior pre-market review. This would impact hundreds of SKUs, thousands of employees, and hundreds of millions of dollars in lost revenue for manufacturers, distributors and retailers of "flavored" cigars.

Further, even if cigar manufacturers were to submit SE Reports, the products could not remain on the market pending FDA's determination of whether the new "flavored" cigar was substantially equivalent to a grandfathered "flavored" cigar.[69] This would cause chaos in the marketplace as retailers and distributors try to determine which products this applied to and which it did not. This is an unprecedented and unwarranted action by FDA. As an example, a 2007 formulation of a cigar that comes in one "flavor" will remain on the market, but the 2011 formulation of that same cigar in a different "flavor" will be forced off the market and cannot be reintroduced until FDA makes an SE determination. Meanwhile, menthol flavored cigarettes that submitted Provisional SE Reports in 2011, and which FDA has not yet determined to be substantially equivalent to a predicate product, remain on the market pending that determination. This is illogical, disparate and arbitrary treatment of these products. FDA ignores the settled

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[68] That Proposed Rule, however, gives limited treatment to what an SE Report for a cigar would need to contain, and asks for comment on a host of critical issues. *See* Content and Format of Substantial Equivalence Reports, 84 Fed. Reg. 12,740 (proposed Apr. 2, 2019) (to be codified at 21 C.F.R. §§16, 1107).

[69] As discussed above, to CAA's knowledge few, if any, full SE Reports have been submitted for cigars as FDA has not yet given industry appropriate guidance on what is required for an SE Report for a cigar. That said, in the Proposed Rule on the Content and Format of Substantial Equivalence Reports, FDA estimates that an initial SE Report would take 300 hours to prepare. *Id.*, Preliminary Regulatory Impact Analysis at 23. Assuming an 8 hour work day, devoted to nothing but one SE Report, it would take 37.5 days to complete **a single SE Report**.

principle that an Agency seeking to change its prior course "must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[70] Further, "[c]hange that does not take account of legitimate reliance on prior interpretation ... may be 'arbitrary, capricious [or] an abuse of discretion.'"[71] This is especially the case here -- FDA has not engaged in reasoned decision making as there have been no changed circumstances *in relation to cigars* identified by FDA that justify its change in policy.

Additionally, it is arbitrary and capricious and violates due process for FDA to abandon its policy of giving regulated industry notice and time to prepare premarket applications.[72] The Supreme Court has consistently upheld the right of parties to rely on their expectations of the law: "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[73] Further, "[t]he conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."[74] In this instance, cigar manufacturers have an expectation that their products would not -- immediately, and without notice and an opportunity to be reviewed -- have

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[70] *U.S. Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163, 171 (D.D.C. 2016).

[71] *Id.* (citing *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

[72] *D&F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1196-7 (D.C. Cir. 2000) ("the FAA's abandonment of its own established procedure and its lack of reasoned analysis on the record constitute arbitrary and capricious agency action in violation of the law.").

[73] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)

[74] *Id.* at 269.

to be removed from the market or face an enforcement action. Further, as noted above, manufacturers expected that products already in the marketplace would be allowed to stay on the market pending agency review. This was the course of action taken for products immediately subject to regulation under the Tobacco Control Act, and it is to date the course taken by FDA.[75] The proposed change is an unprecedented, unconstitutional, and arbitrary and capricious action by FDA.

d. Section 907 Requires Product Standards be Enacted by a Rulemaking

The Tobacco Control Act allows FDA to adopt a tobacco product standard if it finds that it is "appropriate for the protection of the public health."[76] In order to take such action, Congress directed that FDA "shall consider scientific evidence concerning (I) the risks and benefits to the population as a whole, including users and nonusers of tobacco products, of the proposed standard; (II) the increased or decreased likelihood that existing users will stop using such products; and (III) the increased or decreased likelihood that those who do not use tobacco products will start using such products."[77] The Tobacco Control Act contained the first (and to date only) product standard relating to tobacco products: the "special rule for cigarettes."[78] Since

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[75] Congress and FDA -- through the Tobacco Control Act and the Final Rule – did not allow for, or even contemplate, removal of currently marketed products without opportunity for pre-market review. The Tobacco Control Act was introduced into Congress for the first time on February 15, 2007 – the first date the cigarette and smokeless tobacco industries were on notice they were to be regulated. The Tobacco Control Act was signed into law on June 22, 2009, and built into it was a compliance period through March 21, 2011 for "new tobacco products" to submit SE Reports. The products subject to this policy then could stay on the market until FDA reviewed the applications. **To the date of submission of this comment FDA has still not made a final determination on some of these products.** They are still on the market, without premarket review, and being in the class of products Congress mandated FDA to regulate.

[76] Tobacco Control Act § 907(a)(3).

[77] *Id.*

[78] Tobacco Control Act § 907(a)(1)(A).

2009, FDA has proposed only one other product standard – the 2017 (and still pending) proposal to limit NNN in smokeless tobacco products.[79]

FDA has the authority to propose a Product Standard regarding flavors in cigars. The agency has stated many times that it intends to draft such a product standard. In the Final Rule, FDA stated "FDA is announcing that it intends in the future to issue a proposed product standard that, if finalized, would eliminate characterizing flavors in all cigars including cigarillos and little cigars."[80] Additionally, this past November former Commissioner Gottlieb stated "FDA intends to propose product standard that would ban all flavors in cigars."[81] Further, FDA concedes that to restrict flavors in grandfathered cigars, it must enact a product standard through notice and comment rulemaking.[82] Simply because it is expedient, FDA cannot ignore the requirements of the Tobacco Control Act relating to product standards: (1) a thorough, complete and unbiased review of the scientific evidence on the matter; and (2) notice and comment rulemaking. FDA cannot avoid these requirements by adopting a product standard through a (purportedly non-binding) guidance document.[83]

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[79] Tobacco Product Standard for N-nitrosonornicotine Level in Finished Smokeless Tobacco Products, 82 Fed. Reg. 8004 (proposed Jan. 23, 2017) (to be codified at 21 C.F.R. 1132).

[80] Final Rule, *supra* note 4, at 29,024; Flavors ANPRM, *supra* note 8.

[81] U.S. FOOD & DRUG ADMIN., Statement from FDA Commissioner Scott Gottlieb, M.D., on proposed new steps to protect youth by preventing access to flavored tobacco products and banning menthol in cigarettes (Nov. 15, 2018) (available at https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm).

[82] *Id.* ("The FDA's proposal to revisit the compliance policy for flavored cigars that are new tobacco products does not apply to the entire product category, as some products were considered "grandfathered." Accordingly, the FDA intends to propose a product standard that would ban flavors in all cigars.").

