NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

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September 18, 2019

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

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

Re: Opposition to the Nomination of Eugene Scalia

Dear Senators Alexander and 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

[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).

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]

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

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[6] *Equal Emp. Opportunity Comm'n v. Catastrophe Mgm't Solutions*, 852 F.3d 1018 (11th Cir. 2016).

[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 Díaz, *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://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf.

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 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

[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.

[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).

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]

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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 Center 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

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[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/2014/02/20/16509b42-999c-11e3-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).