

Congress of the United States
Washington, DC 20510

February 5, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA21, Tip Regulations under the Fair Labor Standards Act (FLSA)

Dear Secretary Acosta:

Thank you for the opportunity to submit comments in response to the Department of Labor's (DOL) December 5, 2017 Notice of Proposed Rulemaking Regarding Tip Regulations under the Fair Labor Standards Act (FLSA).

DOL has proposed to rescind provisions of its current regulations that clarify tips are the property of employees, regardless of whether the employer takes a tip credit or pays the employee the full federal minimum wage. The Notice invites comments on this proposed rescission.

The proposed rule is contrary to Congressional intent, reverses the Secretary of Labor's decades-long view of tips as being the property of employees, ignores Supreme Court interpretations, renders provisions of the FLSA meaningless, and lacks a quantitative analysis to demonstrate its benefits justify its costs. For these reasons, we urge DOL to withdraw this proposed rule and its national non-enforcement policy for the regulations relating to the retention of tips received by employees who are paid at least the federal minimum wage.

DOL's Proposed Rule Is Contrary to Congressional Intent

The legislative history of the FLSA demonstrates that Congress has consistently intended tips to be treated as the property of the employee who earns them. Amendments to the FLSA regarding the treatment of tips have generally been limited to providing workers with greater protections in the very limited circumstances in which employers may make use of an employee's tips.¹ DOL

¹ See, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (current version at 29 U.S.C. §§ 201-219 (2017)); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) (current version at 29 U.S.C. §§ 201-219 (2017)).

has similarly recognized that tips are the employee's property in regulations and sub-regulatory guidance.²

As first passed in 1938, the FLSA did not reference “tips” or “tipped workers,” and “retail and service establishments,” in which there are a high number of tipped workers, were not covered under the statute.³ In 1942, the U.S. Supreme Court held in *Williams v. Jacksonville Terminal Co.* that an employer could count an employee's tips as a credit against the employer's full obligation to pay the minimum wage.⁴ This is referred to as a “tip credit.” The Court noted that under the statute as it existed in 1938, employers were free to “work out” how their employees received the required minimum wage.⁵ Nonetheless, the Court stated that, “[i]n businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient.”⁶ The Court further held that explicit arrangements in which employers and employees agreed that tips will be turned over to the employer are valid unless there is “statutory interference.”⁷

The 1966 FLSA Amendments Established Tips are Employees' Property and Allowed for Arrangements in Which Employers and Employees Agreed to Turn Tips Over to the Employer

In 1966, Congress amended the FLSA to expand its coverage to hotels and restaurants and included tip credit provisions for the first time.⁸ In these 1966 amendments, Congress overturned parts of the Supreme Court's ruling in *Jacksonville Terminal* by limiting the employer's use of the tip credit to 50 percent of the minimum wage.⁹ By limiting the use of the tip credit, Congress implicitly stated that tips are the property of employees. If tips were the property of the employer, then it would be nonsensical to require at least 50 percent of the minimum wage to be paid by the employer in cash because there would be no difference between the employer's cash reserves and tips paid by customers—both would be the employer's property. Instead, through these amendments, Congress sought to better protect workers when an employer takes a tip credit.

The legislative history also demonstrates that it was Congress's intent to let stand arrangements in which “an employer and his tipped employees [agreed] that all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts.”¹⁰ Congress's reference to an “agreement” between the employer and the employee similarly demonstrates that

²See, 32 Fed. Reg. 13580 (1967); 29 C.F.R. §§ 531.50 - 531.60 (2017); WH Admin. Op., 1974 WL 422051 (June 21, 1974); WH Admin. Op., 1975 WL 40945 (Apr. 30, 1975).

³Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-219 (2017)).

⁴*Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942).

⁵*Id.* at 408.

⁶*Id.* at 397.

⁷*Id.*

⁸Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (current version at 29 U.S.C. §§ 201-219 (2017)).

⁹*Id.* at §101(a).

¹⁰S. Rep. No. 89-1487, at 12 (1966).

tips are the employee's property. If tips were the property of employers, no permission from or agreement with employees would be required for employers to add tips to their gross receipts.