[83] While issued after the Draft Guidance, the recent "Memorandum for the Heads of Executive Departments and Agencies" issued by OMB speaks to how critical it is that Agencies follow appropriate procedures. *See* Exhibit 3.

In addition, while improperly attempting to institute a product standard, the Draft Guidance also ignores the requirements of the Tobacco Control Act relating to the timelines on implementing product standards. The Tobacco Control Act itself recognized that any product standard would have a very large effect on industry and required that "no such regulation shall take effect before 1 year after the date of its publication."[84] In contrast, the Draft Guidance proposes to give cigar manufacturers only 30 days from the date of publication of the final guidance before FDA will seek to enforce its "current thinking on the topic," which does "not establish legally enforceable responsibilities." If FDA seeks to restrict new "flavored" cigars through a de facto product standard, it must adhere to Tobacco Control Act timelines.

FDA must withdraw this part of the Draft Guidance, as it cannot issue a proposed Product Standard without proper notice and comment rulemaking.

VI. The Actions Proposed by FDA in the Draft Guidance are Arbitrary and Capricious Regardless of How Imposed

a. FDA has Not Defined "Flavored Cigar"

The Draft Guidance is arbitrary and capricious because, by failing to define the term "flavor," it does not let cigar manufacturers know which of their products may be affected by the proposals. Neither the Tobacco Control Act nor the Final Rule contain a definition of "flavor." Cigar manufacturers are left to guess what "flavored cigars (other than tobacco-flavored)" means. Unlike e-cigarettes where "flavor" has to be added to the PG/VG nicotine solution – cigars are an agricultural product and may have various flavors depending on the tobaccos used.

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[84] Tobacco Control Act § 907(d)(2).

Moreover, in his public statements former Commissioner Gottlieb used the term "characterizing" flavor, a limiting factor not found in the Draft Guidance. In his statement the day the Draft Guidance was released, he used the term "characterizing flavor" to discuss the Agency's plan for a proposed product standard:

> Under the revised compliance policy, 30 days after the guidance is finalized, any flavored cigars (other than tobacco-flavored) that were on the market on Aug. 8, 2016, and that meet the definition of a new tobacco product, would be subject to enforcement. As a result, flavored cigar products that are not grandfathered tobacco products and lack marketing authorization would no longer be subject to the August 2017 Compliance Policy. The FDA would prioritize enforcement of such products if they did not come off the market 30 days after the final guidance. They would have to seek premarket authorization to be re-introduced to the market. Additionally, we're moving forward with a proposed rule to ban all characterizing flavors in cigars.[85]

A week later, he said that "draft guidance that we put out last week that sought to ban characterizing flavors including menthol in non-grandfathered cigars."[86] Most recently he stated "I don't believe characterizing flavors should be in any combustible tobacco product."[87] FDA must define these terms through rulemaking, and clarify whether the proposed "prioritized enforcement" applies to any and all "flavored" cigars, or a subset with a "characterizing flavor."

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[85] U.S. FOOD & DRUG ADMIN, Statement from FDA Comm'r Scott Gottlieb, M.D., on advancing new policies aimed at preventing youth access to, and appeal of, flavored tobacco products, including e-cigarettes and cigars (Mar, 13, 2019) (available at https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm633291.htm).

[86] Interview by Anna Edney with Scott Gottlieb, M.D., Comm'r, Food & Drug Admin., The Brookings Institution, Washington, D.C. 5 (March 19, 2019), https://www.brookings.edu/events/a-conversation-with-departing-fda-commissioner-scott-gottlieb-on-his-tenure-and-policy-reforms/.

[87] *U.S. Food and Drug Admin. Budget Request Before the H. Comm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies*, *supra* note 10.

In addition, FDA makes explicit that, while it is not seeking to ban menthol in e-cigarettes or combustible cigarettes, it is seeking to ban menthol in cigars.[88] FDA must explain its disparate treatment of similarly-flavored products.

Finally, FDA offers no insight for manufacturers as to how FDA will prioritize enforcement discretion "with respect to particular products … on a case-by-case basis."[89] Many tobacco products contain a flavor additive that is functional in the product, not intended to make the cigar "flavored." For example, the Philip Morris website contains a list of "Cigarette Tobacco and Flavor Ingredients" and states "we have chosen to provide a single list rather than a list for each cigarette product to avoid disclosing to our competitors the specific flavorings that give each cigarette product its own unique flavor, taste and aroma."[90] It then lists items such as celery seed oil, chamomile flower, roman oil, cocoa and cocoa products, lime oil, orange oil- sweet, rum, and vanilla bean extract.[91] No one suggests Philip Morris' cigarettes are "flavored" or have a "flavor" outside of what someone might describe as what a cigarette tastes like. This is because the products are not "flavored" as these ingredients, even if used to create a product with a specific "flavor," are not discernable to the user.

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[88] DRAFT GUIDANCE, *supra* note 1, at 18.

[89] DRAFT GUIDANCE, *supra* note 1, at 6.

[90] PHILIP MORRIS USA, Our Products & Ingredients, http://www.altria.com/About-Altria/our-companies/philipmorrisusa/our-products-and-ingredients/Pages/default.aspx (last visited Apr. 26, 2019).

[91] PHILIP MORRIS USA, PM USA Cigarette Tobacco & Flavor Ingredients, http://www.altria.com/About-Altria/our-companies/philipmorrisusa/our-products-and-ingredients/Documents/PM%20USA%20Tobacco%20and%20Flavor%20Ingredients.pdf (last visited Apr. 26, 2019).

Cigars are no different. Many cigars on the market today use ingredients that may on their face sound like a flavor - but in practice are not. The most basic of these is that certain cigars use a paste, which contains vanilla as a functional element. This does not make the product a "vanilla cigar," but the current Guidance does not tell manufacturers where FDA will draw the line. Similarly, many cigars contain licorice as a moisture preservative, yet this would not be a "flavored" cigar. The Draft Guidance offers manufacturers no objective criteria to know which of their products would be affected by FDA's policy – this is the very definition of arbitrary and capricious action.[92]

b. The Draft Guidance is Arbitrary and Capricious for Failing to Consider an Important Aspect of a Previously Identified Problem

As discussed above, in Section V.c., FDA originally extended the compliance deadline for companies to submit premarket review applications so that it could issue "foundational rules and guidance documents."[93] Nearly a year after the change to the compliance policy was announced, former Commissioner Gottlieb and Center for Tobacco Products Director Mitch Zeller stated that "[w]e all need to be on the same page regarding the basic 'rules of the road,'" in relation to

[92] In addition to FDA's actions being arbitrary and capricious for not defining the universe of products that are effected by the Draft Guidance, FDA's actions also run afoul of the Constitution. To make matters worse FDA has indicated "FDA's decision to exercise its enforcement authorities with respect to particular products will be determined on a case-by-case basis." One of the most "basic principles of due process [is] that an enactment is void for vagueness if its prohibitions are not clearly defined." The Draft Guidance is a vague rule as it "denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Draft Guidance is not "sufficiently specific" to give cigar manufacturers "adequate notice of the conduct [it] require[s] or permit[s]" and is therefore void for vagueness under the U.S. Constitution. *Freenab United Coal Min. Co. v. Federal Mine Safety and Health Review Commission*, 108 F.3d 358, 362 (D.C. Cir. 1997).

