

NOMINATIONS

HEARING OF THE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE NOMINATIONS OF CARLOS G. MUÑIZ, OF FLORIDA, TO BE GENERAL COUNSEL, DEPARTMENT OF EDUCATION, WHO WAS INTRODUCED BY SENATOR RUBIO, AND JANET DHILLON, OF PENNSYLVANIA, AND DANIEL M. GADE, OF NORTH DAKOTA, WHO WAS INTRODUCED BY SENATOR ISAKSON, BOTH TO BE A MEMBER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEPTEMBER 19, 2017

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NOMINATIONS

Tuesday, September 19, 2017

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

The Committee met, pursuant to notice, at 10:04 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Lamar Alexander, Chairman of the Committee.

[presiding] Murray, Isakson, Scott, Casey, Franken, Baldwin, Murphy, Warren, Hassan, and Kaine.

Also present: Senator Rubio.

OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. Senator Murray is on her way, and she suggested that I go ahead and start, so I will do that.

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

This morning, we're holding a confirmation hearing on Janet Dhillon, nominated to be Commissioner and Chair of the Equal Employment Opportunity Commission; Daniel Gade, nominated to be Commissioner on the same Commission; Carlos Muñiz, nominated to be the General Counsel of the U.S. Department of Education.

Senator Murray and I will each have a brief opening statement. Senator Isakson will then introduce Dr. Gade, and Senator Rubio—and we welcome you, Marco. Thank you for being here—we'll introduce Mr. Muñiz. After the nominees' testimonies, Senators will have an opportunity to ask the nominees 5 minutes of questions.

Today we will consider two nominations for the Equal Employment Opportunity Commission. It was established by the Civil Rights Act of 1964 and serves an important role in our Nation's workplaces. Under the leadership of five commissioners and a General Counsel, EEOC is charged with protecting employees from discrimination at work through enforcement of equal employment opportunity laws.

The Commission investigates allegations of discrimination and seeks to mediate cases, allowing lawsuits to go forward if settlements are unsuccessful. The General Counsel pursues allegations of discrimination in court and has been deputized by the Commission to initiate litigation in many instances. The Commission also issues guidance to inform the public about how it believes employers should interpret and apply the laws.

(1)

Currently, the EEOC has three vacancies. Two are vacant Commissioner seats, and the third is for the agency's General Counsel. Today, we are considering the Commissioner nominees.

Ms. Dhillon has been nominated to serve as Commissioner and Chair. She has an impressive record. She served as General Counsel for three Fortune 500 companies: Burlington Stores, JC Penney, and US Airways. She graduated from UCLA Law School, where she was first in her class. She spent 13 years in private practice.

She was nominated on June 29. On July 18, we received her Ethics paperwork. The Office of Government Ethics wrote to me that she is in compliance with all of the applicable laws and regulations. The Committee received her paperwork on July 27.

Dr. Gade is the second Commissioner nominee. He is a decorated veteran who served in Iraq and was wounded in action. He has earned a Bronze Star, two Purple Hearts, and an Army Commendation Medal for Valor. He has become a national expert on disability policy and the challenges facing disabled veterans and all disabled people in this country.

He graduated from West Point. He returned there as a professor in 2011. He holds a Masters and Ph.D. in public administration and policy from the University of Georgia. He served in the White House Domestic Policy Council for George W. Bush, was appointed to the National Council on Disability, and has served on various advisory Committees advising the Secretary of Veterans' Affairs. We received his nomination August 2nd, his paperwork from Government Ethics on August 8th, and OGE wrote that he was in compliance with all of those, and we received his Committee paperwork on August 10th.

For the last 7 years, Congress has been stuck in a partisan stalemate over health insurance, which is not the main issue we ought to be addressing. We ought to be focusing on the rest of health care, which has grown from consuming 9 percent of the Gross Domestic Product in 1980 to nearly 18 percent in 2015, and a predicted 20 percent in 2025, according to CMS. While there are many components to the cost of health care, there is a consensus that wellness and leading a healthier lifestyle reduce the need for health care and saves money and lives.

For example, the Cleveland Clinic said that if you achieve at least four normal measures of good health, such as a healthy body mass index and blood pressure, and you see a primary care physician regularly, and you keep immunizations up to date, you will avoid chronic disease about 80 percent of the time. Congress agreed when it passed the Affordable Care Act in 2010 by including a provision that allowed employers to discount health insurance premiums for healthy lifestyle choices like quitting smoking or maintaining a healthy cholesterol level. It was one of the few parts of the Affordable Care Act that everybody agreed on.

The Obama administration sought to implement the provision through three different agencies, but the EEOC issued regulations that limited the ability of the administration to do what Congress told it to do and reduced the discount that employers could give for participation in a wellness program. Roughly 60 percent of insured Americans get their health insurance on the job, and one of the most straightforward ways to encourage wellness and reduce

health care cost is to give those employers clear guidelines. As Commissioners, my hope is that you will create clear rules for employer-sponsored wellness programs and implement the law the way Congress wrote it.

I look forward to your testimony and thank you for your willingness to serve.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Chairman Alexander.

Before I begin, I do want to address the pivotal moment that we are in on health care. This Committee has had a productive bipartisan conversation about really concrete ways to stabilize the market and prevent families from paying higher premiums next year, and it's imminent upon us.

When it comes to policy, I think it's very clear that there is a lot more that we agree on and disagree on. I feel optimistic if we can focus on that common goal and come to our final differences and deliver a result, it will be the right thing for the country, and I just wanted to say that at the top.

With that, I do want to thank you again, Chairman Alexander, for this hearing. I want to thank all of our nominees today and their families who are here.

Dr. Gade, I want to thank you for your service to our country as well.

I am pleased that we're going to be able to hear from all three of you today on your visions for these critically important roles at the Department of Education and the Equal Employment Opportunity Commission. You all are being nominated to these positions at a really pivotal moment, and I am concerned that since taking office, the President has rolled back protections for workers and students and promoted policies that do make it harder for working families to get ahead. I'm hoping to hear from each of you today that you don't intend just to be a rubber stamp for the President's policies and agenda.

Mr. Muñiz, I'm sure you will recall the millions of parents and students and teachers who stood up after Secretary DeVos' nomination and her confirmation hearing to raise their concerns about her lack of knowledge about education and oppose her anti-public school agenda. It is clear to me that since day one, she has rolled back protections for students and borrowers, making it easier for predatory for-profit colleges to take advantage of students. She has promoted her privatization agenda, and her record on upholding civil rights protection for students has been abysmal.

She scaled back the Office of Civil Rights, signaled to schools that they can once again discriminate against transgender students, and is considering revoking guidance that directs schools on how to investigate claims of campus sexual assault. The Department of Education's primary responsibility is to stand up for our students.

I have to say I'm disappointed by those actions, because I think our children are the most important investment we make, and the protections they have are critically important. We should be work-

ing together to make sure every student can get a good public school in their own neighborhood and those who want to attend college are able to afford it and to climb that ladder of opportunity without a mountain of debt.

We need to make sure that those in the workforce are being paid what they deserve, working in safe environments, and free from discrimination at work. I am concerned that we have watched as President Trump undermined worker protections and made it easier for corporations to take advantage of workers today, and he has, as we all know, repeatedly disparaged and discriminated against millions of people across this country. His actions, though not surprising after his behavior on the campaign trail, do go against everything the EEOC stands for. That is a critical, independent agency that is responsible for protecting workers from discrimination.

Ms. Dhillon and Dr. Gade, I hope you are prepared to demonstrate that you do not share all of the President's views on race and civil rights and women and immigrants and people with disabilities and the LGBT community, and that you are willing to stand up to him when it's necessary. I want to discuss some of my initial concerns that I'm hoping the three of you can address today.

Mr. Muñiz, Secretary DeVos' clear lack of understanding on education issues and current law makes it clear to me that she does need an independent General Counsel who will stand up to her if laws are being broken or ethics rules are being bent. You have worked for individuals and companies that seem to care more about big businesses and for-profit colleges, sometimes at the expense of families and students.

You indicated in our meeting that you admired Secretary DeVos. I hope you plan today to lay out your commitment to remaining independent at the Department of Education and not just blindly implement whatever is handed to you.

Ms. Dhillon, the Chair of the EEOC influences the agenda and decisions of the EEOC. You spent your career, as we know, fighting on the side of big businesses, advocating for rules that often undermine worker protections. I really hope today that you can speak a little bit about how you stand with workers and not just be another voice for those at the top.

Dr. Gade, in news reports yesterday, you confirmed that in 2011, you made disparaging quotes about women in combat roles, saying, and I quote, "The idea of women in that environment is laughable." Though you said your position has changed, these comments, as you can imagine, are pretty troubling and suggest a lack of judgment and respect for women. Along with your lack of experience in employment law, it is really concerning to me. I hope to hear from you today on that.

This is a critical agency. You know that. It helps our workers by enforcing their civil rights. I'm very interested on where you stand on major issues, including the wage gap that's important to workers, sexual orientation and gender identity discrimination, wellness rules, and cases involving systemic discrimination, because we all know today that a lot of families are really struggling, and we need to be doing everything we can to help them get ahead. Whether they choose to do that through higher education or working hard

at a good-paying job, we need to help families join that middle class.

That's what I'm interested in hearing today, and I look forward to all of your testimonies and answers to questions.

The CHAIRMAN. Thank you, Senator Murray.

Senator Isakson, would you like to introduce Dr. Gade?

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. I would, Mr. Chairman, and it's really a privilege and honor. You know, as Senators, we're called upon to come before Committees when somebody from our state is nominated and make what, many times, is a perfunctory introduction of that individual. For me, this is not perfunctory. I have the chance to introduce a true American hero, a man that I met a number of years ago when he came to do an internship in my office for a month, after recovering at Walter Reed from severe injuries he suffered in Iraq.

I got to know Dan as a person, as a man, and as a veteran of the United States military. He was not just a man who talked the talk. He walked the walk and is the perfect nominee for the Equal Employment Opportunity Commission today, and I commend him to all of you.

Dan is not a Georgian, but he has deep roots there. He graduated twice from the University of Georgia with a Master's and a Doctorate in public administration. He had a young man that he commanded in his company in Iraq whose first name was Tyler, who was severely wounded and died in Iraq. Dan came home, and when he had his first son, he named his son Tyler after him, out of respect for the man he served with who died for our country.

Dan is an unequalled individual, in my knowledge, for the subject he's been nominated to handle in terms of the Equal Employment Opportunity Commission, and I know he'll do a great job. More importantly, he'll do a great job for America, and he will represent the best interests of people with disabilities, as well as any other things upon which discrimination is often applied in terms of employment.

He's a lucky guy, too. His wife is here with his kids today, and I want them to stand up. His wife, Wendy, of 18 years; Anna Grace—she's beautiful, by the way—Tyler and William; Dan's mother, Erica; and his cousin, Melanie. Will you all stand, please?

Give them a big round of applause.

[Applause.]

Senator ISAKSON. We all know that although it's Dan who's appointed, it's the family and the children who support him in his appointment. He will be a great servant to the people of the United States of America as he already has been on the battlefield and as an instructor at West Point, and he serves us well today in the U.S. Senate.

Dan, welcome to the Senate. Congratulations on your nomination. I commend you to the Members of the Committee and urge them to vote for a man who served our country well and will serve us well on a continuing basis on the Commission.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Isakson.

Senator Isakson is Chairman of the Veterans' Affairs Committee, and we thank him for that.

We welcome Senator Rubio. Thank you for being here, and we look forward to your introductory remarks about Mr. Muñiz. I know you've got a busy schedule this morning, so if you need—you're welcome to stay, but if you need to leave after the introduction, why, we understand that.

Senator Rubio.

STATEMENT OF SENATOR RUBIO

Senator RUBIO. Thank you, Mr. Chairman. I'd love to stay, but I have a couple of other Committees, but we'll watch it on television.

In any event, I thank you, Mr. Chairman, and to the Ranking Member and all of you. I'm honored to be here today to introduce my friend and a fellow Floridian, Carlos Muñiz, to be the President's nominee for the General Counsel for the United States Department of Education. Carlos has a long history of public service. I actually had the pleasure of working with him during my time as Speaker of the Florida House, where he served as my deputy chief of staff and counsel.

He's also served under Governor Jeb Bush and most recently under our Attorney General Pam Bondi. Without a doubt, he's been an asset to the people of Florida everywhere he has served. As you can see on paper, he's clearly an extraordinary and accomplished individual. Knowing him, he'd probably tell you that he's most proud of being a father to his three children, Robert, William, and Lydia, and a husband to his wife, Katie.

Without a doubt, he has a servant's heart and a keen sense of selflessness that I think drives him to help others. I also think that the fact that he's still devoted to the Washington Redskins demonstrates he has a sense of loyalty and commitment even during times of incredible adversity. Look who's talking, as a Dolphin fan.

[Laughter.]

Senator RUBIO. In any event, most importantly, I have seen his ability to work in an objective, nonpartisan fashion, which makes him the ideal candidate for the position of General Counsel, and I'm confident he will serve this Nation the way he served Florida, admirably.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Rubio.

Now we'll look forward to—if you could summarize your remarks in about 5 minutes, we'll start with Ms. Dhillon and Dr. Gade and then Mr. Muñiz. Then we'll go to rounds of questions by the Senators.

Ms. Dhillon, welcome.

STATEMENT OF JANET DHILLON

Ms. DHILLON. Thank you. Chairman Alexander, Ranking Member Murray, and Members of the Committee, thank you for the opportunity to appear before you today. It is an honor to be here as the President's nominee for Chair of the Equal Employment Opportunity Commission, and I thank the President for his nomination.

With me here today is my husband, Uttam Dhillon. We recently celebrated our 32nd wedding anniversary, and I'm grateful every day for his love and support.

I grew up in southern California, the daughter of two public school teachers. My parents had high standards. They expected that my sister and I would respect our teachers, do well in school, and graduate from college. They never placed any limits on our ambitions and certainly not because of our sex.

For example, in elementary school, I informed my parents that I wanted to learn how to play the trombone. I'd seen the boys playing the trombone in the school marching band, and it looked like it was fun to me. My parents dutifully acquired a trombone, which was significantly more expensive than the flutes and clarinets that my girlfriends played. They then spent the next decade driving me and my trombone to and from band practices and events. Had I decided to play the flute or clarinet, as the other girls did, I could have walked. For the 10 years that I played the trombone in school bands, I was the only girl in the trombone section.

After college and law school, I was in private practice for 13 years, most of that time litigating cases. I then moved into an in-house role, and I served as General Counsel of three Fortune 500 companies. My professional career is a testament to the impact of the Civil Rights Act of 1964, as well as the efforts of the EEOC and others in the civil rights community, as well as the women who came before me.

In the over 50 years since the Equal Employment Opportunity Commission was established, this country has made great strides toward achieving the goal of equal opportunity in the workplace. Barriers have been reduced and opportunities have been expanded. Yet, unfortunately, the goal of a nondiscriminatory workplace has not been fully achieved, and, thus, the EEOC's work is not done.

Notwithstanding the tremendous efforts on the part of many, including those at the EEOC, there continues to be unlawful discrimination in the workplace. Such discrimination is not only illegal. It's economically counterproductive, and it's corrosive to the very fabric of our society.

In my prior roles in the private sector, I have seen the EEOC in action and the positive impact that it has on workplaces across the country. If I have the privilege of being confirmed, I would work to build on the agency's legacy to tackle workplace discrimination, seeking to strike a careful balance between enforcement and compliance assistance.

I believe that the EEOC must be highly responsive to those who raise claims of discrimination. We owe it to those employees, as well as everyone else involved, to swiftly address their concerns. Notwithstanding the efforts of many in the agency, the EEOC currently has a substantial backlog of charges, and this situation is not new. It's a sad reality that, too often, justice delayed can be justice denied. Evidence can be misplaced, and memories can fade. Thus, it's critical that charges are handled promptly.

Part of that effort involves meaningful conciliation efforts, which are a vital part of the agency's mission. Successful conciliation avoids time-consuming, expensive litigation and is a win-win for all. I believe that litigation truly is a last resort. However, when

it does become necessary, the EEOC's litigation should be conducted with the highest ethical standards.

The EEOC is the preeminent Federal agency on workplace discrimination issues. Its work in the courtroom should be consistently excellent and at all time demonstrate respect for the tribunal and other litigants. Courts and others in the litigation process should recognize the EEOC as an honest broker whose advocacy is above reproach, whose motives are transparent, and whose approach is always constructive.

Critically important to the EEOC's mission is outreach and education. When the EEOC is called upon to provide guidance or take regulatory action, it should do so in a way that is transparent and provides opportunity for all stakeholders to provide input. Honest exchanges and views, sharing of best practices, and vigorous debate will result in a better product for all involved.

The past 50 years have seen tremendous changes in the workplace which have benefited not only employees and employers, but our Nation as a whole. The progress has been remarkable, but the job is not done.

Thank you for your consideration, and I look forward to answering your questions.

[The prepared statement of Ms. Dhillon follows:]

PREPARED STATEMENT OF JANET DHILLON

Chairman Alexander, Ranking Member Murray, and Members of the Committee: Thank you for the opportunity to appear before you today. It is an honor to be here as the President's nominee for Chair of the Equal Employment Opportunity Commission. With me here today is my husband, Uttam Dhillon. We recently celebrated our 32nd wedding anniversary—I am grateful every day for his love and support.

I grew up in Southern California, the daughter of two public school teachers. While we were never wealthy, my parents always found the funds for books and set the example themselves by being voracious readers. My parents also had high standards. They expected that my sister and I would respect our teachers, do well in school, and graduate from college. They never placed any limits on our ambitions—and certainly not because of our gender.

For example, in elementary school I informed my parents that I wanted to learn how to play the trombone. I had seen boys playing trombone in the local high school marching band, and it looked like fun to me. My parents dutifully acquired a trombone—which was more expensive than the flutes that the other girls played. They then spent the next decade driving the trombone (and me) to and from band practices and events. Had I decided to play the flute, as the other girls did, it would have fit in my backpack and I could have walked. For the 10 years I played the trombone in school bands, I was the only girl in the trombone section. I learned early on in my life the importance of equal opportunity.

After college and law school, I was in private practice for 13 years, most of that time litigating cases. I then moved into an in-house role. I have served as General Counsel of three Fortune 500 companies, in the airline and retail industries. My professional career is a testament to the impact of the Civil Rights Act of 1964, as well as the efforts of the EEOC and others in the Civil Rights community, and the women that went before me. Now, after practicing law in the private sector for over 25 years, I would like to have the opportunity to give back in the form of public service as Chair of the EEOC.

In the over 50 years since the Equal Employment Opportunity Commission was established, this country has made great strides toward achieving the goal of equal opportunity in the workplace. Barriers have been reduced, and opportunities expanded. Yet, unfortunately, the goal of a nondiscriminatory workplace has not been fully achieved, and thus the EEOC's work is not done. Notwithstanding the tremendous efforts on the part of many, including those at the EEOC, there continues to be unlawful discrimination in the workplace. Such discrimination is not only illegal, it is economically counterproductive, and is corrosive to the very fabric of our society.

In my prior roles in the private sector, I have seen the EEOC in action—and the positive impact that it has had on workforces across the country. If I have the privilege of being confirmed as Chair of the EEOC, I would work to build on the agency's legacy to tackle workplace discrimination, seeking to strike a careful balance between enforcement and compliance assistance.

I believe that the EEOC must be highly responsive to the employees who raise claims of discrimination. An employee's decision to bring a charge can be, in many instances, a courageous act—but an act that can also be stressful for the individual and his or her family. We owe it to these employees, as well as everyone else involved, to swiftly address their concerns. Notwithstanding the efforts of many in the agency, the EEOC currently has a substantial backlog of charges—and this situation is not new. It is the sad reality that too often, justice delayed is justice denied. Evidence can be misplaced, and memories fade with the passage of time. The opportunity to quickly remediate a discriminatory practice can also be lost—potentially to the detriment of other impacted employees. Thus, it is critical that charges are handled promptly—it is the right thing to do for employees, as well as employers. Part of that effort involves meaningful conciliation efforts—which are a vital part of the agency's mission. Successful conciliation avoids time-consuming, expensive and stressful litigation. It truly is a win-win result.

I believe that litigation truly is a last resort. However, when it does become necessary, the EEOC's litigation should be conducted in accordance with the highest ethical standards. The EEOC is the preeminent Federal agency on workplace discrimination issues—its work in the courtroom should be consistently excellent, and at all times demonstrate respect for both the tribunal and other litigants. The EEOC's litigation attorneys should have access to the resources needed to conduct litigation to these high standards, and should be subject to careful oversight and given appropriate guidance. Courts and others in the litigation process should recognize the EEOC as an honest broker, whose advocacy is above reproach, motives are transparent, and approach is always constructive.

Critically important to the EEOC's mission is outreach and education. I believe that most employers want to be law-abiding; the EEOC should continue to build on its work of providing tools to employers that allow them to be legally compliant. Where the EEOC is called upon to provide guidance or take regulatory action, it should do so in a way that is transparent, and provides opportunities for all stakeholders to provide input. Honest exchanges of views, sharing of best practices, and vigorous debate will result in a better product, which benefits all involved.

The past 50 years has seen tremendous changes in the workplace, which have benefited not only employees and employers, but our nation as a whole. This progress has been remarkable—but the job is not done.

Thank you for your consideration. I look forward to answering your questions.

The CHAIRMAN. Thank you, Ms. Dhillon.
Dr. Gade, welcome.

STATEMENT OF DANIEL M. GADE

Dr. GADE. Chairman Alexander, Ranking Member Murray, and Members of the Committee, thank you for considering my nomination as a Commissioner of the Equal Employment Opportunity Commission.

I want to start my statement by acknowledging my wife of more than 18 years and our three children. My first and most important job is to love them and provide for them, and I hope that I will always be the kind of man that they can emulate and respect. My mother, a patriot and mother of patriots, is also here and is a key reason that I am who I am.

I also want to publicly thank the many men and women who I served with in my more than 20 years in the United States Army, some of whom have joined us this morning and are in the gallery. Your many examples of selflessness, courage, and sacrifice awe me and awe the American people. In particular, I want to thank the families of First Lieutenant Tyler Brown and Specialist Dennis

Miller, both of whom were killed in action while under my command in Iraq in 2004. You laid your son's lives on the altar of freedom, and the American people are forever grateful.

If confirmed, I will consider my service on the EEOC to be a natural sequel to my military service, recalling that the key phrase of my oath as a commissioned officer was to, quote, "Support and defend the Constitution of the United States against all enemies." My oath of office was not to a political party, nor to a particular President, but to a system of laws, not of men. Being able to point to the Constitution as the ultimate law of the land allows me to be anchored to a set of values that are independent of the political winds that have blown with increasing force for the last quarter century.

The EEOC performs a critically important role in enforcing laws that prohibit employment discrimination on the bases of race, color, religion, sex, pregnancy, national origin, age, disability, and genetic information. I am committed to enforcing these laws in accordance with the authorizing statutes of the EEOC and look forward to continuing to protect the vulnerable against those who would marginalize them or dismiss them from employment based on characteristics unrelated to their ability to perform the job at hand.

I bring a unique though not unprecedented background to this position. I am one of very few non-attorneys to be appointed to the EEOC. Similarly, the EEOC has only had a small number of veterans as Commissioners in the 53 years since it was created. Fortunately, I am no stranger to either the Federal Government or the veterans and disability community. From 2007 to 2008, I served as an associate director of the Domestic Policy Council at the White House, where I was responsible for veterans' disability policy, ADA oversight, and military health care policy.

I've also served on two different advisory Committees to the Secretary of Veterans' Affairs, and since 2015, I've served on the National Council on Disability, where I have been active in various critical disability policy initiatives. Simultaneous to several of those commissions, I taught political science and leadership courses for more than 5 years at the United States Military Academy after earning both a Master's and a Ph.D. in public administration and policy.

I believe that my record of accomplishment in academia, government, military, and nonprofit roles makes me well suited to serve on the EEOC. I will bring a fresh, energetic, outside perspective; well developed judgment; proven character; and constitutional fidelity to my role as a Commissioner.

If confirmed, I intend to act in a spirit of careful consideration and collegiality. I'm excited about working with the other Commissioners, the professional staff, law makers, and interested citizens and groups of citizens to combat illegal discrimination in all of its forms. Where the current anti-discrimination laws are unclear or contested, I intend to work with Congress, advocating that they be updated.

My priorities, if confirmed, will be in the following areas. First, the backlog of charges being investigated by the EEOC needs to be addressed. Each outstanding charge means that both an employer and employee are waiting, sometimes for months, for a resolution.

Second, I intend to take a close look at the Strategic Enforcement Plan in concert with the other Commissioners and professional staff to ensure that it is plotting the right course into the future. Third, I would like to spend time on educational and outreach functions of the EEOC in the sincere belief that most discrimination is unintentional and could be prevented with better information.

I look forward to your questions.

[The prepared statement of Dr. Gade follows:]

PREPARED STATEMENT OF DANIEL M. GADE

Chairman Alexander, Ranking Member Murray, and Members of the Committee: Thank you for considering my nomination as a Commissioner of the Equal Employment

Opportunity Commission. I want to start my statement by acknowledging my wife of more than 18 years, Wendy, and our three children. My first and most important job is to love them and provide for them, and I hope that I will always be the kind of man that they can emulate and respect. My mother, a patriot and mother of patriots, is also here and is a key reason that I am who I am.

I also want to publicly thank the many men and women who I served with in my more than 20 years in the United States Army. Your many examples of selflessness, courage, and sacrifice awe me and awe the American people. In particular, I want to thank the families of First Lieutenant Tyler Brown and Specialist Dennis Miller, both of whom were killed in action while under my command in Iraq in 2004. You laid your sons' lives on the altar of freedom, and the American people are forever grateful.

If confirmed, I will consider my service on the EEOC to be a natural sequel to my military service, recalling that the key phrase of my oath as a commissioned officer was "to support and defend the Constitution of the United States against all enemies..." "My oath of office was not to a political party, nor to a particular President, but to a system of "laws, not of men". Being able to point to the Constitution as the ultimate law of the land allows me to be anchored to a set of values that are independent of the political winds that have blown with increasing force for the last quarter-century.

The EEOC performs a critically important role in enforcing laws that prohibit employment discrimination on the bases of race, color, religion, sex, pregnancy, national origin, age, disability or genetic information. I am committed to enforcing these laws in accordance with the authorizing statute of the EEOC, and look forward to continuing to protect the vulnerable against those who would marginalize them or dismiss them from employment based on characteristics unrelated to their ability to perform the job at hand.

I bring a unique, though not unprecedented, background to this position. I am one of very few non-attorneys to be appointed to the EEOC. Similarly, the EEOC has only had a small number of Veterans as Commissioners in the 53 years since it was created. Fortunately, I am no stranger to either the Federal Government or the Veterans and disability community. From 2007 to 2008, I served as an Associate Director of the Domestic Policy Council at the White House, where I was responsible for Veterans' disability policy, ADA oversight, and military health care policy. I have also served on two different advisory Committees to the Secretary of Veterans Affairs, and since 2015 have served on the National Council on Disability, where I have been active in various critical disability policy initiatives. Simultaneous to several of those commissions, I taught political science and leadership courses for more than 5 years at the United States Military Academy after earning both a Master's degree and a Ph.D. in public administration and policy. I believe that my record of accomplishment in academia, government, military, and non-profit roles makes me well-suited to serve on the EEOC. I will bring a fresh, energetic outside perspective, well-developed judgment, proven character, and Constitutional fidelity to my role as a Commissioner.

If confirmed, I intend to act in a spirit of careful consideration and collegiality. I am excited about working with the other commissioners, the professional staff, lawmakers, and interested citizens and groups of citizens to combat illegal discrimination in all of its forms. Where the current anti-discrimination laws are unclear or contested, I intend to work with Congress, advocating that they be updated.

My priorities, if confirmed, will be in the following areas. First, the backlog of charges being investigated by the EEOC needs to be addressed. Each outstanding charge means that both an employer and an employee are waiting, sometimes for

months, for a resolution. Second, I intend to take a close look at the Strategic Enforcement Plan, in concert with the other Commissioners and professional staff, to ensure that it is plotting the right course into the future. Third, I would like to spend time on the educational and outreach functions of the EEOC, in the sincere belief that most discrimination is unintentional and could be prevented with better information.

I look forward to your questions.

The CHAIRMAN. Thank you, Dr. Gade.

Mr. Muñiz, welcome.

STATEMENT OF CARLOS G. MUÑIZ

Mr. MUÑIZ. Chairman Alexander, Ranking Member Murray, and Members of the Committee, it's an honor to appear before you today, and it's especially an honor to appear with these distinguished nominees.

I've had the opportunity to meet with several of you and with your staffs. I'm grateful for the courtesy I've been shown in those meetings, and, if confirmed, I look forward to working with you cooperatively and in a spirit of good will.

I'd like to begin by thanking President Trump for nominating me, Secretary DeVos for her support and confidence, and Senator Rubio for that very kind introduction. I'm especially grateful that Senator Rubio took time to be here today, given all the work that he's been doing helping our state recover from Hurricane Irma. I'd also like to thank the many mentors and colleagues who have helped me throughout my career, including Judge José Cabranes, for whom I had the great privilege of clerking.

Finally, I'd like to mention and thank my family. My wife, Katie, and our three children, Robert, William, and Lydia, are at home in Tallahassee studying hard, but I know they're with me today in spirit. In the audience today are my parents, Carlos Muñiz and Veronica Moreland, along with two of my dear friends, Greg Garr and Joe Riley. I appreciate their support and encouragement.

My many years of prior government service, particularly on behalf of the State of Florida, have taught me the importance of the rule of law and the special accountability and obligations that come with public service. I would consider it a great honor to work with the leaders in the Department of Education, as well as the Department's career lawyers and civil servants, to carry out the many important responsibilities that this body's laws have assigned to the Department.

If I am confirmed, I will embrace my obligation to follow the law. I will exercise independent judgment to give my clients at the Department candid legal advice. I understand and appreciate that my ultimate duty will be to the law, not to any individual or objective. You have my full commitment to honor these responsibilities.

Thank you for your consideration, and I look forward to answering your questions.

[The prepared statement of Mr. Muñiz follows:]

PREPARED STATEMENT OF CARLOS G. MUÑIZ

Chairman Alexander, Ranking Member Murray, Members of the Committee: It is an honor to appear before you today as the nominee to be General Counsel of the U.S. Department of Education.

I would like first to thank President Trump for nominating me and Secretary DeVos for her support and confidence. I would also like to thank Senator Rubio for introducing me. Finally, I would like to acknowledge how grateful I am to the many mentors, colleagues, and friends who have helped me over the years, and to my family, especially my wife Katie and our three children, Robert, William, and Lydia.

At her own confirmation hearing, Secretary DeVos outlined many goals for her tenure as Secretary of Education—including: to promote an education system that meets the unique needs of each student; to support access to quality, affordable higher education; and to embrace new pathways of learning. She spoke of her commitment to supporting our public schools, to empowering our teachers, and to ensuring that all our students can pursue an education free from discrimination. She pledged to carry out Congress's intention to restore States' and local communities' primary role in education. It would be a great privilege to assist Secretary DeVos and her colleagues at the Department of Education in working to accomplish these noble objectives.

Should I be given the honor of serving as the Department's General Counsel, I would bring to the position legal expertise and management skills developed over a 20-year career in private practice and in public service. As Deputy Attorney General of the State of Florida, Deputy General Counsel to the Florida Governor, an adviser to the Speaker of the Florida House of Representatives, and a State agency General Counsel, I have cultivated an expertise and appreciation for rigorous legal analysis, learned the importance of leading by example, and internalized the accountability that comes with public service. Perhaps most importantly, I have gained invaluable experience in, and pride myself on providing candid and independent legal advice, even when doing so is difficult.

If confirmed by the Senate, I will strive to carry out my duties with humility, integrity, and civility. I will work cooperatively with Congress and with the Department's partners in the executive branch. I will be guided always by a reverence for the Constitution and for the rule of law.

Thank you again for the opportunity to appear before you.

The CHAIRMAN. Thank you, Mr. Muñiz.

We'll now go to 5-minute rounds of questions. I'll try to keep the questions to about 5 minutes. We have an 11 o'clock vote, so we'll take that into account. We'll begin with Senator Scott.

STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Mr. Chairman, and thank you to the panel for being here this morning.