In line with Congressional intent, DOL issued regulations in 1967, the first regulations issued after the 1966 amendments to the FLSA, explicitly stating that tips are the property of employees:

[G]enerally [the customer] has the right to determine who shall be the recipient of his gratuity. In the absence of an agreement to the contrary between the recipient and a third party, *a tip becomes the property of the person in recognition of whose service it is presented by the customer.* . . . [An employee] may use [tips] as he chooses free of any control by the employer.¹¹

The regulations also make reference to “employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts.”¹² While the 1967 regulations allowed for such agreements—notwithstanding its declaration that tips are the property of the employee receiving them—Congress eliminated such agreements with the 1974 amendments to the statute.

The 1974 Amendments Further Indicated that Tips are Employees' Property and Eliminated the Use of Arrangements Where Tips Were to be Turned Over to the Employer

In 1974, Congress further amended the FLSA to prohibit employment arrangements where tips are turned over to the employer. Under the 1974 amendments to the FLSA, an employer may only take a tip credit for an employee if “such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee.”¹³ In the accompanying Senate report, Congress stated outright that the 1974 amendments had the purpose of “requiring that all tips received be paid out to tipped employees” and referenced DOL's 1967 regulations, saying “generally [the customer] has the right to determine who shall be the recipient of the gratuity.”¹⁴ This reference again reflects Congress's belief that where customers provide employees with tips, those tips are the property of the employees. Congress has in fact raised legal and ethical questions of allowing an employer to benefit from tips intended for the employee to meet the employer's obligations to pay the minimum wage.¹⁵

Although Congress questioned the use of a tip credit generally, it nonetheless sought improved protections for employees whose employers utilize a tip credit. The Senate Report notes, “the tipped employee should have stronger protection to ensure the fair operation of [the tip

¹¹ 32 Fed. Reg. 13580 (1967) (emphasis added).

¹² *Id.* at 13581.

¹³ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, §13(e) (1974) (current version at 29 U.S.C. §§ 201-219(2017)).

¹⁴ S. Rep. No. 93-690, at 42 (1974).

¹⁵ *Id.* at 42-43.

allowance] provision.”¹⁶ Within this context, Congress noted that the retention required was “added to make clear the original Congressional intent that an employer could not use the tips of a ‘tipped employee’ to satisfy more than 50 percent of the Act's applicable minimum wage.”¹⁷ This provision eliminated the use of arrangements where tips were to be turned over to an employer, providing stronger protections to workers in the limited circumstances in which the FLSA allows the employer to make use of an employee’s tips to meet minimum wage obligations.

Less than three months after the passage of the 1974 amendments, DOL issued an Opinion Letter acknowledging Congress had prohibited such arrangements: “[t]he amendments to section 3(m) of the Act would have no meaning or effect unless they prohibit agreements under which tips are credited or turned over to the employer for use by the employer in satisfying the monetary requirements of the Act.”¹⁸ The Opinion Letter also stated with complete clarity that, “[u]nder the amended [FLSA], a tip becomes the property of the ‘tipped employee’ in recognition of whose service it is presented by the customer,” and further that “[t]he tip is given to the employee, not the employer.”¹⁹

The next year, DOL issued another Opinion Letter addressing the specific question of whether an employer must allow tipped employees to retain all of their tips *even when the employer does not utilize the tip credit*. DOL’s 1975 Opinion Letter stated:

Although, as you suggest, Section 3(m) now provides an exception from the Act’s minimum wage requirements, it is a limited exception which permits employers to take a tip credit against the applicable minimum in an amount not to exceed 50 percent of such minimum. If an employer should elect not to avail himself of this limited exception, he would have to pay his tipped employees in accordance with the Act’s minimum wage standards and, in addition, allow them to keep their tips since, as pointed out in 29 CFR 531, “A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him.” This section of our interpretation bulletin was expressly approved in S. Rept. 93-690, p.42.²⁰

When the Senate debated additional amendments to the FLSA three years later in 1977, it expressed that it also viewed the 1974 amendments as having the policy result described in DOL’s 1975 Opinion Letter, stating in a Senate report that:

Tips are not wages, and under the 1974 amendments tips must be retained by the employees—which can include employees who are in an appropriate tip pool—

¹⁶ *Id.* at. 42.