[93] Scott Gottlieb, M.D., Comm'r, U.S. Food & Drug Admin., *Remarks on Protecting American Families: Comprehensive Approach to Nicotine and Tobacco* (July 28, 2017) (available at https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm).

premarket review.[94] Further, the so-called "sunset policy" was extended because "[t]he current policy could have forced existing products off the market."[95]

Neither of these problems has been resolved – foundational rules still do not exist, and reverting to a previous "sunset policy" will force existing products off the market. FDA has not yet published additional rules or guidance relating to PMTAs, Modified Risk Tobacco Product Applications or Exemption from Substantial Equivalence. The only thing FDA has issued is a Proposed Rule on the Content and Format of Substantial Equivalence Reports; however, this Proposed Rule was published *after* the Draft Guidance was issued.[96] It should also be noted that this Proposed Rule on SE Reports outlines little of what will be required for an SE Report for cigars. It is arbitrary and capricious for FDA to "fail[] to consider an important aspect" of the situation.[97] FDA does not even acknowledge the original reasons for the extension of the pre-market review compliance policies in the Draft Guidance, let alone explain how manufacturers can reasonably file an SE Report and receive a marketing order prior to FDA arbitrarily revoking the compliance policy.

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[94] Scott Gottlieb, M.D., Comm'r, U.S. Food & Drug Admin. & Mitch Zeller, J.D. Director, Center for Tobacco Products, Advancing Tobacco Regulation to Protect Children and Families: Updates and New Initiatives from the FDA on the Anniversary of the Tobacco Control Act and FDA's Comprehensive Plan for Nicotine (Aug. 2, 2018) (available at https://www.fda.gov/news-events/fda-voices-perspectives-fda-experts/advancing-tobacco-regulation-protect-children-and-families-updates-and-new-initiatives-fda.)

[95] Scott Gottlieb, M.D., Comm'r, U.S. Food & Drug Admin., *Remarks on Protecting American Families: Comprehensive Approach to Nicotine and Tobacco* (July 28, 2017) (available at https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm.)

[96] *See* Content and Format of Substantial Equivalence Reports, 84 Fed. Reg. 12,740 (proposed Apr. 2, 2019) (to be codified at 21 C.F.R. §§16, 1107).

[97] *See Motor Vehicles Mfrs. Ass'n. v. State Farm Ins.*, 463 U.S. 29 (1983).

c. The Draft Guidance is Arbitrary and Capricious For Not Considering Any Less Restrictive Alternatives

Agencies must consider "significant and viable and obvious alternatives" to their proposed regulatory action.[98] The Draft Guidance does not propose, nor discuss, the many alternatives that could be offered as opposed to simply eliminating a compliance period for new "flavored" cigars.

First, the Final Rule itself contemplated that these products would have eighteen months from the effective date of the Final Rule to file SE Reports, and then at least an additional year to stay on the market pending FDA review.[99] *Second*, FDA then extended this compliance policy so that cigars had 60 months from the effective date of the Final Rule to file SE Reports and could then stay on the market indefinitely pending review. FDA has now rescinded both of these policies *in their entirety*.[100]

This is starkly different from FDA's proposed course in relation to flavored e-cigarettes. For flavored e-cigarettes, the products where FDA has actually identified an increase in youth usage, FDA has only decreased the time for the filing of PMTAs by 12 months (thereby giving these products 60 months since the effective date of the Final Rule to file as opposed to 72 months), and has sought to restrict sales of these products to certain retail locations. "Flavored" cigars are not offered either of these "obvious" and less restrictive alternatives. E-cigarettes, products

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[98] *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (citing *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013)); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[99] Final Rule, *supra* note 4, at 29,011.

[100] *See supra* Section V.c. FDA has never had a policy that products already on the market at the time they were regulated could not stay on the market pending pre-market review. This is contrary to the intent of Congress and unjustified action by FDA.

which must submit an application showing they "are appropriate for the protection of the public health" are allowed to remain on the market while "flavored" cigars that only have to file a report demonstrating they are "substantially equivalent" to another cigar are at risk of being immediately ordered off the market. In this instance FDA offers "no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion."[101] FDA's entire justification for imposing a de facto ban on flavored cigars is that the lesser restrictions imposed on e-cigarettes *will be* effective in deterring youth use – so effective that youth will migrate from e-cigarettes to flavored cigars. FDA has not explained why similar restrictions on flavored cigars would not be equally effective. This action by FDA, in not having considered or explained why any less restrictive alternative other than that proposed in the Draft Guidance could be used, is arbitrary and capricious and cannot stand.[102]

d. The Draft Guidance Relies on Data that is Not Publicly Available

FDA is a science based agency and is supposed to regulate via good regulatory practices and sound science. The Draft Guidance does not follow either of these principles. Specifically, FDA has not laid out an appropriate scientific basis for its actions. FDA is relying on scientific data not available to the public. In addition, rather than use data from the publicly available Waves 1-3 of the PATH study, FDA instead has chosen to *rely only on* Wave 4 PATH data,

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[101] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, (1983) (citing *New York v. United States,* 342 U.S. 882, 884 (1951) (dissenting opinion)).

[102] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, (1983); ("We are not prepared to and the Administrative Procedure Act will not permit us to accept such ... practice.... Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'") *Id.*

which is not yet publicly available and not scheduled for released until at least May 2019.[103] It then releases a "summary" of the Wave 4 data, citing "internal analysis." It is inappropriate for FDA to rest a sweeping product restriction on internal analysis of data not available to the public.