My question is for the EEOC nominees around two subjects. One is helping folks with disabilities find full time paid employment. It certainly seems to be easier for folks with disabilities to get apprenticeship programs and internships that don't always pay. I have found as a former employer and as a policymaker that there should be an emphasis placed on the priority for folks with disabilities to have access and opportunity for paid work.

I've also seen studies from the Institute for Corporate Productivity that confirm that bringing people with disabilities onto your team is a boon for employers. It boosts morale and bolsters the bottom line, as companies of every variety have begun to recognize this. That's good news. We're still behind the curve, but we're making a lot of progress. I've found that in my own office that hiring folks with disabilities has been incredibly important to improving morale at the office.

I will also suggest that having the opportunity to tour workplaces in South Carolina where companies focus on that prioritization has been an amazing experience for me. Walgreen's is a classic example where their distribution center in Williamston, South Carolina, has about 40 percent of the employees with disabili-

ities, and according to the folks in the company headquarters, it is one of if not the most productive distribution center in their organization.

We're not doing something positive and good just for the employee. We're doing something strong and helpful for the employer and, frankly, creating a better environment for our country from my perspective. I want to ensure that the rules passed down from agencies like the EEOC do not discourage employers from hiring individuals with disabilities.

What role, if any, should the EEOC play in encouraging employers to hire individuals with disabilities, and how can the EEOC balance this role with a duty to preserve employer flexibility such that existing initiatives can proceed without disruptive unnecessary interventions?

We'll start with you, ma'am.

Ms. DHILLON. Thank you for your question, Senator Scott, and I completely agree with you about the importance of integrating disabled workers into the workforce, and I also agree with you that it is a win-win for the employers and the employees. In terms of what the EEOC can do, I think in terms—it does have a bully pulpit, and the private employer community listens to what the EEOC has to say carefully. I think it can use that and highlight some of the types of examples that you brought up to help employers think creatively about how to expand opportunities in their workplace for disabled Americans and disabled workers.

In addition, one of the things that EEOC has recently done is it has enacted some new regulations that will apply in the Federal workplace that are interesting and very creative in a lot of ways, and they will take effect next year. I think we're going to learn a lot from some of the very innovative approaches that the EEOC is advocating, and I think we're going to be able to develop some best practices that we can then share with the private employer community.

Senator SCOTT. Thank you.

Dr. Gade.

Dr. GADE. Senator, thank you for the question. One of the key things to remember is that people with disabilities still, even though it's 2017, often face significant discrimination in the workplace and in society. I had a brief—maybe about a 30 minute conversation this morning with the Capitol Police about why I needed to use a Segway in the building, and eventually I was able to get in. It was a moment where, if I had been late for a job interview or something, that could have cost me the job.

The EEOC has a critically important role in enforcing those—the anti-discrimination laws that protect people with disabilities. More broadly, I think, as my colleague said, the fact that the agency has a bully pulpit is really important in educational outreach and in the—as we discuss the wellness regulations and so forth, all of those need to be carefully crafted so that they are assisting people with disabilities and assisting employers in hiring those folks.

Senator SCOTT. Thank you.

Mr. Chairman, my time is running out very quickly here. I'm not sure that you set the clock for 5 minutes or 2 minutes, but it went really fast.

I will ask a question for the record about wellness programs. They are very effective. Voluntary wellness programs have helped many folks reduce their weight, improve their BMI indexes, become more consistent on their medicine, and help me make better choices on eating less ice cream. The reality of it is a lot of folks benefit in a lot of ways.

I'd love to hear your perspective on that, and I'll ask for your answers to be submitted in writing.

Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Scott.

Senator Murray.

Senator MURRAY. Thank you very much.

Mr. Muñiz, let me start with you. The bipartisan Every Student Succeeds Act was written by this Committee just 2 years ago, and we worked very hard to carefully strike a balance between providing states with flexibility while holding them accountable for ensuring that our schools provide high-quality education for all of our students.

According to news reports, Secretary DeVos wished the law—and I'm going to quote her—"gave states even more flexibility," and she encouraged states to, quote, "go right up to the line, test how far it takes to get over it." Well, I'm worried about that willingness to skirt the law in a number of instances from the Department, and, in fact, the Department is now facing lawsuits for unilaterally delaying and failing to implement rules that would protect students and provide relief to defrauded borrowers in violation of current law.

I wanted to ask you would you give states and other stakeholders the legal advice to go right up to the line of a law that Congress has written and test how far it takes to go over it?

Mr. MUÑIZ. Senator, thank you for that question. My advice to states would be to make a good faith effort to comply with the law, and my advice to the Secretary will always be to scrupulously follow the law and apply the requirements in ESSA when she is reviewing state plans.

Senator MURRAY. Okay. You have said your role is to help your clients understand their bounds of discretion in the law. Correct? Is it your job to help Secretary DeVos figure out how to get past the laws Congress has written?

Mr. MUÑIZ. No, Senator. My job will be to advise her as to what the law requires, advise her what her discretion might be, advise her of her options, and give her the opportunity to make an informed judgment as to what the right to do is.

Senator MURRAY. Okay. I appreciate that.

Let me turn to both of you. The EEOC interprets the Civil Rights Act as forbidding employment discrimination based on gender identity or sexual orientation. The EEOC's work has allowed millions of people now to seek employment while knowing that if they run into discrimination, the EEOC will have their back. This is really important, because lesbian, gay, bisexual, and transgender workers are far more likely to be unemployed or live in poverty. Dr. Gade and Ms. Dhillon, I want to ask you—millions of LGBTQ workers want to know if you'll stand up for them in this position.

Dr. Gade, let me start with you, and in the interest of time, please, yes or no. If the question is raised at the Commission about whether to change any part of the EEOC's current position, do you commit to advocating for that current interpretation that it is against Federal law for employers to discriminate based on sexual orientation or gender identity?

Dr. GADE. Senator, I'm personally opposed to discrimination on the basis of sexual orientation or gender identity, and I'm committed to enforcing the law as it is written and as the courts have interpreted it.

Senator MURRAY. Ms. Dhillon, you want to be Chair of the EEOC, and the EEOC already has a position, and their position is clear. Discrimination includes sexual orientation and gender identity. It is not clear when the courts can take up this matter. The question I want to ask you is what will you do when the question is before you to decide? Will you commit to keeping the current position or not?

Ms. DHILLON. Well, Senator, thank you for the question. As Dr. Gade has indicated, and I will echo, I am personally opposed to discrimination on the basis of gender identity or sexual orientation. As Chair of the EEOC, on this issue, I would be one of five votes. What I can commit to you is a very careful review and careful consultation with the career professional staff at the agency who have been working on this issue. As you noted, there is a dispute—

Senator MURRAY. There is. My question to you is will you stand up for current law or not?

Ms. DHILLON. Well, the current law, Senator, is in flux.

Senator MURRAY. The question will come before you.

Ms. DHILLON. It will. We now have a split in the circuits, and we also have two agencies that have taken differing views of the very same text. Absent a legislative solution to clarify that, I do believe, given that circumstance—

Senator MURRAY. It sounds wishy-washy to me, but I appreciate the first part of your answer that you believe in not discriminating. I just have a few seconds left, and I did want to ask both of you a quick question. Women make up half the workforce. Two-thirds of them are primary or co-bread winners in America today, yet women still only make 80 cents on the dollar.

Both of you have said that you support the collection of pay data by the EEOC. When we met in my office, you both told me it's important that we have that information so companies take a hard look at wage gaps in their workforce and for the EEOC to be able to use its enforcement power effectively. Late last month, the Trump administration froze the EEOC rule that would have finally brought some transparency to the pay practices of large employers.

I only have—well, I'm out of time, so yes or no. Will each of you commit to me that you will make finalizing a transparent pay data collection by the EEOC a priority and that it will be finished in a timely manner?

Dr. GADE. Yes, ma'am, absolutely.

Ms. DHILLON. Yes, Senator.

Senator MURRAY. Okay. Thank you to both of you. I appreciate that.

The CHAIRMAN. Thank you, Senator Murray.

Senator Isakson.

Senator ISAKSON. Thank you, Chairman Alexander, and I apologize to the panel that I had to leave for a minute to make a quorum in Foreign Relations, but I'm back, and I'm glad to be back, because this is an important hearing.

Dan, I welcome you to the Committee.

Dr. GADE. Thank you, sir.

Senator ISAKSON. I know you started the Independence Project, if I'm not mistaken—

Dr. GADE. Yes, sir.

Senator ISAKSON [continuing]. to empower veterans and employ veterans. Can you talk a little bit about what that has done since its founding?

Dr. GADE. Yes, sir. It's part of my commitment to disabled veterans and to those who have served our country so admirably and with whom I was in the hospital. I was in the hospital with many of them, as I spent a year recovering from my wounds. One of the things I discovered was that, in many cases, what they need is a helping hand and not a handout. What the Independence Project does is help people get back on their feet by incentivizing wellness and by incentivizing employment, and we're gathering data on that project right now, and we're excited about what that could do for veterans in the future.

Senator ISAKSON. You know, one thing I watched you do in my office the month that you worked for me when I was a Member of the House—you had just lost your leg in Iraq, if I'm not mistaken, the year before. Is that correct?

Dr. GADE. Yes, sir, in 2005.

Senator ISAKSON. You were in the process of rehabilitating at Walter Reed, is that correct?

Dr. GADE. I was—yes, sir.

Senator ISAKSON. Well, for the benefit of the Committee and to answer some of Ms. Murray's questions, Senator Murray's questions, I would come in the office late in the afternoon, and something would be going on back in the back room, and Dan would have taken his leg off to use it as an example of how my staff shouldn't be embarrassed or afraid to deal with somebody with a disability but to embrace it. He was a great role model with our young staff and with people in the House on what somebody with a disability can do. I think that as a Member of this Commission, you have the opportunity to do the same thing for employees and for those who would employ people that have disabilities and handicaps.

How much other work have you done with organizations other than your Independence Project that you can think of that promote the employment of people with disabilities?

Dr. GADE. Extensive work with the Department of Veterans' Affairs, and then in government, while I was working at the White House, that was one of my key focuses as I worked with the Department of Veterans' Affairs, the Department of Labor, and others on those issues.

Senator ISAKSON. You were an appointee of Speaker John Boehner at the time—council, is that correct?

Dr. GADE. No, sir. That's the National Council on Disability, which I currently serve on, and I was appointed in October 2015 right before he left office, and I currently serve as a Member of the National Council on Disability.

Senator ISAKSON. We commend you on your work. Thank you for being willing to accept this responsibility, and I wish you well.

Dr. GADE. Thank you, sir.

Senator ISAKSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Isakson.

Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thanks very much.

I want to thank the nominees for your willingness to serve and the willingness of your families to support that. We're grateful, and, Dr. Gade, especially for your exemplary service to the country.

Ms. Dhillon, I know you've got Pennsylvania connections, but in limited time, I'm going to direct my questions for today—the questions here as opposed to in writing—to Mr. Muñiz.

Two questions, one focused on the 2011 Dear Colleague letter, the guidance on sexual assault on our college campuses, and the other on public education. First of all, on the issue of sexual assault, to say it's an epidemic on our campuses is not in any way an overstatement. It might be an understatement. The best estimate is that one in five women are victims of sexual assault. We're just beginning over the last several years to deal with it more effectively, both by way of legislation, statutory change, as well as by the regulatory work that the—or the oversight work that the Department of Education does.

I had a bill that I was able to get passed a couple of years ago when we made changes to the Violence Against Women Act, the so-called Campus SaVE Act, passed in 2013 after the regulatory process and went into effect the fall of 2015. We're into our second academic year of those requirements in place, and I think they're essential for college campuses to provide victims more help than they would provide otherwise.

For example, if a victim comes forward and says that she wants to report an assault, the school now has to support her in a range of ways, according to my bill, but they have to help her to the extent that she can leave the campus and get a protective order from a court if that's what she desires. She can report it to law enforcement outside of the campus. One thing we tried to do in that bill was to say this is an issue for the whole campus. Everyone has to be part of the solution. That was progress made. There's other legislation to do even more.

A lot of the debate, a lot of the discussion, has been around the so-called 2011 Dear Colleague letter by the Department. I don't agree with the assertion that somehow it's controversial to have a preponderance of the evidence standard as opposed to clear and convincing. In fact, there's a great white paper submitted by—I don't know how many—I didn't count—but many, many law professors who went through this. Among other things, they talk about how this standard has been around since the 1990s, through the Clinton administration, through the George W. Bush administra-

tion, never the subject of controversy or even comment, and now we have this debate that has ensued in the last couple of years.

The assertions against the Dear Colleague letter are wrong, and, unfortunately, my prediction about what Secretary DeVos would do was correct. I knew that—I had a sense that she would challenge it, and, apparently, she is.

I guess the first question I have is: As someone seeking this position, despite the longstanding articulation of this preponderance of the evidence standard being used and being necessary to ensure, quote, “prompt and equitable,” unquote, proceedings for Title IX sexual assault cases, how would you approach that, given that that preponderance standard is used for other areas of civil rights law as well? Will you commit to upholding this policy, which I believe, and I think a lot of people believe, is consistent with longstanding Department policy as well as longstanding civil rights law?

Mr. MUÑIZ. Senator, thank you for your question, and thank you for all the work you’ve done on this really important issue. In my capacity as a private citizen, I’m familiar with the public statements the Department has made about what they intend to do. I understand that the Department is going to be looking at the 2011 letter, looking at all the developments in this area, trying to keep a robust commitment to protecting students from any kind of sex discrimination, particularly sexual assault, while also trying to see if there are due process protections that might be helpful in that regard.

The preponderance of the evidence standard, I understand, is something that’s been debated and studied, and I fully expect that that will be part of the discussion during whatever process the Department undertakes. Hopefully, by going through that process, they’ll be able to hear all sides of that argument and then end up with a product that ends up serving students as well as possible.

Senator CASEY. I would hope—I know I’m out of time. I would hope that as a good lawyer and, I’m sure, a very capable one, that you would tell the Secretary that not only you and your team, but she should read that white paper on the legal underpinning of where we are now with regard to that guidance. There’s nothing wrong with a debate, but to create uncertainty and confusion for our colleges on something this important is just unacceptable. We’re going to be watching very closely.

I’ll submit a question for the record on Title I funding and public education. Thanks very much.

The CHAIRMAN. Thank you, Senator Casey.

I’ll ask my questions now, and at 11, I’m going to go vote, and Senator Isakson will chair, and then I’ll come back, and other Senators can go back and forth.

Let me continue with Senator Casey’s line of questioning, Mr. Muñoz. In April 2011, the Department issued a guidance under Title IX, known as a Dear Colleague letter, which told colleges and universities for the first time the standard of proof that must be used when investigating allegations of sexual assault. That guidance applies to about 6,000 colleges and universities and about 20 million students. There wasn’t a public comment period.

The head of the Office of Civil Rights for the Department, the Assistant Secretary, was here in June 2014, and I asked her this. I

said, "I've got here about 66 pages of guidance under Title IX. Do you expect institutions to comply with your Title IX guidance documents? The Secretary said, "We do." I said, "You do?" What authority do you have to do that? Why do you not go through the same process of public comment that the Department is going through under the Cleary Act?" She said, "Well, we would if they were regulatory changes." I asked, "Why are they not regulatory changes?" You require 6,000 institutions to comply with this, correct?" "We do." "Then who gave you the authority to do that?" She said, "Well, with gratitude, you did when I was confirmed."

Now, Mr. Muñiz, do you agree that the Assistant Secretary for Civil Rights can issue a guidance and that colleges and universities must comply with that guidance?

Mr. MUÑIZ. Senator, thanks for that question. Although sometimes the line can be hard to find, I think the law is clear that guidance cannot create new binding obligations on regulated parties or entities. Whenever any agency is trying to decide whether to proceed through guidance or through rulemaking, they need to make sure that if they're issuing guidance that it's merely interpreting existing law and not creating new duties. Otherwise, they wouldn't be complying with the law.

The CHAIRMAN. A guidance is not a law.

Mr. MUÑIZ. A guidance by definition is not law. It doesn't create new binding obligations.

The CHAIRMAN. On the issue is standard of proof when investigating allegations of sexual assault, particularly changing an existing definition, wouldn't that seem to be more appropriate for a law or a regulation, which has the force of law after a period of public comment?

Mr. MUÑIZ. Senator, if the Department is imposing new obligations and new requirements that are binding, then that should be done through regulations.

The CHAIRMAN. Let me ask the nominees for the Equal Employment Opportunity Commission—you heard my comments, and we discussed in my office my interest in focusing this Committee's attention on the high cost of health care, and my disappointment, which has been shared by other Senators, that perhaps the one thing, or at least one of the few things that Democrats and Republicans agreed with in the Affordable Care Act was the focus on wellness. If one were looking at a—I mean, there's agreement everywhere that a few lifestyle changes make a difference in health in a way that almost nothing else does.

It's pretty elementary, also, that if you're looking for a way to implement incentives for those lifestyle changes, it's hard to think of a better way than the health insurance provided by employers, because 60 percent of us in the United States get our—that's 170 million or 180 million people—get our health insurance from employers. The Affordable Care Act said that employers could give employees discounts for following a healthy lifestyle, and the Obama administration had three agencies try to do that, and then the Equal Employment Opportunity Commission came long and limited what they could do and redefined what they could do.

Now, my question to you is: Will you agree, now that it's back in your lap—because it went to court—back in your lap, and you

have a chance to reconsider it, given the high cost of health care in the United States and your opportunity to clear up what employers may do to encourage a healthy lifestyle by their employees in the provision of health insurance and other benefits—will you make that a priority so employers in America will have a clear guideline about what they may do and what they may not do?

Ms. DHILLON. Well, thank you, Senator, for the question. I share your views. I think wellness programs are incredibly important and very beneficial for employees and employers. As you noted, the district court has sent the EEOC's regulations back to the agency, and so yes, it would be a priority to redo those regulations to comply both with congressional intent and, obviously, the court's direction as well.

The CHAIRMAN. Dr. Gade, I'm out of time, but your answer?

Dr. GADE. Yes, sir, absolutely. One of the things I want to point out is that people with disabilities are particularly vulnerable to— if the wellness incentives are set in a way that disadvantage people with disabilities or disadvantage people because of their genetic information, those would be areas that would be very problematic as the new regulation is eventually rolled out. That's something that I look forward to participating in, but I absolutely agree with you that wellness is important.

The CHAIRMAN. Dr. Gade, thank you.
Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman, and I want to thank you and the Ranking Member for holding today's hearing and for the hearings that we've had in this Committee over the past 2 weeks on individual health insurance market reforms.

Our Committee is working in a very productive bipartisan way to tackle a difficult issue. We've heard from Governors, we've heard from insurance commissioners, and we've heard from experts, that all span the ideological spectrum. This is what regular order looks like, and this is the way the Senate is supposed to work.

I've worked with everybody on the Committee here in good faith to reach a compromise that we can all feel proud of. However, all that work is in jeopardy because of a destructive partisan last-ditch effort to repeal the Affordable Care Act and end the Medicaid program as we know it. The Graham-Cassidy legislation, which would fundamentally restructure our health care system, was introduced just last week, and yet it could pass next week using the partisan reconciliation vehicle. This is not regular order.

I urge my Republican colleagues to drop this repeal immediately. This is not what Americans want, and it is an affront to the way that the Senate should work. When Senator McCain talked about the importance of regular order, he was referring to the type of process that you, Chairman Alexander and Ranking Member Murray, have gotten underway to address rate increases in the individual market. Please do not abandon these efforts, and I urge my colleagues to oppose the Graham-Cassidy legislation.

Now, on to today's regular order. Mr. Muñiz, LGBT students deserve to learn in an environment free of discrimination, and they deserve to be treated with dignity and respect. Do you agree?

Mr. MUÑIZ. Yes, Senator.

Senator FRANKEN. Well, Mr. Muñiz, far too often, LGBT students, particularly transgender kids, endure harassment and discrimination. When that happens, those students are deprived of an equal education. Now, part of the reason that happens is that many schools don't understand what the law requires. In May of last year, the Obama administration issued comprehensive guidance on what Title IX means for transgender students. That guidance made crystal clear that under Title IX, students must allow transgender students to use the bathrooms and locker rooms that match their gender identity. In February, the Trump administration scrapped those guidelines.

Mr. Muñiz, back in June of last year, then candidate Trump tweeted, quote, "Thank you to the LGBT community. I will fight for you." When he later accepted the Republican nomination, he said, quote, "As your President, I will do everything in my power to protect our LGBTQ citizens from violence and oppression. Believe me."

Tell me, Mr. Muñiz, do you think that rescinding the Title IX guidance is what LGBT children and their families expected when they heard the President promise to fight for them?

Mr. MUÑIZ. Senator, what I can say about that is that rescinding that guidance, I believe, from what I understand as a private citizen, was to give the new administration an opportunity to study the law and study those issues and, hopefully, address them in the way that they think is right. I will say that the Department has been clear that all students have a right to be free from sex discrimination in schools that receive Federal funds, and they've been equally clear that any student who feels that they've been subject to sex discrimination should submit their complaint and that it will be thoroughly reviewed to see whether, under any theory of sex discrimination, they've been wronged and, hopefully, get help from the Department.

Senator FRANKEN. I just want to make it clear that the rescinding of the guidance, while it sent a terrible message to LGBT students and their parents, the guidance didn't change the law, and it didn't change—take away students' rights. Even without the guidance and the model policies issued by the Obama administration, Title IX still protects transgender students, and all you have to do is ask the Seventh Circuit Court of Appeals.

In May, the Seventh Circuit ruled in favor of a transgender boy named Ash Whitaker, whose school wouldn't let him use the boys' bathroom. The court ruled that the school's discriminatory bathroom policy violated Title IX and the 14th Amendment.

I know I'm out of time, Mr. Chairman, but I hope to continue in a second round.

I just want to say that students—LGBT students go to school afraid, and 30 percent of LGBT students report missing a day of school in the last month because of fear, and that going to school—it's hard to learn if you dread going to school. I want to raise this again in my next round.

Thank you.

SENATOR ISAKSON. [presiding]. Thank you, Senator Franken.
Senator Hassan.

STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you, Senator Isakson, and thank you, Ranking Member Murray, for holding this hearing. I will add my two cents in to say that I hope very much that we can continue in this Committee to find our way forward on bipartisan solutions to stabilize our current health insurance market and that we should—and encourage my colleagues on the other side of the aisle to not bring forward the Graham-Cassidy bill which hasn't been through regular process and has the potential of greatly, greatly disrupting the lives of many, many granite staters and Americans who need healthcare.

With that, now I will turn to our nominees. Congratulations on your nominations to all of you and thank you to your families as well. This is, in fact, a family affair, and we are very appreciative. To the children in the audience, you are doing much better than many adults do in this process.

[Laughter.]

Senator HASSAN. Thank you very much for your poise and attention.

I want to start, Mr. Muñiz, with you, because one of the things that I've been concerned about is that you have a current client who is a large for-profit college company, career education corporation, which has a history of providing inaccurate job placement numbers to prospective students. When you worked for the State of Florida, you also helped to set up meetings between Attorney General Bondi and Bridgepoint Education, which is a large publicly traded for-profit college chain with a history of targeting and taking advantage and defrauding service members and veterans.

While many other states were investigating Bridgepoint, as I understand it, the State of Florida decided not to. Can you help us understand why, when there was so much information coming out about Bridgepoint and other for-profit colleges, that the State of Florida decided not to investigate?

Mr. MUÑIZ. Senator, thank you for that question. During my time in the Florida AG's office, there were several investigations in that sector. I never was part of any conversations where Bridgepoint was mentioned as being a possible subject of investigation. I've read in the media that there weren't a large number of complaints against Bridgepoint in Florida. As you know, they operate throughout the country, and Florida looks at things mainly from a Florida perspective.

I just want to be clear on this issue, because I know that it's important to the Committee. One of the obligations that the Department has is to protect student borrowers, to protect taxpayers, to make sure that laws and regulations holding schools accountable in this sector are enforced. I'm fully committed to helping my prospective client, if confirmed, to carry out that mission, and if I weren't committed to that aspect of the mission, I wouldn't be seeking this position.

Senator HASSAN. Well, I thank you for that reassurance. I will tell you that, given some of the Department's decisions such as pulling back on the gainful employment rule, a lot of us are very concerned that the Department is refraining from oversight on the

for-profit sector, even though there's extraordinary information to show that the for-profit sector has been taking advantage of students. I hope very much that if you are confirmed that you will take this to heart and that your past associations and representations of for-profit entities in this field won't cloud your judgment or present a conflict of interest.

I also just wanted to ask you a question about forced arbitration. Forced arbitration clauses in contracts prevent students from having access to the courts when, for instance, Bridgepoint University has cheated them or lied to them. The use of forced arbitration is well known in the for-profit college sector.

You were asked about this issue in your staff interview, specifically about whether you thought that forced arbitration agreements get in the way of groups of students obtaining relief from student debt. You responded, as I understand it—the quote is “I guess they can.” I just want to clarify this for the record. In your 20 years of experience as an attorney, would you agree that forced arbitration typically limits relief to students?

Mr. MUÑIZ. Senator, I actually haven't had a lot of experience with arbitration, and I think, depending on the specific case, arbitration may or may not be beneficial. Sometimes arbitration can help someone get relief more quickly. Other times, maybe they might be in a better legal position without that.

Senator HASSAN. Of course, when students—and I see my time is up, so if I have a chance for a second round, we might pursue this. What I'd ask you to think about is this. When there are standard clauses, students don't have the option of negotiating their contracts with these entities one at a time, and it is denying people access to the courts, even though they find out that they have been defrauded or lied to in some cases and deserve compensation. There are a group of us that really believe forced arbitration clauses shouldn't be allowed in this type of contract, and I'd ask you to consider that, and if you are confirmed, I'd look forward to working with you on that.

Thank you.

Mr. MUÑIZ. Thank you, Senator.

Senator ISAKSON. Senator Murphy.

STATEMENT OF SENATOR MURPHY

Senator MURPHY. Thank you very much, Mr. Chairman. I may submit questions to the record for this panel, but notwithstanding the fact that it's just you and I here, and Chairman Alexander is no longer present, I want to use my time to just raise similar concerns to others about the process going forward on health care reform.

I worry that we're watching a Charlie Brown and Lucy move be perpetuated on the Democrats on this Committee. I took it on faith that this Committee was truly dedicated to a bipartisan Committee process that was real. I spent the last 2 weeks working hard to study up for our hearings with experts and Governors and insurance commissioners. I sat through those hearings. I had multiple discussions with the Chairman and other Members of this Committee about paths forward, only to receive news through the press that the intent of leadership may be to bring a repeal bill once

again before the Senate that has not gone through this Committee, that has not gone through the Finance Committee, that has not received a hearing, that has not gone through a markup, and, incredibly, may come before the Senate without even receiving a CBO score.

I am hopeful that we are going to reinvest in our bipartisan process here, because when I spent time back in my State over the course of August, I heard one thing loud and clear from Republicans, Democrats, and unaffiliated voters. They wanted us to stop the political games and come together and try to find a bipartisan compromise to keep what works in the Affordable Care Act and get rid of what doesn't work or fix what doesn't work, and we are very close to achieving that on this Committee.

I am really hopeful that this was not a ruse, that this was not all a distraction to make sure that Democrats on this Committee who tend to spend the most time working on health care policy didn't use the last few weeks to study up on Graham-Cassidy, to get serious about talking about its danger to our constituents and instead got pulled in to a Committee process and a bipartisan legislative process that, in the end, may be simply used as cover and distraction to get a partisan bill passed through the U.S. Senate.

I know there are a lot of Members of this Committee who care about the traditions and precedent of the Senate. If you care about the traditions and precedent of the Senate, then you can't support this process or this bill. It was bad enough that for the first 6 months of this year, this Committee was totally cut out of any discussion of the repeal bill that was being developed behind closed doors and ultimately moved to a vote before the Senate. I said multiple times here that I didn't really see the point of continuing to show up if this Committee wasn't going to ultimately weigh in on a reordering of the entire American health care system.

This is even worse. At least, Republicans waited for a CBO score, waited to find out what the bill did before bringing it for a vote. What we're hearing is that if this bill comes before the Senate next week, not only will it blow up all of the good work that has been done on this Committee to try to find a bipartisan solution, but it will also be voted upon without any, any understanding of how much it costs, how many people it hurts, what it does to premium increases.

I think we're at a point now where the Republican majority, if they walk away from this bipartisan process and move to a vote on the floor on a bill that no one understands, will have completely broken the U.S. Senate. It will be unfixable. It will be unfixable if we were all asked to be part of this bipartisan process, have the rug pulled out from under us, and a bill voted on that has no CBO score, reordering one-fifth of the American economy.

Mr. Chairman, I don't have questions for the witnesses because I think this is a really dire moment for this country and for the future of the Senate. As a new member, as someone who hopes to be around the Senate for a long time, I don't know whether you can fix the Senate if this process that we are all asked to take part in breaks down and a partisan bill comes before the Senate next week. I hope that everyone on this Committee will do whatever is possible to stop that from happening.

Thank you, Mr. Chairman.

Senator ISAKSON. I note that there are no other Members present. Are any other members coming back other than Senator Alexander? Today or tomorrow or—

[Laughter.]

Senator ISAKSON. Today, now?

Senator MURPHY. Mr. Chairman, we have three Members who are on their way as we speak. Senator Warren—

Senator ISAKSON. Out of respect for the comments you just made, I'm not about to shut the Committee down when somebody wants to have something to say.

Senator MURPHY. Thank you.

Senator ISAKSON. I also don't want to just keep—oh, there's Ms. Warren.

Would you like to be recognized?

Senator WARREN. I would in 1 minute.

Senator ISAKSON. You're limited to five.

[Laughter.]

Senator ISAKSON. You can do whatever you want to during those five.

Senator Warren.

Senator WARREN. Thank you, Mr. Chairman.

STATEMENT OF SENATOR WARREN

You know, this Committee has had bipartisan discussions over how to stabilize the health insurance markets in this country, and I applaud the work of Senator Alexander and Senator Murray as they've tried to get us on the right path here, and I strongly oppose turning back in the wrong direction by attacking the health insurance coverage of millions of Americans and gutting the Medicaid program. I hope we stay on the path we have set out in this Committee.

Now, what I want to ask about today is a really important employment issue. Two weeks ago, Equifax, one of the big three consumer credit reporting agencies, announced that they had been hacked, jeopardizing personal information for about 143 million Americans. Americans are outraged by this hack, and let's face it, they have every right to be.

There is a lot at stake here. Identity theft can follow you literally for the rest of your life, particularly the theft of your social security number and your birth date. It gets worse. Your credit history can affect your ability to get a loan, to buy a car, and even whether or not you can get a new job. According to a survey by the Society for Human Resource Management, about 50 percent of employers in America check the credit histories of prospective hires.

Now, Ms. Dhillon, you are President Trump's nominee to serve as Chair of the Equal Employment Opportunity Commission, the independent Federal agency that enforces civil rights laws prohibiting workplace discrimination. Do you think employees should compete on the merits of the job, or on whether or not they already have enough money to pay their bills?

Ms. DHILLON. Well, thank you, Senator Warren, for your question and also for your time last week—I appreciated it—when we discussed this issue.

Senator WARREN. Yes. No surprises.

Ms. DHILLON. As we discussed, currently, the FTC has jurisdiction for enforcing FCRA, and with respect to the current structure of employment law, really, I think the remedies are limited to whether or not, if an employer decides to have credit checks as part of its hiring process, it does so in a nondiscriminatory fashion. The issues that you raised, I think, are very interesting issues, and I would like to look at the data. I think we agreed we're both data geeks. I would look forward to working with you on this issue, because I think that the issue raises an important one.

Senator WARREN. If we can, let's talk just a little bit about the data, because this is a good chance to get it out there and have people think about this. You know, there are a number of problems with employers using credit histories in their decisions for hiring and promoting people. First, neither job performance nor worker productivity is correlated with credit history, and, second, credit histories are riddled with mistakes. The recent Equifax breach will make those mistakes even more likely.

According to a 2012 study by the Federal Trade Commission, more than a quarter of Americans sampled had an error in their credit report already, and these errors are really hard to correct. I don't know if you've ever tried to correct one, but they are a bear to try to fix. A followup study by the FTC found that a majority of their sample who had reported an error on one of their credit reports still believed that some part of their credit report was inaccurate.

There's one more problem, though, with using credit histories to screen job applicants. Credit reports may look objective, but they have a disproportionate impact on people of color. For example, blacks are more likely than their white counterparts to have no credit history at all, and those who do have a credit history, on average, have lower credit scores than whites.