¹⁷ *Id.* at 43.

¹⁸ WH Admin. Op., 1974 WL 422051 (June 21, 1974).

¹⁹ *Id.*

²⁰ WH Admin. Op., 1975 WL 40945 (Apr. 30, 1975).

and cannot be paid to the employer or otherwise used by the employer to offset his wage obligation, except to the extent permitted by section 3(m).²¹

DOL's 2011 FLSA Regulation Also Clarified Tips are the Property of Employees

In 2010, the Ninth Circuit Court of Appeals held in *Cumbie v. Woody Woo, Inc.* that the text of the FLSA does not restrict tip pooling arrangements where the employer does not use a tip credit.²² We disagree with this holding, as it is counter to Congressional intent. In 2011, also concluding that *Woody Woo* was decided incorrectly, DOL issued a final rule amending the FLSA's regulations to clarify tips are the property of the employee.²³ The regulation reads:

*Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.*²⁴

In the Preamble to the 2011 rule, DOL noted that this rule complied with DOL's position on the treatment of tips following the 1974 amendments to the FLSA and is consistent with Congressional intent.²⁵

On February 23, 2016, the Ninth Circuit Court of Appeals upheld DOL's 2011 rule in *Oregon Restaurant and Lodging Association v. Perez*, concluding DOL had the authority to promulgate the rule, and that the rule is consistent with statutory text and Congressional intent.²⁶ On June 30, 2017, the Tenth Circuit Court of Appeals invalidated the rule in its circuit in *Marlow v. New Food Guy, Inc.*, finding DOL did not have the authority to fill any perceived gaps in the FLSA and, declining to review legislative history, concluded that restrictions on employers' use of tips only apply to employers who take the tip credit.²⁷ However, this conclusion is inconsistent with Congressional intent that tips are the property of employees, as outlined above.

DOL's Proposed Rule Seeks to Make Valid Arrangements that Congress Prohibited in 1974 and Creates a Loophole that Renders FLSA Provisions Limiting Allowable Tip Credit Meaningless

As described above, the 1966 amendments to the FLSA prohibited employers from using an employee's tips to meet their *entire* minimum wage obligation. Under this proposed rule,

²¹ S. Rep. No. 95-440, at 24 (1977).

²² *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

²³ 29 C.F.R. §§ 531.50 - 531.60 (2017).

²⁴ *Id.* at § 531.52 (emphasis added).

²⁵ Updating Regulations Issued Under the Fair Labor Standards Act, 32 Fed. Reg. 18831, 18841 (2011).

²⁶ *Oregon Restaurant and Lodging Association v. Perez*, 843 F.3d 355 (9th Cir. 2016). En banc review was denied. In January 2017, the National Restaurant Association filed a petition for a writ of certiorari before the Supreme Court. No. 16-920.

²⁷ *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157 (10th Cir. 2017).

employees who are paid at or above the federal minimum wage of \$7.25 per hour could be required to turn over part or all of their tips to the employer. From these tips, the employer could then pay the employee \$7.25 per hour. This would have the practical effect of allowing the employer to use the employee's tips to meet its *entire* obligation to pay the federal minimum wage, as prohibited under the FLSA. As the Supreme Court has stated, “[i]t, of course, can make no practical difference whether [employees] first turn in their tips and then receive their minimum wage or are charged with the tips received up to the minimum wage per hour.”²⁸ This result would be contrary to section 3(m) of the statute, *which currently limits the tip credit to \$5.12 an hour*. Even DOL recognizes this circumvention in the proposed rule.²⁹

The 1974 amendments went further still, eliminating employment arrangements where tips were turned over to the employer. Under this proposed rule, employers would be allowed to create arrangements requiring employees who are paid at or above the federal minimum wage to turn over some or all of their tips to the employer as part of its gross receipts. This means the employer could simply pocket tips for use in whatever manner it sought fit, contrary to Congressional intent.