Even worse, there is publicly available data for FDA to rely upon that shows *decreasing* youth usage of cigars. (*See* above, Section III). Further, the question that FDA relies upon asked "ever" users (meaning anyone who has taken one puff of a cigar) whether their first cigar was "flavored." The majority of youth who had ever smoked a cigar did not first use a "flavored" cigar. Using FDA's Wave 4 summary of internal analysis, it appears that 74.1% of youth ever traditional cigar users did not first use a "flavored" product; 66.5% of youth filtered ever cigar users did not first use a "flavored" product; and 43.2% of youth ever cigarillo users did not first use a "flavored" product.[104] FDA claims this evidence demonstrates that "flavors increase youth appeal of these products."[105] No such conclusion can be drawn from this evidence; although FDA should ultimately proceed, if at all, only through a proper notice and comment rulemaking, it should also, if the Draft Guidance is not withdrawn, release the underlying data and extend the comment period on the Draft Guidance until it is released.[106]

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[103] Office of Science, Center for Tobacco Products, FDA, Memorandum to The Docket: Summary of Internal Analyses from Wave 4 of the Population Assessment of Tobacco and Health (PATH) Study at 4-5.

[104] *Id.*

[105] DRAFT GUIDANCE, *supra* note 1, at 16.

[106] Further, FDA bases the meager defense of its proposed actions on cigars on the alleged actions by one company relating to clove products. For this argument, FDA cites one published article three times. (Draft Guidance at 17). Nowhere in the article, however, does the word "clove" appear, and the article does not support the propositions FDA has made. It is arbitrary and capricious for FDA to attempt to rest a policy that would have huge repercussions in the marketplace upon incorrect scientific data.

e. The Draft Guidance is Arbitrary and Capricious as it is Based on Unsupported Claims Regarding Future Behavior

FDA has issued the Draft Guidance because the "recent surge in youth use of ENDS products has caused us to reevaluate our priorities and modify the compliance policy for certain products."[107] The first 14 pages of the Draft Guidance discuss the increase youth usage of ENDS and related FDA actions. Nowhere in the Draft Guidance does FDA claim that youth usage of cigars has increased; in fact, it has declined.[108] Instead, FDA states that "it is concerned that…minors who use flavored ENDS products **might** migrate to flavored cigars" and that "minors have a tendency to be polytobacco users and, therefore, **may** switch to other flavored tobacco products like flavored cigars if flavored ENDS are not available."[109] FDA once again does not offer any scientific evidence to support these statements.[110] In fact there is scientific evidence that youth who use e-cigarettes are not migrating to other combustible tobacco

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[107] DRAFT GUIDANCE, *supra* note 1, at 4 (emphasis added).

[108] *See* Section III above detailing recent data youth usage of cigars.

[109] DRAFT GUIDANCE, *supra* note 1, at 16.

[110] FDA argues that after a significant change in federal tax rates for roll-your-own tobacco sales of pipe tobacco surged even though usage data for pipe tobacco "remained consistent." FDA concludes that "these data indicate that following the implementation of a tobacco control policy, consumers may modify their behavior to adapt to market changes." Draft Guidance at 18. This conclusion is illogical. Consumers did not change their behavior, marketers did. This change in labeling for "fake" pipe tobacco has been documented by researchers. Daniel S. Morris & Michael A. Tynan, *Fiscal and Policy Implications of Selling Pipe Tobacco for Roll-Your-Own Cigarettes in the United States*, PLoS ONE 7(5):e36847 (2012). ("After this tax disparity developed, RYO manufacturers began to label loose tobacco as pipe tobacco, making these products available to RYO customers at a lower price. . . . Approximately 45 million pounds of pipe tobacco has been sold for RYO use from April 2009 through August 2011, lowering state and federal revenue by over $1.3 billion."); Michael D. Tynan et al., *Continued Implications of taxing roll-your-own tobacco as pipe tobacco in the USA*, 24 Tobacco Control 2, e125-e127 (2015). This rise of "fake" pipe tobacco, however, has done nothing to change actual consumer behavior, for as FDA notes "self-reported pipe tobacco use….remained consistent and RYO consumption increased." DRAFT GUIDANCE at 17-18.

products.[111] FDA's actions are arbitrary and capricious as they are based on a "factual premise that is unsupported by substantial evidence."[112]

f. FDA Has Not Yet Determined the Regulatory Status of Premium Cigars

i. FDA has an Open Rule-Making on the Status of Premium Cigars

In July 2017, as part of FDA's "Comprehensive Plan for Tobacco and Nicotine Regulation" former Commissioner Gottlieb announced that:

> I'm also asking the Tobacco Center leadership to explore a process by which it could ask for new information related to the patterns of use and resulting public health impacts from so-called premium cigars. The final deeming rule covers all cigars. But I want the Center to consider opportunities it could provide to interested parties to develop and submit new information or data on this issue. This will take the form of a new Advance Notice of Proposed Rulemaking, to develop a new administrative record to explore these questions. We will explore any new and different questions raised, and seriously consider any additional data submitted relevant to the appropriate regulatory status of premium cigars.[113]

As a result of that announcement, on March, 26, 2018, FDA promulgated an Advance Notice of Proposed Rulemaking "Regulation of Premium Cigars."[114] Comments to the Premium Cigar ANPRM were due on July 25, 2018. FDA has since listed the Premium Cigar ANPRM under

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[111] *See, e.g.,* HALLINGBERG B., ET AL., *Have e-cigarettes normalized or displaced youth smoking? Results of a segmented regression analysis of repeated cross sectional survey data in England, Scotland and Wales* 0:1-10 (Tobacco Control, 1st ed., Apr. 2019); LEVY DT, ET AL. *Examining the relationship of vaping to smoking initiation among US youth and young adults: a reality check* (Tobacco Control, 1st ed., Nov. 2018).

[112] *Ctr. For Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.D.C. 1992).

[113] Scott Gottlieb, M.D., Comm'r, U.S. Food & Drug Admin., *Remarks on Protecting American Families: Comprehensive Approach to Nicotine and Tobacco* (July 28, 2017) (available at https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm).

[114] Advance Notice of Proposed Rulemaking, Regulation of Premium Cigars, 83 Fed. Reg. 12,901 (proposed Mar. 26, 2018) (to be codified 21 C.F.R. §§ 1100, 1140, 1143) [hereinafter Premium Cigar ANPRM].