There's even evidence in a new working paper from researchers at the University of Wisconsin and Harvard University showing that employers penalize black applicants with bad credit more than identical white applicants with bad credit. The unemployment rate already for black Americans is twice that of white Americans, and we should be finding ways to close the gap, not to help the gap get wider.

Ms. Dhillon, if you are confirmed to the EEOC, you'll have plenty of ability to bring claims against employers whose use of this policy is having a disparate impact on groups protected by Title VII of the Civil Rights Act of 1964, including workers of color. I just want to know if you will commit to doing that.

Ms. DHILLON. Well, Senator, as we discussed, if I were confirmed, I would want to work with the career professional staff. I would want to review the data, the data that you cited, whatever data they may already have collected that I am not privy to, to completely understand the issue, and I look forward to working with you to address the issue.

Senator WARREN. Okay. I take it that what that answer means is you'll look at the data. If the data back up these claims, then you're ready to move.

Ms. DHILLON. Then we're ready to work on solutions, absolutely.

Senator WARREN. Thank you very much.

You know, the magnitude of this Equifax problem is just almost impossible to comprehend. One small thing that Congress can do to make life a little easier for people who are affected by this hack is to pass a bill—I've got a bill going forward now—to say that employers cannot use this information in a decision about who to hire and who not to hire.

Thank you, Mr. Chairman. I appreciate the time.

Senator ISAKSON. Thank you, Senator Warren.

Senator Baldwin.

STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you.

I wanted to follow-up with our EEOC nominees on an issue that Ranking Member Murray raised about Title VII. I strongly support the EEOC's decision to make it clear that Title VII's sex discrimination provisions are properly understood to prohibit discrimination based on both gender identity and sexual orientation. I applaud the Commission for its advocacy on behalf of LGBTQ workers.

For example, in July 2017, the agency brought a suit against a Georgetown Restaurant on behalf of Alejandro Hernandez. He is a young gay man who was subjected to harassment because of his sexual orientation. That case resulted in a \$50,000 settlement and changes to the employer's policies and training to address discrimination and harassment. In May 2016, the Commission secured a \$140,000 settlement and policy changes on behalf of a transgender woman who was blocked from doing her job as an IT contractor at a Minnesota college when she announced her intent to transition from male to female.

I wanted to followup on Senator Murray's question, because I want to be clear. I did hear each of you, Dr. Gade and Ms. Dhillon, speak to your personal opposition to discrimination on the basis of sexual orientation or gender identity.

Ms. Dhillon, I heard you talk about the agencies that have taken different positions, about careful review and consultation with senior career staff at the Commission—is what I jotted down in terms of the notes, what I understood you to say. I guess I want some greater clarity here. No. 1, will you commit to supporting the EEOC bringing cases on behalf of workers like the two that I mentioned who face discrimination because they are gay, lesbian, bisexual, or transgender? Yes or no?

Ms. DHILLON. Well, thank you for your question, Senator. As I indicated, I am personally opposed to that form of discrimination. It's unrelated to the ability of someone to be able to perform their job duties. The challenge that we have right now, though, is that we have two agencies of government who have taken different interpretations of the same statutory language. In addition, we have courts—

Senator BALDWIN. The Commission has taken one, and you're joining the Commission. Would you pursue the understanding and the finding that the Commission has made previously?

Ms. DHILLON. The challenge, Senator, is that it actually says—

Senator BALDWIN. Is that a no?

Ms. DHILLON. No, it's not a no. The challenges that—and I think that this is something that I am focused on—is that while the EEOC has jurisdiction over the private workforce and state and local government and Federal Government, the Department of Justice actually enforces Title VII with respect to state and local government employees. I think it's critical that the Federal Government ultimately speak with one voice on how this statute is appropriately interpreted and whether that's a legislative solution, which would be——

Senator BALDWIN. Let me—I'm going to cut you off, because I want to just point out two things from your testimony. One thing you said was that an employee's decision to bring a charge can, in many instances, be a courageous act, but an act that can also be stressful for the individual and his or her family. You go on to comment on justice delayed is justice denied sort of thoughts about the backlog and how swiftness is important.

I want to underscore both of those points. I only practiced law for a very brief time many years ago. When I represented individuals who had been discriminated against in the workforce on the basis of sexual orientation, bringing a complaint in and of itself was definitely a courageous act, potentially subjecting them to additional discrimination.

I agree with the point that you made in your testimony about the delay, and it just strikes me that what you're saying in terms of waiting to resolve differences is going to impact both of those in the opposite way than you want.

Thank you, Mr. Chairman.

The Chairman [presiding]: Thank you, Senator Baldwin.

We'll now begin a second round of questions unless some Senator arrives who has not had a first round. I'll begin.

Ms. Dhillon, for 3 years in a row now, the appropriations bill which funds the EEOC has included report language directing greater transparency for the guidance documents that EEOC releases, that those guidances be circulated for public input at least 6 months before adoption. Do you think an EEOC guidance document will be a better product if it goes through a public comment period? If you're confirmed, will you set a permanent policy requiring this type of transparency for new guidance documents?

Ms. DHILLON. Thank you, Senator Alexander. Yes, I believe that guidance can absolutely be improved with greater input, and if I'm confirmed, I would commit to working to solicit the views of all stakeholders and to engage in a vigorous notice and comment process so that the final guidance or regulations that are issued by the Commission reflect the best thinking and the input of all stakeholders.

The CHAIRMAN. Thank you, Ms. Dhillon. Ms. Dhillon, in 2016, President Obama's Office of Management and Budget approved revisions to what's called the EEO-1 that would have required employers to submit not just demographic information but also W-2 wages and hours worked for all employees in a variety of categories. It increased by 20 times the number of pieces of information, from 180 to 3,660, for each of the 61,000 private employers on their 63 million employees.

In August 2017, OMB issued a stay of the effectiveness of EEO-1. I was one of those Senators who was very concerned about the increased burden on employers that seemed to me to be completely unnecessary by this action. What would you do to make sure that any future EEO-1 revisions are more reasonable?

Ms. DHILLON. Well, Senator, certainly the focus of the EEOC on enforcement of the equal pay laws is an appropriate priority and an important priority of the agency. If I were confirmed, I would want to work with the career staff to understand what additional data the agency needs to improve its enforcement of the Nation's equal pay laws.

I think, going back to your earlier question about the importance of input and the importance of the notice and comment process, that with respect to the EEO-1, in particular, it would have benefited from a more vigorous process. There were recommendations that were made—

The CHAIRMAN. I only have a little time. Do you agree that was an unnecessarily burdensome order?

Ms. DHILLON. I think it was unfortunate that the agency did not incorporate the input of a number of stakeholders who had suggested revisions to the guidance that I think could have—or the regulation that could have improved it.

The CHAIRMAN. Let me go to Mr. Muñiz.

Mr. Muñiz, Senator Murray asked you about congressional intent. You know, we debated a lot of issues here and worked them out when we fixed No Child Left Behind, which is what we're elected to do, and wrote the language carefully, therefore. It's the result of compromise here on the Committee. We knew what we were doing when we wrote the law. We might have been wrong. We might have been wrong, but we were elected to write it.

Now, we did the extraordinary thing, too, of placing in the law some prohibitions, some things the Secretary may not do, and that concerned me with the previous administration. Yet early in this administration—I'll give you an example. The U.S. Department of Education under this administration said the Delaware Department of Education must revise its plan to identify and describe long-term goals that are ambitious for all students and for each subgroup of students.

Now, the law says that each state shall establish ambitious state-designed goals, and then the law says the Secretary may not do a number of things: add new requirements, add new criteria, prescribe long-term goals, promulgate a definition of any term used in this part. Now, Secretary DeVos then clarified what was meant there.

Do you agree that when Congress writes plain English words like ambitious state-designed goals and then prohibits the Secretary from defining it, that the Secretary should follow that?

Mr. MUÑIZ. Yes, Senator. Thanks for that question, and I can assure you that if I'm confirmed, I'll do my best to advise the Secretary and the other clients at the Department as to what the law requires and that I'll be equally scrupulous about advising about what the Department may do and, in cases where Congress has been clear, about what the Department or the Secretary may not do. I will also so advise the Secretary.

The CHAIRMAN. Thank you, Mr. Muñiz.
 Senator Kaine.

STATEMENT OF SENATOR KAINE

Senator KAINE. Thank you, Mr. Chairman.

Thank you to the witnesses and congratulations on your nomination to these very important positions. I want to ask a question to both of the EEOC nominees about gender identity and sex discrimination. You've had a number of opportunities in private discussions and during the hearing to describe whether you'll support or oppose any change to the EEOC's approach to sexual orientation and gender identity discrimination under Title VII. The EEOC has long held that that is a violation of law.

From each of the EEOC nominees I'd love to know whether you personally believe that this type of discrimination, that is, employment discrimination based upon sexual orientation or gender identity, is wrong, and if you could just answer that with a simple yes or no, that would be great.

Ms. DHILLON. Yes, I believe it's wrong.

Dr. GADE. Yes, Senator.

Senator KAINE. Given those answers, which I appreciate, if someone proposed to scale back the EEOC's approach to this type of discrimination, would you support or oppose that?

Ms. DHILLON. Well, Senator, again, this goes back to what the statutory language actually requires, and the challenge that we face currently is that the EEOC has interpreted the statute in one way, and the Department of Justice has interpreted the statute another way in the very same case, which is currently pending before the Second Circuit. There is a split in the circuits. I think the courts are wrestling with this statutory interpretation issue as well.

The fact that both the EEOC and the DOJ have jurisdiction over enforcing Title VII, I think, also mandates that we come to a solution to this. This has real human implications for the people who are impacted and for their families. It's easy to give a quick answer, but the issue is too serious to give an easy quick answer.

You know, ideally, a legislative solution could resolve this. I know that there have been bills that have been introduced and that people have worked hard on that. I also think that, given the situation that we face with the split in the circuits as well as the fact that there's now various different state laws, it makes it more likely that the Supreme Court will ultimately take up this issue and—

Senator KAINE. Assuming there continues to be some ambiguity in the circuits, would it be your intent to continue to follow the current EEOC practice and insist that discrimination on the grounds of sexual orientation or gender identity violates Title VII until there is clear legal precedent suggesting that the EEOC position is wrong?

Ms. DHILLON. Well, I think the challenge here is that there are conflicting decisions out of different circuit courts—

Senator KAINE. Right.

Ms. DHILLON [continuing]. and the EEOC, though, is bound by those decisions because those are Federal appellate courts. The

agency is faced with really interpreting the same statute in different ways, depending on geography.

Senator KAINE. Well, let me ask you this. The EEOC has a provision, and in any jurisdiction where a circuit court has followed or been consistent with the EEOC provision, you're going to continue to enforce the EEOC doctrine, correct, in a circuit where the circuit court—

Ms. DHILLON. Oh, yes.

Senator KAINE. In any circuit where there hasn't been a decision, you're not going to backtrack off EEOC's nondiscrimination provision, are you?

Ms. DHILLON. That is where I would like to consult with the career professional staff because they have both access to information I don't have, but also experience in what is a very unusual situation where the agency is being called upon to enforce the same law in different ways in different parts of the country.

Senator KAINE. When you mentioned the human—I'm glad you mentioned that this is an important issue about human cost. I mean, discrimination is one of the worst things that can happen to somebody, being turned away from a position or a promotion because of sort of an organic thing about who you are—being turned away for that reason. There is a significant human cost.

Ms. DHILLON. Absolutely, because it's unrelated to their ability to perform the work.

Senator KAINE. Right. The EEOC has a current policy. It is subject to some legal challenge, but the current policy is to treat gender identity and sexual orientation discrimination as in violation of Title VII. I recognize that in circuits where the circuit court has held otherwise, that can create a challenge. In circuits where the circuit has decided in accord with the Title VII policy, or in circuits where the circuit has not countered the Title VII policy, I would love to hear you commit that you would follow the Title VII policy, and perhaps I would ask of the other witness, Dr. Gade, to respond.

Dr. GADE. Yes, sir. I'm committed to enforcing the law as it's passed by the Congress and interpreted by the courts, and right now, that means different things in different parts of the country, and it means different things at different levels of government, as we discussed.

Senator KAINE. Mr. Chair, if I could just—so you will enforce current law of the EEOC about this topic in a circuit that has upheld the EEOC's interpretation, and you will also enforce it in any circuit that has not countered the EEOC interpretation. Is that your commitment to me today?

Dr. GADE. Sir, as far as I know, there is no move afoot in the EEOC to reinterpret those guidelines, but I'm committed to—

Senator KAINE. You would not support such a move unless there is clear legal—

Dr. GADE. Unless there are clear legal reasons for such a move, I am not going to drive that process myself.

Senator KAINE. Thank you, Mr. Chair.

The CHAIRMAN. Thank you, Senator Kaine.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Muñiz, while you were a top aid to Attorney General Pam Bondi, were you aware of student complaints against Trump University?

Mr. MUÑIZ. Senator, I became aware of the existence of Trump University when our office got a press inquiry about that.

Senator FRANKEN. There are emails that show that you were included in discussions about student complaints alleging fraud with Trump's real estate seminars. Were you aware of complaints from Floridians who had taken Trump University seminars?

Mr. MUÑIZ. Senator, after we got the media call that I just referred to, I and others at the office tried to find out what Trump University was and what, if any, contact there had been regarding that with our office. In the course of that due diligence, I learned that there had been one complaint in 2011, and I believe after the initial media report, a couple of more complaints may have come into the office.

Senator FRANKEN. Had you received emails before you got the media—you heard about the complaints in the media?

Mr. MUÑIZ. I had never gotten any emails or been involved in any discussion about Trump University before that.

Senator FRANKEN. Before that, but then, subsequently, you did.

Mr. MUÑIZ. Once we got the media inquiry, my role was largely to find out how the office would handle that and to make sure that we were getting the facts right and communicating accurate information to people who were interested in learning about that.

Senator FRANKEN. There are emails that show you were included in discussions about these complaints, and did you approve the decision as the Attorney General's chief advisor not to investigate Trump University?

Mr. MUÑIZ. Well, once I learned about the issue and I learned about how the career staff believed it should be handled, I agreed with that then under the facts and circumstances that I knew, and sitting here today, I still agree with that.

Senator FRANKEN. Why?

Mr. MUÑIZ. Well, I think for me, the two main factors were the small number of complaints, given—you know, we're an office that focuses on consumer protection across the board. A conservative estimate of the complaints that come in is something like 70,000 a year. In this case, there were a couple of complaints. There was another—

Senator FRANKEN. There were two complaints? Is that your testimony?

Mr. MUÑIZ. Senator, my understanding is when we first learned about this, there was one complaint that had come in 2011 that related to Trump University. There was another entity with a similar name that was not Trump University and, previous to Attorney General Bondi taking office, there were complaints involving that. When it came to the question of how to handle the issue of Trump University, the number of complaints—my understanding is that there was the one in 2011 and a couple of—after the media reports, and to complete my answer—

Senator FRANKEN. Now, you said there were a couple. This is the Orlando Sentinel. Well, let me see—Trump University and a Florida-based Trump Institute had stopped offering classes by the time

Bondi took office in 2011. By then, more than 20 consumer complaints had been filed by former students who said they were swindled. Is it still your testimony that there were only two?

Mr. MUÑIZ. Well, as the article there points out—and, again, this is to the best of my recollection and my understanding of this—Trump Institute was a completely different entity that had a completely different business relationship. The question that we got was about Trump University, and the question—

Senator FRANKEN. What is it Trump Institute did that was different than Trump University?

Mr. MUÑIZ. Well, if I could finish, the question that came in was about a lawsuit that another State was filing, and the question that was posed to us was essentially sort of asking for a comment on that from the Florida Attorney General's Office. The focus of our due diligence in collecting information was to find out about this New York lawsuit and what, if anything, the office knew about Trump University, which was a different entity from Trump Institute.

Then, again, I just want to put things in context. Seventy thousand complaints a year. The career servants in the Florida Attorney General's Office have to make a lot of decisions about—

Senator FRANKEN. Okay. I'm now out of time. Would the chairman let me—

The CHAIRMAN. Well, let him finish the answer before you ask another question, if you please.

Senator FRANKEN. OK.

Mr. MUÑIZ. Well, I don't want to minimize any complaints that the office might get, but I also want to put—if you're asking about whatever the number of complaints were that were at issue with Trump University or even Trump Institute, I believe that those need to be viewed in context of the overall work in front of the office.

Senator FRANKEN. My question was do you know what the difference between Trump Institute and Trump University was?

Mr. MUÑIZ. Senator, I actually don't know what services Trump Institute offered.

Senator FRANKEN. Is it possible that they were essentially the same entity?

Mr. MUÑIZ. Senator, my understanding of this is that I don't believe they were the same entity. I believe that it was—

Senator FRANKEN. Your understanding is that you—so your understanding is that you don't believe that.

Mr. MUÑIZ. I do not believe that they were the same entity.

Senator FRANKEN. You don't know for sure.

Mr. MUÑIZ. When we were trying to answer these questions, my understanding—what I recall is that they were completely separate entities and had been handled—prior to Attorney General Bondi taking office in 2011, the office had interaction with Trump Institute. I don't know the exact details of that. What I can say sitting here today is that to the best of my understanding, they were two completely separate businesses, separate entities.

Senator FRANKEN. Thank you.

The CHAIRMAN. Thank you, Senator Franken.

Senator Warren.

Senator WARREN. Thank you, Mr. Chairman.

Now, Mr. Muñiz, at this point, Betsy DeVos isn't really even trying to hide the fact that she's giving her friends at student loan companies and—the for-profit student loan companies and colleges pretty much anything on their wish list. That's bad enough. I have an even bigger problem when she breaks the law to do it.

For example, 19 State Attorneys General led by Massachusetts Attorney General Maura Healey have sued Betsy DeVos for illegally delaying rules to help students who have been defrauded by for-profit colleges.

Mr. Chairman, I'd like to enter this July 2017 complaint filed by 19 State Attorneys General in Federal court against Betsy DeVos into the hearing record, if I could.

The CHAIRMAN. It will be.

Senator WARREN. Thank you. I'm just trying to understand what, in your record, should give us confidence that, if you're confirmed, you would help reverse the problem at the Department of Education or at least make sure that Secretary DeVos is following the law. Can you give me just one example from when you were a top aid to the Florida Attorney General's Office when you initiated a new case to stand up for students who were being cheated by for-profit colleges?

Mr. MUÑIZ. Senator, thanks for that question. When I worked for the Florida Attorney General, I was the Deputy Attorney General and Chief of Staff.

Senator WARREN. Yes, I know.

Mr. MUÑIZ. As you may know, my role wasn't to initiate particular cases—

Senator WARREN. Is the answer none?

Mr. MUÑIZ. The answer is that, in general, not just, Senator, in the area of these companies—but what I was going to say is that we have a lot of respect for the career attorneys—

Senator WARREN. Is the answer none?

Mr. MUÑIZ. We have a lot of respect for the career—

The CHAIRMAN. Let the witness answer the question, please.

Senator WARREN. All right. I'm going to run out of time here, Mr. Chairman. This is not—

The CHAIRMAN. I'm going to insist that the witness be allowed to answer the question.

Senator WARREN. Fair enough.

The CHAIRMAN. You can have additional time if you'd like.

Mr. MUÑIZ. Senator, I'll be brief. We had a lot of respect for the career attorneys in our office. Consumer protection is something that is largely driven by our career employees, and I can assure you that when I was there, the cases that you're asking about in this industry weren't—I did not handle those or oversee those or have any involvement with those that was any different from the way that I would have treated anything else that we worked on in that office.

Senator WARREN. All right. I'll just point out this is not a new question. I asked you this a week ago when you were in my office. I asked you specifically, "Do you have one example that you can just give me where you stood up and you said, "You know, here's some evidence that came to us, and we're going to use that evi-

dence to go after one of the for-profit colleges.” I asked you for the example and made it pretty clear that I was going to ask you here again in public. What I’m hearing is no, you don’t have any.

You know, as Senator Franken pointed out, we know that once your boss got a \$25,000 political donation from Donald Trump, you didn’t join the other states that were suing Trump University for cheating students, and you didn’t join the other states in going after Bridgepoint University for cheating students after that for-profit college set up a private meeting with your boss. I think this is important, because Betsy DeVos has filled the Education Department with for-profit college hacks, including a former Bridgepoint executive and another administrator of for-profit colleges who is now in charge of policing sham colleges.

It looks like, from the point of view of the Department of Education, that these for-profit colleges can just go right on cheating students and so can the student loan companies. Betsy DeVos recently terminated the Department’s partnership with the Consumer Financial Protection Bureau. I want to understand if you’re going to help shield these companies from accountability, or if you’ll at least get out of the way when other agencies are trying to take steps to protect students.

Mr. Muñiz, do you believe that when student loan giant, Navient, illegally overcharged our military troops on their student loans, the Department of Justice had the legal authority to enforce the Service Member Civil Relief Act to fine them in 2014?

Mr. MUÑIZ. Senator, I’m not familiar with that case.

Senator WARREN. Do you believe that when the Department of Education debt collector was caught hounding borrowers about debts that weren’t even theirs, the Federal Trade Commission had the legal authority to enforce the Fair Debt Collection Practices Act and fine them?

Mr. MUÑIZ. Senator, I’m not familiar with that case. As we discussed when we met privately, I fully respect the authority of any other entity, whether it’s another Federal agency or whether it’s a State Attorney General, to exercise whatever authority they have under their power—

Senator WARREN. You’ll get out of the way? You’re making a commitment to get out of the way so that those agencies can do that, even if that’s contrary to what your boss has said?

Mr. MUÑIZ. Senator, if I’m confirmed, my focus is going to be to advise the Secretary on what the Department of Education can and can’t do. Obviously, part of that may sometimes involve advising about jurisdictional issues between—

Senator WARREN. Let me ask you one more jurisdictional issue. I’m trying to keep my time short. I don’t want to cut him off—

The CHAIRMAN. Go ahead.

Senator WARREN. When Navient railroaded borrowers into repayment options that cost students more money but boosted Navient’s profits, do you believe the CFPB had legal authority to enforce Dodd-Frank and the Fair Credit Reporting Act to go after them?

Mr. MUÑIZ. Senator, I don’t have a view on other agencies or what their authority is.

Senator WARREN. Look, I’ll just quit on this, because this is really frustrating. The Department of Education under Betsy DeVos

has now said that she's in the way of these other agencies trying to enforce legal rules to help students, rules over which I believe they have jurisdiction. This has been all over the news. You've been nominated to be the lead counsel here, and the idea that you haven't even looked into the question of whether these three other agencies, the Department of Justice, the FTC, and the CFPB, do, in fact, in cases that have actually come up in very recent history, have legal jurisdiction to go forward.

I think it's a fair question to ask you. Do you think they have jurisdiction? If you don't have an opinion on that, I'm sorry, but you just sound like a guy who's going to say, "Whatever Betsy DeVos wants me to say, I promise I'll sit down and do that."

I appreciate the extra time, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

I want to thank Ms. Dhillon, Dr. Gade, Mr. Muñiz for coming, and for their family Members, welcome.

I want to ask unanimous consent to introduce five letters of support for Dr. Gade and two letters of support for Janet Dhillon into the record.

The CHAIRMAN. If Senators wish to ask additional questions of the nominees, those questions are due by 5 p.m. Thursday, September 21st. For all other matters, the hearing record will remain open for 10 days. Members may submit additional information for the record within that time. We will meet next week to consider these nominees.

Thank you for being here. The Committee will stand adjourned.
[Additional material follows:]

ADDITIONAL MATERIAL

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 12-Civ-21431-COOKE/TORRES

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

*FASTTRAIN II CORP., d/b/a FASTTRAIN COLLEGE,
an administratively dissolved for profit
Florida corporation and ALEJANDRO
AMOR, an individual,*

Defendants.

**OMNIBUS ORDER ON MOTIONS FOR SUMMARY
JUDGMENT**

This is an action under the Federal False Claims Act, 31 U.S.C. §§ 379–3733 (“FCA”). Plaintiff, the United States of America, alleges Defendants FastTrain II Corp., d/b/a FastTrain College (“FastTrain”) and its President, Chief Executive Officer and co-owner, Alejandro Amor,¹ knowingly presented, or caused to be presented, false statements and claims to the United States and the United States Department of Education (“DOE”). Plaintiff seeks treble damages and civil penalties.

I have jurisdiction under 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a).

Pending are: (1) the United States’ Motion for Summary Judgment (ECF No. 131); and (2) Amor’s Cross-Motion for Summary Judgment (ECF No. 141).² For the reasons that follow, I grant Plaintiff’s Motion and deny Defendant’s Motion.

I. BACKGROUND

This action arises from violations of the FCA and common law by FastTrain and its President, Chief Executive Officer, and co-owner Amor. From at least January 2010 through June 2012, when FastTrain closed, FastTrain and Amor knowingly presented, or caused to be presented, false claims and statements to the DOE and concealed material information in order to participate in the Federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (“HEA”), as amended, 20 U.S.C. §§ 1070 et seq. (“Title IV, HEA Programs”).

At Amor’s direction, FastTrain knowingly submitted and/or caused to be submitted false information relating to the eligibility of students to receive Title IV, HEA Programs funds—through the Federal Pell Grant Program (Pell Grant), the Federal Family Educational Loan Program (“FFEL”), the Federal Direct Loan Program (“FDL”) and the Campus Based Programs—by providing false documentation that certain students had a high school diploma or its recognized equivalent when in fact they did not have such credentials. Also at Amor’s direction, FastTrain admissions employees instructed and counseled ineligible prospective students to provide false high school completion attestations and further coached them to lie on their Free Application for Federal Student Aid (“FAFSA”), the document that students file to obtain Title IV, HEA funds. As a result of Amor’s fraudulent scheme and false representations of Title IV eligibility, FastTrain received millions of dollars of Title IV financial aid that it otherwise would not have received.

After a twenty-three day trial in *United States of America v. Alejandro Amor*, Case No. 1:14-cr-20750–JAL(s)-1 (S.D. Fla.) (“*Amor Criminal Proceeding*”), a jury

¹ On October 26, 2016, I granted Amor’s leave to proceed pro se in this action. (ECF No. 103). With respect to FastTrain, however, I granted Plaintiff’s Motion for Default Judgment (ECF No. 173) because after FastTrain’s counsel withdrew, it failed timely to obtain new counsel. See *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1386 (11th Cir. 1985).

² Amor’s September 22, 2016 Cross-Motion for Summary Judgment was untimely, as dispositive motions were due by August 26, 2016. Nonetheless, in the interest of bringing this tortuous litigation to a long-overdue final resolution, I address Amor’s arguments herein.

convicted Amor of one count of conspiracy to steal Government funds, in violation of Title 18, United States Code, Section 371, and 12 counts of theft of Government funds, in violation of Title 18, United States Code, Section 641.³ The United States now seeks to recover treble damages and civil penalties under the FCA for Amor's illegal acts.

II. STANDARD OF REVIEW

Summary judgment “shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642 (11th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)) (internal quotations omitted); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). Thus, the entry of summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

“The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). “Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.” *Id.*

Rule 56 “requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324. Thus, the nonmoving party “may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks omitted).

“A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Damon*, 196 F.3d at 1358. “A mere ‘scintilla’ of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Abbes v. Embraer Servs., Inc.*, 195 F. App'x 898, 899–900 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

When deciding whether summary judgment is appropriate, “the evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party.” *Bush v. Houston County Commission*, 414 F. App'x 264, 266 (11th Cir. 2011).

III. THE FALSE CLAIMS ACT

The FCA provides that:

(1) [A]ny person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

is liable to the U.S. Government for a civil penalty of not less than \$[5,500] and not more than \$[11,000], as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–41), plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a)(1)(A)–(B); see 28 C.F.R. § 85.3(a)(9) (adjusting penalties for inflation).

As used in the FCA, a “claim”

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

³*Amor Criminal Proceeding*, ECF Nos. 393, 489.

(i) is presented to an officer, employee, or agent of the United States. . . .
31 U.S.C. § 3729(b)(2), as amended.

While Congress did not define what makes a claim “false” or “fraudulent,” the “phrase ‘false or fraudulent claim’ in the [FCA] should be construed broadly.” *United States ex rel. Sanchez v. Abuabara*, 2012 WL 254764, at *6 (S.D. Fla. 2012) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999); see S. Rep. No. 99–345, at 9 (1986). The FCA does not require specific intent to defraud, only knowledge of the false information or deliberate ignorance or reckless disregard of its falsity. 31 U.S.C. § 3729(b)(1).

The FCA further provides that:

Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731(e).

IV. DISCUSSION

Before I turn to the merits of the parties’ Motions, I first address two procedural arguments Amor raises. He asserts: (1) this Court lacks subject matter jurisdiction because the Government is a party to a civil administrative money penalty proceeding involving Amor; and (2) the Second Amended Complaint (“SAC”) does not meet the heightened pleading standards of Fed. R. Civ. P. 9(b).⁴ (ECF Nos. 141, 162).

A. Subject Matter Jurisdiction

Amor argues that the Court lacks subject matter jurisdiction under 31 U.S.C. § 3730(e)(3) and (4), and lacked jurisdiction over the dismissed Relator’s original qui tam complaint, because FastTrain was subject to a 2011 DOE Program Review. The relevant subsections of § 3730(e) provide:

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(3)–(4).

Amor’s “public disclosure bar” argument fails because he provides no evidence that the DOE’s preliminary Program Review Report⁵ about FastTrain (ECF No.

⁴In addition to these arguments, Amor contends: (1) students do not need a high school diploma or equivalent degree to be eligible for Federal student aid; (2) students were not, in fact, ineligible; (3) this action violates the Double Jeopardy Clause of the Fifth Amendment; and (4) res judicata established Government loss to be \$1,900,000. (ECF Nos. 141, 162).

⁵According to the DOE’s Program Review Guide, the purpose of a program review is to promote and improve compliance by improving institutional performance. The reviewer(s) will: (1) analyze the institution’s data and records and identify any weaknesses in the institution’s procedures for administering Title IV, HEA program funds; (2) frame required actions and recommendations that will strengthen the institution’s future compliance with Title IV, HEA rules and regulations; (3) quantify any harm resulting from the institution’s impaired performance and identify liabilities where noncompliance results in loss, misuse, or unnecessary expenditure of Federal funds; determine the extent to which any weaknesses in the institution’s administration of Title IV, HEA program funds may subject students and taxpayers to potential or actual fraud, waste, and abuse; and (4) refer institutions for administrative action to protect the interests of students and taxpayers, when necessary. Program Review Guide for Institutions (2009), <https://ifap.ed.gov/programrevguide/attachments/2009ProgramReviewGuide.pdf>.

141–1) ever reached the public domain (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media. *See United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 777 F.3d 691, 697 (4th Cir. 2015) (“[T]he government is not the equivalent of the public domain.”) (quoting *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004)). Indeed, Federal law requires the DOE to “maintain and preserve” the confidentiality of any program review report until the institution has responded and the DOE issues a Final Program Review Determination (“FPRD”). 20 U.S.C. § 1099c–1(b)(6)(8). That never happened here. Where there is “no ‘public disclosure’ under section 3730(e)(4)(A), [the] qui tam action is not jurisdictionally barred under that section.”⁶ *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (7th Cir. 2016).

As for Amor’s arguments under § 3703(e)(3), it is his burden to show that the Government is a party in an administrative civil money penalty proceeding based on the same allegations or transactions at issue in this case. *See United States ex rel. Johnson v. Shell Oil Co.*, 26 F. Supp. 2d 923, 928 (E.D. Tex. 1998) (burden lies with defendant). He is correct that the FCA does not define the phrase, “administrative civil money penalty proceeding,” and thus leaves it open to interpretation. The fact is, however, that the preliminary Program Review Report contains no demand for payment of a money penalty. Cf. *id.* (payment demands and audit letters do not bar suit under § 3730(e)(3)). Indeed, the DOE may seek to recover money from an institution only after it issues an FPRD. 34 C.F.R. pt. 668. Again, that never happened here. Amor therefore has not convinced me that the preliminary Program Review Report is an administrative civil money penalty proceeding that would bar this action under § 3730(e)(3), or that it is evidence that such a proceeding was pending.

Simply put, Amor’s contention that this Court lacks subject-matter jurisdiction is misguided.