DOL Fails to Quantify the Benefits or Transfers of this Proposed Rule, Rendering DOL Unable to Assess the Rule's Impact on Workers

Contrary to the rule of law, this proposed rule fails to comply with the requirements of Executive Orders 13563 and 12866. Section 1(c) of Executive Order 13563, Improving Regulation and Regulatory Review, expressly requires agencies to “quantify anticipated present and future benefits and costs as accurately as possible.”³⁰ Executive Order 12866 requires that an agency can propose or adopt a regulation *only* upon a reasoned determination that its benefits justify its costs.³¹

Yet, by its own admission, DOL fails to provide any quantitative analysis, stating that “[t]he potential benefits and transfers have not been quantified in this NPRM.” DOL states simply that “transfers of tips would depend on employer behavior, employee behavior, customer behavior, and other factors.”³² This fact does not preclude DOL from calculating transfers based on varied

²⁸ *Jacksonville*, 315 U.S. at 407.

²⁹ “If an employer pays its tipped employees a direct cash wage of at least the full federal minimum wage but takes its employees' tips to satisfy the entirety of its minimum wage obligation, there is a question as to whether the employer is circumventing the protections of section 3(m) because it is utilizing its employees' tips towards its minimum wage obligations to a greater extent than permitted under the statute for employers that take the tip credit.” Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395, 57402 n.14 (proposed December 5, 2017).

³⁰ Executive Order 13563, Improving Regulation and Regulatory Review (76 FR 3821; January 21, 2011).

³¹ Executive Order 12866, Regulatory Planning and Review (58 FR 51735; October 4, 1993). OMB has determined that this proposed rule is a “significant regulatory action” under section 3(f) of Executive Order 12866. 82 Fed. Reg. 57395.

³² *Id.* at 57405.

employer behavior as it has done in the past.³³ Without these required quantified costs, DOL cannot come to any determination that the rule's benefits justify its costs, as required by law.

Commenters may point out that DOL did not include an economic analysis, quantitative or qualitative, for the relevant provisions of its 2011 rule. However, DOL's 2011 regulations merely reflected statutory changes and enshrined DOL policy relating back to at least 1974.³⁴ In contrast, the proposed rule represents a significant departure from DOL's long-standing policy surrounding the treatment of tips and would likely cause employers to shift payment practices.

Transfer of Tips to Non-Tipped Workers and Employers

The FLSA does not permit employers to make use of employees' tips for any purpose other than a tip credit or a mandatory tip pool that includes only workers who customarily and regularly receive tips. Thus, the FLSA does not permit employers to mandate a tip pool that includes workers who do not customarily and regularly receive tips.

DOL has argued this proposed rule will reduce wage disparities. DOL proposes to allow employers to take tips earned by tipped employees and redistribute them in order to supplement the low wages paid to employees who do not customarily receive tips. Even if this were permissible under the FLSA, nothing in the proposed rule would *require* employers to use tips to actually *increase* overall pay for non-tipped workers. This means employers could opt to reduce non-tipped workers' base pay and redirect tips taken from tipped workers to keep non-tipped workers at their existing pay levels, harming tipped workers and leaving non-tipped workers no better off. In fact, DOL seems to readily admit this, stating that under its proposed rule, an employer could use employees' tips to "reduce its overall wage bill" and thereby could increase its profits.³⁵

DOL also acknowledges that, under this proposed rule, employers could simply commandeer their employees' tips as long as they are paid at least the federal minimum wage of \$7.25 per hour. In fact, DOL suggests that employers may "make an arrangement to allocate any customer tips to make capital improvements to their establishments (e.g., enlarging the dining area to accommodate more customers)."³⁶ An analysis by the Economic Policy Institute estimates that employers would pocket \$5.8 billion of their employees' tips each year under the proposed rule.³⁷ Even if state or territorial laws provide for better protections for employees' tips than

³³ See, e.g., Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32482 (finalized May 23, 2016); DOL estimated the transfer of income from employers to employees in wages based on varied employer response to increasing the overtime salary threshold.

³⁴ Updating Regulations Issued Under the Fair Labor Standards Act, 32 Fed. Reg. 18831, 18851 (2011).

³⁵ Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395, 57408 (proposed December 5, 2017).