"long term actions" on its regulatory agenda, indicating that no action will be taken on this item in this fiscal year.[115]

The Draft Guidance does not distinguish between the categories of "cigars" that it applies to, even though FDA is well aware that there are different categories of cigars, and is evaluating a proposed rule to treat premium cigars differently. As FDA has been admonished previously, it needs to have its "ducks in a row" before issuing policy or changing policy regarding what products it will regulate and how it will regulate them.[116]

As discussed below, CAA submitted extensive comment to the Premium Cigar ANPRM.[117] CAA proposed an objective definition of a premium cigar as "a product that (i) is wrapped in whole leaf tobacco; (ii) contains a 100% leaf tobacco binder; (iii) is made by manually combining the wrapper, filler, and binder; (iv) has no filter, tip, or non-tobacco mouthpiece and is capped by hand; and (v) weights more than 6 pounds per thousand units."[118] As Judge Mehta noted, in relation to a challenge to the health warnings provision of the Final Rule:

> The sheer breadth of the ANPRM begs the obvious question: Might the FDA in the near future do away with the health warning requirements for premium cigars? And yet another: Why is the agency insisting that the premium cigar industry expend millions of dollars to conform to regulatory mandates that might be rescinded only months after their effective date? The FDA provides no satisfactory response to either

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[115] OFFICE OF INFO. AND REG. AFFAIRS, Agency Rule List – Fall 2018: Dept. of Health & Human Servs., https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201810&showStage=longterm&agencyCd=0900&Image58.x=36&Image58.y=21 (last visited Apr. 26, 2019).

[116] *See* Transcript of Summary Judgment Motion Hearing at 38:19-20, *Cigar Assoc. of Am., Inc., et al. v. United States Food and Drug Admin.,* 323 F.R.D. 54 (2017) (1:16-CV1460(APM)). Attached as Exhibit 6.

[117] CAA, Comments on Proposed Rule: Regulation of Premium Cigars (July 25, 2018) Attached as Exhibit 7.

[118] *Id.* at 11.

> question. Whatever the answers, one thing is certain: Requiring the premium cigar industry to incur substantial compliance costs while the agency comprehensively reassesses the wisdom of regulation, *before* the warnings requirements go into effect, smacks of basic unfairness.[119]

It is arbitrary and capricious and impermissible for FDA to try to use enforcement discretion to remove products from the market prior to determining the regulatory status of the products.

ii. Youth Do Not Use Premium Cigars

FDA has sought to justify the unjustified ban on "flavored" cigars proposed in the Draft Guidance by suggesting that if youth no longer have access to flavored e-cigarettes that they "**might** be willing to move to other flavored tobacco products if their preferred product is no longer available."[120] As discussed below, FDA has not offered any evidence that youth using flavored e-cigarettes would potentially then use "flavored" cigars, and FDA has certainly not shown that youth use premium cigars, let alone would move to premium cigars that might be considered "flavored."

In its comments on the Premium Cigar ANPRM, CAA provided three detailed expert reports to FDA on the usage patterns of premium cigars, and on the purchase patterns of online purchasers of premium cigars. First, the average age of online purchasers of premium cigars was 55, the average age for purchasers of "flavored" premium cigars was 52.[121] Second, and most importantly, there is no measurable youth usage of premium cigars, or of "flavored" premium cigars. NERA Economic Consulting undertook and in depth analysis of Waves 1-3 of the PATH

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[119] *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 315 F. Supp. 3d 143, 175 (D.D.C. 2018)

[120] DRAFT GUIDANCE, *supra* note 1, at 17.

[121] Exhibit 7, Exhibit B at 9.

data and demonstrated that youth are not using premium cigars.[122] Further, NERA reported that "there were too few observations to produce reliable estimates" for youth usage of "flavored" premium cigars.[123] Table Two illustrates that over the three waves of the PATH study youth usage of premium cigars was nearly non-existent, and continued to decrease.

Table 2. Prevalence of Premium Cigar Usage Among Youth Aged 12-17, Waves 1-3 of the PATH Study[124]

PATH Wave	Overall Premium Cigars	Overall Unflavored Premium Cigars
Wave 1 (13,651 youth respondents)		
Overall Youth Prevalence		
Percentage	0.08%	0.08%
Confidence Interval	(0.02-0.14%)	(0.02-0.14%)
Number of Users	8	8
Wave 2 (12,172 youth respondents)		
Overall Youth Prevalence		
Percentage	0.04%	0.04%
Confidence Interval	(0.00-0.08%)	(0.00-0.08%)
Number of Users	4	4
Wave 3 (11,814 youth respondents)		
Overall Youth Prevalence		
Percentage	0.02%	0.02%
Confidence Interval	(0.00-0.05%)	(0.00-0.05%)
Number of Users	1	1

There is no basis for FDA to change the compliance policy for any "flavored" cigar, and in particular for any premium "flavored" cigar, as there can be no basis for the statement that youth

[122] NERA only analyzed Waves 1-3 of the PATH study as these were, and still currently are, the only three data sets publicly available to researchers; Exhibit 8, Exhibit A at Table 1.

[123] Exhibit 7, Exhibit A at ¶21.

[124] Adapted from Exhibit 7, Exhibit A at Table 1.

"might" switch from a flavored e-cigarette to a "flavored" premium cigar. Any "case-by-case" enforcement should take into account this fact.[125]

VII. Conclusion

For the reasons set forth above, CAA does not believe FDA can or should finalize the policies in the Draft Guidance relating to "flavored cigars." Indeed, that section of the Draft Guidance should be withdrawn.

Respectfully submitted,

Craig Williamson
President
Cigar Association of America, Inc.

[125] Recent testimony at a Congressional Field Hearing offered even further support that premium cigars are a unique product, and based on usage patterns should be exempt from regulation. Dr. Brad Rodu, a professor of tobacco harm reduction at the School of Medicine at the University of Louisville testified on April 5, 2019 at the Congressional Field Hearing "Keeping Small Premium Cigar Businesses Rolling." In his testimony he stated "[t]he following facts are indisputable with respect to cigars: (1) the prevalence of cigar use in the U.S. is extremely small, especially for premium cigars; (2) these products, especially premium category, are used infrequently and in small numbers; (3) they are puffed, rather than inhaled." Prof. Rodu's testimony is attached as Exhibit 8.

SWISHER INTERNATIONAL, INC.

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April 30, 2019

Dr. Norman Sharpless
Acting Commissioner
Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

cc: Acting Director Russell T. Vought
Office of Management and Budget

cc: Acting Administrator Paul Ray
Office of Information and Regulatory Affairs

Re: Modifications to Compliance Policy for Certain Deemed Tobacco Products (FDA-2019-D-0661)

Dear Acting Commissioner Sharpless:

Swisher International, Inc. ("Swisher") is an international cigar company based out of Jacksonville, Florida. Founded in 1861, Swisher is a leader in the tobacco business, accounting for over one quarter of the nation's cigar sales. Swisher has long produced quality cigars in a wide variety of shapes and sizes, including cigars with characterizing flavors. Swisher submits these comments in response to the purported "draft guidance" document issued by FDA's Center for Tobacco Products on March 13, 2019. FDA, *Modifications to Compliance Policy for Certain Deemed Tobacco Products* (March 2019).