B. Rule 9(b)

The United States contends Amor waived his argument under Rule 9(b) by failing timely to raise it. “Rule 9(b)’s pleading standard is not an affirmative defense that is waived by a defendant’s failure to raise it” in an initial pleading. *See, e.g., Olson v. Fairview Health Servs. of Minnesota*, 831 F.3d 1063, 1074 (8th Cir. 2016). A court may resolve a Rule 9(b) deficiency even on a motion for summary judgment. *United State ex rel Schwartz v. Coastal Healthcare Group, Inc.*, 2000 WL 1595976, at *4 (10th Cir. 2000). That said, Amor’s Rule 9(b) argument is unavailing.

A complaint under the False Claims Act must meet the Rule 9(b) pleading standard. *See United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1309–10 (11th Cir. 2002) (noting “it was ‘well settled’ and ‘self-evident’ that the False Claims Act is ‘a fraud statute’ for the purposes of Rule 9(b)” (citation omitted)). A False Claims Act complaint satisfies Rule 9(b) if it sets forth “‘facts as to time, place, and substance of the defendant’s alleged fraud,’ specifically ‘the details of the defendants’ allegedly fraudulent acts, when they occurred, and who engaged in them.’” *Id.* at 1310 (quoting *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 567–68 (11th Cir. 1994)).

The SAC easily satisfies Rule 9(b)’s requirements. It specifies the substance of Amor’s fraudulent acts in exacting detail, *see generally* ECF No. 83, including the approximate time periods and, in some cases, specific dates of fraudulent acts, *see, e.g., id.* ¶¶ 63, 100, and who engaged in them, *see, e.g., id.* ¶¶ 86, 100. Amor’s argument under Rule 9(b) therefore fails.

C. The United States’ Arguments

I next address the United States’ arguments in support of its Motion, as they are case dispositive. The United States contends: (1) Amor’s criminal conviction precludes him from denying any of the elements of the fraudulent and/or false claims alleged in this action; (2) Amor’s false claims were material to the DOE’s payments to FastTrain; (3) the United States is entitled to treble damages; and (4) Amor is liable for civil penalties under 31 U.S.C. § 3729(a). I discuss the effect of Amor’s criminal conviction first.

⁶In any event, the United States has invoked its statutory right under 31 U.S.C. § 3730(e)(4) to oppose dismissal on this basis.

1. The Effect of Amor's Criminal Conviction

Under the principles of collateral estoppel, the preclusive effect of a criminal conviction on future civil proceedings is well established. *See, e.g., Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568–69 (1951) (“It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding.”). Under Federal common law, for collateral estoppel to apply: “(1) the issue must be identical in the pending case to that decided in the earlier proceeding; (2) the issue must necessarily have been decided in the earlier proceeding; (3) the party to be estopped must have been a party or have been adequately represented by a party in the earlier proceeding; and (4) the issue must actually have been litigated in the first proceeding.” *Montalbano v. C.I.R.*, 307 F. App'x. 322 (11th Cir. 2009) (citing *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983)).

For claims arising under the FCA, the principle of collateral estoppel is codified in the FCA at 31 U.S.C. § 3731(e). The statute makes clear that a criminal conviction for a violation of 18 U.S.C. §§ 371 and/or 641 estops a defendant in a FCA case from denying the essential elements of the §§ 3729(a)(1)(A) and (B) offenses when the claims involve the same transaction at issue in the defendant's prior criminal proceeding. *See, e.g., United States v. Anghaie*, 633 F. App'x. 514, 516 (11th Cir. 2015).⁷

Here, the Second Superseding Indictment against Amor and his co-conspirators alleges, as the United States alleges in this action, *inter alia*, that the DOE approved FastTrain to receive both Pell Grants and Direct Loans. See Second Amended Complaint, E.C.F. No. 83 ¶¶ 37–68; Amor Criminal Proceeding, Second Superseding Indictment, ECF No. 252 ¶¶ 15–30. Amor signed Program Participation Agreements (“PPAs”) in which he agreed that FastTrain would comply with all applicable Federal statutes and regulations relating to the Pell Grant and Direct Loan Programs, including, *inter alia*, the requirement that FastTrain enroll only students with a high school diploma, GED, or other approved credential. Based on those representations, the Government charged Amor with fraud or false statements in the Amor Criminal Proceeding. For example, the Second Superseding Indictment alleges, *inter alia*:

PURPOSE OF CONSPIRACY

3. It was the purpose of the [Defendants'] **conspiracy** to unlawfully enrich themselves by obtaining and misappropriating Pell Grant and Direct Loan funds from the United States Department of Education **by making materially false and fraudulent representations, and by the concealment of material facts**, concerning, among other things, the eligibility of students to receive Pell Grant and Direct Loan funds and the students' status as high school graduates.

MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the defendants and their co-conspirators sought to accomplish the object and purpose of the conspiracy included, among other things, the following:

4. Beginning in or around January 2010, ALEJANDRO AMOR directed JOSE W. GONZALEZ, ANTHONY MINCEY, Michael Grubbs, Luis Arroyo, Juan Arreola, Juan Peña, and others, to enroll students without high school diplomas or GEDS in FastTrain. AMOR further directed [them], and others, to coach those students to

⁷ *See also United States v. Aleff*, 772 F.3d 508, 510 (8th Cir. 2014) (defendants who pled guilty to conspiracy to defraud the United States by submitting false applications for loan-deficiency payments estopped from denying essential elements of FCA offenses); *United States ex rel. Nottingham v. Thomas*, 2015 WL 7424738 (E.D. Va. 2015) (criminal conviction precludes denying liability); *United States ex rel. Green v. Schuykill Products, Inc.*, 2014 WL 2154664 (M.D. Pa. 2014) (guilty plea for 18 U.S.C. § 371 violation conclusively established all factual issues as to his liability under the FCA); *United States v. Karron*, 750 F.Supp.2d 480, 487 (S.D.N.Y. 2011) (defendant in a FCA suit precluded from denying liability for false statements when previously convicted in criminal proceeding for the “same transaction.”); *United States v. Mastellone*, 2011 WL 4031199 (S.D.N.Y. 2011) (defendant who pled guilty to felony charge of fraudulently stealing money from the United States, in violation of 18 U.S.C. § 641, “estopped from denying the essential elements of the §§ 3729(a)(1)(A) and (B) offenses, since these claims involve the same transaction at issue in [defendant's] prior criminal proceeding, at which he pled guilty.”); *United States v. Sriram*, 2008 WL 516306 (N.D. Ill. 2008) (statutory estoppel proper where civil action involved the “same course of conduct” and overlapping “specific factual matters” as prior criminal case); *United States v. Eghbal*, 475 F. Supp. 2d 1008 (C.D. Cal. 2007) (no genuine issue of material fact regarding liability under FCA because defendants' prior convictions and admissions in plea agreements established that their false statements caused the Government “to pay out money”).

lie to FastTrain financial aid representatives assisting students with their FAFSAs, in order to falsely and fraudulently obtain Pell Grant and Direct Loan funds for the students.

5. JOSE W. GONZALEZ, ANTHONY MINCEY, Michael Grubbs, Luis Arroyo, Juan Arreola, Juan Peña, and others, acting at the direction of ALEJANDRO AMOR, recruited students without high school diplomas to enroll in FastTrain by, among other things, **falsely and fraudulently advising** the students that they could obtain a high school diploma for a fee and **should falsely and fraudulently respond yes** when asked by FastTrain financial aid representatives whether they had a high school diploma or GED.

6. ALEJANDRO AMOR, JOSE W. GONZALEZ, ANTHONY MINCEY, Michael Grubbs, Luis Arroyo, Juan Arreola, Juan Peña, and others, caused the students without high school diplomas to submit FAFSAs to the United States Department of Education **falsely and fraudulently indicating** that the student had graduated from high school or had a GED.

7. As a result of these **false and fraudulent FAFSAs**, ALEJANDRO AMOR received Pell Grants and Direct Loans from the United States Department of Education.

8. ALEJANDRO AMOR used the proceeds from the **false and fraudulent FAFSAs** for his own benefit and the benefit of others, and to further the fraud.

See Amor Criminal Proceeding, Second Superseding Indictment, ECF No. 252, Purpose of Conspiracy ¶ 3; Manner and Means of the Conspiracy ¶¶ 4, 5, 6, 7, 8 (emphasis added); *see also* Second Superseding Indictment, ECF No. 252, Overt Acts ¶¶ 1–40.

The SAC in this case contains nearly identical allegations. To highlight just a few examples:

7. Beginning in at least July 1, 2009 and continuing through its closure in 2012, FastTrain engaged in a widespread **scheme to defraud** the Department of Education in order to receive Federal funding it would not otherwise have been entitled to receive.

8. FastTrain **made false statements and concealed material information** from the Department of Education in order to ensure that it would continue to receive Federal funding under Title IV of the HEA. For example, FastTrain and its employees knowingly submitted and/or **caused to be submitted false information** relating to the eligibility of students to receive title IV, HEA program assistance, by providing false documentation that students had high school diplomas or its recognized equivalent, when such students did not have such credentials.

9. FastTrain **engaged in fraudulent conduct** in an attempt to secure Federal aid for students who, but for FastTrain's conduct, would have been ineligible for assistance under Title IV of the HEA. FastTrain fabricated high school diplomas of some of its prospective students at some of its campuses in order to permit unqualified students to enroll at FastTrain. FastTrain then improperly received and retained Title IV assistance for those unqualified students. FastTrain also told prospective students who did not have high school diplomas or their equivalency that they could enroll and receive Federal financial assistance if they attended FastTrain. FastTrain instructed and counseled certain ineligible prospective students **to provide false high school completion attestations** and further coached certain prospective ineligible students to lie on Free Application for Federal Student Aid ("FAFSA") documentation. FastTrain also improperly received and retained Title IV assistance for those unqualified students.

10. FastTrain also **routinely altered attendance records** of students who were not meeting minimum requirements. FastTrain kept students on its attendance rolls—and, as such, Federal financial aid recipient list—when students were not attending FastTrain. Finally, FastTrain employees **falsified financial aid records** in order to secure more Federal funding for students than the students were eligible to receive.

11. Defendants' conduct was knowing and material to FastTrain's continued eligibility to participate in the Title IV programs. As a result of Defendants' **fraudulent scheme and false representations of** Title IV eligibility, FastTrain received millions of dollars of Title IV financial aid that it otherwise would not have received but for Defendants' conduct.

(ECF 83 ¶¶ 7–11) (emphasis added).

Amor argues that estoppel does not apply because the elements of his criminal charges are different than the elements of the civil claims in this case. That argument ignores the FCA's plain language, which specifies that preclusion applies where "the essential elements of the offense [in the civil case] . . . involve[] the same *transaction* as in the criminal proceeding." 31 U.S.C. §3731(e) (emphasis added). The court's Order Denying Defendant Amor's Motion for New Trial (ECF

No. 410) in the Amor Criminal Proceeding leaves no doubt that the transactions at issue there were the same as those at issue here. It states, in relevant part:

This case arose from an investigation by the United States Department of Education, Office of [Inspector] General, regarding illegal student recruiting and enrollment practices at Fast Train, a for-profit college with seven campuses throughout Florida. Testimony at trial revealed that Fast Train admissions representatives—acting at the direction of the school’s owner, Defendant Alejandro Amor (“Defendant”)—routinely recruited and enrolled students at Fast Train who were not eligible for Federal student aid because they did not have a high school diploma or GED. In order to obtain Federal student aid on behalf of the ineligible students they recruited, Fast Train admissions representatives . . . coached the students to falsely claim that they did have the required credential—first on their Fast Train enrollment paperwork, then in interviews with Fast Train’s financial aid officers, and finally on their applications for Federal student aid (“FAFSAs”). As part of their efforts to induce ineligible students to enroll in Fast Train, admissions representatives falsely promised students they would earn a high school diploma while attending Fast Train and, in some cases, representatives actually sold students fictitious high school diplomas.

. . .

The Government presented approximately forty witnesses, including several former Fast Train students who testified that they were recruited, coached to lie on their FAFSAs about their eligibility for student aid, and saddled with thousands of dollars in debt that they are unable to repay. Most of the student witnesses testified that they dropped out of Fast Train for personal reasons or because they were not satisfied with the school. Six Jacksonville students identified Mincey as the (or one of the) admissions representatives who falsely advised them that a high school diploma or GED was not required for admission to Fast Train.

The Government also presented the testimony of several former Fast Train employees who were either directed by Defendant to enroll ineligible students or fired for refusing to do so. For example, former admissions director Luis Arroyo testified that he and his staff began creating fake high school diplomas for ineligible students and that he got the idea from Defendant, who had ordered education director Santiago Martinez to create a diploma for a student. Additionally, former financial aid representative Caridad Perez testified that Defendant routinely pressured her to process ineligible students for Federal student aid, and ultimately fired her for refusing to do so. Moreover, former admissions representative Jose W. Gonzalez testified that, with Defendant’s blessing, he obtained invalid high school diplomas for recruits from a high school called American Worldwide Academy, by taking the test for students and collecting a fee; in some cases, Mr. Gonzalez enrolled the students without actually collecting the fee or providing the diploma at all. Finally, the Government presented several emails and other documents, as well as an audio recording, which, together with the testimony, established that Defendant was repeatedly advised about the illegal activities at Fast Train, and took active steps to conceal those activities, including creating false reports of internal investigations, fake “secret shopper” programs, and fake employee disciplinary reports.

. . .

Defendant presented several witnesses in his defense. . . . Fifth, former Fast Train operations manager German Vargas testified that Defendant never asked him to do anything illegal and, in fact, that Defendant had directed him to conduct an investigation into allegations of misconduct raised by former Fast Train employee (and Government witness) Joseph Bodden. . . .

The Government called eight rebuttal witnesses to establish that Amor had falsified the results of the Bodden investigation, about which German Vargas had testified. Specifically, the rebuttal witnesses demonstrated that, even when presented with notes of the investigation, which included names of Fast Train enrollees without high school diplomas, Defendant had not only retained Federal student aid in those enrollees’ names, but had also prepared a lengthy type-written report falsely claiming that the Bodden investigation had revealed no improprieties in any area, including students without diplomas.

Applying the criteria for estoppel under the FCA, Amor's prior conviction has preclusive effect in the instant case.⁸ The criminal and civil cases both involve the same transactions—Amor's fraudulent claims to the DOE.⁹ The falsity of Amor's statements and claims were central to his criminal charges, and are central to his liability in this case. Thus, as a matter of law, the final judgment rendered in favor of the United States and against Amor in the Amor Criminal Proceeding estops Amor from denying the essential elements of the offense in this action. See 31 U.S.C. § 3731(e). The effect of this estoppel is that Amor cannot deny liability under 31 U.S.C. § 3729(a)(1)(A) and (B).¹⁰

As Amor is estopped from contesting the FCA cause of action against him, there are no genuine issues of material fact upon which Amor might craft a defense. Summary Judgment in favor of the United States and against Amor is therefore warranted. Accordingly, the only issue left for me to resolve is the amount of damages and/or civil penalties to which the United States is entitled.

2. Damages

When found to have violated the FCA, a defendant "is liable to the U.S. Government for . . . [three] times the amount of damages which the Government sustains because of the act of that person," plus civil penalties. 31 U.S.C. § 3729(a). Amor does not appear to dispute that fact. Instead, he challenges the United States' proposed measure of single damages. He argues that in the *Amor Criminal Proceeding*, the court made a "judicial determination" of the United States' losses when it ordered him to pay restitution totaling \$1,900,000. Thus, he contends, that "amount is indeed *res judicata*" as to damages in this case. (ECF No. 162 at 9). That contention lacks merit.

The Eleventh Circuit has recognized that "[a]n order of restitution is not a judicial determination of damages. Damages measure the amount of compensable loss a victim has suffered. Restitution, by contrast, is an equitable remedy, 'subject to the general equitable principle that [it] is granted to the extent and only to the extent that justice between the parties requires.'" *United States v. Barnette*, 10 F.3d 1553, 1556–57 (11th Cir. 1994) (citation omitted). In *Barnette*, the Eleventh Circuit declined to limit a damages award in a civil FCA case to the amount of restitution awarded by the district court, noting that the defendant's attempt to equate the sentencing judge's restitution order with a determination of damages was "unpersuasive". *Barnette*, 10 F.3d at 1556–57. The court held that "[m]ore likely, the sentencing judge decided that the Government had lost at least \$7 million and that *Barnette* could pay that amount, but left final resolution of the Government's damages claim to the ensuing civil case." *Id.* Although the sentencing court in this case awarded restitution of \$1,900,000, *Barnette's* reasoning nevertheless directs that a restitution finding in a criminal case does not foreclose the United States from seeking a different damages award in a subsequent civil case. *See id.*

"FCA damages 'typically are liberally calculated to ensure that they afford the government complete indemnity for the injuries done it.'" *United States ex rel. Doe v. DeGregorio*, 510 F. Supp. 2d 877, 890 (M.D. Fla. 2007) (quoting *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 646 (6th Cir. 2002)). While there is "no set formula for determining the government's actual damages" for an FCA claim, the Eleventh Circuit has explained that, as a general rule, the "measure is 'the difference between what the government actually paid on the fraudulent claim and what it would have paid had'" it known of the false statements. *Anghaie*, 633 F. App'x at 518 (quoting, *United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988)). Where, as here, the United States would have paid out nothing to FastTrain but for its false claims and certifications, the proper measure of damages is the full amount the United States paid out. *See id.* (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 461–62, 473 (5th Cir. 2009) (affirming award of damages based on full amount of Government grant without offset)).¹¹

⁸The fact that Amor is currently appealing his conviction is irrelevant to the preclusion analysis. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Sun*, 1997 WL 165331, at *2 (2d Cir. 1997) ("[A] pending appeal does not relieve a conviction of its preclusive effect.")

⁹Indeed, the parties previously stipulated that this action and the Amor Criminal Proceeding arise from the "same general facts." *See, e.g., Joint Motion to Stay Civil Proceedings Pending Final Resolution of Related Criminal Case* (E.C.F. No. 84 at 6).

¹⁰Because I conclude Amor is estopped from denying liability in this case, I need not address the parties' arguments as to whether Amor actually violated the FCA.

¹¹*See also United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010) ("Where the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself, the government can easily establish

Continued

According to the United States, the DOE paid out approximately \$25,200,000 to FastTrain during the 2010–2012 program years. That amount, if supported by the evidence, would therefore be an accurate measure of single damages under the law. Within its discretion, however, the United States requests that I limit the measure of damages to the more modest amount of Federal student aid FastTrain actually stole through its false claims and false certifications. Testimony in the Amor Criminal Proceeding pegged that amount at \$4,129,765. *See, e.g., Amor Criminal Proceeding*, ECF No. 543 at 33–34. I find that amount to be a reasonable, if not a conservative, estimate of the United States’ loss. *See United States ex rel. Doe*, 510 F. Supp. at 890 (“The computation of damages does not have to be done with mathematical precision but, rather, may be based upon a reasonable estimate of the loss.”). Amor is therefore liable for \$4,129,765, trebled, minus any restitution he pays to the Government.¹²

3. Civil Penalties

Liability under the FCA also triggers the imposition of civil penalties. 31 U.S.C. § 3729(a) (a person liable under the FCA “is liable to the U.S. Government for a civil penalty of not less than \$[5,500] and not more than \$[11,000]”); 28 C.F.R. § 85.3(a)(9) (adjusting penalties for inflation). The civil penalty the Government is entitled to recover is assessed for each false claim. 31 U.S.C. § 3729(a)(2). Thus, the number of violations of the FCA depends on the number of false or fraudulent claims or other requests for payments that defendant caused to be submitted.

Amor signed, certified and submitted four PPAs to the DOE on behalf of FastTrain during the 2010–2012 timeframe. (ECF No. 134–2 ¶ 2; ECF No. 302–1 at 17–20). Those PPAs constituted false claims. Additionally, during the 2010–2012 program years, there were 920 separate draw-downs associated with FastTrain in the DOE’s Grants Management System (G–5). (ECF No. 134–1 ¶ 3). Each draw-down falsely certified FastTrain’s compliance with DOE regulations. The United States argues that, given the “egregious” nature of Amor’s conduct, I should impose the maximum penalty: a \$11,000 fine for each of the 924 false claims. (ECF 131 at 19–20). I agree.

The student victims in this case were especially vulnerable. They were young people who, for whatever reasons, had not graduated high school. Realizing there are few jobs one can obtain without a high-school diploma or equivalent degree, they turned to FastTrain, hoping to learn marketable skills to improve their chances of making a decent living. FastTrain aggressively recruited these students, and then used fraud to make the Government think they were eligible for Federal aid and loans. FastTrain bilked the Government out of millions of dollars, most of which ended up in Amor’s pockets. As for the student victims, many now carry debt that will be enormously difficult to pay off with what they can earn working the low-level jobs for which they are qualified. The effects of Amor’s fraudulent acts are thus abhorrent and far-reaching.

In light of the seriousness of Amor’s misconduct, I find that the statutory maximum fine of \$11,000 for each of the 924 false claims is appropriate. *See Cole v. U.S. Dept of Agric.*, A.S.C.S., 133 F.3d 803, 807 (11th Cir. 1998) (remedial penalties are not subject to excessive fine scrutiny); *United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993) (qui tam provisions are remedial penalties).

CONCLUSION

It is, therefore, **ORDERED** and **ADJUDGED** that Plaintiff the United States’ Motion for Summary Judgment (ECF No. 131) is **GRANTED** and Defendant Amor’s Cross-Motion for Summary Judgment (ECF No. 141) is **DENIED**.

DONE and **ORDERED** in chambers at Miami, Florida, this 15th day of February 2017.

MARCIA G. COOKE
United States District Judge

Copies furnished to:

that it received nothing of value from the defendant and that all payments made are therefore recoverable as damages.”); *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (affirming award of damages based on total amount that defendant received from Government without offset); *United States v. Mackby*, 339 F.3d 1013, 1018–19 (9th Cir. 2003) (rejecting damages offset where the Government had received no asset of ascertainable value).

¹²Imposition of FCA treble damages and civil penalties does not, as Amor argues, violate the Double Jeopardy Clause of the Fifth Amendment. *See Karron*, 750 F. Supp. 2d at 493 n.12 (collecting cases).

*Edwin G. Torres, U.S. Magistrate Judge
Counsel of Record*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-Civ-21431-COOKE/TORRES

*UNITED STATES OF AMERICA, et al.,
Plaintiffs,*

vs.

*FASTTRAIN II CORP.,
d/b/a FASTTRAIN COLLEGE,
an administratively dissolved for profit
Florida corporation and ALEJANDRO
AMOR, an individual,*

Defendants.

FINAL JUDGMENT

It is **ORDERED** and **ADJUDGED** that Plaintiff the United States of America's Motion for Summary Judgment (ECF No. 131) is **GRANTED** and Defendant Alejandro Amor's Cross-Motion for Summary Judgment (ECF No. 141) is **DENIED**. Final judgment is entered in favor of the Plaintiff and against Defendant Amor. Plaintiff is awarded damages in the amount of \$4,129,765, trebled, together with pre-and post-judgment interest, which shall accrue at the applicable legal rate, for which sum let execution issue. In addition, Defendant Amor is assessed a civil penalty of \$11,000 for each of the 924 false claims Defendants made to the Department of Education.

DONE and ORDERED in chambers, at Miami, Florida, this 15th day of February 2017.

MARCIA G. COOKE
United States District Judge

Copies furnished to:
*Edwin G. Torres, U.S. Magistrate Judge
Counsel of Record*

HIRE HEROES USA,
ALPHARETTA, GA 30004,
April 28, 2017.

Senator LAMAR ALEXANDER, Chairman
*U.S. Senate Committee on Health, Education, Labor & Pensions,
455 Dirksen Senate Office Building,
Washington, DC 20510.*

Senator Alexander, It is my distinct pleasure to endorse Lieutenant Colonel Dan Gade, USA, Ret. for confirmation as an Equal Employment Opportunity Commissioner. Colonel Gade's character, leadership, and lifetime of service to the United States make him well-suited to the position.

I have had the privilege of working with Colonel Gade for the past 2 years in my capacity as President and CEO of Hire Heroes USA, the nation's most notable veteran employment nonprofit. During that time, Colonel Gade has played a pivotal role in the development and fielding of a research study called The Independence Project, which my team leads and manages. The Independence Project is premised on the idea that disabled veterans can achieve better outcomes by being incented to find meaningful work, rather than paying them to identify as disabled for a lifetime. We are proud to collaborate with Colonel Gade and his co-founder, Thomas Meyer, on this groundbreaking project.

As a professional in the veteran service space for more than 8 years, I have been impressed by Colonel Gade's outstanding thought leadership on behalf of veterans. On a personal basis as a combat veteran, I respect Colonel Gade's stoicism and grit

in turning his leg amputation from Iraq into a catalyst for so much positive change in the veteran space. Disabled veterans have few stronger advocates or more inspirational role models than Colonel Gade.

Sincerely,

BRIAN STANN,
President and CEO.

SENATOR BOB DOLE,
THE ATLANTIC BUILDING,
WASHINGTON, D.C. 20004.
August 21, 2017.

LAMAR ALEXANDER, Chairman
PATTY MURRAY, Ranking Member
*U.S. Senate Committee on Health, Education, Labor and Pensions
428 Dirksen Senate Office Building Washington, DC. 20510*

DEAR LAMAR AND PATTY, I am writing to offer my endorsement of the nomination of LTC (Retired) Daniel M. Gade for Commissioner of the Equal Employment Opportunity Commission. His expertise in veterans and disability policy is outstanding, and I am confident that he will add immeasurably to the capabilities and mission of the EEOC.

I first met Daniel over 10 years ago when I served as Co-Chair of the President's Commission on Care for America's Returning Wounded Warriors (the Dole/Shalala Commission). At that time, Daniel was an Associate Director of the White House Domestic Policy Council. I was impressed by his grasp of the issues and his willingness to tackle politically challenging and sensitive topics with ease. He contributed significantly to the rollout of the recommendations and to the eventual implementation of some of them.

Daniel was gravely wounded in action in Iraq in 2005. His life-changing wounds served as a catalyst for helping other veterans and persons with disabilities. I am very hopeful about the potential of Daniel serving on the EEOC, and I encourage you to confirm him swiftly. He will serve with distinction.

God Bless America,

BOB DOLE.

SENATOR BOB KERREY (RETIRED),
NEW YORK, NEW YORK 10003,
August 16, 2017.

LAMAR ALEXANDER,
*Attn: Senate HELP Committee,
455 Dirksen Bldg,
Washington, DC 20510.*

DEAR SENATOR ALEXANDER: I write today to offer my full and unqualified support of Daniel M. Gade, Ph.D., in his nomination to be a Commissioner of the Equal Employment Opportunity Commission. I have known Dr. Gade for several years, first meeting him when I was serving on a Commission to reform the military retirement system, and have since had an opportunity to mentor him on several occasions.

I am confident that in his role as an EEOC Commissioner, he will fight to ensure that the laws against discrimination in our country are fully and faithfully enforced. He has the kind of keen mind, steady temperament, and empathy for the down-trodden that will serve him well in this critically important role. He is also committed to working with Congress, and will fight every day to do his duty. I also believe that he will be an independent voice who is unafraid to stand up to the Executive, should that become necessary.

Finally, I would like you to carefully consider the impact that Dr. Gade can have on employment for Veterans and people with disabilities. He has been a fierce advocate for both groups for many years, and his experience of being grievously wounded in combat gives him rock-solid credibility. Please act on his nomination with alacrity, and allow him to continue his service to our great nation.

Thank you.
Sincerely,

BOB KERREY.

WOUNDED WARRIOR PROJECT,
JACKSONVILLE, FLORIDA 32256,
August 14, 2017.

Hon. LAMAR ALEXANDER,
*ATTN: Senate HELP Committee Staff 455 Dirksen Building,
Washington, DC 20510.*

DEAR CHAIRMAN ALEXANDER: I write today to give my full and enthusiastic support of Dr. Daniel Gade (LTC, US Army, Retired) as a Commissioner of the US Equal Employment Opportunity Commission. Please vote to confirm him as soon as possible, so he may continue to defend Veterans and people with disabilities from workplace discrimination.

Dr. Gade has been an advocate for wounded Veterans and active-duty soldiers since 2007, just 2 years after he lost a leg in combat. His work at the White House was instrumental in ensuring that the principles of the Dole/Shalala Commission were put into action, and he has been a tireless voice of sanity in proposing and defending common-sense reforms to the disability compensation system.

Dan has also put his time and effort into actually creating an experiment to help Veterans: The Independence Project, a project of Hire Heroes, USA, is a one-of-a-kind training and incentive program to help Veterans get on their feet before they get trapped in a disability mindset.

Although I cannot speak on behalf of the board of Wounded Warrior Project, I do speak from my own experience as an active-duty Army officer for 35 years.

Very Respectfully,

MICHAEL S. LINNINGTON,
*Lieutenant General, US Army (Retired) CEO,
Wounded Warrior Project.*

RETAIL INDUSTRY LEADERS ASSOCIATION,
EDUCATE.COLLABORATE.ADVOCATE,
ARLINGTON, VA 22209,
September 18, 2017.

Hon. LAMAR ALEXANDER, *Chairman*
Hon. PATRICIA MURRAY, *Ranking Member*
Committee on Health, Education, Labor and Pensions
U.S. Senate
428 Senate Dirksen Office Building
Washington, DC 20510

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY, Thank you for holding a hearing at the Senate Health, Education, Labor and Pensions Committee (HELP) to advance the nominations of Ms. Janet Dhillon and retired Lieutenant Colonel Daniel Gade to the U. S. Equal Employment and Opportunity Commission (EEOC). We strongly support both nominees and urge swift approval to fill the current vacancies to ensure effective oversight by the Commission.

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.

While we support both nominees, we want to highlight our strong support for Ms. Dhillon. Ms. Dhillon is an accomplished lawyer and a true trailblazer. She graduated first in her law school class. Over the course of her distinguished career, Ms. Dhillon served as General Counsel for three major U.S. corporations, one each from the Fortune 100, 300 and 500 lists. At the time she began in those roles, fewer women headed corporate legal departments. Her leadership and example have encouraged many women to follow her path.

Ms. Dhillon also served as the first chair of RILA's sister organization, the Retail Litigation Center. The RLC seeks to educate courts on the impact that their decisions will have on the retail community and the millions of American jobs that depend on retail. Since it was founded in 2010, during a period of significant regulatory activity, the RLC has filed more than 100 amicus briefs on a wide range of issues that impact retailers including labor and employment law, patent trolls, statutory interpretation, class action certification standards, and payment system issues.

The mission of the Equal Employment Opportunity Commission is to enforce Federal laws that make it illegal to discriminate against an employee because of certain characteristics, including the person's race, religion, sex or age. Given her accomplishments as a lawyer and her experience at the legal helm of multiple major U.S. employers, Ms. Dhillon has important insight on the laws that govern the American workforce and the opportunity that Congress directed that those laws provide to employees. As a result, Ms. Dhillon is an exceptional choice to lead the Commission.

We look forward to Senate HELP Committee's approval of both Ms. Dhillon's and Lt. Col. Gade's nominations, as well as their swift confirmation by the full Senate.

Sincerely,

SANDY KENNEDY,
President.

WORKFORCE FAIRNESS INSTITUTE,
September 18, 2017.

SENATOR LAMAR ALEXANDER, Chairman
SENATOR PATTY MURRAY Ranking Member
Senate Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building Washington, DC. 20510

CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY, The Workforce Fairness Institute (WFI), an organization devoted to educating workers, their employers, employees and citizens about issues affecting the workplace, would like to extend our gratitude for the recent hearing held by the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP) regarding the nomination of Janet Dhillon to the Equal Employment and Opportunity Commission (EEOC).

We believe Dhillon is a strong and qualified nominee having served as general counsel for Burlington Stores, Inc. and J.C. Penny Company, Inc. Her distinguished legal career also led her to operate as in-house counsel for U.S. Airways after working more than one decade at a well-respected law firm. She was also first in her class at the UCLA School of Law.

For these reasons, among others, WFI believes Dhillon will be a meaningful addition to the EEOC and advance its mission of enforcing Federal law making it illegal for discrimination to take place in American workplaces.

WFI strongly supports Janet Dhillon's nomination to the EEOC, and believes she will be an able and committed advocate for workers in her service on the commission and as its chairwoman.