³⁶ *Id.* at 57408.

³⁷ Heidi Shierholz, David Cooper, Julia Wolfe, and Ben Zipperer, "Employers would pocket \$5.8 billion of workers' tips under Trump administration's proposed 'tip stealing' rule," Economic Policy Institute (December 12, 2017), available at <http://www.epi.org/publication/employers-would-pocket-workers-tips-under-trump-administrations-proposed-tip-stealing-rule/>. EPI estimates that the annual amount of employees' tips pocketed by employers as a result of this rule is between \$523 million and \$13.2 billion, with the best estimate being \$5.8 billion.

those provided for under this proposed rule, the rule is likely to lead to employee or customer confusion regarding ownership of tips and increase illegal tip theft.

DOL contends it has issued the proposed rule because, as a result of recent litigation, it has “serious concerns that it incorrectly construed the statute in promulgating its current regulations.”³⁸ As explained above, however, the current regulations are consistent with Congressional intent and with DOL’s regulations and sub-regulatory guidance since 1967. DOL’s newfound desire to allow tip pools to include employees who are not customarily tipped is not a valid justification for issuing a rule that is counter to the text of the FLSA and Congressional intent.

Summary

This proposal to allow the transfer of tips runs counter to the FLSA, would not guarantee increased wages for workers, and would benefit employers at workers’ expense. From both an equity and public policy perspective, we believe that the benefit to employers who would be able to add tips to their gross receipts or reduce their labor costs for non-tipped workers, who will not be guaranteed higher wages, is not outweighed by the cost to workers in lost income—and DOL bears the legal burden of demonstrating otherwise in its rulemaking process.

DOL’s proposed rule is contrary to Congressional intent, renders provisions of the FLSA meaningless, and lacks a quantitative analysis to demonstrate its benefits justify its costs.

Recommendation

For the reasons set forth above, we urge DOL to withdraw this proposed rule and its national non-enforcement policy for the regulations relating to the retention of tips received by employees who are paid at least the federal minimum wage.

Thank you for your consideration of these views. For any questions or further communication, please contact Udochi Onwubiko with the House Education and the Workforce Committee Minority Staff at Udochi.Onwubiko@mail.house.gov or (202) 225-3725 or Joe Shantz with the Senate Health, Education, Labor, and Pensions Committee Minority Staff at Joseph_Shantz@help.senate.gov or (202) 224-0767.

Sincerely,



Robert C. “Bobby” Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives



Patty Murray
Ranking Member
Committee on Health, Education,
Labor, and Pensions
U.S. Senate

³⁸ Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. at 57399.