I. Introduction

The purported "draft guidance" is, in reality, a substantive rule that imposes severe and unprecedented restrictions on the sale of "flavored" cigars, and charts a drastic course reversal from the compliance regime contemplated by the deeming rule, as well as that prescribed by Congress for originally regulated "new tobacco products" that were already in the market following passage of the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act" or "TCA").[1] When FDA promulgated the deeming rule, FDA simultaneously established a compliance period that was intended to give manufacturers of deemed "new tobacco products" a genuine opportunity to comply with the premarket filing requirements of the Tobacco Control Act before FDA initiated enforcement actions, as was the case with originally regulated products. FDA subsequently extended its compliance policy beyond August 2021 to give the agency time to issue regulations telling newly regulated parties what they must include in premarket filings, and otherwise modified the policy in a way that better aligned it with the reality of the review process and the statutory treatment of originally regulated products.

Even though those regulations have yet to issue, FDA now proposes to revoke the compliance policy for flavored cigars, fundamentally altering the regulatory scheme and forcing manufacturers to take their flavored cigars off the market before they have a real

[1] The purported "draft guidance" inexplicably fails to define the term "flavored." Swisher assumes for purposes of this letter that the term "flavored cigars" refers to cigars with an identifiable characterizing flavor that are branded and/or marketed accordingly (e.g., a cigar manufactured with a cherry or vanilla flavor and marketed as such) as opposed to cigars containing flavor additives that serve a functional purpose or otherwise do not result in an identifiable characterizing flavor.

opportunity to submit premarket filings, or else risk FDA sanctions. This combination of regulatory moves amounts to an effective—and, as FDA has repeatedly stated, intended—ban on flavored cigars.

As explained in the comments submitted by the Cigar Association of America, FDA's proposed action is arbitrary and capricious and contrary to law for several independent reasons. Swisher writes to emphasize that FDA cannot promulgate such a consequential change in the lawfulness of flavored cigars unless, at the very least, it accounts for the significant reliance interests at stake, engages in notice-and-comment rulemaking, and complies with the OMB and Congressional Review Act requirements for "major rules." If FDA follows through with its proposal, moreover, it will call into question the validity of the deeming rule itself. FDA should withdraw the portion of the purported "draft guidance" relating to flavored cigars.

II. FDA's Effective Ban Will Nullify Significant Reliance Interests

All of Swisher's flavored cigar products are covered by FDA's compliance policy because they were introduced to the market prior to the August 8, 2016 effective date of the deeming rule—indeed, some of Swisher's products have been on the market since before the enactment of the Tobacco Control Act. Relying on FDA's compliance policy and anticipating future sales of flavored cigars, Swisher has made substantial investments in its flavored cigar products. For example, Swisher already has purchased over 10 million dollars' worth of flavoring components and other materials and has invested nearly $5 million in machinery and equipment that can be used for no purpose other than to

manufacture flavored cigars. Other manufacturers of flavored cigars no doubt have made similar irrevocable investments in reliance on FDA's compliance policy.

FDA's proposal would eviscerate those investments (and others) by suddenly forcing flavored cigars off the market. Revoking the compliance policy would require Swisher to obtain FDA approval of substantial equivalence reports ("SE Reports") for its numerous flavored cigar products in a matter of months—and *years* earlier than Swisher expected. That is an impossible task. FDA estimates that each SE Report will take nearly two months to prepare and almost nine months for FDA to review. *See* 84 Fed. Reg. 12,740, 12,767, 12,772 (Apr. 2, 2019) (SE Report takes 300 hours to prepare and 270 days to review). And that is hopelessly optimistic: It took FDA *seven years* to issue orders approving Swisher's SE Reports for some of its smokeless tobacco products, and some of Swisher's smokeless filings—submitted in March of 2011—remain under review even today.

But timing is not the only problem. An even more fundamental impediment to compliance is that FDA has not yet told flavored cigar manufacturers what information must be included in their SE Reports. Only recently did FDA issue a *proposed* rule "establish[ing] the information an SE Report *must* include." 84 Fed. Reg. at 12,740 (emphasis added) ("Proposed SE Rule"). And flavored cigar manufacturers cannot even base their SE Reports on the Proposed SE Rule because it does not provide answers to basic questions about the content and scope of SE Reports for flavored cigars.

First, the Proposed SE Rule does not answer the threshold question of how flavored cigar manufacturers should choose which kind of SE Report to prepare and file for a

particular product. The Tobacco Control Act allows a manufacturer to demonstrate that its new tobacco product is substantially equivalent to a predicate product by showing either (1) that the new product has the "same characteristics" as the predicate product, or (2) that the new product has "different characteristics" but "does not raise different questions of public health." 21 U.S.C. § 387j(a)(3)(A)(i)-(ii). That distinction matters because the "different characteristics" path requires a much more rigorous SE Report that includes (among other information) "clinical data if deemed necessary" by FDA. *Id.* § 387j(a)(3)(A)(ii).

As FDA well knows, a federal court recently explained that "the 'same characteristics' prong may encompass similar, but not necessarily identical, products, while the 'different characteristics' prong may cover significantly different products." *Philip Morris USA Inc. v. FDA*, 202 F. Supp. 3d 31, 54 (D.D.C. 2016). Yet FDA's Proposed SE Rule "does not include a proposed interpretation of 'same characteristics' and 'different characteristics.'" 84 Fed. Reg. at 12,744. The agency instead offers just a few examples (which are "illustrative only") and asks for comments both on how to "distinguish the scope of the same characteristics prong from the different characteristics prong" and on "what information would need to be included under either or both prongs." *Id.* at 12,475.

Second, the Proposed SE Rule repeatedly demands categories of information that FDA has yet to define for cigar products. For instance, the proposed rule would require an SE Report to include detailed information comparing the harmful or potentially harmful constituents (HPHCs) in both the new and predicate cigar products. 84 Fed. Reg. at 12,763.

As FDA explained, "HPHC information . . . is *necessary* for FDA to determine whether the new tobacco product raises different questions of public health." *Id.* at 12,748 (emphasis added). But FDA has not yet published a list of HPHCs for cigars, which the agency is required to do by statute, 21 U.S.C. § 387d(e), and which it already has done for cigarettes, smokeless tobacco, and roll-your-own tobacco products. Indeed, FDA has recently extended the deadline for filings under the standalone HPHC reporting requirement, previously due in November of this year, until six-to-nine months following the publication of a Final Guidance specifying the HPHC testing requirements for newly regulated products, including cigars.