Sincerely,

HEATHER GREENAWAY,
Workforce Fairness Institute.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR MURRAY

Question 1. The Every Student Succeeds Act, Public Law 114-95, (ESSA) was signed into law on December 10, 2015. The law mandates that each state must submit State plans to meet the law's requirements and permits states to submit consolidated State plans in lieu of individual Title-specific plans. To date, many states have chosen to submit consolidated state plans under ESSA. However, there are many requirements in ESSA that are not detailed in these consolidated state plans that states must still meet. As the Department's chief legal counsel, how will you ensure that the Department works to hold states accountable to upholding *all* Federal requirements laid out in ESSA, as is your role and responsibility?

Answer 1. If confirmed, it will be my job to advise the Department as it ensures that states are following the law. Each state's plan is closely reviewed prior to approval and each State receives ongoing monitoring as the approved plans are implemented.

Question 2. It has been reported that Secretary DeVos recently stated with regard to State plans required by ESSA that states should "go right up to the line, test how far it takes to get over it." sked about this statement at your hearing you said, "My job would be to advise her as to what the law requires, advise her as to what her discretion might be." Do you believe that Secretary DeVos has the discretion to encourage states to "test the line?"

Answer 2. My advice to the states would be to make a good-faith effort to comply with the law. My advice to the Secretary would be to follow the law scrupulously.

Question 3. President Trump and Secretary DeVos have made a \$20 billion voucher program a key pillar of their education platform. However, the Department's

overarching mission is to support our Nation's public schools and the 90 percent of students who attend those schools. In addition, statutory language and congressional intent makes clear funding is for public schools. Would you advise Secretary DeVos that she could promote a privatization program by manipulating competitive priorities in the existing grant programs?

Answer 3. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I would examine this issue to determine what the law requires or allows, and provide the best legal advice I can. On policy issues, I would defer to the policymakers.

Question 4. Is it your legal opinion that the Department could promote its privatization agenda through implementation of ESSA?

Answer 4. I am not aware of any such agenda at the Department, but I will advise the Secretary to follow the law as written and Congress intended.

Question 5. In 2011 an internal company investigation revealed that Career Education Corporation (CEC) had misstated job placement rates, and in 2013 CEC agreed to pay more than \$10 million to the State of New York resulting from the State attorney general's investigation into the company's misrepresentations. In 2014, CEC also received inquiries from 18 State Attorneys General regarding the company's business practices. You served as a consultant for CEC during the multiState investigation. Please provide a brief but detailed description of the work that you performed on behalf of CEC including any contact you had with State or Federal agencies during the course of your representation.

Answer 5. In its securities filings, CEC has disclosed the existence of a multiState attorneys general investigation. I have represented CEC in its ongoing efforts to respond to the concerns of the attorneys general involved in the multiState inquiry and in CEC's attempt to resolve the investigation. Over the course of the representation, I have had extensive interaction with the State attorney general offices working on the multiState investigation. My only contact on behalf of CEC with any Federal agency consisted of participating in phone conferences in which a CFPB official described and answered questions about an online, interactive student financial aid disclosure tool developed by the CFPB.

Question 6. As a result of your previous representation of CEC you will be recused from matters dealing with the company for a period of time. CEC's most recent 10-K filing with the Securities and Exchange Commission from the fiscal year which ended December 31, 2016 states: "Additional ED or other rulemaking could materially and adversely affect our operations, business, results of operations, financial condition and cash-flows;" "We cannot predict the impact the defense to repayment regulations will have on student enrollment, the volume of future claims for loan discharge, or our future financial responsibility as determined by ED, all of which could be materially adverse;" "Future regulatory actions by ED or other agencies that regulate our institutions are likely to occur and to have significant impacts on our business, require us to change our business practices and incur costs of compliance and of developing and implementing changes in operations, as has been the case with past regulatory changes;" and "Our repayment liability to ED for discharged student loans could have a material adverse effect on our financial condition, results of operations and cash-flows." Will you recuse yourself from rulemakings that will bear directly upon the financial condition of your former client?

Answer 6. If confirmed, I will abide by my ethics pledge and work with the Designated Agency Ethics Official on an ongoing basis to ensure I am in compliance with all ethics rules and laws.

Question 7. Given your experience with enforcement of consumer protection law, do you believe that fundamentally different types of governance structures in higher education, such as control by corporate owners and investors versus governance by publicly elected or appointed trustees, should factor into how government assesses the risk associated with the use of taxpayer dollars?

Answer 7. I do not have any particular views on that matter. If confirmed, I would look to applicable law and regulations to determine the extent to which such distinctions are legally relevant.

Question 8. In your opinion, what is the role of the Department in ensuring that the mission of educating students attending a publicly traded for-profit educational institution is satisfied given the sometimes competing duty of the company to generate profits for its shareholders?

Answer 8. If confirmed, I will do my best to advise the Department as to the laws and regulations governing any such institutions.

Question 9. At public and nonprofit colleges, State and Federal law generally requires that institutional assets must be controlled and governed by individuals with no personal financial interest in the assets, and that compensation of institutional executives and administrators must be publicly disclosed. These requirements do not generally apply to for-profit colleges. Do you believe that applying both of these requirements to all colleges would make for-profit colleges more accountable to the public and reduce the need for legal action to correct misconduct?

Answer 9. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers to decide the best policy on questions of this nature.

Question 10. If confirmed as General Counsel, you will play a role in reviewing applications by for-profit colleges that seek to convert to non-profit status. Do you believe it is appropriate for the Department to analyze whether the purpose or motivation for the application by any organization for such conversion is primarily to avoid Federal regulations?

Answer 10. If confirmed, I will do my best to advise the Department as to what the applicable laws and regulations require in evaluating such applications.

Question 11. If a for-profit college is approved to convert to non-profit status, do you believe that it is appropriate for the former for-profit owners to continue to receive payments from the institution through rent, lease, loan repayments, or other types of payments?

Answer 11. If confirmed, I will do my best to advise the Department as to what the applicable laws and regulations require in this situation. I would defer to policymakers to decide the best policy on questions of this nature.

Question 12. When the Internal Revenue Service approves an application for a for-profit entity to be a recognized tax-exempt organization, they note that the approval can be revoked retroactively to reclaim lost tax revenue. If the U.S. Department of Education approves the conversion of an entity from for-profit to non-profit status and later discovers, as the IRS describes, "*the organization omitted or misstated a material fact, operated in a manner materially different from that originally represented, or engaged in a prohibited transaction for the purpose of diverting corpus or income from its exempt purpose*" do you believe the organization should be retroactively liable for repaying Federal student aid dollars that were erroneously awarded?

Answer 12. If confirmed, I will do my best to advise the Department as to what the applicable laws and regulations require in this situation. I would defer to policymakers to decide the best policy on questions of this nature.

Question 13. If you are confirmed, your role will be to act as an independent voice to ensure the U.S. Department of Education enforces Federal law, including the Higher Education Act. This will be a shift from your current role as an attorney defending colleges from investigations and lawsuits. What specific steps do you plan to take to familiarize yourself with this new role and to ensure that you are adequately prepared to advise the Secretary on when it is necessary to initiate investigations or enforcement actions against institutions of higher education that are potentially misusing taxpayer dollars?

Answer 13. If confirmed, I will meet with my colleagues in the general counsel's office, including career attorneys, to further familiarize myself with the laws and regulations enforced by the Department and with the General Counsel's office's traditional policies and practices. I commit to ensuring that all the advice I give as General Counsel, including advice related to potential or actual investigations, will be candid and based on my independent judgment.

Question 14. Florida Attorney General Pam Bondi approved a settlement with Keiser University in 2012, during the period of time that you served as one of her top advisors. Please describe the role that you played in negotiating and/or approving that settlement.

Answer 14. I was aware of the existence of the Florida Attorney General's office's investigation of Keiser University while the investigation was ongoing. I was aware of the settlement that resolved the investigation, and I believed that the settlement appropriately resolved the matter. I neither negotiated nor approved that settlement.

Question 15. If confirmed as General Counsel, the designated agency ethics official will report to you. Please describe how you will handle potential violations of Federal ethics rules by employees of the Department. Do you commit to allowing the Department's ethics officials and attorneys, including the Designated Agency Ethics

Official, make independent evaluations and determinations of conflicts of interest matters?

Answer 15. If confirmed, I will work with the Department's Designated Ethics Official to handle any potential ethics violations by employees of the Department in the same manner I would for any other rule violation by an employee of the Department, and I commit to following the proscribed procedures and protocols for handling such matters. I will encourage Department employees to seek guidance from the Department's ethics officials regarding Federal ethics rules and for conflict of interest matters.

Question 16. In your hearing you stated that you believed complaints were a relevant tool for a regulatory and oversight work by government agencies. If confirmed, you will help to oversee the U.S. Department of Education's enforcement activities. Do you commit to utilize the Department's student complaint system, including individual student complaints, as a tool in the Department's investigatory and program review work?

Answer 16. I can commit to you that if confirmed I will review all the tools available within the Department of Education and consider each in carrying out my role as General Counsel in providing advice and counsel to the Secretary.

Question 17. In your opinion, what are the specific advantages of the Department's negotiated rulemaking process as required by and described in Section 492 of the Higher Education Act?

Answer 17. It would not, at this time, be appropriate for me to comment on the advantages and disadvantages of a process required by statute and one the Department of Education is required to carry out. If confirmed I look forward to providing the best advice and counsel I can regarding issues that may come before me as a result of the negotiated rulemaking process.

Question 18. The Federal Government spends approximately \$130 billion per year in Federal student aid through grants and loans to colleges and universities under the Higher Education Act. Given the ongoing efforts to roll back protections against poorly performing career training programs, and pathways for defrauded borrowers to receive loan forgiveness, what do you believe that the U.S. Department of Education can do differently or better to ensure colleges are accountable for the taxpayer dollars they receive?

Answer 18. If confirmed, I will do my best to give the Department sound legal advice as it carries out this important aspect of its mission.

Question 19. The Office of General Counsel plays an important role in overseeing the Department's work to hold colleges accountable, including approving the agency's investigations into colleges and universities. What would you advise the Secretary to do if the Department receives evidence that a school has engaged in unfair, deceptive, or abusive acts or practices from a State or other Federal agency?

Answer 19. It would not be appropriate, at this time, for me to render an opinion on statements for which I do not have all the relevant facts. Each case would need to be evaluated fully on its own merits based on its own facts. At that point, and after consultation with my team, I will provide the best advice and counsel possible to the Secretary.

Question 20. Under the Higher Education Act, the Secretary is permitted to limit, suspend, or terminate the participation in any financial aid program, or impose a civil penalty, whenever the Secretary has determined that an institution has violated to carry out any statutory or regulatory requirement for the use of Federal financial aid dollars. How would you advise the Secretary if your office received evidence that a school had violated the Higher Education Act or its Program Participation Agreement?

Answer 20. It would not be appropriate, at this time, for me to render an opinion on statements for which I do not have all the relevant facts. Each case would need to be evaluated fully on its own merits based on its own facts. At that point, and after consultation with my team, I will provide the best advice and counsel possible to the Secretary.

Question 21. The Administrative Procedures Act governs the way in which administrative agencies of the Federal Government may propose and establish regulations. It has been called "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated" by Federal Government agencies. In your legal opinion, once a rule has been promulgated, how should an agency go about changing that rule?

Answer 21. In my legal opinion, agencies should follow all applicable laws, including the Administrative Procedure Act, when seeking to change a rule.

Question 22. The Department is currently processing debt relief claims from students defrauded by their institution under its current authority to relieve borrowers of their obligation to repay a loan if “any act or omission of the school attended by the student would give rise to a cause of action against the school under applicable State law.” If two borrowers are similarly situated—they attended the same program in the same State at the same time, they both allege that their school broke the law, and the Department has evidence that the school engaged in unlawful activity, would both borrowers receive a discharge, and would both borrowers receive the same amount of discharge?

Answer 22. It would be inappropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 23. Do you believe that student loan borrowers, should receive loan forgiveness when there is evidence of systemic misrepresentation, deception and fraud by a campus or an institution?

Answer 23. I believe that student loan borrowers may be eligible for borrower defense to repayment forgiveness of Federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain State laws.

Question 24. Section 455(h) of the Higher Education Act provides the Department with the authority to specify in regulation “which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan.” The Department is currently choosing to enforce a 1994 implementing regulation which permits borrowers to receive a discharge if “any act or omission of the school attended by the student would give rise to a cause of action against the school under applicable State law.” In your opinion as an attorney do you believe that the Higher Education Act guarantees defrauded students the right to have their entire loan discharged?

Answer 24. In my opinion as an attorney, student loan borrowers may be eligible for borrower defense to repayment forgiveness of Federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain State laws.

Question 25. Under Section 455(h) of the Higher Education Act is it your legal opinion that a successful defense to “*repayment of a loan*” could be interpreted to mean any partial benefit, restoration, or discharge that does not relieve the borrower of the entire outstanding balance of the loan?

Answer 25. It is my legal opinion that student loan borrowers may be eligible for borrower defense to repayment forgiveness of Federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain State laws.

Question 26. Corinthian Colleges, Inc. was one of the largest collapses of an institution of higher education in United States history. They refused to comply with U.S. Department of Education requests for data on job placement data and, in November 2015, investigations by attorneys general in California and Massachusetts later found evidence of widespread falsification of job placement rates and other problems. For example, they found that Everest University Accounting Associate Degree at Brandon had a posted placement rate 92 percent, but an actual placement rate of 12 percent. In another example, Everest University Computer Information Sciences Associate Degree at Brandon had a posted placement rate 62 percent, but an actual placement rate of 13 percent. Would you advise the Secretary to shut off access to taxpayer dollars for schools that have misrepresented students’ job prospects?

Answer 26. It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues, providing advice and counsel as to what the law requires and what options are available to make these types of decisions.

Question 27. The Department, particularly the Office of Federal Student Aid, awards nearly \$1 billion in taxpayer-funded contracts to student loan servicers and debt collectors on an annual basis. These contracts have been the subject of considerable controversy. For example, the U.S. Department of Justice and the Federal Deposit Insurance Corporation found Sallie Mae (now Navient Corporation) to be in violation of the Servicemembers Civil Relief Act by overcharging military families on their student loans, and later settled with the company over these allegations. Department contracts require contractors to comply with all Federal and State laws. When a Federal or State regulator finds wrongdoing by a Department contractor, will you commit to holding the Department responsible for following through with

all necessary actions, including holding a hearing to collect comment on whether the contract should be terminated, and if terminated, to vigorously defend the Department in any subsequent lawsuits?

Answer 27. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation. I will advise the Department to take all legally necessary actions, and I will do my part to vigorously defend the Department as necessary in all legal matters.

Question 28 You indicated in your meeting with me that you are a “fan of Secretary DeVos.” Over the past few months, the Secretary has made it clear that she intends to roll back existing Title IX guidance related to sexual assault. Do you support removing Title IX guidance, including guidance clarifying protections for transgender students? If not, which policy proposals that she has put forth do you find admirable?

Answer 28. I admire Secretary DeVos’s longstanding commitment to improving the educational opportunities available to all students. In the letter rescinding the 2016 transgender guidance and in her accompanying statement last February, Secretary DeVos stated that the Department rescinded the guidance because it was procedurally improper due to the lack of notice to the public and opportunity for comment and emphasized that the rescission of that guidance in no way diminishes the Department’s commitment to protecting all students from harassment and bullying and to promoting education environments that support and meet the needs of all students. The same holds true for the Title IX sexual assault guidance. If confirmed, I will work to ensure that OCR continues to fulfill its mission of vigorous civil rights enforcement.

Question 29. How has your work in the Title IX space informed your approach to the value of clear, consistent guidance from the Department?

Answer 29. The institutions I have represented take the Department’s guidance seriously, and to that extent clarity and consistency are of course beneficial. That said, it is well known that there has been a lively public debate over the substance of the Department’s Title IX guidance and over whether that guidance was promulgated in a manner consistent with the APA.

Question 30. Do you believe you have a duty to survivors of sexual assault to hear from them to help inform your role as General Counsel if you are confirmed?

Answer 30. Without question, the interests and experiences of survivors of sexual assault deserve careful consideration when formulating policy in this area.

Question 31. As General Counsel, would you have a duty to proactively inform the Secretary of any potential harm to individuals that you see as a result of potential actions by the Department or is your role solely to respond to questions of whether an action is legally permissible?

Answer 31. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, including advising the Secretary of any legal harms that might result from potential actions by the Department.

Question 32. Based on your experience working with Florida State University, would allowing schools to have different standards for reviewing Title IX complaints make understanding what the Department expects from schools in terms of complying with Title IX more or less complicated?

Answer 32. I cannot answer that question in the abstract. Were the Department to recognize more flexibility in this area for schools, an important question would be the clarity of the boundaries to be imposed on the schools’ discretion.

Question 33. Do you believe it is legally permissible to require schools use a preponderance of evidence standard to respond to Title IX complaints related to sexual violence?

Answer 33. It would not be appropriate for me to provide my opinion on a matter that is pending before my potential future client. If confirmed, I look forward to working with the Secretary on this issue.

Question 34. Do you believe it is legally permissible for the Department to inform Members of Congress of information that is being shared with the public?

Answer 34. Generally, yes, in instances where the information has already been appropriately shared with the public under authorized, proper authority, such as, for example, when agency records are produced pursuant to a request under the Freedom of Information Act or when information is posted on the Department website or other authorized location published by the Department.

Question 35. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions (“HELP”) Committee have the authority to conduct oversight of the Department of Education?

Answer 35. I respect the oversight responsibilities of each Member of Congress and the corresponding need for information to fulfill their legislative duties. Should I be confirmed, I will be as prompt and responsive as possible to congressional oversight requests from members of the Health, Education, Labor, and Pensions Committee regardless of party or leadership position.

Question 36. If confirmed, do you agree to provide briefings on Department of Education business to members of the HELP Committee, including minority members, if requested?

Answer 36. If confirmed, I will work with my colleagues in the Office of Legislation and congressional Affairs to ensure responsiveness to any briefing requests from members of the HELP Committee regardless of party or position, whenever participation by the Office of General Counsel is requested or appropriate.

Question 37. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for Department of Education documents, communications, or other forms of data?

Answer 37. If confirmed, I will, to the best of my ability in my role as General Counsel, respond in a timely manner to requests for information, data, and other communications from members of the HELP Committee regardless of party or leadership position.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR BERNARD SANDERS

Federal student loan debt

The total amount of Federal student loan debt is \$1.3 trillion, exceeding credit card debt and car loan debt. Students on average graduate with debt of \$30,000. On the campaign trail, President Trump promised to address the crisis of student loan debt, lower interest rates, and make loan repayment affordable.

Question 1. As general counsel, what is your role in affecting the sorts of policies needed to make good on the President’s promise to students and those with student loan debt?

Answer 1. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I will defer to policymakers on that point.

Question 2. What specific policies will you advocate for to the Secretary so that students and families see relief on their student loans?

Answer 2. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create or advocate for a particular policy. I will defer to policymakers on that point.

Question 3. Do you believe that the amount of student loan debt is a crisis that the Department should have an active role in addressing? What role can the Department, and you specifically in your role as general counsel, play to address student loan debt by working with colleges on affordability?

Answer 3. While there are obvious and founded concerns regarding the issue of student debt, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation and not to create policy. I will defer to policymakers on that point.

Question 4. It makes no sense that in this country, you can refinance your car loan or home mortgage, but you cannot refinance your student loans. I have introduced legislation that allows borrowers to do just that, and I have supported my colleagues in their efforts to assist borrowers with crushing debt. Do you support borrowers’ ability to refinance their student loans with the Department of Education?

Answer 4. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation and not to create policy. I will defer to policymakers on that point.

College Affordability

In the 21st century, a public education system that goes from kindergarten through high school is no longer good enough. If this country is to succeed in a highly competitive global economy and have the best-educated workforce in the world, public colleges and universities must become tuition-free for working families. Today, we should be encouraging Americans to get the type of education best suited

for entering or reentering the workforce, not punishing them with a mountain of debt.

Question 5. Do you believe that the Federal Government should invest in students and tackle the student loan crisis head-on? What would that investment look like, and how can the department's policies result in better investment in the type of workforce needed for the 21st century?

Answer 5. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I will defer to policymakers on that point. It would not, at this time, be appropriate for me to render my opinion about actions I think the Department should or should not take or what impact such hypothetical actions may have.

Question 6. Do you believe that the cost shouldn't be a barrier to earn a college degree? What can we be doing to ensure that a college education isn't something accessible for the wealthy few, or that students aren't faced with a lifetime of crippling debt, just for pursuing an education?

Answer 6. The American system of postsecondary education provides a multitude of choices for students. Those options are important to ensure access is available for all. However, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation and not to create or advocate for a particular policy. I will defer to policymakers on that point.

Question 7. Please speak to the critical importance of the Federal TRIO programs. These programs provide critical services to low-income, first-generation students and underrepresented high school and college students. As general counsel, how will you focus your efforts on outreach to first generation students and those from communities underrepresented on college campuses?

Answer 7. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create or advocate for a particular policy or to provide specific outreach to students.

Diversity and Inclusion

Schools and universities need to be inclusive environments, where all students are able to feel safe and welcome, to see themselves in the curriculum, and to be equipped to succeed.

Question 8. As general counsel, what department policies will you advocate for to ensure that students of color feel safe in schools and on college campuses?

Answer 8. If confirmed, I will work to ensure that the Department vigorously enforces Title VI of the Civil Rights Act, and I will provide legal advice to the Office for Civil Rights as it ensures that educational institutions that receive Federal funds comply with their legal responsibilities regarding students of color.

Question 9. What will you do to combat racism and other forms of bigotry in schools and on college campuses?

Answer 9. If confirmed, my role as General Counsel will be to provide legal advice to the Secretary and the Department's Office for Civil Rights concerning legal matters and enforcement actions under Title VI against educational institutions that receive Federal funds. I will work to ensure that the Department vigorously enforces the Department's responsibilities in this important area.

Question 10. What specific actions will you take as general counsel to ensure schools and colleges are places that promote diversity and inclusion?

Answer 10. If confirmed, my role as General Counsel will be to provide legal advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers in this area, although I will work to ensure that the Department vigorously enforces the civil rights laws under its purview.

Question 11. How will you ensure students of all faiths are supported in public schools and universities? Recent incidences of hate crimes occurring on campuses across this country are alarming. What tools is the department implementing in schools and on college campuses to eliminate these instances?

Answer 11. If confirmed, my role as General Counsel will be to provide legal advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers in this area, although I will work to ensure that the Department vigorously enforces the civil rights laws under its purview. It would not be appropriate for me to provide my opinion on a matter before my potential future client.

Question 12. What specifically is the department doing to provide safe spaces in schools and root out instances of LGBTQ students being bullied?

Answer 12. If confirmed, my role as General Counsel will be to provide legal advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers in this area, although I will work to ensure that the Department vigorously enforces the civil rights laws under its purview. It would not be appropriate for me to provide my opinion on a matter before my potential future client.

Question 13. Can you point to specific examples in your background where you have worked to promote diversity, inclusion, or have curbed bullying in schools?

Answer 13. I have assisted clients with Title IX compliance generally, and Title IX compliance touches on the issues of diversity, inclusion, and bullying.

Support for MSIs, HBCUs, and TCUs Minority Serving Institutions, such as HBCUs, TCUs, HSIs, and AANAPISIs, play a pivotal role in providing high quality postsecondary education to students of color and helping us achieve our goal to lead the world in college graduates. They enroll more than 5 million students a year, many who have overcome significant barriers to get to college.

Question 14. Are you familiar with these institutions and how will you, as general counsel, make sure the Department continues to support these institutions?

Answer 14. I am familiar with these institutions; however in my capacity as General Counsel, my role will be to provide advice and counsel on matters of legal interpretation, not to create policy. I will defer to policymakers on that point.

Question 15. How will you advise the Secretary to make sure students who attend these institutions are able to complete their degrees in a timely fashion without taking on burdensome debt?

Answer 15. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I will defer to policymakers on that point.

Question 16. What will you do to ensure that the students they serve succeed and thrive in college and in the job market post-graduation?

Answer 16. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I will defer to policymakers on that point.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR CASEY

1. Mr. Muñoz, according to the U.S. Department of Education National Center for Education Statistics, there are approximately 50.7 million children in the United States attending public schools, approximately 90 percent of all children attend school in one of the almost 100,000 public schools in the over 13,000 public school districts in the country. Sec. DeVos, is a huge supporter of school vouchers and “transportability” of public funds to be used in private schools. She and the President have talked about creating a \$20 billion school voucher program. The two largest Federal sources of funding for preK–12 schooling are Titles I and II of the Elementary and Secondary Education Act and the Individuals with Disabilities Education Act. Those two laws were passed by Congress to specifically make it possible for local public school districts to better serve children from poorer communities and children with disabilities. Those two programs also account for annual Federal spending exceeding \$20 billion a year.

Question a. With Sec. DeVos’ and the President’s expressed interest to create a Federal school voucher program, I want to ask your legal opinion about the use of those funds. As General Counsel to the Secretary of Education, what will your guidance be about using ESEA Title I and Title II funds or IDEA funds to create a voucher program?

Answer a. It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR BENNET

Question 1. ESSA created the Education Innovative and Research Grant (EIR) to support promising educational programs and study their effectiveness. The administration’s fiscal 2018 budget allocated \$250 million of EIR funding to be spent on private school choice. During your question and answer session, you declined to comment on the legality of this proposal, saying you had not researched the issue thoroughly. Now that you’ve had additional time to review ESSA and the budget proposal, is it your legal opinion that the EIR can be used for private school vouchers?

Will you commit to advising the Secretary that the congressional intent of the program was not to fund private school choice?

Answer 1. It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues.

2. During your nomination hearing, you stated that the Department of Education has been clear that “all students have a right to be free from sex discrimination from any school that receives Federal funds.”

Question a. Do you believe Title IX prohibits discrimination on the basis of sexual orientation and gender identity?

Answer a. It would not be appropriate for me to take a position on these issues, which are contested, are under active litigation in the courts, and are under consideration by my potential client. If confirmed, if and when I am called upon to give legal advice on these issues, I will give my best advice based on the law as it stands at the time.

Question b. In your legal opinion, can schools that discriminate on the basis of sexual orientation—for example, by refusing to hire gay teachers—receive Federal funds under a potential private school voucher program?

Answer b. Currently there is no such program. If such a program were to come into existence, I would do my best to advise the Department as to all the laws governing the program, including any requirements imposed on the program by Congress.

3. During your career as a private attorney, you defended Florida State University in a lawsuit brought by a victim of sexual assault. Presumably, you became very familiar with Title IX regulations and the school’s disciplinary procedures.

Question a. Do you believe that FSU’s disciplinary process for sexual assault claims was or is unfair to the accused?

Answer a. During my representation of Florida State University, it was apparent to me that that institution takes seriously and attempts to honor the rights of both alleged victims and respondents in sexual assault cases.

Question b. In July, acting assistant secretary for civil rights Candice Jackson stated that “90 percent” of sexual assault accusations “fall into the category of ‘we were both drunk, we broke up, and 6 months later I found myself under a Title IX investigation.’” Do you agree with that assessment that the majority of Title IX investigations are illegitimate or overblown?

Answer b. No. Each complaint should be investigated and adjudicated on its own merits.

Question c. Secretary DeVos recently stated that the 2011 Title IX guidance “weaponized the Office of Civil Rights to work against schools and students.” FSU was under an OCR investigation during your time as their attorney. Please describe your experience with the OCR investigation. Did you believe it was appropriate? Do you agree with Secretary DeVos’ statement about the OCR?

Answer c. It would not, at this time, be appropriate for me to comment on an open investigation, particularly one involving a former client and being carried out by a potential future client.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR WHITEHOUSE

In June 2017, Secretary DeVos announced she was re-opening the rulemaking process on both the borrower defense rule describing it as “a muddled process that’s unfair to students and schools.” The Department’s announcement also stated that, “While negotiated rulemaking occurs, the Department will continue to process applications under the current borrower defense rules.” According to the Department in a July 7, 2017 response to Senator Durbin:

- Overall 96,944 claims have been received.
 - 31,773 borrower claims have been approved; 26,372 of the approved claims have been completed, 5,401 are in progress and 2 were denied.
- 65,169 claims are currently pending review, decision, or adjudication.
 - 45,092 pending claims are associated with students who attended Corinthian
 - 7,186 pending claims are associated with students who attended ITT
 - 12,891 from other schools
- ED received 14,949 claims since January 20, 2017. According to the letter, “No borrower defense applications have been approved between January 20, 2017, and today [July 7].”⁵

Question 1. What legal obligation does ED have under the APA and HEA to enforce a current, final rule before it finalizes a new rule on an issue?

Answer 1. If I am confirmed as General Counsel, I will advise that the Department follow all applicable laws with respect to the enforcement of regulations.

Question a. Given that the current borrower defense rules provide for automatic discharge of student loans for certain closed schools—a situation which covers at least 52,000 of the pending claims—and that no borrower defense applications were approved between the Inauguration and early July; does it appear that the Department is processing claims under the current borrower defense rule?

Answer a. It would not be appropriate for me to comment on ongoing matters involving the Department's processing of claims.

Question 2. What specific steps would you recommend the Department take if the Department was failing to enforce a final rule?

Answer 2. Without the relevant facts, I cannot comment on specific steps I would advise be taken.

Question 3. Do you think that mandatory, pre-dispute arbitration clauses present a barrier to consumers obtaining group relief?

Answer 3. Arbitration may or may not be beneficial depending on the situation. If I am confirmed as General Counsel, I will review this and other legal issues relating to borrower defenses to repayment of student loans closely. As this is one of many issues currently under review by the Department, it would not be appropriate for me to provide my opinion on this matter. I look forward to working with the Secretary on these issues.

Question 4. Do you commit to ensuring that the Department of Education responds to oversight requests from all Members of Congress, including those in the minority?

Answer 4. Responding to all oversight requests from Congress, regardless of party or leadership position, is a responsibility that each agency must take seriously. Should I be confirmed, I commit to being as responsive as possible to congressional oversight requests.

Question 5. How important is it for the Department to respond to FOIA requests in a timely manner?

Answer 5. Responding to requests for information under the Freedom of Information Act is a responsibility that each agency must take seriously.

Question a. If confirmed in this position, what specific steps will you take to ensure the Office of General Counsel does not unduly delay the processing of FOIA responses?

Answer a. Until I am confirmed and have consulted with Department officials on the Department's FOIA processes, I cannot State what further steps I would take regarding the Department's processing of FOIA requests.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR BALDWIN

In your interview with staff, you indicated that one of your clients is Career Education Corporation, a for-profit college corporation with tens of thousands of students using Federal grants and loans. You also said that recusing yourself from working on issues affecting your former clients was a “no brainer.”

To be clear, what I referred to as a “no brainer” was my commitment to recuse myself from any specific matter before the Department if I had also worked on that same matter in private practice (one example being the pending OCR investigation of Florida State University involving Jameis Winston and Erica Kinsman). As a general matter, if confirmed, I commit to seeking and following the advice of the Department's Designated Agency Ethics Official regarding any conflict of interest or recusal issue that arises during my tenure at the Department.

Question 1. Did you have any other education-related clients who may have business before the Department of Education? If so, please provide a list.

Answer 1. My education-related clients at McGuireWoods have been Florida State University, the University of Florida, Career Education Corp., McGraw-Hill Education, and ACT. My work for McGraw-Hill and for ACT was minimal (less than 3 hours for each client), took place entirely in 2014, and did not involve the U.S. Department of Education. The McGraw-Hill matter involved Oklahoma State government, and the ACT matter involved Florida State government.

In 2009 and 2010, while in private practice at Bancroft Associates, I performed legal work for Strayer University, a client of the firm.

In 2003–2005, while in private practice at GrayRobinson, I performed legal work for the Florida Department of Education, a client of the firm.

Question 2. Do you believe that employees of the Department should recuse themselves from working on regulations that will substantially impact their former client or former employers, especially when those rules determine where these companies can continue operating with taxpayer dollars?

Answer 2. I believe that the Federal ethics laws address this matter, and all Department employees are required to and must comply with the Federal ethics laws.

Question 3. If confirmed, how will you advise personnel at the Department who might have conflicts of interest to follow ethics protocols for recusals—both those that are required by law and the President's Executive Order, and to avoid any appearance of impropriety?

Answer 3. If confirmed, I will advise Department personnel to follow the Federal ethics laws and guidance of the Department's Designated Agency Ethics Official for any actual conflicts of interest or appearances of a conflict of interest.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR MURPHY

Question 1. The General Counsel plays an important role in overseeing the Department's work to hold colleges accountable, including approving the agency's investigations into colleges and universities. Given your background working for a State attorney general, what is your view on the authority states have to enforce their own consumer protection laws in higher education, including whether to allow predatory colleges or universities or loan servicers to operate inside their borders?

