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September 18, 2019

The Honorable Lamar Alexander, Chairman, and The Honorable Patty Murray, Ranking Member
U.S. Senate Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

Re: Nomination of Eugene Scalia for U.S. Secretary of Labor

Dear Senators Alexander and 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 communities, 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 law-breaking 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

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 towards 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

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.

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>.

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 wellbeing 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.

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

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.*


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 1990s,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

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-nlr-complaint-against-boeing-represent-classic-case-labor?redirect_source=/research/2011/05/14/experts-say-allegations-in-nlr-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.