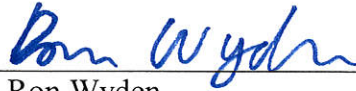
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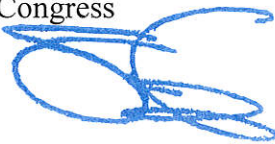
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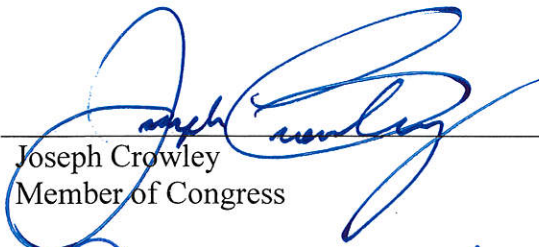
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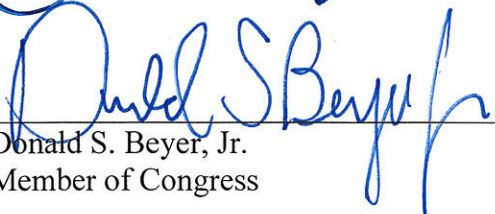
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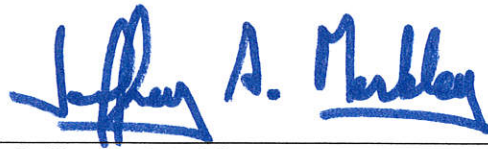
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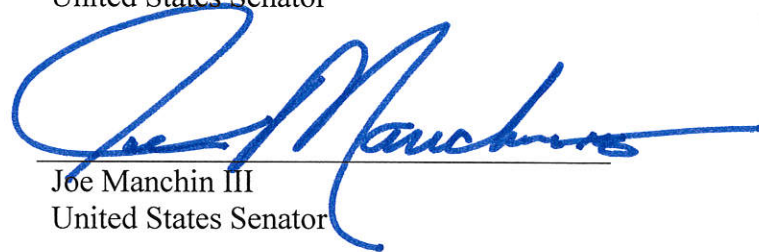
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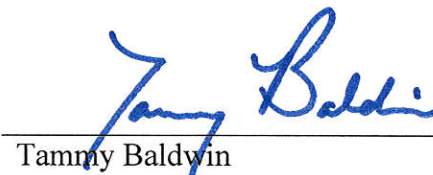
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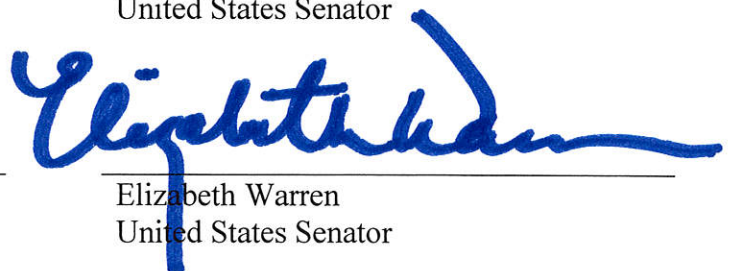
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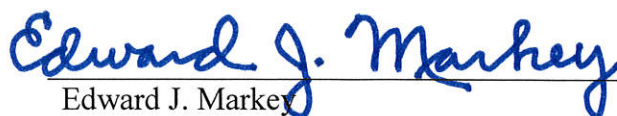
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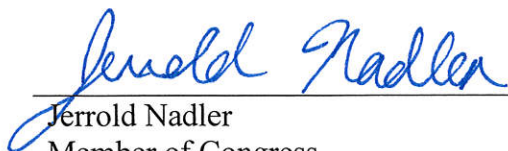
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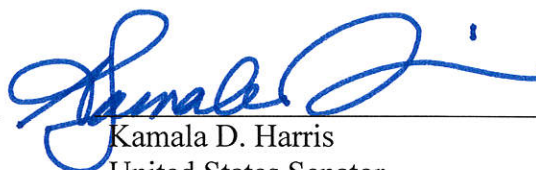