Answer 1. Having worked in a State attorney general office, I have great respect for the role of states in enforcing their consumer protection laws. States have the responsibility of enforcing their own consumer protection laws in higher education, except to the extent those laws are pre-empted by Federal education laws.

Question 2. I am very concerned that the Department has stopped enforcing higher education accountability regulations and hired an enforcement chief who was formerly a senior executive at a large publicly traded for-profit college that just settled a \$100 million fraud suit with the Federal Trade Commission. How should the Department approach enforcement and oversight work in higher education? Should it generally be deferential to the college, or to students' complaints?

Answer 2. If confirmed, my role will be to advise the Secretary on what the law requires, including what options and tools the Secretary has to enforce the law and ensure compliance. I do not intend to advise the Secretary to be presumptively deferential to any party, except to the extent the law requires such deference.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR WARREN

Question 1. Are Title IV dollars taxpayer dollars? Describe your view on the Department of Education (ED)'s responsibilities when it comes to the use of taxpayer dollars, including dollars distributed under Title IV of the Higher Education Act?

Answer 1. Yes, title IV dollars are taxpayer dollars; however, it would not be appropriate at this time for me to comment on matters relating to what the Department's responsibilities are in this or any other matter, other than to say that the Department must follow the law. Should I be confirmed, I will, in my role as General Counsel, provide advice and counsel on matters of legal interpretation and will not be in a policy development role.

Question 2. Under what circumstance would you recommend the Secretary take administrative action against an institution of higher education?

Answer 2. The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

Question 3. Under what circumstances would you recommend the Secretary withhold or cease Title IV funding from an institution of higher education?

a. Would such circumstances include:

- Northwestern Polytechnic University: Operated as a Potemkin college that changed failing grades by hand and faked classes when it was visited by regulators.¹
- FastTrain College: A college whose owner used exotic dancers to recruit students and was sent to jail for committing fraud in the Federal aid programs.²
- American Commercial College: A college sued by the Department of Justice for lying about the percentage of its revenue received from the U.S. Department of Education. Following the suit, the college's owner was sentenced to 24 months in prison and ordered to repay \$975,000 after pleading guilty to theft of Federal financial aid.³
- Anamarc College: A college that was raided by the FBI in 2014 after an abrupt closure. Family members of the college's owners were later sued and settled a lawsuit for stealing more than \$450,000 from the school.⁴
- Computer Systems Institute: A college that was denied re-certification to participate in Federal student aid programs in 2016 for falsifying job placement rates.⁵

Answer 3. The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

Question 4. Are there examples where the previous Administration took administrative action or withheld Title IV funding where you believe that the actions were unjustified or exceeded appropriate authority? If so, please list those examples.

Answer 4. It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

Question 5. Are there examples where the previous Administration took such action, and you believe that doing so was justified and where you would recommend taking similar action? If so, please list those examples (2—3 examples).

Answer 5. It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

Question 6 Do you have any examples of instances when the previous Administration should have taken action, but didn't? If so, please list them.

Answer 6. It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

Question 7 Based on what you know in the public record, how would you evaluate how the previous Administration handled Corinthian?

Answer 7. It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

Question 8. Based on what you know in the public record, how would you evaluate how the previous Administration handled ITT Technical Institute?

Answer 8. It would not be appropriate for me to make judgments about decisions made by a previous administration, particularly without the benefit of full knowledge about the basis on which such decisions were made.

Question 9. How would you advise the Secretary if your office received clear evidence that a school had violated the Higher Education Act or its Program Participation Agreement?

Answer 9. If the General Counsel's office were to receive any such information, I would first bring it to the attention of the unit within the Department responsible for regulating the institution at issue. My legal advice would necessarily depend on the law, regulations, policies, contract or other authority applicable to the facts and circumstances at issue.

¹ https://www.buzzfeed.com/mollyhensleyclancy/inside-the-school-that-abolished-the-f-and-raked-in-the-cash?utm_term=.dejq5OZW#.mrPb62WEy.

² <http://www.miamiherald.com/news/local/education/article46253760.html>.

³ <https://www.justice.gov/usao-ndtx/pr/american-commercial-colleges-inc-and-its-President-plead-guilty-Federal-charges>.

⁴ <http://www.elpasotimes.com/story/news/2015/10/23/anamarc-embezzlement-lawsuit-bankruptcy-college/74485836/>.

⁵ <https://studentaid.ed.gov/sa/sites/default/files/csi-denial-letter.pdf>.

Question 10. How would you advise the Secretary if your office had or received clear evidence that a school made material and substantial misrepresentations to students?

Answer 10. If the General Counsel's office were to receive any such information, I would first bring it to the attention of the unit within the Department responsible for regulating the institution at issue. My legal advice would necessarily depend on the law, regulations, policies, contract or other authority applicable to the facts and circumstances at issue.

Question 11. Can you provide an example of a substantial misrepresentations from a college that would constitute fraud in your legal opinion?

Answer 11. One example of substantial misrepresentation that comes to mind is presented in the Fasttrain Corporation case. I have attached key documents in that case for easy reference.

Question 12. What penalties do you believe are appropriate for an institution of higher education is deliberately misleading students with inaccurate statistics or marketing?

Answer 12. The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case are the bases on which I will make a decision as to how best to advise the Secretary.

Question 13. What is your view of the Administrative Procedures Act (APA)? Once a regulation has been promulgated through the proper APA notice and comment process (and negotiated rulemaking, when appropriate), is that regulation considered law?

Answer 13. The Administrative Procedure Act provides the relevant definition of the term "rule" in section 551, and prescribes the process for agencies to follow in issuing such rules in section 553. If I am confirmed as General Counsel, I will advise the Secretary to follow the provisions of the APA and other relevant laws in promulgating and implementing Department regulations.

Question 14. In your legal opinion, does a Secretary have the legal authority to not enforce a regulation that has been properly promulgated? If so, in what specific circumstances is this legal?

Answer 14. It would not be appropriate for me to opine on an enforcement issue without knowing all of the facts and circumstances.

Question 15. Can the Secretary unilaterally delay implementation of an entire regulation that has been properly promulgated?

Answer 15. It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

Question a. Parts of a regulation?

Answer a. It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

Question b. Under what circumstances can the Secretary delay the implementation of an entire regulation?

Answer b. It would not be appropriate for me to opine on an implementation issue without knowing all of the facts and circumstances.

Question 16. In negotiated rulemaking, if 90 percent of the rulemaking Committee agrees on 90 percent of the rule, but failed to reach consensus, in your legal view, how should the Department take that into consideration as it drafts the rule?

Answer 16. It would not be inappropriate for me to comment on this matter without knowing the specific facts and circumstances.

Question a. When drafting a rule after a failed negotiated rulemaking session, is it legally appropriate for the Department to diverge from the consensus view of particular provisions that may have emerged during negotiated rulemaking?

Answer a. It is my understanding that the Department conducts negotiated rulemaking pursuant to relevant statutory requirements, and I would advise the Secretary to follow such requirements, including those pertaining to consensus agreements reached by the negotiators and the issuance of proposed rules.

Question 17. What action would you recommend the Secretary take if you discovered that an employee of the Department violated Federal ethics laws?

Answer 17. Without knowing the nature of the violation, the specific facts, and any relevant precedents, it is not possible to State in advance what my advice to the Secretary would be in such circumstances.

Question 18. What is your understanding of “particular matter” versus a “particular matter involving specific parties” in Federal ethics law?

Answer 18. In the absence of a formal ethics briefing by the Department’s Designated Agency Ethics Official, I respectfully decline to speculate on the legal meaning and definition of those terms.

Question 19. What constitutes, in your legal opinion, ‘the appearance of impropriety’?

Answer 19. If confirmed, I will seek guidance from the Department’s Designated Agency Ethics Official to determine how that legal term is defined under any applicable law, regulation, or policy.

Question 20. How would you advise Department officials to avoid “the appearance of impropriety”?

Answer 20. If confirmed, I will advise Department officials to seek out and follow guidance from the Department’s Designated Agency Ethics Official concerning appearances of impropriety.

Question 21. Beyond what may be required by law, what specific recusals will you commit to avoid “the appearance of impropriety”?

Answer 21. If confirmed, I will follow the Federal ethics laws and the guidance provided by the Department’s Designated Agency Ethics Official pertaining to any appearance of impropriety.

Question 22. Do you believe that your involvement at the Department on those matters of policy that affect CEC could create “the appearance of impropriety”?

Answer 22. If confirmed, I will follow the Federal ethics laws and guidance provided by the Department’s Designated Agency Ethics Official that address appearances of impropriety.

Question 23. Pursuant to President Trump’s “Ethics Commitment by executive branch Appointees” Executive Order, you pledged to, for a period of 2 years, refrain from participating “in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.”⁶ Do you commit to recusing yourself from any matter, “including regulations and contracts,” that is “directly and substantially” related to your former client Career Education Corporation (CEC)?

Answer 23. If confirmed, I will abide by the requirement of the my ethics pledge, follow the guidance provided by the Designated Agency Ethics Official, including recusals, and work with the Designated Agency Ethics Official on an ongoing basis to ensure I am in compliance with all ethics rules and laws.

Question 24. What is your understanding of the meaning of phrase “directly and substantially” in this context?

Answer 24. In the absence of a formal ethics briefing from the Department’s Designated Agency Ethics Official, I respectfully decline to speculate on the legal meaning and definition of this term.

Question 25. Please list any other former employers or clients, besides CEC, that provide educational services or own companies that provide educational services.

Answer 25. My education-related clients at McGuireWoods have been Florida State University, the University of Florida, Career Education Corp., McGraw-Hill Education, and ACT. My work for McGraw-Hill and for ACT was minimal (less than 3 hours for each client), took place entirely in 2014, and did not involve the U.S. Department of Education. The McGraw-Hill matter involved Oklahoma State government, and the ACT matter involved Florida State government.

In 2009 and 2010, while in private practice at Bancroft Associates, I performed legal work for Strayer University, a client of the firm.

In 2003–2005, while in private practice at GrayRobinson, I performed legal work for the Florida Department of Education, a client of the firm.

Question 26. If you are confirmed, the Department’s agency ethics official will report to you. What steps will you take to ensure that the ethics official’s decisions are and appear to be independent and are not and do not appear to be conflicted with your personal interests or those of the Secretary?

Answer 26. If confirmed, I will work with the Department’s Designated Ethics Official to handle any potential ethics violations by employees of the Department in the same manner I would for any other rule violation by an employee of the Depart-

⁶ <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>.

ment, and I commit to following the proscribed procedures and protocols for handling such matters.

I will encourage Department employees to seek guidance from the Department's ethics officials regarding Federal ethics rules and for conflict of interest matters.

Question 27. Would you ever overrule a decision or recommendation made by the agency ethics official regarding the recusal of a Department employee?

a. If so, under what circumstances would this be appropriate, and what would you do to avoid the appearance of impropriety in such circumstances?

Answer 27. In the absence of formal ethics briefing from the Department's Designated Agency Ethics Official, it is not possible to speculate or predict my decision on future and unknown legal matters that may be brought to my attention for review. If confirmed, I will work with the Department's Designated Ethics Official to address these matters in the same manner I would for any other brought to my attention for review, and I commit to following the proscribed procedures and protocols for handling such matters.

Question 28. Do you believe that the Higher Education Act provides defrauded students the right to have their entire loan discharged?

Answer 28. Under the Higher Education Act, student loan borrowers may be eligible for borrower defense to repayment forgiveness of Federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain State laws.

Question 29. In your hearing, in a response to a question from Senator Hassan, you stated that "depending on the specific case, arbitration may or may not be beneficial" for defrauded students seeking relief. If this is true, do you believe that schools should be permitted to force students into arbitration?

Answer 29. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. I would defer to policymakers on that point.

Question 30. Do you believe that defrauded students should have the choice to arbitrate or attempt litigation? If not, why not?

Answer 30. If confirmed, my role as General Counsel will be to provide advice and counsel on matters of legal interpretation, not to create policy. On policy issues, I would defer to the policymakers.

Question 31. Do you believe the Department has the legal authority to prohibit intuitions of higher education from forcing students into pre-dispute arbitration agreements?

Answer 31. If I am confirmed as General Counsel, I intend to review this and other legal issues relating to borrower defenses to repayment of student loans closely. At this time, I have not formed an opinion.

Question 32. If two borrowers are similarly situated—they attended the same program at the same time, and they both allege that their school broke the law, and the Department has clear evidence to corroborate the borrowers' allegations that the school engaged in unlawful activity, should both borrowers receive a discharge? Should the discharge be the same? If no, then why not? Under what circumstances would it be appropriate for these borrower to not receive the same relief?

Answer 32. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 33. Consider the two borrowers in question 34: if borrower A received a borrower defense discharge, is borrower B legally entitled to the same relief? Why or why not?

Answer 33. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 34. Consider the two borrowers in question 34: If Borrower A obtained a well-paying job, but Borrower B did not, are they still entitled to the same relief for the fraudulent loans?

Answer 34. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 35. Does the employment outcome of the borrower matter if they both paid for the same fraudulent product?

Answer 35. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 36. Is it legally appropriate for the Department to collect loans for which the Department has clear evidence that such loans were fraudulently made?

Answer 36. Under the law, student loan borrowers may be eligible for borrower defense to repayment forgiveness of Federal student loans that they took out to attend a school if that school misled the borrower, or engaged in other misconduct in violation of certain State laws.

Question 37. Is it legal for the Department to treat borrowers differently based on race? Gender? National origin? Religion?

Answer 37. Section 421(a)(2) of the Higher Education Act bans discrimination on the basis of race, national origin, religion, sex, marital status, age, or handicapped status.

Question 38. Under what specific circumstances is it legally appropriate for the Department to treat defrauded borrower A differently from defrauded borrower B? Under what specific circumstances specific circumstances is it legally appropriate for the Department grant borrowers A and B unequal protection under the law?

Answer 38. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 39. Can you please explain Attorney General Bondi's decision not to investigate Trump University?

Question a. Were you involved in that decision?

- i. If not, were you aware that it was being made?
- ii. To your knowledge, who was involved?

Answer a. Consistent with office practice for a matter of this nature, career consumer protection staff determined how to respond to any complaints involving Trump University, including whether to open an investigation. I first learned from a media inquiry in August 2013 that the New York attorney general had sued Trump University. It was only as a result of the media inquiry that I learned of the existence of Trump University and of the Florida Attorney General's office's handling of any complaints involving that entity or any other Trump-related entity. Based on the facts and circumstances, I believed in 2013 that the office's handling of the matter was appropriate, and I continue to believe that today.

Question b. To your knowledge, what factors were considered in the decision not to investigate Trump University?

Answer b. To my knowledge, the office's handling of this matter was based primarily on the following factors: the small number of complaints received by the office (the office receives at least 70,000 consumer complaints in a typical year); the fact that Trump University had ceased operating in Florida in 2010; and the fact that the New York lawsuit was seeking relief for all allegedly harmed consumers, regardless of their State of residence.

Question c. When that decision was made, were you aware of Donald Trump's campaign contributions to AG Bondi?⁷

Answer c. To the best of my recollection, I learned of the political contribution when it was first reported in the press in September or October 2013. To the best of my recollection, the career consumer protection staff had already determined how to handle the Trump University matter before the political contribution was reported in the press.

Question d. To your knowledge, was anyone else in the office aware of those contributions?

Answer d. I cannot speak to what others in the office might have known about the political contribution or when they knew it

Question e. To your knowledge, were those contributions discussed in the decisionmaking process?

Answer e. To my knowledge, no.

Question 40. Given your role in AG Bondi's office at the time of the decision not to investigate Trump University and Bridgepoint, do you believe that your involvement in matters of policy that materially and substantially affect those organizations could create the appearance of impropriety? If not, why not?

Answer 40. To be clear, I am not aware of anyone in the Florida Attorney General's office deliberating whether to investigate Bridgepoint Education/Ashford University during my tenure in that office. Given the limited nature of my involvement

⁷ T3<https://www.nytimes.com/2016/09/15/us/politics/pam-bondi-donald-trump-foundation.html>.

in anything having to do with Trump University or Bridgepoint Education, I do not believe that my “involvement in matters of policy that materially and substantially affect those organizations could create the appearance of impropriety.” That said, if confirmed, I will seek and follow the advice of the Department’s Designated Agency Ethics Official regarding any ethics issues, including issues involving an appearance of impropriety.

Question 41. Please discuss your views on the role of Congress in conducting oversight of the Department of Education.

Answer 41. I fully appreciate and respect the oversight responsibilities of Members of Congress, and in particular, the oversight role of the Department’s Committees of jurisdiction and their corresponding need for information to fulfill their legislative duties. If confirmed I will, in my role, work with staff to ensure responsiveness to oversight requests.

Question 42. In your confirmation hearing, you noted that you were unfamiliar with certain law enforcement matters by the Department of Justice, the Federal Trade Commission, and the Consumer Financial Protection Bureau where one of the Education Department’s contracts was found to be engaged in misconduct. In 2014, the Federal Deposit Insurance Corporation and the Department of Justice found that Navient had violated the Servicemember Civil Relief Act, overcharging 78,000 members of the military.⁸ The violations implicated private, FFEL, and Direct Loans. In a letter from the Department to the CFPB terminating certain law enforcement-related information sharing agreements, the Department wrote: “The Department has full oversight responsibility for Federal student loans.”⁹

In your confirmation hearing, you stated that you would respect the rights of Federal and State agencies to exercise their respective enforcement authorities. Do you disagree with the Department’s assertion that it has “full oversight responsibility,” since it does not enforce all laws that companies like Navient must comply with?

Answer 42. It would not be appropriate for me to comment on positions taken by the Department while I am not aware of all of the facts and circumstances.

Question 43. In the past, ED’s Office of General Counsel (OGC) attorneys have worked closely with other law enforcement agencies to enforce laws where ED has no jurisdiction, like Federal unfair, deceptive, abusive acts and practices laws, the False Claims Act, or the Servicemember Civil Relief Act, for example. Will you commit to recommending the Secretary maintain information and evidence sharing relationships with those agencies responsible for enforcing Federal laws for which they have jurisdiction—particularly when alleged violations involve an ED contractor or a Title IV participating institution of higher education?

a. Under what circumstances would you recommend referring evidence to the Department of Justice?

b. The Consumer Financial Protection Bureau (CFPB)?

c. The Federal Trade Commission?

Answer 43. If I am confirmed as General Counsel, I will recommend that the Department continue its practice of sharing information and evidence as appropriate with Federal agencies responsible for law enforcement.

Question 44. Does the CFPB, in your legal opinion, have the authority to enforce Federal consumer protection laws (including The Dodd—Frank Wall Street Reform and Consumer Protection Act and Fair Debt Collection Practices Act) on Federal student loan servicers and contractors?

Answer 44. I have not reviewed the CFPB’s legal authorities with respect to Federal student loan servicers and contractors but am looking forward to reviewing these issues if I am confirmed as General Counsel.

Question 45. What is your view on enforcement of the False Claims Act (FCA)? What would you do if your office had evidence that an institution of higher education had violated the FCA in order to receive Title IV funds?

Answer 45. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 46. The Consumer Financial Protection Bureau, the Illinois Attorney General, and the Washington Attorney General have all sued Navient for a wide range of violations. Courts have rejected Navient’s motions to dismiss. Can you clearly State that the CFPB and the states are well within their rights to bring enforcement actions under laws delegated to them by Congress and their State legisla-

⁸ <https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging>.

⁹ <https://edworkforce.house.gov/uploadedfiles/2017-09-01-signed-letter-to-cfpb.pdf>.

tures? Will you commit to ensuring that the Department will not seek to undermine investigations by Federal and State agencies?

Answer 46. States have the responsibility of enforcing their own consumer protection laws in higher education, except to the extent those laws are pre-empted by Federal education laws. If I am confirmed as General Counsel, I will recommend that the Department continue its practice of sharing information and evidence as appropriate with Federal agencies responsible for law enforcement.

Question 47. When the Department conducts oversight and prepares reports on schools and financial institutions, do you acknowledge that it is well within the bounds of the law for this information to be shared with other Federal and State agencies, especially when potential wrongdoing is detected?

Answer 47. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 48. Earlier this year, Secretary DeVos revoked memoranda that instructed procurement officials to closely consider the past performance, including regulatory infractions, when selecting contractors. How will you ensure that the Department is properly guarding against hiring of contracts with a history of breaking the law?

Answer 48. It would not be appropriate for me to comment on positions taken by the Department while I am not aware of all of the facts and circumstances.

Question 49. In 2009, the Education Department's Inspector General found that a subsidiary of Sallie Mae (now Navient) overcharged the Department by \$22.3 million. Subsequently, the Department's staff concurred with this finding. Nearly 8 years later, the matter has still been unresolved. Why was Navient granted numerous appeals in this matter?

Answer 49. As I do not work at the Department, I cannot comment on this matter.

Question 50. If confirmed, will you commit in your first 90 days to recommending that Secretary issue a final order, offset other payments to Navient, or pursue payment in litigation?

Answer 50. It would not be appropriate for me to comment on a matter that is currently the subject of pending litigation.

Question 51. Navient recently announced the purchase of a large portfolio of loans owned by Wells Fargo, increasing its dominant share in the FFEL loan market. Do you believe the Department has the authority to block sales of FFEL loans?

Answer 51. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 52. In February 2015, the Department announced that it found violations of law by several student loan debt collectors. Many of these collectors sued the Department. As General Counsel, will you commit to vigorously defending the Department's right to wind down contracts due to poor performance or violation of law?

Answer 52. In my capacity as General Counsel, I will advise the Department to take all legally necessary actions, and I will do my part to vigorously defend the Department as necessary in all legal matters.

Question 53. As General Counsel, will you commit to personally providing regular briefings to the HELP Committee or any interested member office on ensuring compliance with Department contracts, especially those related to the Office of Federal Student Aid?

Answer 53. If confirmed, I will work with my colleagues in the Office of Legislation and congressional Affairs to be responsive to any briefing requests from members of the HELP Committee or other congressional offices, whenever participation by the Office of General Counsel is requested or appropriate.

Question 54. In your legal opinion, does an agency have the authority to promulgate non-regulatory guidance to clarify its thinking on an issue?

Answer 54. Yes.

Question 55. What is your opinion on negotiated rulemaking vs. traditional notice and comment rulemaking? at are the advantages and disadvantages of both?

Answer 55. I believe that both negotiated rulemaking and traditional notice-and-comment rulemaking are valuable for obtaining public input on the development of regulations, and I look forward to advising the Department with regard to both processes should I be confirmed.

Question 56. Do you believe that under the Higher Education Act, institutions of higher education that are currently unaccredited or seeking accreditation, which were previously accredited by ACICS, have only 18 months to find a new accreditor or lose access to Title IV dollars?

Answer 56. It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues.

Question 57. Do you commit to recommending to the Secretary that the Department of Education follow the law and halt Title IV dollars to institutions (discussed in question 56) that are unable to find another accreditor by the end of the 18 month period?

Answer 57. If confirmed, in my position as General Counsel I will provide advice and counsel on matters of legal interpretation. As I said during my confirmation hearing, the basis for my activity is following the rule of law. I have and will continue to advise my clients as such.

If you have any questions, then please contact Josh Delaney in my office at (202) 224-4543.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR KAINÉ

Question 1. Recently the Department of Education announced that it would begin a process to roll back rules to provide students with debt relief that were finalized last year. In the meantime, there are 65,000 pending claims from students including 1,659 from my State of Virginia, none of whom have heard anything about their loans under this Administration. Many of the claims are from former students who were enrolled at colleges that don't even exist anymore. In your legal opinion, does the Department of Education have a responsibility to provide these students with a full discharge of their loans, according to the law? Do you commit to advising the Department to move swiftly to discharge these loans in full and clearing the backlog?

Answer 1. It would not be appropriate for me to comment on this matter without knowing all of the specific facts and circumstances.

Question 2. Title I of the Every Student Succeeds Act (ESSA) provides significant Federal funding to states to support public education. The law does not provide funding for students in private schools. Do you agree with this interpretation of the law? Secretary DeVos recently made statements encouraging states to effectively skirt the law in their ESSA State plans, would you advise the Secretary that Title I funds cannot be used for private school vouchers?

Answer 2. It would not be appropriate for me to provide my opinion on a matter before my potential future client. If confirmed, I look forward to working with the Secretary on these issues.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR HASSAN

1. In your hearing I asked you about forced arbitration, which can prevent students from seeking legal redress to fraud and abuse through the courts. I find these practices very concerning.

Question a. Will you work on behalf of students, former students, and employees to provide them with a choice for how they can file and pursue a complaint?

Answer a. If I am confirmed as General Counsel, I intend to review this and other legal issues relating to borrower defenses to repayment of student loans closely.

Question b. When students are defrauded by their college, do you believe they have a right to seek legal remedies in court?

Answer b. If I am confirmed as General Counsel, I intend to review this and other legal issues relating to borrower defenses to repayment of student loans closely.

Question c. Will you commit to looking into ending forced arbitration in the for-profit education industry?

Answer c. If I am confirmed as General Counsel, I intend to review this and other legal issues relating to borrower defenses to repayment of student loans closely.

2. If confirmed, your role will be to act as an independent voice to ensure the Department of Education enforces Federal law. The Higher Education Act does not permit colleges and universities to mislead their students. I am interested to know

how you will advise the Secretary to take action against institutions of higher education that mislead their students.

Question a. In what specific ways do you think the Department should hold bad actors accountable?

Answer a. The circumstances, specific case, and a careful and thorough review of all evidence pertaining to that case is the basis on which I will make a decision as to how best to advise the Secretary.

3. Following Secretary DeVos' recent announcement, we know the Department is planning to release new guidance and enter into a rulemaking process around Title IX and sexual assault. If confirmed, part of your role as General Counsel will be to ensure that the Department of Education is enforcing Title IX. Survivors of sexual assault face enormous psychological and physical harm. A recent University of New Hampshire report found that survivors often face academic challenges. The report shows that survivors of a violent attack are more likely to drop classes, experience higher stress, and have lower academic efficacy.

Question a.. Do you believe education institutions have an obligation to work to protect their students from sexual violence, [yes, or no]?

Answer a. Yes.

Question b. Do you believe in cases of alleged sexual violence on campus that a lower standard of proof should be applied than in criminal courts, [yes, or no]?

Answer b. It would not be appropriate for me to provide my legal opinion on a matter that is pending before my potential future client prior to confirmation.

Question c. If you had been at the Department, would you have advised Secretary DeVos to remove existing guidance and release new temporary guidance before opening a public rulemaking process, [yes, or no]?

Answer c. It would not be appropriate for me to provide my legal opinion on a matter that is pending before my potential future client prior to confirmation.

Question d. Do you agree that announcing a rulemaking process without making clear what guidance institutions are currently under is problematic and confusing, [yes, or no]?

Answer d. It would not be appropriate for me to provide my legal opinion on a matter that is pending before my potential future client prior to confirmation.

4. According to reports, former Florida Attorney General Bill McCollum was actively considering adding his office to a multiState investigation against Bridgepoint Education. Attorney General Bondi later decided not to join this case.

Question a. As a chief advisor to Ms. Bondi, what role did you play in the decision to not join the investigation?

Question b. What factors were considered in this decision not to investigate Bridgepoint?

Question c. Given what we know about how Bridgepoint's practices have harmed students, do you think AG Bondi made the wrong decision in not investigating Bridgepoint?

Question d. What specific role did you play in that decision not to investigate?

Question e. Can you elaborate on the timeline of those decisions?

Answer. Although I am aware of the Assurance of Voluntary Compliance entered between Bridgepoint Education, Inc./Ashford University and the State of Iowa in May 2014, I am not personally aware of any multiState investigation of Bridgepoint/Ashford. Nor am I personally aware of any deliberations of Attorney General McCollum regarding whether to investigate Bridgepoint/Ashford. I am not aware of anyone in the Florida Attorney General's office deliberating whether to investigate Bridgepoint/Ashford during my tenure in that office. I personally had no discussions with Attorney General Bondi or with anyone else in the office about whether to investigate Bridgepoint/Ashford. I left employment at the Florida Attorney General's office as of January 1, 2014, and I cannot speak to any Bridgepoint/Ashford-related deliberations or discussions after that date.

Question f. How will you make certain that you and other political appointees are receiving a balanced perspective on legal matters that appear before your office, and that you are not primarily being briefed by special interests that gain access to influence the Department?

Answer f. If confirmed, I will become fully informed of the relevant law and facts before giving legal advice to any client within the Department, and I will expect all my colleagues in the office to do the same. My legal advice will not be unduly influenced by any outside person or entity.

Question g. In your legal opinion, what constitutes “the appearance of impropriety”?

Answer g. If confirmed, I will seek guidance from the Department’s Designated Agency Ethics Official to determine how that legal term is defined under any applicable law, regulation, or policy.

Question h. If you are confirmed, in what ways would you advise Department officials to avoid “the appearance of impropriety”?

Answer h. If confirmed, I will advise Department officials to seek and follow guidance from the Department’s Designated Agency Ethics Official concerning appearances of impropriety.

Question i. What recusals will you commit to in order to avoid “the appearance of impropriety”?

Answer i. If confirmed, I will follow the Federal ethics laws and the guidance provided by the Department’s Designated Agency Ethics Official pertaining to any appearance of impropriety.

RESPONSES BY CARLOS G. MUÑIZ TO QUESTIONS OF SENATOR YOUNG

Question 1. I recognize the challenges in our workforce today, and have spoken in depth on the skills gap and ensuring that educational and employment opportunities are provided to those who seek them. I would like to highlight the good work of an organization in my home State and make you aware of an issue they have been facing with a Department of Education definition on “competitive integrated employment”. Bosma Enterprises is a nonprofit organization located in Indianapolis, Indiana and is a leading resource for Hoosiers affected by blindness. Bosma Enterprises provides job training and employment opportunities for blind and visually impaired individuals. Currently, 70 percent of people who are blind or visually impaired are unemployed.

I would like to bring your attention to rules that were finalized by the Department of Education after the passage of the Workforce Innovation and Opportunity Act (WIOA). WIOA requires all placements for vocational rehabilitation (VR) to be determined on a case-by-case basis. The final rule regarding VR was issued by the Rehabilitation Services Agency under the Department of Education. This rule stated that nonprofits like Bosma are unlikely to provide employment opportunities in integrated work settings. This prompted vocational rehabilitation agencies to notify some nonprofits that their job placements will not be considered successful. Currently 19 states have made blanket determinations, and many could follow suit. This interpretation has implications for nonprofit entities like Bosma Enterprises that do a great job in finding adequate and individualized job placement opportunities. I believe we should be working to invest in our workforce and empower organizations that are effective, and not place onerous requirements that hinder good actors.

- What is your brief assessment of challenges facing the workforce? Is there a role for the Department of Education in providing clarity on this issue?

Answer 1. I agree that individuals with disabilities encounter significantly greater challenges in securing employment. I believe the Department has a role to play in providing clarity on these issues. On June 22, 2017, the Department published a Federal Register notice to provide members of the public the opportunity to submit comments concerning regulations and policy guidance they recommend the Department repeal, replace or modify. The WIOA regulations which you reference are included in that review. The comment period for that review just closed on September 20th. If confirmed I look forward to working on the next steps in the regulatory review process in my capacity as General Counsel.

- If confirmed as General Counsel for the Department of Education, do you commit to working with me on this issue in the future?

If confirmed, I look forward to working with you on this issue at the Department alongside my colleagues in my capacity as General Counsel.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR MURRAY

Question 1. Do you agree that employee access to information about pay within a workplace is critical to helping employees determine whether they are being paid less than their peer for discriminatory reasons?

Answer 1. An employee’s pay can be a function of a number of individualized factors. The EEOC Compliance Manual recognizes a variety of legitimate factors that can explain pay differences. Thus, while access to information about other employees’ pay may provide a basis for comparison, that comparison needs to be put into appropriate context.

Question 2. What initiatives will you undertake to strengthen the ability of the EEOC and the ability of working people to identify and challenge pay discrimination?

Answer 2. If confirmed, I would work with the career professional staff and my fellow commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of Federal equal pay laws. In addition, if confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws.