Third, and most basic of all, FDA has not even provided the required form for filing an SE Report. The Proposed SE Rule "would require the applicant to submit the SE Report with the appropriate FDA form." 84 Fed. Reg. at 12,749. FDA references the required form—Draft Form 3965—throughout the proposed rule, but the agency has yet to make it available to the public.

In short, FDA has provided Swisher neither adequate guidance nor sufficient time to prepare SE Reports that stand any chance of being approved before FDA revokes its compliance policy and bans Swisher's products from the market. It is arbitrary and capricious for FDA to induce investments by Swisher and others only to later pull the rug out from under them, particularly in the absence of a substantial change in circumstances and a persuasive showing that the benefits of the effective ban outweigh the manufacturers' reliance costs. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency

must "provide a more detailed justification" for its action when "its prior policy has engendered serious reliance interests").

III. FDA Must Use Notice and Comment Rulemaking

Both the Administrative Procedure Act (APA) and the Tobacco Control Act require FDA to issue its effective ban on flavored cigars using notice-and-comment rulemaking.

First, FDA's proposal is a substantive rule subject to the notice and comment procedures of the APA because, if finalized, it will "impose obligations" on regulated parties. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). Although FDA's proposed "guidance" purports to be "not binding," it is intended to—and will—remove flavored cigars from the market. FDA's proposal will accelerate by years the deadlines for SE Reports and will commit FDA to prioritizing enforcement against manufacturers who, as discussed, will inevitably fail to meet the new deadlines. Manufacturers facing imminent FDA sanctions will have no choice but to cease marketing flavored cigars. FDA cannot "produce [these] significant effects on private interests" absent notice-and-comment rulemaking. *American Hospital*, 834 F.2d at 1045.

Second, FDA's proposed ban circumvents the Tobacco Control Act's rulemaking requirements, further demonstrating that FDA is engaged in substantive rulemaking. If FDA has authority to pluck flavored cigars from among the newly deemed tobacco products and prohibit them outright, the agency may do so only by "promulgat[ing] a regulation establishing a tobacco product standard" after "a comment period of not less than 60 days." 21 U.S.C. § 387g(c), (d). Before establishing such a standard, the agency would have to grapple with, among other things, scientific evidence concerning "the

increased or decreased likelihood that existing users of tobacco products will stop using such products" as a result of a ban on flavored cigars. *Id.* § 387g(a)(3)(B)(i)(II).

FDA has not done that legwork, and it cannot use its "enforcement discretion" to postpone the application of the deeming rule for every other type of newly deemed tobacco product and then circumvent these statutory requirements (or try to avoid the scientific evidence, or lack thereof) by issuing "nonbinding" guidance that selectively targets flavored cigars. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 654 (4th Cir. 2018) (prohibiting the use of a "back-door mechanism" to "circumvent Congress's intended notice-and-comment process").

IV. FDA's Purported Draft Guidance Is Subject to OMB Review and the Congressional Review Act

FDA's proposal also is a "major rule" subject to the requirements of the Congressional Review Act. 5 U.S.C. § 804(2). By threatening imminent sanctions that will make it prohibitively costly for the cigar industry to continue offering flavored cigars, FDA's effective ban will result in a "major increase in costs" for an "individual industr[y]" and will have "significant adverse effects" on "employment, investment, productivity, [and] innovation." *Id.* § 804(2)(B), (C). Simply put, when an agency extinguishes product lines that for decades have been integral to the business models of American companies employing thousands of workers, that action is doubtless a "major rule" subject to the Congressional Review Act's requirements.

Those requirements prohibit FDA from unilaterally finalizing its effective ban and implementing it within 30 days. Instead, the Congressional Review Act requires FDA first

to give the Office of Information and Regulatory Affairs (OIRA) an opportunity to determine whether the proposal is a major rule. 5 U.S.C. § 804(2). Once OIRA makes a major rule determination, FDA must submit its rule to Congress along with OIRA's major rule determination and a proposed effective date. *Id.* § 801(a)(1)(A). FDA's rule may not take effect until 60 days after FDA submits the report to Congress or publishes the rule in the Federal Register, whichever is later. *Id.* § 801(a)(3).

OMB recently reiterated the "broad applicability" of these procedures to "all Federal agencies and a wide range of rules," including "notice-and-comment rules . . . guidance documents, general statements of policy, and interpretive rules." OMB, *Guidance on Compliance with the Congressional Review Act* 2-3 (April 11, 2019). FDA must follow those procedures here. Indeed, it would make a mockery of OMB's important April 11 Memorandum if, just weeks later, an agency could wreak the industry-wide changes FDA attempts here with a supposed "guidance" document.

V. Revoking FDA's Compliance Policy Would Call the Deeming Rule Into Question

If FDA may issue a "guidance" document that forces flavored cigars off the market before companies can obtain premarket approval, then the deeming rule is arbitrary and capricious because it "entirely failed to consider [this] important aspect of the problem." *Am. Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

A central component of the deeming rule was that manufacturers of newly deemed products would have a genuine opportunity to submit premarket review applications for good faith review and potential approval before FDA initiated enforcement. *See* 81 Fed.

Reg. 28,974, 29,025 (May 10, 2016) ("FDA is providing a compliance policy that will provide additional time for manufacturers of newly deemed products to comply with certain requirements, and which will reduce the burdens on manufacturers as they become regulated by FDA for the first time"); *id.* at 29,026 ("To assist newly regulated firms, FDA is announcing in this final rule a compliance policy to address some of the possible burdens suggested by comments . . . .").

FDA subsequently recognized that manufacturers lacked sufficient guidance to submit high-quality premarket applications, so the agency extended its compliance policy to allow it to issue "foundational rules" outlining "what information the agency expects to be included in Premarket Tobacco Applications (PMTAs) . . . and reports to demonstrate Substantial Equivalence (SE)." FDA News Release, *FDA announces comprehensive regulatory plan* (July 28, 2017). As discussed, those rules still have not been finalized and, indeed, the rulemaking process has only just begun.

FDA's proposal would upend the regulatory scheme that FDA articulated in the deeming rule. When it adopted the deeming rule, FDA recognized that the decision to extend its regulatory authority to previously unregulated products was integrally related to the question of how those products would come into compliance. FDA established its compliance policy to address that problem. Nowhere in the rule did FDA consider the possibility that the agency could force entire categories of products off the market *before* manufacturers were given a realistic opportunity to prepare, file, and obtain FDA approval of premarket applications. Yet it now appears that FDA believes the deeming rule provides the agency that very authority. If that is so, the ramifications of an *immediate* ban on newly

deemed products was "an important aspect of the problem" that FDA was required to consider under bedrock principles of administrative law. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead of addressing that issue in the deeming rule, FDA deflected manufacturers' concerns by relying on the very compliance policy it now plans to revoke. FDA's revocation of that policy thus would render the deeming rule arbitrary and capricious.