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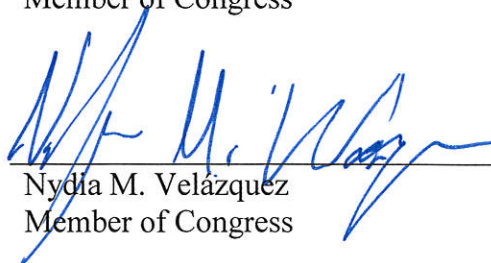
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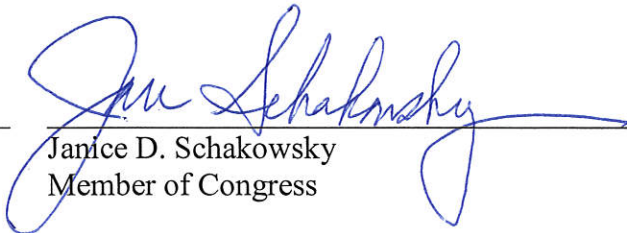
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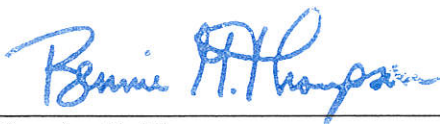
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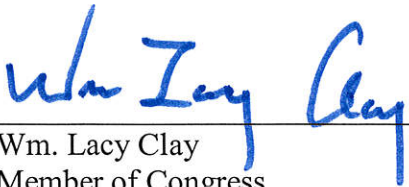
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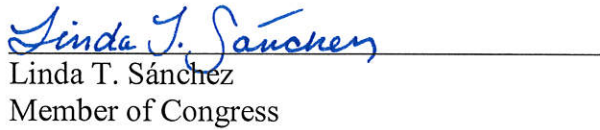
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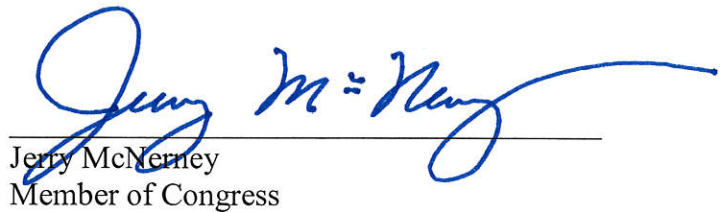
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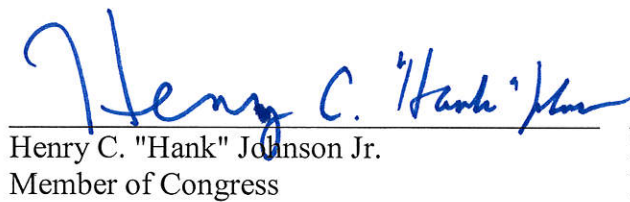
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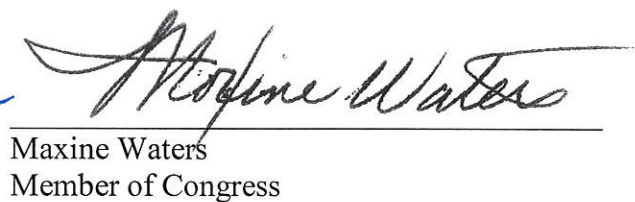
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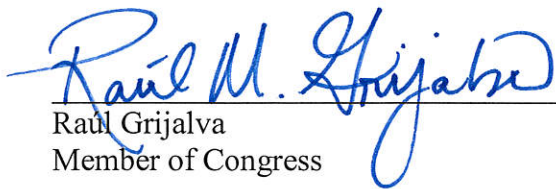
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Carol Shea-Porter
Member of Congress