Question 3. The Administration recently stayed the EEOC's equal pay data collection via the EEO-1 form for further review. OMB stayed the data collection and instructed the EEOC to submit a new proposal. EEOC must now address OMB's expressed concerns and identify a path forward for the collection of pay data. At the hearing, you affirmed that you supported the collection of pay data from employers by the EEOC, and that development of a revised pay data collection would be priority and would be completed in a reasonable time period.

a. Do you agree in order to be useful and effective for enforcement purposes, employers must be required to collect and submit to the EEOC data identifying job type, total compensation, and whether the employee is full-time or part-time?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for a meaningful comparison. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws.

b. Do you believe a revised pay data collection should be mandatory for participating employers?

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC's mission of enforcing the Federal equal pay laws.

c. If you have concerns about the EEO-1 pay data collection as previously approved, how would you seek to modify it while still ensuring that critical information about pay and hours worked is collected and submitted by employers?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for a meaningful comparison. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws. I would like to understand how the EEOC performed its burden analysis, and the agency's data security program. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC's mission of enforcing Federal equal pay laws.

d. Please explain how you will incorporate the public comments and analysis already produced during the extensive planning process for the pay data collection.

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine the comments and analysis already provided to the EEOC and how that input was incorporated into the final regulations. I will want to understand the reasoning behind the agency's decision to not incorporate comments, including comments addressing data security issues, the type of data collected, and the burden and costs that employers would have incurred in complying with the EEO-1 requirement. I would also seek to learn why the agency rejected suggestions to implement a pilot program.

e. If you are confirmed, will you commit to leading a process to finalize and implement pay data collection by EEOC, including through a public hearing and other diverse stakeholder engagement efforts, and to submitting a revised pay data collection proposal to OMB for its review within 6 months of your confirmation?

Answer: If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws, and analyze the relevant legal requirements governing data collection, including those contained in the Paperwork Reduction Act. I am open to exploring an initial pilot program to develop a bet-

ter understanding of how collection of pay data could help further the EEOC's mission of enforcing the Federal equal pay laws.

Question 4. The equal pay data collection was adopted after transparent process that included multiple opportunities for the public to comment, public hearings, and extensive explanation by EEOC of its analysis and its decision. At the hearing, you stated that said the EEO-1 would have benefited from a "more vigorous process" of public comment, and that the agency failed to incorporate the suggestions of stakeholders that would have been helpful. Please provide specific details regarding the ways in which you found the process lacking as well as specific additional activities you believe might have resulted in a more vigorous process.

Answer 4. Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for meaningful comparisons. I am concerned that the final EEO-1 did not adequately reflected the input of stakeholders on various elements, including the type of pay data to be collected, whether a pilot program was appropriate, and data security implications inherent in the collection of that data. I also do not believe that the EEOC effectively communicated the burden and costs to employers of gathering and submitting this data. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws.

Question 5. The EEOC's analysis supporting the pay data collection explained in detail the agency's justification for adding pay data to the EEO-1, the process by EEOC used to choose the W-2 data collection mechanism, and the stakeholders the EEOC consulted with. For example, the EEOC analysis explains that the Commission considered give different measures of earnings, and detailed the strengths and weaknesses of the various measures. The EEOC analysis also explained that the Commission convened a 2-day working group of employer representatives, statisticians, human resources information system (HRIS) experts, and information technology specialists to inform its revision of the EEO-1. EEOC also reviewed over 900 public comments while adopting the EEO-1 pay data collection. OMB's decision to review and stay the previously approved EEO-1 pay data collection was not subject to a public notice and comment process and the publicly available explanation provided by OMB for its decision to set aside this extensively reviewed pay data collection was just two paragraphs long. Do you agree with OMB's change in position?

Answer 5. I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

Question 6. Do you believe that OMB should fully disclose the basis for its stay, the analysis underlying its conclusion, and the process by which it reached that conclusion, including any outside interest groups with which it consulted?

Answer 6. I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

Question 7. OMB's decision to stay the pay data collection rested in part on the assertion that EEOC provided "data file specifications" for employers to directly upload pay data only after OMB approved the equal pay data collection. Are you aware that this is just one voluntary option to submit the data that is offered by the EEOC for employer convenience?

Answer 7. I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

Question 8. Do you believe that OMB's decision to stay the pay data collection was justified, given that OMB approved the data collection last year fully aware that EEOC would post the data file specifications afterwards?

Answer 8. I do not have sufficient information about the OMB's processes to respond to this question. If confirmed, I would consult with OMB, as well as career professional staff and my fellow commissioners to fully understand both the substantive and procedural questions surrounding pay data collection.

Question 9. President Trump's 2018 budget proposed merging the Office of Federal Contract Compliance Programs (OFCCP) and EEOC and significantly reducing the offices' budget. What is your position on the proposed merger?

Answer 9. I understand that the merger has been proposed as a means of streamlining government and saving taxpayer dollars, which are worthy goals. I recognize that the two agencies have different mechanisms for investigation and enforcement, and that the two agencies are discussing how a merger would be accomplished. If confirmed, I look forward to learning more about those discussions.

Question 10. The Retail Litigation Center, the litigation arm of the Retail Industry Leaders Association, is “dedicated to advocating the retail industry’s perspective in judicial proceedings.” Deborah White, President of RLC, described you as “instrumental in the formation and early success of the Retail Litigation Center.” You were the Chairman and past Chairman of the Board of the Retail Litigation Center (RLC) from March 2010 to March 2015, and the RLC website continues to list you as an emeritus member of the Board. For each of the following cases, please answer whether you voted for or against filing the brief, and a detailed explanation of why you voted the way you did.

Answer 10. I was Chair of the RLC from its formation in 2010 until October 2013, and thereafter served on the Board until March 2015. I have not been involved in the RLC since March 2015. The RLC is a membership organization, and the decision to participate or not participate in cases was made collectively by the Board. I did not have the unilateral authority to cause the RLC to act.

a. The 2011 RLC amicus brief filed in *Wal-Mart Stores, Inc. v. Dukes* (S. Ct. 2011) arguing that a nationwide class of women workers at Wal-Mart alleging sex discrimination in pay and promotions had been improperly certified.

Answer: The RLC advocated for the reversal of the certification of the class in the underlying action. The United States Supreme Court found that the class had been improperly certified and remanded the case to the lower court.

b. The 2011 RLC amicus filed in *Jock v. Sterling Jewelers, Inc.* (2d Cir. 2011) regarding allegations of gender and age discrimination against employees at a jewelry store.

Answer: The RLC, joining another amicus, asked the Second Circuit to affirm that parties may not be compelled to participate in class arbitrations. The Second Circuit reversed the lower court’s decision vacating the arbitration award and remanded with instructions to confirm the arbitration award.

c. The 2013 brief filed in *Vance v. Ball State Univ.* (S. Ct. 2013) regarding the “power to hire and fire” test for determining who is a supervisor for the purposes of employer’s vicarious liability for supervisor sexual harassment.

Answer: The RLC, joined by another amicus, asked the United States Supreme Court to affirm the “power to hire and fire” standard used by the Seventh Circuit Court of Appeals. The Supreme Court affirmed the Seventh Circuit’s decision, holding that under Title VII, a supervisor, for purposes of imputing liability to the employer, is defined as an employee who has the power to hire and fire.

d. The 2013 RLC amicus filed in *University of Texas v. Nassar* (S. Ct. 2013) arguing that a plaintiff must show but-for causation to succeed under Title VII’s anti-retaliation provision.

Answer: The RLC, joined by another amicus, asked the United States Supreme Court to reverse the Fifth Circuit’s decision and find that Title VII’s anti-retaliation provision requires a plaintiff to prove but-for causation and that a mixed-motive is insufficient to establish employer liability. The Supreme Court held that claimants asserting a retaliation claim under Title VII must prove but-for causation. The case was vacated and remanded.

Question 11. Given the conflicting legal interests of the RLC and workers, how can this Committee be confident that under your leadership the EEOC will continue to vigorously investigate, conciliate, and litigate workplace discrimination?

Answer 11. If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC’s statutory mandates, as well applicable judicial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

Question 12. While you served on the board of the Retail Litigation Center, you approved the filing of an amicus brief in the Supreme Court case *Mach Mining v. EEOC*. The amicus brief, filed on behalf of the RLC, the Chamber of Commerce, and other business associations, urged the Court to find that the EEOC’s duty to conciliate is subject to judicial review.

a. Is this litigation position, advocating for substantially limiting the EEOC's authority and ability to investigate and litigate systemic discrimination cases, at odds with the mission of the agency you are nominated to lead?

Answer: The issue in *Mach Mining v. EEOC* was whether EEOC's statutory duty to conciliate was subject to judicial review. The RLC, and other amici, argued that the EEOC's conciliation obligation was subject to judicial review. The United States Supreme Court agreed in a unanimous decision authored by Justice Kagan. I do not believe that judicial review of the EEOC's statutory obligation to conciliate is at odds with the mission of the EEOC.

b. Do you commit to establishing enforcement goals and priorities at the EEOC that include addressing systemic discrimination against marginalized communities, including women and people of color?

Answer: Yes. If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable court and judicial precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

Question 13. Do you agree with the EEOC's position in *Baldwin v. Dep't of Transportation* (EEOC Appeal No. 0120133080, July 15, 2015) that sexual orientation discrimination is a form of sex discrimination?

Answer 13. If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

Question 14. Do you agree with EEOC's position in *Lusardi v. Dep't of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that denying employees access the restroom matching their gender identity is sex discrimination?

Answer 14. If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

Question 15. Do you agree with EEOC's position in *Macy v. Dep't of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against someone because they are transgender is a form of sex discrimination?

Answer 15. If confirmed, I will consult with the career professional staff and other Commissioners on cases and work to enforce employment discrimination laws in accordance with the statutes and applicable legal precedents.

Question 16. The EEOC's strategic enforcement plan current includes "protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex." Do you intend to amend the inclusion of protections for LGBT workers in the strategic enforcement plan?

Answer 16. No.

Question 17. Do you commit to advancing the current EEOC position that Title VII prohibits employers from discriminating on the basis of sexual orientation and gender identity in circuit courts where the question has not been decided?

Answer 17. If confirmed, I will consult with career professional staff, and seek the input of the other commissioners, to determine how to most effectively advocate on behalf of charging parties who allege discrimination on the basis of sexual orientation and gender identity in jurisdictions where there is no applicable circuit court precedent. Claims of sexual orientation discrimination and gender identity discrimination based on gender stereotyping are based on United States Supreme Court precedent, and the EEOC can pursue these claims in all circuit courts.

Question 18. The EEOC's systemic litigation program has successfully ensured workers discriminated against in their employment receive justice. In July 2016 EEOC Chair Jenny Yang issued a report entitled *A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*. The review found that in 2013–2014 the systemic litigation program contributed to a tripling of monetary relief recovered for victims and that the systemic program has had a 10-year success rate of 94 percent. Do you agree with the findings of the report? Do you agree that overall the existing systemic litigation program has been successful?

Answer 18. I do not have access to the underlying, nonpublic data to make an assessment. I am mindful of the significant backlog of individual charges of discrimination that existed during the period of time covered by the report. If confirmed, I would also want to understand why the number of litigation cases based on individual charges of discrimination has declined.

Question 19. You have indicated that you are not confident that EEOC staff are sufficiently trained and resourced to pursue systemic litigation. Please explain the

challenges you believe face the systemic program, how those challenges factor into the findings of the report and how you plan to address those challenges.

Answer 19. Systemic litigation tends to be more complex than individual charges of discrimination, and can require greater reliance on expert testimony, more extensive discovery, more complicated evidentiary issues, and more complex trials. If confirmed, I will seek to learn more about the resources available to the professionals at the EEOC who handle systemic litigation.

Question 20. Will you commit to continuing to pursue coordinated, systemic litigation on behalf of those subject to discriminatory patterns, practices, or policies?

Answer 20. If confirmed, I will work with the career professional staff, and consult with my fellow commissioners, to understand the resources being devoted to systemic investigations and the resources applied to the existing backlog of charges. I am concerned about the backlog, and would work to ensure there is an appropriate balance between these two efforts. In addition, if confirmed, I will want to learn why the number of litigation cases based on individual charges of discrimination has declined.

Question 21. Please describe in detail when you believe that systemic litigation is appropriately used by EEOC.

Answer 21. I believe that systemic litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic litigation that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

Question 22. In 2012, the EEOC issued criminal history guidance. In your opinion, when can employers appropriately use criminal history background checks when making employment decisions and when is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer 22. Because this guidance has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. I am aware that the EEOC's efforts to enforce this guidance through litigation have been subjected to criticism from various courts, including in *EEOC v. Kaplan Higher Education Corp.*, *EEOC v. Freeman, Inc.* and *EEOC v. Peoplemark, Inc.*, and that significant sanctions have been assessed. If confirmed, I will seek to learn more about the EEOC's enforcement efforts in this area.

Question 23. Do you support maintaining the current EEOC criminal history guidance that has been in place for 5 years and is generally understood by employers? If not why not?

Answer 23. Because this guidance has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. However, if confirmed, I would consult with career professional staff and my fellow commissioners to understand the issues surrounding the guidance.

Question 24. Title II of the Genetic Information Nondiscrimination Act (GINA) and Title I of the Americans with Disabilities Act (ADA) protect an employee's privacy in the workplace and ensure that employers can only request or obtain genetic and medical information when an employee provides it voluntarily. In a recent ruling by the U.S. District Court for the District of Columbia on *AARP v. EEOC*, the EEOC's rules about the fees employers can assess workers who do not participate in workplace wellness programs were deemed arbitrary. However, rather than vacate the rules, the court has requested EEOC to "address the rules' failings in a timely manner". Please explain your understanding of why the court sent the wellness rules back to the EEOC.

Answer 24. The District Court stated in its Memorandum Opinion that the "EEOC . . . has failed to provide a reasoned explanation for its decision to adopt the 30 percent incentive levels in both the ADA and GINA rules." The Court remanded the rules to the EEOC for reconsideration.

Question 25. Do you agree that workplace wellness programs do not need to collect and retain employees' genetic and medical information to be effective?

Answer 25. I do not have sufficient information on which to form an opinion. If confirmed, I would consult with career professional staff and my fellow commissioners to fully understand the impact of GINA and the ADA on the need to collect and retain medical information as part of workplace wellness plans.

Question 26. As the Commission redrafts rules on how Title II of GINA and Title I of ADA apply to workplace wellness programs, will you work to ensure that an employee (or spouse) should not be subject to steep financial pressure by their employer or health plan to disclose their genetic and medical information?

Answer 26. If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v. EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

Question 27. What are some possible ways the wellness program rules can be redrafted to protect employee health privacy, ensure voluntary employee participation, and comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA)?

Answer 27. If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v. EEOC* matter, and to ensure that the EEOC's interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA's passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court's recent order.

Question 28. In your opinion, when is it appropriate for an agency to use sub regulatory guidance?

Answer 28. Sub regulatory guidance should be used to State the law in a manner that is understandable to all stakeholders.

Question 29. EEOC under the leadership of Chair Yang has conducted a public process when considering sub regulatory guidance. Do you agree additional transparency has improved the process and the final guidance?

Answer 29. I believe that additional transparency is helpful. In addition, sub regulatory guidance should be used to State the law in a manner that is understandable to all stakeholders.

Question 30. Every year, EEOC receives tens of thousands of harassment complaints. For example, in fiscal year 2016, nearly 30,000 harassment complaints were filed with the EEOC. In 2015, EEOC convened a bipartisan Select Task Force on the Study of Harassment in the Workplace. After 18 months of examination, the Task Force released a lengthy report on workplace harassment, along with recommendations for a range of stakeholders, including the EEOC. Do you commit to supporting the bipartisan task force recommendations? If not, which task force recommendations to you oppose? Please explain your answer in detail.

Answer 30. I believe that Task Force's efforts to seek input from stakeholders were positive and appropriate, and that the Task Force's report was drafted in a constructive way. I thought that the checklists and charts of risk factors, drafted in a straightforward terms, were particularly helpful and serve as a good example of how the EEOC can work to prevent unlawful employment discrimination. If confirmed, I look forward to learning more about the process within the agency for assembling the Task Force's report, and how the lessons from that process can be applied to future efforts by the agency.

Question 31. Do you have any concerns with EEOC's 2017 Proposed Enforcement Guidance on Unlawful Harassment? Do you believe the guidance needs to be rescinded or revised in any way?

a. Do you support the Proposed Enforcement Guidance's expansion of the interpretation of sex-based harassment to include harassment based on gender stereotypes and nonconformance with gender norms, gender identity and sexual orientation?

b. Do you believe that the Proposed Enforcement Guidance should make clear that sex-based harassment includes harassment on the basis of pregnancy, childbirth, or other related conditions, including reproductive health decisions?

Answer: I believe that EEOC's efforts to seek public comment on the Proposed Enforcement Guidance were appropriate. I thought that the work underlying the Proposed Enforcement Guidance, particularly the Select Task Force on the Study of Harassment in the Workplace, was constructive. I am aware of concerns raised about the potential conflict between the EEOC's recommendations that employers provide civility training, and the NLRB's position that broad workplace civility codes can infringe on employees' rights. If confirmed, I will

seek the input of the career professional staff, and my fellow commissioners, and review the input from stakeholders on all aspects of the Proposed Enforcement Guidance. I will take all of these views into careful consideration in forming an opinion on whether any changes to the Proposed Enforcement Guidance are necessary or desirable, keeping in mind that the role of sub regulatory guidance is to State the law in a manner understandable to all stakeholders, not as a means of changing existing law.

Question 32. Do you have any concerns with EEOC's 2016 Enforcement Guidance on National Origin Discrimination? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 32. I believe that the EEOC's guidance reflects a significant effort on the part of the agency, and reflects input from stakeholders as well as the EEOC's extensive experience in this area. I am aware of concerns that have been raised about the guidance on the issue of "perceived" national origin. If confirmed, I look forward to working with the career professional staff, and my fellow commissioners, to evaluate whether those concerns have had any practical impact on the EEOC's enforcement efforts, or caused any meaningful confusion in the employer community.

Question 33. Do you have any concerns with EEOC's 2016 Enforcement Guidance on Retaliation and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 33. It is vitally important that employees are protected from retaliation. If confirmed, I look forward to working with the career professional staff, and my fellow commissioners, to learn how the Guidance is impacting the prosecution of retaliation cases at the EEOC. I am aware of concerns that have been raised that the Guidance reflects the EEOC's view that employees are protected even when they assert claims in bad faith. If confirmed, I look forward to evaluating whether this issue has impacted the agency's efforts to enforce legal prohibitions against workplace retaliation.

Question 34. Do you have any concerns with EEOC's 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 34. If confirmed, I will work with the career professional staff and fellow commissioners to review the Enforcement Guidance, and analyze how it is being applied in practice. I will also want to understand why this Enforcement Guidance was not made available for public comment before it was issued.

Question 35. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing or ongoing enforcement guidance?

Answer 35. I will work with the Committee in its oversight activities.

Question 36. The 50th anniversary of the Age Discrimination in Employment Act ("ADEA") is this year. While we have made substantial progress in the last five decades in reducing discrimination faced by older workers, there is much progress left to be made. What specific steps will you recommend EEOC take to reduce age discrimination in the workforce?

Answer 36. If confirmed, I will work with the career professional staff and fellow commissioners to understand ongoing efforts to enforce the ADEA, and to identify whether additional efforts are needed to reduce age discrimination in the workforce. I am also aware that some judicial interpretations of the ADEA have placed limitations on the ability of the EEOC to combat certain forms of age discrimination in the workplace.

Question 37. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions ("HELP") Committee have the authority to conduct oversight of the EEOC?

Answer 37. If confirmed, I will work with all members of the HELP Committee.

Question 38. If confirmed, do you agree to provide briefings on EEOC business to members of the HELP Committee, including minority members, if requested?

Answer 38. Yes.

Question 39. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for EEOC documents, communications, or other forms of data?

Answer 39. Yes, subject to statutory limitations on the ability of the EEOC to disclose information about charging parties and respondents.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR SANDERS

Question 1. The EEOC is an independent Federal agency that seeks to “eradicate employment discrimination at the workplace” yet your history of defending cases has been characterized as limiting the ability of workers to challenge discriminatory practices. The Chairman of the EEOC plays a critical role in driving the policies to achieve the EEOC’s mission. As an attorney who built their career advocating for corporate interests and pursuing policies that weaken protections for the American worker, how do you plan to carry on the EEOC’s mission of eradicating discrimination in the workplace? You critics point to your tenure at the Retail Litigation Center, an organization that many describe as hostile toward EEOC positions and enforcement efforts, as a troubling background for a someone now charged with protecting workers. How do you respond to such criticisms? What biases do you think you bring to the position of Chairman of the EEOC? How do you plan to balance your background with the responsibilities inherent in your new role?

Answer 1. In my prior roles as General Counsel, I worked to put into place policies and practices to prevent unlawful employment discrimination. I also took steps to ensure that when complaints of discrimination were raised, they were promptly and fairly investigated, and that appropriate action was taken if necessary. I believe these efforts were fully consistent with the mission of the EEOC.

Likewise, the RLC supported the work of the EEOC and its objective to eliminate workplace discrimination.

My experiences in the private sector, and with the RLC, taught me that honest debate, vigorous exchange of views and respectful consideration of other perspectives leads to better outcomes. If confirmed, I will strive to apply those lessons to my work at the EEOC.

Question 2. An integral part of our government system is checks and balances. One way this is exercised is through congressional oversight. Oversight includes the review, monitoring, and supervision of Federal agencies, and timely and accurate information from agencies is critical to conducting that oversight. For example, the Senate exercises its oversight role is with confirmation hearings for Presidential appointees, the appropriations process, or through investigations and inquiries. Congressional oversight is a critical to ensuring transparency and making sure we are good stewards of taxpayer dollars. Ms. Dhillon, it is reported that you instructed executive agencies not to comply with Democratic oversight requests. Do you commit to responding timely and appropriately to all oversight requests from the Senate, regardless of which Senator or party initiates the request?

Answer 2. I have not given any instructions to any executive agencies; I have never served in government. The press reports referenced in this question do not refer to me. If confirmed, I will cooperate with the HELP Committee’s oversight activity.

Question 3. In 2010, you signed a letter to the SEC arguing against protections for stakeholders. This letter addresses a post-Dodd-Frank regulatory proposal by the SEC concerning the reporting of corporate misconduct to in-house compliance departments. Representing corporate interests, you urged the SEC to require whistleblowers to use internal reporting mechanisms before turning to the SEC. In the letter, you acknowledge the risk that companies would retaliate against reporting employees and the delay in filing cases with the SEC. In your testimony before the Committee, you acknowledged a delay in case filings hurts both sides and argued that it would be better for all parties involved if the delay for filing and processing was minimized.

a. If confirmed, you will be sworn in to fulfill the mission of the EEOC, as directed by the Congress, to enforce laws prohibiting workplace discrimination. How do you plan to reconcile your past position of advocating for industry/internal reporting mechanisms over filing with the appropriate regulatory Federal agency?

b. Do you agree that in instances of systemic cultural workplace discrimination, internal reporting would only reinforce a culture of discrimination?

Answer. In the 2010 letter signed by members of the Association of Corporate Counsel (ACC), the signatories expressed the view that creating disincentives for whistleblowers to report internally could delay the discovery of wrongdoing. This is particularly concerning in the context of financial reporting, where a delay in identifying internal wrongdoing could harm shareholders and others.

I continue to believe that the points identified by the ACC are legitimate concerns. In the context of statutes enforced by the EEOC, there is no requirement that an employee notify his or her employer before filing a charge of discrimination, and

I believe this structure is appropriate. That said, I believe it is desirable for employers to create and foster supportive environments where employees feel comfortable raising concerns of discrimination with their manager, or others in the organization, without fear of retaliation.

Question 4. In 2016, the EEOC began reporting out on LGBTQ sex discrimination cases. Will you ensure that this vital data continues to be made publically available?
Answer 4. Yes.

Question 5. In your testimony before the Committee, you emphasized outreach and education as a means to achieve the EEOC's mission. What educational and outreach approaches would you add, change, or remove in order to support the EEOC's mission?

Answer 5. If confirmed, I would seek the input of the career professional staff and my fellow commissioners on ways to enhance ongoing educational and outreach efforts. In particular, I would want to look at ways to enhance educational efforts for small businesses and their employees, as well as in sectors that generate disproportionate charge activity. I would also seek to understand the impact on the effectiveness of the EEOC's current practice of charging fees to attend certain EEOC-sponsored events.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR FRANKEN

Question 1. Women make up about half the workforce, and are the primary or co-breadwinners in two-thirds of American households. Yet a woman still makes only 80 cents, on average, for every dollar earned by a man, and the gap is even wider for women of color. In the absence of the EEOC being able to collect pay data as proposed in the recently blocked update to the EEO-1 pay data collection survey, how would you propose pay information be collected, and how should the EEOC address gender-based pay inequality?

Answer 1. If confirmed, I would work with the career professional staff and my fellow commissioners to ensure that an appropriate amount of the agency's resources are being devoted to enforcement of Federal equal pay laws. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allows for meaningful comparisons. In addition, if confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce equal pay laws.

Question 2. In October of last year, the EEOC approved a Strategic Enforcement Plan for Fiscal Years 2017–2021. The Plan identifies six substantive priority areas for the EEOC. No. 5 is titled “Preserving Access to the Legal System.”

The plan provides that the EEOC will focus on addressing employer “policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC’s investigative or enforcement efforts. Specifically, EEOC will focus on overly broad waivers, releases, and mandatory arbitration provisions that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims.”

Ms. Dhillon, are you able to stand behind that statement? In other words, can you commit to fighting forced arbitration clauses that prevent workers from vindicating their rights under the Civil Rights Act?

Answer 2. I am committed to enforcing the country’s employment antidiscrimination laws and to removing barriers to employees seeking to remedy employment discrimination. In addition, I note that the EEOC is not bound by arbitration agreements between an employer and employee. If confirmed, I would support the EEOC’s pursuit of cases regardless of the existence of an arbitration agreement.

Question 3. Ms. Dhillon, the Retail Litigation Center, which you helped form, has devoted a considerable amount of time to defending employers’ use of forced arbitration clauses and class action waivers. These clauses prevent workers from banding together to seek justice in a public court of law when they’ve been cheated or mistreated by their employer.

As a founder, former chair, and then member of the Board of the Retail Litigation Center, can you describe what role you played in determining which cases the Center would get involved in? Based on the Center’s advocacy, is it fair to say that you stand behind employers’ use of pre-dispute arbitration clauses in employment contracts?

Answer 3. The Retail Litigation Center (RLC) is a membership organization, and the decision to participate in cases was made collectively by the Board. I did not have the unilateral authority to cause the RLC to act.

I believe that arbitration can be a useful process to resolve disputes in a cost-effective manner, reduce stress on the litigants, and alleviate burdens on the courts. The Federal Arbitration Act sanctions the use of arbitration, and the United States Supreme Court has recognized arbitration as a legally enforceable mechanism for dispute resolution. The Supreme Court has also held that the EEOC is not bound by arbitration agreements between an employer and employee. If confirmed, I would support the EEOC's pursuit of cases regardless of the existence of an arbitration agreement.

Question 4. Your stance on forced arbitration demonstrates your willingness to defend workers' rights under the Civil Rights Act. Former Fox News anchor, Gretchen Carlson, began fighting against the use of forced arbitration clauses after filing a lawsuit against her boss, Roger Ailes, for sexual harassment. Mr. Ailes' lawyers tried to force her into private arbitration, arguing that Ms. Carlson had breached a forced arbitration clause in her employment contract—a clause which also prohibited her from speaking out about the claim.

In an op-ed published a few months back, Ms. Carlson wrote, “so many women are being silenced by employers who force them into a secret star chamber proceeding called arbitration. By coercing women to remain silent about illegal behavior, the employer is able to shield abusers from true accountability and leave them in place to harass again. The arbitration process—often argued to be a quicker and cheaper method of dispute resolution for employees—instead has silenced millions of women who otherwise may have come forward if they knew they were not alone.”

Ms. Dhillon, would you agree that one benefit of our civil justice system is ensuring that other victims, including workers who have faced harassment and discrimination, are made aware of widespread wrongdoing? That such awareness allows them to mitigate the harm to themselves?

Answer 4. Yes.

Question 5. As head of the EEOC, it would be incumbent on you to take every action to ensure safety and equality in the workplace. It's particularly important that EEOC investigate public allegations of widespread wrongdoing within an organization. Would you agree that this mission is hampered if harmed individuals are prevented from speaking out about their claims?

Answer 5. Yes.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR WHITEHOUSE

Question 1. Given your extensive history defending employers, what assurances can you provide that you can adequately appreciate the claims of individuals how bring claims against employers?

Answer 1. In my prior roles as General Counsel of three public companies, I worked to put into place policies and practices to prevent unlawful employment discrimination. I also took steps to ensure that when complaints of discrimination were raised, they were promptly and fairly investigated, and that appropriate action was taken if necessary. If employees brought charges with the EEOC, I expected my team to work constructively with the EEOC, in a respectful and professional manner, to promptly address the matters raised. I believe that my work in the private sector demonstrates my commitment to enforcement of the nation's antidiscrimination laws.

Question 2. Please list the three most significant cases in which you successfully obtained relief for an individual who brought an employment discrimination claim. Why were those cases significant to you?

Answer 2. As a General Counsel, my professional and ethical obligations were to my employer. In my community work, my efforts focused on securing services and protecting the rights of children in foster care and other temporary care arrangements, and on supporting food banks. Earlier in my career, I worked on pro bono matters involving housing discrimination and criminal sentencing.

Question 3. What do you understand the role of Fair Employment Practices Agencies (FEPAs) to be?

Answer 3. FEPAs generally enforce employment discrimination laws enacted by states or localities. The EEOC has work-sharing agreements with some FEPAs which allow them to work cooperatively and reduce duplication of effort.

Question 4. Do you agree with the EEOC's current enforcement priorities?

a. If not, what do you think the priorities should be?

Answer 4. If confirmed, I will consult with the career professional staff, as well as my fellow commissioners, concerning the EEOC's current enforcement priorities. I will seek to understand the resources being devoted to each priority, as well as what metrics are being used to measure progress. I will seek to balance these enforcement priorities against the need to reduce the backlog of individual charges.

Question 5. Do you support systemic lawsuits as an effective and efficient way to combat discrimination?

Answer 5. I believe that systemic litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic litigation that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

Question 6. Do you commit to maintaining the EEOC's current position that discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination prohibited by Title VII?

Answer 6. The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. If confirmed, I will work to ensure the EEOC continues its work to address discrimination on this basis, including in cases that involve allegations of discrimination on the basis of sexual orientation or gender identity. I will also work to continue the EEOC's efforts to enforce the provisions of applicable Executive Orders that prohibit discrimination on the basis of sexual orientation or gender identity. In addition, in those circuits that have recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (even absent gender stereotyping), I will work to ensure that the EEOC continues to pursue those cases. I will take steps to ensure that the EEOC does not stand in the way of claimants pursuing discrimination claims on the basis of sexual orientation or gender identity under applicable State laws. With the respect to those Federal jurisdictions where the courts have held that Title VII does not extend to discrimination claims based on sexual orientation or gender identity (absent allegations of gender stereotyping), the EEOC must comply with the law of that circuit.

Question 7. You have stated that you are personally opposed to discrimination on the basis of sexual orientation and gender identity, but you have equivocated when asked whether you would continue the EEOC's current interpretation of Title VII on these issues. When making decisions as the Chair of the EEOC your personally held views are not as relevant as the effects of your decisions. If you are confirmed as Chair of the EEOC, will you make decisions that promote or tolerate employment discrimination against LGBT people?

Answer 7. No.

Question 8. Do you personally know anyone who is transgender?

Answer 8. Yes.

a. Would you be willing to meet with transgender workers to discuss their workplace experiences?

Answer: Yes.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR BALDWIN

Question. In 2013, the Supreme Court issued a decision in *Vance v. Ball State University* that made it much harder to hold employers accountable for the harassment employees face at the hands of direct supervisors. Under this decision, only people with the power to hire and fire are supervisors under Title VII. In reality, lower-level supervisors can have enormous authority over subordinates—particularly in low-wage occupations like child care workers and cashiers, where women make up a significant majority of workers.

When you served on the board of directors of the Retail Litigation Center, that organization filed an amicus brief in *Vance* supporting a narrow understanding of Title VII with regard to liability for supervisor harassment. The Center also took positions in a number of cases in favor of narrowing employer liability standards.