VI. Conclusion

For the foregoing reasons, FDA should withdraw the portion of the purported "draft guidance" relating to flavored cigars.

Respectfully submitted,

/s/ Christopher L. Casey
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Swisher International, Inc.

/s/ Eugene Scalia and Helgi C. Walker
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May 29, 2019

VIA HAND DELIVERY

The Honorable Paul W. Grimm
United States District Court for the District of Maryland
6500 Cherrywood Lane, Suite 465A
Greenbelt, MD 20770

Re: *American Academy of Pediatrics v. FDA*, No. 18-cv-883-PWG

Dear Judge Grimm:

Pursuant to the Court's Standing Order in the above-titled case, ECF No. 15, JUUL Labs, Inc. ("JLI") respectfully notifies the Court of its intent to file a motion to intervene under Federal Rule of Civil Procedure 24 as (1) it has "an interest in the subject matter of the action"; (2) the "protection of [which] would be impaired because of the action"; and (3) it "is not adequately represented by existing parties to the litigation." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013). JLI will move alternatively for permissive intervention under Rule 24(b).

JLI plans to file its motion to intervene and proposed remedy brief on or before the date that Defendants' remedy brief is due, currently June 12. JLI's intervention therefore will not disrupt the Court's briefing schedule or prejudice any of the existing parties.

As JLI will set forth in its motion to intervene and supporting memorandum, intervention is necessary to protect its interests and the interests of adult former smokers who have switched from combustible cigarettes to JUUL products, a closed-system vapor platform that provides an alternative, non-combustible nicotine delivery. JLI was founded in 2015 by two former cigarette smokers with the mission of "improving the lives of the world's one billion adult smokers by eliminating cigarettes." *See Our Mission*, https://www.juul.com/mission-values. The National Academy of Sciences has stated that "[c]ompletely substituting e-cigarettes for combustible tobacco cigarettes conclusively reduces a person's exposure to many toxicants and carcinogens" and "pose[s] less risk" to individual health.[1] Public Health England has

[1] NAS, Consensus Study Report Highlights, Public Health Consequences of E-Cigarettes (2018), https://www.nap.edu/resource/24952/012318ecigaretteHighlights.pdf.

concluded that e-cigarettes are approximately 95% less harmful than combustible cigarettes.[2] And the data indicate that JUUL products are successful in moving adult smokers down the continuum of risk associated with tobacco use: For example, from 2011 to 2016, based on syndicated market data, the historical rate of decline in cigarette sales was just over 2.7%. As JUUL products began to gain traction in 2018, that rate increased to 5.3%; in a recent four-week period, the rate exceeded 10%.[3]

JLI recognizes that its products' potential is endangered by underage and illegal youth usage, and is actively addressing this challenge through, among other things, advocating an increase in the legal age to purchase tobacco and vapor products to 21 nationwide, and initiating an industry leading Youth Action Plan in November 2018.[4]

In 2016, the FDA published the Deeming Rule, subjecting e-cigarettes to federal regulation for the first time. Deeming Rule, 81 Fed. Reg. 28,974 (May 10, 2016). A central consideration in the FDA's adoption of the Deeming Rule was a compliance policy that permitted companies to continue to market their products while preparing premarket review applications. *Id.* at 28,978/1. This was important, the FDA recognized, because forcing e-cigarettes off the market immediately would eliminate an important alternative for adults seeking to switch from smoking combustible cigarettes. *Id.* at 29,011/2 (noting the "evidence suggest[ing] that ENDS may potentially promote transition away from combusted tobacco").

Before regulated entities can complete meaningful premarket applications, however, the FDA must delineate what those applications are to include. This is necessary because a premarket review application is typically a lengthy and detailed substantive submission accompanied by scientific research regarding topics, and in accordance with parameters, that the FDA identifies in advance. The FDA recognized this at the time it published the Deeming Rule, issuing "draft guidance" that "*when final*," it said, "will describe FDA's current thinking" on what to include in the application. *Id.* at 28,997/1 (emphasis added). The FDA extended its compliance policy in part to give itself time "to finalize guidance on how it intends to review [premarket applications]." FDA Press Release, July 28, 2017.[5] However, the FDA still has not finalized the guidance for those applications. Accordingly,

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[2] *See* Brose, McNeill, *et al.*, E-cigarettes: an evidence update, A report commissioned by Public Health England, August 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733022/Ecigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf.

[3] Market analyses provided herein were developed from syndicated market data provided by The Nielsen Company's "Answers on Demand Services for the Total Store/Tobacco Category."

[4] *See* https://newsroom.juul.com/2018/11/13/juul-labs-action-plan/.

[5] Available at https://www.fda.gov/news-events/press-announcements/fda-announces-comprehensive-regulatory-plan-shift-trajectory-tobacco-related-disease-death (noting "plans to issue foundational rules to make the product review process more efficient, predictable, and transparent for manufacturers," including "what information the agency expects to be included in Premarket Tobacco Applications (PMTAs)").

although JLI has made substantial investments and expended tens of millions of dollars to prepare its premarket review applications, final FDA guidance is critically important to completing and submitting an application that meets the FDA's interpretation of the statutory standard.

Any remedial order that affects this careful balancing of interests could directly affect JLI's products and undercut its central mission. (JUUL was referred to by name in the Court's May 15 decision.) JLI has a strong interest in ensuring that the remedy ordered by the Court does not force JLI's products from the market before the company has a fair opportunity to submit a premarket review application—indeed, before FDA has even finalized its guidance informing regulated entities what the applications are to include. The remedy the Court orders may also affect former cigarette smokers who have switched from combustible products to JLI products, directly undercutting JLI's core mission.

Because the remedy the Court decides to impose could present a significant threat to JLI's entire business, JLI has a vital interest in addressing the issues currently being briefed. *See Feller v. Brock,* 802 F.2d 722, 730 (4th Cir. 1986). That interest is not adequately represented by any of the current parties to the litigation, none of whom shares JLI's interests in being able to continue to offer its products, nor its interest in a remedial order that provides JLI the time and information necessary to prepare premarket review applications following the FDA's decision of what should be in those applications.

We appreciate your attention to these matters and are prepared to address them further at the Court's convenience.

Respectfully submitted,

Eugene Scalia/AG

Eugene Scalia
District of Maryland Bar No. 12182

cc: Counsel of Record (by electronic mail only)

[Whereupon, at 11:53 a.m., the hearing was adjourned.]

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