Marc A. Veasey
Member of Congress



Raul Grijalva
Member of Congress



Anthony Brown
Member of Congress



Darren Soto
Member of Congress



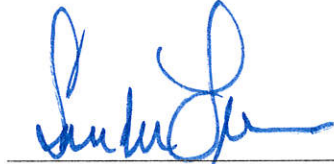
Katherine M. Clark
Member of Congress



Jared Huffman
Member of Congress



Zoe Lofgren
Member of Congress



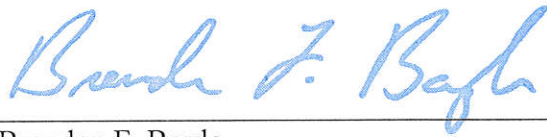
Sander M. Levin
Member of Congress



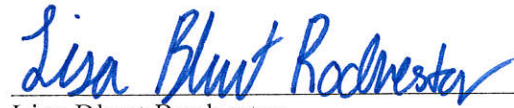
Susan A. Davis
Member of Congress



Brenda L. Lawrence
Member of Congress



Brendan F. Boyle
Member of Congress



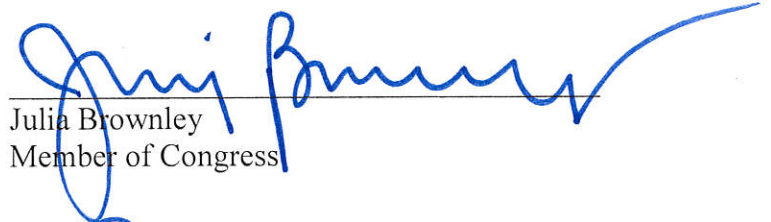
Lisa Blunt Rochester
Member of Congress



Debbie Wasserman Schultz
Member of Congress



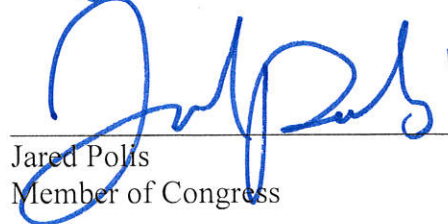
Earl Blumenauer
Member of Congress



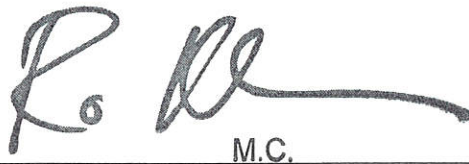
Julia Brownley
Member of Congress



Cheri Bustos
Member of Congress

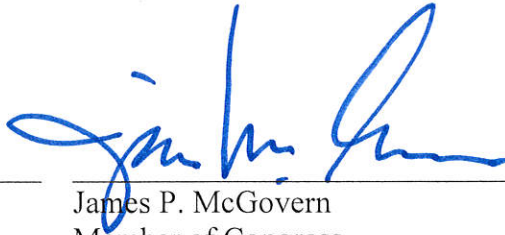


Jared Polis
Member of Congress

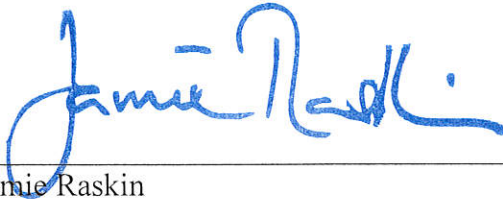


M.C.

Ro Khanna
Member of Congress



James P. McGovern
Member of Congress



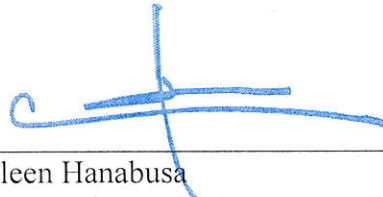
Jamie Raskin
Member of Congress



Charlie Crist
Member of Congress



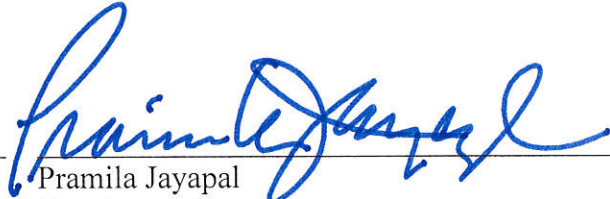
Denny Heck
Member of Congress



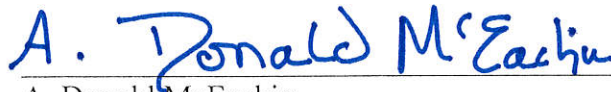
Colleen Hanabusa
Member of Congress



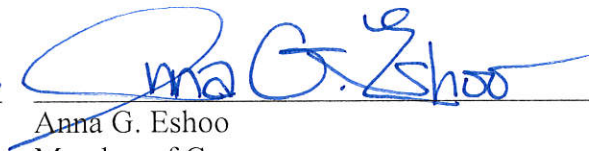
Jacky Rosen
Member of Congress



Pramila Jayapal
Member of Congress



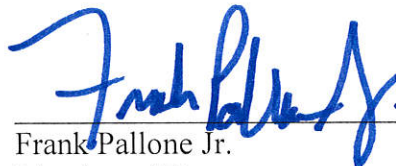
A. Donald McEachin
Member of Congress



Anna G. Eshoo
Member of Congress



Val Butler Demings
Member of Congress



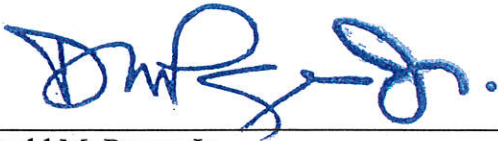
Frank Pallone Jr.
Member of Congress



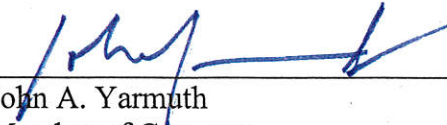
Ted W. Lieu
Member of Congress



Salud O. Carbajal
Member of Congress



Donald M. Payne Jr.
Member of Congress



John A. Yarmuth
Member of Congress



Alan S. Lowenthal
Member of Congress



Alma S. Adams
Member of Congress



Raja Krishnamoorthi
Member of Congress



Derek Kilmer
Member of Congress