Given that record, can you explain how, as a Commissioner, you would work to ensure that individuals who experience harassment and discrimination at the hands of their supervisors have recourse? Would you support legislation that I have previously introduced, the Fair Employment Protection Act, which makes clear that employers can be held liable for the discriminatory conduct of lower-level supervisors?

Answer: If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable judi-

cial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders. If additional laws are enacted to provide additional protections to employees, and the EEOC is charged with enforcing those laws, I will work to faithfully implement those new laws.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR WARREN

Sexual Orientation and Gender Identity Discrimination

Title VII of the *Civil Rights Act* prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”¹ The EEOC currently “interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation...regardless of any contrary State or local laws.”² Numerous court decisions³ support EEOC’s conclusion that “sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias.”⁴ Since beginning data collection on LGBT discrimination in 2013, the EEOC has collected \$6.4 million in monetary relief for individuals who have experienced LGBT-related discrimination.⁵

During your confirmation hearing on September 19th, you stated that you were “personally opposed to discrimination on the basis of gender identity or sexual orientation.” You also asserted that the EEOC is the “preeminent Federal agency on workplace discrimination issues” and that “courts and other litigants should recognize that EEOC is an honest broker whose advocacy is beyond reproach [and] whose motives are always transparent.” If confirmed as EEOC Chair, you will inherit pending cases addressing LGBT discrimination.⁶

Question 1. The EEOC has laid out its position on Title VII in numerous Federal sector court cases.⁷ Do you agree with the EEOC’s legal interpretation that Title VII prohibits sex discrimination on the basis of sexual orientation and gender identity? If so, please highlight the specific EEOC cases that align with your legal interpretation of Title VII, as well as provide rebuttals to arguments that Title VII does not prohibit sex discrimination on the basis of sexual orientation and gender identity.

Answer 1. The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. Lower courts have applied this reasoning to claims involving allegations of discrimination on the basis of sexual orientation or gender identity. Executive Orders also prohibit discrimination on the basis of sexual orientation or gender identity, and apply to Federal civilian employees as well as employees of Federal contractors. In addition, at least one circuit court has recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (absent gender stereotyping).

The crux of the legal issue under Title VII is whether the word “sex” extends to claims for discrimination on the basis of sexual orientation or gender identity (absent gender stereotyping). There is a split in the circuits on this question, and now there is a split of government agencies (with the EEOC advocating in favor of one interpretation, and the Department of Justice advocating in favor of the opposite interpretation).

The legislative history of the original Civil Rights Act of 1964 does not resolve this question of statutory interpretation. In subsequent amendments to Title VII, Congress did not expand the statute to explicitly encompass claims for discrimina-

¹ U.S. Equal Employment Opportunity Commission, “Title VII of the Civil Rights Act of 1964” (online at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>).

² 1AU.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at <https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement—protections—lgbt—workers.cfm>).

³ U.S. Equal Employment Opportunity Commission, “Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII” (online at <https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt—examples—decisions.cfm>).

⁴ U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at <https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement—protections—lgbt—workers.cfm>).

⁵ U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at <https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement—protections—lgbt—workers.cfm>).

⁶ U.S. Equal Employment Opportunity Commission, “Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination” (last updated July 8, 2016) (online at <https://www.eeoc.gov/eeoc/litigation/selected/lgbt—facts.cfm>).

⁷ U.S. Equal Employment Opportunity Commission, “Federal Sector Cases Involving Transgender Individuals” and “Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals” (online at <https://www.eeoc.gov/Federal/reports/lgbt—cases.cfm>).

tion on the basis of sexual orientation or gender identity. Multiple bills have been introduced in Congress to address this issue, but none have passed. Those unsuccessful bills are cited as evidence that Congress did not intend to have Title VII's reference to "sex" read broadly to include claims of discrimination based on sexual orientation or gender identity.

Question 2. As EEOC Chair, would you continue to uphold the EEOC's current position on Title VII, including in currently pending cases?

Answer 2. The United States Supreme Court has recognized that discrimination on the basis of gender stereotyping is a violation of Title VII. If confirmed, I will work to ensure the EEOC continues its work to address discrimination on this basis, including in cases that involve allegations of discrimination on the basis of sexual orientation or gender identity. I will also work to continue the EEOC's efforts to enforce the provisions of applicable Executive Orders that prohibit discrimination on the basis of sexual orientation or gender identity. In addition, in those circuits that have recognized a cause of action for discrimination on the basis of sexual orientation or gender identity under Title VII (even absent gender stereotyping), I will work to ensure that the EEOC continues to pursue those cases. I will take steps to ensure that the EEOC does not stand in the way of claimants pursuing discrimination claims on the basis of sexual orientation or gender identity under applicable State laws. With respect to those Federal jurisdictions where the courts have held that Title VII does not extend to discrimination claims based on sexual orientation or gender identity (absent allegations of gender stereotyping), the EEOC must comply with the law of that circuit.

Question 3. On January 27, 2017, the Department of Justice (DOJ) filed an amicus brief in an LGBT-discrimination case that Title VII "does not reach[] sexual orientation discrimination." DOJ also stated that the EEOC was "not speaking for the United States" in its opposing brief on the matter. DOJ also stated that the EEOC was "not speaking for the United States" in its opposing brief on the matter.⁸

a. Do you believe that the DOJ or the EEOC "speaks for the United States" on the issue of Title VII discrimination?

Answer 3. Under Title VII, the EEOC does not have the authority to issue substantive rules or regulations; its explicit rulemaking authority is limited to procedural rules. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations . . . the level of deference afforded [to the EEOC's interpretations] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.") (citations omitted).

The Department of Justice brings litigation to enforce Title VII against State and local governments. Further, the Department of Justice, through the Solicitor General, represents the EEOC before the United States Supreme Court.

b. Should disagreements between the EEOC and other Federal agencies over the interpretation of Title VII arise in the future, how will you defend the EEOC's role as the "preeminent" arbiter of workplace discrimination issues?

Answer: The EEOC has the authority to adjudicate disputes under Title VII in the Federal employment sector, although it cannot impose injunctive relief on other Federal agencies. The Department of Justice has jurisdiction for enforcing Title VII against State and local governments in the litigation context. Further, the Department of Justice, through the Solicitor General, represents the EEOC before the United States Supreme Court. If confirmed, I will continue to respect this distribution of authority among the agencies.

Question 4. The EEOC's Strategic Enforcement Plan (SEP) for 2013–2016 listed the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an "emerging or developing" issue that EEOC should "prioritize."⁹ The EEOC's SEP for 2017–2021 lists the protection of LGBT Americans from discrimination based on sex as an "emerging and developing issue"

⁸ Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," *New York Times* (July 27, 2017) (online at <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>).

⁹ U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: fiscal year 2013–2016" (online at <https://www.eeoc.gov/eeoc/plan/sep.cfm>).

priority, but notes that “the Commission may choose to add or remove particular issues as the law develops.”¹⁰ If confirmed, would you support continuing to prioritize the protection of LGBT Americans from sex discrimination as an “emerging and developing” issue?

Answer 4. Yes.

EEO-1 Data and Pay Discrimination

The Civil Rights Act of 1967 and the Equal Employment Opportunity Act of 1972 require employers with 100 or more employees to annually submit EEO-1 forms to the EEOC. EEO-1 forms capture information on the gender and race of employees.¹¹ In January 2016, the Obama administration proposed an update to the EEO-1 that would have required employers to report additional information on workers’ wages, broken down by race, ethnicity, and gender. The form was officially revised in September 2016. The goal of this revision—which would have required companies to start submitting data by March 2018—was to provide EEOC with additional wage data to track and combat wage discrimination.¹²

Describing the new EEO-1 requirements—particularly its “data file specifications for employers”—as “unnecessarily burdensome,” the Office of Management and Budget (OMB) recently halted the implementation of the EEO-1 pay data collection requirements. During your nomination hearing, you committed to “make finalizing a transparent pay data collection by the EEOC a priority” in a “timely matter.”

Question 5. Do you agree with the OMB’s assessment that the EEOC’s recent efforts to change the EEO-1 form are “unnecessarily burdensome” for employers? If not, please describe what steps the EEOC will take under your leadership to ensure that the EEO-1 form is amended to collect pay data by gender and race. If so, please provide a detailed description of how you will alter the EEOC’s pay data collection proposal to make the regulation less “burdensome” while still collecting pay data by gender and race.

Answer 5. Pay discrimination is a serious issue and an appropriate focus of the EEOC’s efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allows for meaningful comparisons. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws. I would like to understand how the EEOC performed its burden analysis, and how it arrived at its annual burden estimate per filer. I am open to exploring an initial pilot program to develop a better understanding of how collection of pay data could help further the EEOC’s mission of enforcing the Federal equal pay laws.

Question 6. Changes to the EEO-1 form were meant to “help focus public enforcement of our equal pay laws.” How would you direct the EEOC to utilize additional race- and gender-related pay data, should the EEOC manage to successfully collect it?

Answer 6. If confirmed, I would want to consult with the career professional staff, as well as my fellow commissioners, to determine how best to utilize collected pay data to further the agency’s mission. I would also look to reports previously done by the EEOC, including *Diversity in the Finance Industry*, *Diversity in the Media*, as examples of how the EEOC can utilize the data it collects to further its mission.

Question 7. Do you think measures to increase transparency by providing employees with information about pay is an effective tool to combat discrimination? If so, what specific measures—in addition to improving pay data collection at the EEOC—do you support?

Answer 7. Pay discrimination is a serious issue and an appropriate focus of the EEOC’s efforts. I believe that transparency of pay data is a useful tool, but it is important that the data collected and disclosed allow for meaningful comparisons. The EEOC Compliance Manual recognizes a variety of legitimate factors that can explain pay differences. Thus, while access to information about other employees’ pay may provide a basis for comparison, that comparison needs to be put into appropriate context.

¹⁰ U.S. Equal Employment Opportunity Commission, “Strategic Enforcement Plan: Fiscal Years 2017–2021” (online at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>).

¹¹ U.S. Equal Employment Opportunity Commission, “EEO-1: Legal Basis for Requirements” (online at <https://www.eeoc.gov/employers/eeo1survey/legalbasis.cfm>).

¹² President Barack Obama, “FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act,” The White House of President Barack Obama (January 29, 2016) (online at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).

Wellness Programs

The EEOC is responsible for enforcing the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Among other requirements, the ACA “prohibits employers from requiring medical exams or inquiring as to whether an individual has a disability unless the inquiry is both ‘job related’ and ‘consistent with business necessity’—though employers may collect this information if its collection is “voluntary.”¹³ GINA, meanwhile, “prohibits employers from requesting, requiring, or purchasing genetic information from employees or their families.”¹⁴

To help reduce the cost of healthcare, the Affordable Care Act (ACA) allows employers to offer financial incentives to encourage employee participation in wellness programs. In 2013, the Departments of Labor, Health and Human Services, and the Treasury (the Departments) issued regulations implementing the ACA that permit employers to offer financial incentives of up to 30 percent of healthcare premiums for participation in “health contingent” wellness plans. In 2016, EEOC issued regulations designed to align the ADA and GINA with the Department’s wellness program regulations.¹⁵ The EEOC’s regulations asserted that programs with a 30 percent financial incentive were “voluntary” under the ADA, and would have permitted employers to condition financial incentives on the participation of an employees’ spouse in a program that collects their genetic information. On July 13, 2015, and February 2, 2016, I sent letters to the EEOC expressing my concerns with this approach.¹⁶

In August 2017, a district court ruled in *AARP v. U.S. Equal Employment Opportunity Commission* that the EEOC’s regulations violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).¹⁷ The EEOC was directed to rewrite its regulations defining how employers can incentivize participation in wellness programs.¹⁸

Question 8. Will you commit to preserving GINA protections in the EEOC’s upcoming revision of its wellness program regulations?

Answer 8. If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC’s interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA’s passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court’s recent order.

Question 9. Will you commit to preserving ADA protections in the EEOC’s upcoming revision of its wellness program regulations?

Answer 9. If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC’s interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA’s passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court’s recent order.

¹³ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

¹⁴ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

¹⁵ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

¹⁶ See Letters from Senator Warren et al. to Jenny R. Yang, Chair, EEOC, on July 13, 2015, and February 2, 2016.

¹⁷ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

¹⁸ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eec-s-wellness-program-incentive-72781/>).

Question 10. Do you believe that participation in an employee wellness program can be “voluntary” if the terms of the program place significant financial pressure on an employee to reveal genetic information, including the medical history of the employee or a family member?

Answer 10. If confirmed, I will work with the career professional staff and my fellow commissioners to redraft the rules to address the concerns raised by the Court in the *AARP v EEOC* matter, and to ensure that the EEOC’s interpretations are consistent with the regulations that HHS, the Department of Treasury and the DOL promulgated in the wake of the ACA’s passage, as well as the requirements of GINA and the ADA. In light of the ongoing litigation, I do not believe it would be appropriate for me to comment on specific aspects of the wellness regulations that the EEOC has promulgated, and which are the subject of the litigation and the court’s recent order.

Criminal Background Checks

Question 11. In your opinion, what is the appropriate use of criminal history background checks in an employment application process?

Answer 11. Criminal history background checks can be appropriate to screen applicants whose prior criminal history indicates the applicant could put the employer and/or its employees/customers at unreasonable risk. For example, an applicant with a criminal record for child sexual abuse would likely not be an appropriate candidate for a position in a child day-care center.

Question 12. Is it ever unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer 12. Yes.

Question 13. Will you commit to bringing cases against employers whose use of criminal background checks has a disparate impact on protected classes under Title VII?

Answer 13. Because the EEOC’s guidance on this topic has been challenged and is the subject of ongoing litigation, I do not believe it is appropriate for me to respond to this question. I am aware that the EEOC’s efforts to enforce this guidance through litigation have been subjected to criticism from various courts, including in *EEOC v. Kaplan Higher Education Corp.*, *EEOC v. Freeman, Inc.* and *EEOC v. Peoplemark, Inc.*, and that significant sanctions have been assessed. If confirmed, I will seek to learn more about the EEOC’s enforcement efforts in this area.

Credit Checks

Question 14. In your opinion, what is the appropriate use of credit checks in an employment application process?

Answer 14. If an employer elects to use credit checks in an employment application process, it must do so in a neutral fashion, and not as a pretext for screening out protected classes of employees. In addition, credit checks must be conducted in accordance with the requirements of FCRA (the Fair Credit Reporting Act) and other similar State laws.

Question 15. Is it ever unlawful or discriminatory for an employer not to hire workers because of their credit history?

Answer 15. If an employer elects to use credit checks in an employment application process, it must do so in a neutral fashion, and not as a pretext for screening out protected classes of employees. In addition, credit checks must be conducted in accordance with the requirements of FCRA (the Fair Credit Reporting Act) and other similar State laws.

Question 16. Will you commit to bringing cases against employers whose use of credit history has a disparate impact on protected classes under Title VII?

Answer 16. If confirmed, I will consult with the career professional staff, as well as my fellow commissioners, and review the data on this subject.

Case Load

Question 17. Given the current case backlog at EEOC do you support the Trump administration’s fiscal year 2018 budget proposal to eliminate 249 full-time positions at EEOC?

Answer 17. If confirmed, I will carefully examine the agency’s expenditures to make sure that the agency is making the most efficient use of its resources, and is making strategic investments of its resources to ensure it can achieve its mandate in the most cost-effective manner possible.

Question 18. If not, will you commit to advocating against budget cuts to The White House?

Answer 18. If confirmed, I will advocate for resources necessary for the agency to perform its mandate.

Systemic Investigations

Question 19. What are your views on EEOC's systemic program?

Answer 19. I believe that systemic investigations and litigation can be used to maximize the impact of the agency's resources by pursuing matters that are high impact. Systemic investigations and, where necessary, litigation, that addresses a widespread pattern or practice of discriminatory treatment is a valuable tool to combat discrimination.

Census

Question 20. As you may know, the EEOC relies on data gathered in Census products such as the American Community Survey. The President has proposed debilitating budgets to the Census and has not appointed a Director. Will you commit to advocating to the White House for a fully funded and staffed Census Bureau?

Answer 20. I am aware that the EEOC receives data from the Census, but I am not familiar with that data, nor how it is utilized. If confirmed, I will work with the career professional staff to understand how the agency uses Census data.

Question 21. Will you commit to informing the HELP Committee if you do not have adequate data from Census products or if the quality of Census data that you use declines?

Answer 21 Yes.

Retail Litigation Center

You helped found and served as chair of the Retail Litigation Center (RLC), which files briefs representing the retail industry's interests in a variety of legal proceedings, including matters of EEOC policy, enforcement, and litigation.¹⁹ In that capacity, you worked with high-level executives of other major employers to decide if and how to intervene in retail-related cases, including some before the EEOC.

Question 22. What steps will you take to avoid the appearance of impropriety if the RLC has filed a brief in a case that comes before you as chair of the EEOC?

Answer 22. I intend to recuse myself from matters in which the RLC is involved if I had involvement in that matter while I was on the Board of the RLC. Beyond that, I will consult with the EEOC's ethics officer on recusal issues.

Question 23. Please list the companies whose executives sat on the RLC's Board of Directors while you were Chair.

Answer 23 J.C. Penney Company, Inc., Lowe's Companies, Inc., Michaels Stores, Inc., Target Corporation, 7-Eleven, Inc., Jo-Ann Stores, Inc., Dollar General Corporation, Whole Foods Market, Inc., Wal-Mart Stores, Inc., and Walgreen Co.

Question 24. If any of these companies is a party in a case that comes before the EEOC, what steps will you take to avoid the appearance of impropriety in light of your prior relationship with such a company?

Answer 24. I will consult with the EEOC's ethics officer on recusal issues.

a. In such circumstances, would you take a meeting or otherwise communicate with an executive from that company?

Answer. I will consult with the EEOC's ethics officer.

Congressional Oversight

Question 25. Please describe your views on the role of Congress in conducting oversight of the EEOC.

Answer 25. Congressional oversight is important function that supports Congress's authorizing and appropriating roles and derives from its implied powers in the Constitution.

Question 26. Will you commit to promptly and comprehensively answering any requests for information that you receive from any member of members of the HELP Committee?

Answer 26. Yes, subject to statutory limitations on the ability of the EEOC to disclose information about charging parties and respondents.

¹⁹ <https://www.rila.org/enterprise/retaillitigationcenter/Pages/default.aspx>.

Question 27. Will you treat requests for information from Majority Members of Congress differently than you will treat requests from Minority members? If so, how?

Answer 27. No.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR KAINE

Question 1. In light of this Administration's attacks on undocumented immigrants, it is more important than ever that the EEOC continue to vigorously enforce claims of discrimination filed by undocumented workers. Will you abide by the EEOC's guidance stating that workers are protected under Title VII regardless of their immigration status or authorization to work?

Answer 1. Yes.

Question 2. Strong EEOC enforcement efforts are especially important in low-wage jobs because these jobs are disproportionately held by workers who are vulnerable to discrimination, including women of color.

a. How do you plan to make sure that the EEOC is devoting sufficient resources to addressing discrimination in the industries where these low-wage jobs are concentrated?

Answer: I believe that the EEOC's focus on vulnerable members of the nation's workforce is an important part of its overall mission. If confirmed, I will work with the career professional staff, and my fellow commissioners, to ensure that an appropriate amount of the agency's resources are focused on issues impacting these workers.

b. Are there any biases you bring to the EEOC from your work on behalf of management and industry in the retail sector that will hinder your ability to strongly enforce low-wage workers' rights, including those in the retail industry?

Answer: No—I do not believe so. If I am confirmed, I will do my best to objectively lead the agency in a manner consistent with the EEOC's statutory mandates, as well as applicable judicial and agency precedent, taking into account the views of other commissioners, the career professional staff, and interested stakeholders.

Question 3. The Office of Management and Budget (OMB) recently suspended the pay data collection and reporting requirement under the updated version of the EEO-1 form that was originally scheduled to take effect in March of 18.

a. Do you believe there is a gender-base wage gap that is due in part to lack of transparency around compensation and lack of review by employers into their pay practices?

Answer: Yes.

b. Do you believe that some intervention by the EEOC is needed to gain insight into employers' pay practices?

Answer: Yes.

c. What do you think are effective strategies to address pay discrimination?

Answer: Pay discrimination is a serious issue and an appropriate focus of the EEOC's efforts. I believe that transparency of pay data is a useful tool in combating pay discrimination, but it is important that the data collected and disclosed allow for meaningful comparisons. If confirmed, I would consult with the career professional staff and my fellow commissioners to examine what additional data the EEOC needs to fulfill its mandate to enforce Federal equal pay laws. I will also want to understand what resources are being devoted to enforcement of the nation's equal pay laws, and make a determination whether those resources are appropriate.

RESPONSES BY JANET DHILLON TO QUESTIONS OF SENATOR HASSAN

Question 1. Section 14(c) of the Fair Labor Standards Act, authorizes employers to pay sub-minimum wages to workers who experience disabilities. Often times, this type of employment occurs in a secluded environment known as a sheltered workplace. In 2015, with the support of the NH business community, New Hampshire was the first State to eliminate the payment of the subminimum wage and there have been efforts in Congress to end this practice.

a. Understanding that your role is to execute the current law, do you personally support ending the practice of paying subminimum wage to individuals who experience disabilities and phasing out the practice of using sheltered workplaces in favor of Competitive Integrated Employment?

Answer: I do not have sufficient information or background on this issue to form an informed view. If confirmed, I would consult with the career professional staff and fellow commissioners to learn more about this area.

Question 2. One of the biggest gaps between men and women in both education and the workforce is in the STEM fields. Women outnumber men as college graduates, but in STEM fields the numbers are quite the opposite. In turn, men have higher representation in STEM careers, which tend to pay much more than jobs in female-dominated spheres. Women who do enter into STEM fields often face heavy discrimination and hostile work environments, as many recent articles about STEM-field office cultures have demonstrated. They are also shortchanged on pay. A 2015 study by the American Association of University Women found that women in STEM fields are paid only 82–87 percent of what their male counterparts are paid.²⁰

- a. How will you work to combat this systemic gap in pay?
- b. How will you monitor whether this gap is closing?
- c. What steps will you take to ensure that these women's rights' are protected in hostile work environments?

Answer: I believe that pay discrimination in any field is unacceptable. In the past, the EEOC has established Task Forces to focus on particular issues, and has issued reports on employment practices in particular sectors (for example, the EEOC's reports titled Diversity in the Finance Industry and Diversity in the Media). I believe these types of in-depth efforts have been effective at driving positive change. If confirmed, I would work with the career professional staff, as well as my fellow commissioners, to explore ways that the EEOC can address these issues.

Question 3. As you know the Americans with Disabilities Act requires that employers provide reasonable accommodations to an employee who experiences a disability. Despite this, individuals with disabilities continue to face an unemployment rate of over 8 percent and have a labor participation rate of only 20.5 percent compared to 68.8 percent of individuals who do not experience a disability.

- a. Can you explain your understanding of a reasonable accommodation under the ADA?

Answer: What constitutes a reasonable accommodation is highly dependent on the facts of a particular circumstance. Employers should engage in the interactive process to determine what constitutes a reasonable accommodation in a particular circumstance.

Question 4. Often times, especially in cases of individuals with mental health issues or a learning disability, employees may choose to not disclose their disability and in turn not receive the accommodations they are afforded under law.

- a. What role do you believe the EEOC plays in ensuring that employers are held accountable to provide accommodations and that employees know their legal rights to disclose their disability with no repercussions?

Answer: I believe that employer and employee outreach and education efforts are particularly important in this area. In addition, the EEOC's mediation program can play a significant role in these types of situations. In addition, if unlawful discrimination is found, the EEOC should engage in a meaningful conciliation effort.

- b. You've been a corporate executive for several retail chains, do you feel there are too many lawsuits under the ADA?

Answer: I do not have access to information on which to form a judgment on the amount of litigation brought under the ADA.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR PATTY MURRAY

Question 1. In January a blogpost on the website BlackFive argued that women should not be allowed in combat units. You commented twice on this post, agreeing with the author's argument—that combat units should be restricted to men. You said allowing women in combat roles will be a detriment to national security, will result into lower standards at Ranger, SFAS, and other schools, and that the idea of women fighting in that environment is "laughable." Please explain how your views have changed since 2011 and why.

Answer 1. As late as 2011, I agreed with the military's policy at that time that excluded women from some combat roles. Later that year, when I arrived at West Point as a professor, I began to observe women in demanding leadership roles within the Corps of Cadets. I mentored many women, including several who became combat arms officers upon graduation. I am proud of those women, and proud of my mentorship of them.

²⁰ <http://www.aauw.org/2015/04/14/women-shortchanged-in-stem/>.

My concerns that the military would lower physical standards as part of the effort to include women were unfounded, and I do not currently hold the views that I held in 2011. My direct observation and mentorship of women who are currently serving as combat arms officers, including one who was the 4th woman to graduate from Ranger School and another who is the only woman serving as a Sapper platoon leader in the 101st Airborne Division, make my concerns in 2011 seem antiquated. I no longer hold those views, and am proud of my years-long mentorship of those officers.

Question 2. The original blogpost in question, “Women in combat units—Oh! Hell! No!” not only argued vigorously against allowing women into combat roles, but did so in an incendiary way perpetuating harmful gender stereotypes. For example, the author said that “[w]omen are not as big and strong as men, nor can they withstand the rigors of living completely off the grid for the extended stretches combat can require.” The author went on to explain “you just threw a healthy, breeding age, female into a pack of dogs with an established, yet always evolving hierarchy,” questioned where the “vital gap is in our combat repertoire that requires a feminine touch, and noted “the need for monthly maintenance is another show stopper” (referring to menstruation). Did you agree with these statements in 2011 and do you agree with them now? How can women trust that you no longer hold or endorse these stereotypes?

Answer 2. No, I did not agree with the original poster of that article, nor do I agree with him now. Military professionals who are leading units in austere environments must take into account all of the unique needs of their soldiers, including mental and physical health, hygiene, and other mission requirements. I believe in the professionalism of the leaders of those units, and trust them to take into account all of the variables related to mission accomplishment. Anyone with concerns can look to my record of mentorship and direct care of women who later joined combat arms branches.

Question 3. In one of your comments on BlackFive you called the Military Leadership Diversity Commission, which was established by Congress in 2009, “silly.” What about your experience with women in the military at the time you made those comments led you to think that it was a silly or laughable idea for women to serve in combat units?

Answer 3. I knew nothing at that time about the diversity commission, and do not believe that it was “silly.” My concern at that time was that the Commission would simply endorse the political views of its founders and members, rather than take military readiness into account in a direct and honest way. Although I am not familiar with any reports made by that Commission, I am pleased that the Army has been rigorous in enforcing the standards for each position rather than relying on the sex of the soldier as a proxy for ability. Women can (and do) serve with distinction across the force, and I am pleased that some of those women were mentored by me during my time as a professor at West Point.

Question 4. Are there currently any jobs or types of work that you believe should be restricted or open only to one gender? If so, what are those jobs? Please explain in detail.

Answer 4. No, I do not think that gender is relevant to employment. Some jobs require more physical strength than others, and the employer must be careful to only apply tests that are directly relevant to the actual job to be performed rather than relying on stereotypes.

Question 5. The EEOC’s mission is to promote equal employment opportunity in the workplace. Do you commit to supporting EEOC’s efforts to reduce women’s barriers to entry into jobs traditionally dominated by men?

Answer 5. Yes. I believe in the EEOC’s role in that important work, and am committed to enforcing the law in those matters.

Question 6. Many jobs traditionally dominated by men, such as firefighting, use physical requirements and tests in recruitment, hiring, and promotion. Height and weight requirements, and strength and physical tests, have often been designed and used to exclude women from nontraditional fields. In some cases such requirements have been found to impose a disparate impact on women in violation of Title VII. Do you believe that occupational standards for jobs, whether in the military or civilian sectors, should reflect the actual, regular and recurring duties of the job, and be applied fairly?

For many years, job applicants were excluded from some jobs based on their sex. In order to prevent discrimination based on sex, any test applied to job applicants should clearly reflect actual job necessities.

a. Do you believe that the use of physical tests and requirements in recruitment, hiring, and promotion is justified? If yes, in what circumstances

Answer: Yes, physical tests may be appropriate. When used, those tests must not be based on assumptions about the characteristics of each sex, nor may they be designed to exclude members of a particular sex. Instead, they must be carefully designed to allow those capable of doing the work to be hired, promoted, and retained.

b. If you are confirmed, what steps will you take to actively promote equal employment opportunity for women, particularly in fields traditionally dominated by men?

Answer: The law must be vigorously enforced, and I am committed to doing so.

Question 7. Do you support the Administration's ban on military service by transgender individuals?

Answer 7. The President, in accordance with the Secretary of Defense, Service Secretaries, and Joint Chiefs of Staff, make policy affecting the military services. I believe that any person who meets the physical and mental standards of the profession of arms should be allowed to serve. During my service, I had no involvement with policy issues related to transgender service.

Question 8. Do you agree that employee access to information about pay within a workplace is critical to helping employees determine whether they are being paid less than their peer for discriminatory reasons?

Answer 8. Yes. One of the lessons of the Lilly Ledbetter case was that people sometimes don't know that they have been discriminated against because they have no information about what others are paid. As a general matter, I believe that employees should be able to have access to the required information to discern whether they have been discriminated against based on sex, race, or other protected category.

Question 9. What initiatives will you undertake to strengthen the ability of the EEOC and the ability of working people to identify and challenge pay discrimination?

Answer 9. The EEOC has the legal authority to collect pay data. If the EEOC decides to re-issue a revision to the EEO-1 form, the data collected should serve three purposes: to allow employees to understand whether they are being paid fairly; to allow employers to conduct self-audits to determine whether they are paying their employees fairly; and to allow the government to use the data for law enforcement or educational purposes.

Question 10. The EEO-1 form was created in the 1960's to provide the agency a better understanding of employment patterns by race, gender, and ethnicity across different job categories and industries. For more than 50 years, the form has been an effective tool to help root out discriminatory practices. It continues to be a vital tool that the EEOC relies on to investigate and resolve race, sex, and national origin discrimination claims. The revised EEO-1 form approved in 2016 continued the collection of this important data, in what is called component 1 of the form, and added a new component 2 focused on pay data collection. Given the important role that the EEO-1 form has played in the EEOC's work to combat race, gender, and national origin discrimination, do you believe that the data on race, gender, and ethnicity collected through component 1 of the form is still useful today and that the EEOC should continue to collect this data?

Answer 10. Yes, I absolutely agree that the component 1 data should be collected and analyzed.

Question 11. Are there specific changes to the collection of component 1 data (race, gender, ethnicity) that you think are important to pursue? If so, why?

Answer 11. I am committed to working with the career staff and other commissioners to analyzing this question. If additional data fields are to be collected, that requirement should be promulgated through a normal notice and comment process, and subject to as much collaboration and consultation as possible. I am committed to openness and transparency in that process.

Question 12. The Administration recently stayed the EEOC's equal pay data collection via the EEO-1 form for further review. OMB stayed the data collection and instructed the EEOC to submit a new proposal. EEOC must now address OMB's expressed concerns and identify a path forward for the collection of pay data. At the hearing, you affirmed that you supported the collection of pay data from employers by the EEOC, and that development of a revised pay data collection would be priority and would be completed in a reasonable time period.

a. Do you agree in order to be useful and effective for enforcement purposes, employers must be required to collect and submit to the EEOC data identifying job type, total compensation, and whether the employee is full-time or part-time?

Answer: I am committed to effectively enforcing anti-discrimination law. In consultation with those professionals who were involved in the original design of the new EEO-1 form, I am committed to working swiftly to address OMB and stakeholder concerns with the data to be collected and the process for collecting it.

b. Do you believe a revised pay data collection should be mandatory for participating employers?

Answer: I am committed to the mission of the agency, and believe that pay discrimination is both illegal and immoral. I am not willing to pre-judge the outcome of the discussions that we will have related to this issue. However, "optional" data collection is rarely efficacious in detecting and correcting unsound behaviors and practices.

c. If you have concerns about the EEO-1 pay data collection as previously approved, how would you seek to modify it while still ensuring that critical information about pay and hours worked is collected and submitted by employers?

Answer: I am committed to working collaboratively with the professionals who designed the revised EEO-1 in the first place. The agency clearly needs to address the OMB and stakeholder concerns with the data to be collected and the process of fielding the requirement, while upholding its statutory mandate to eliminate discrimination.

d. Please explain how you will incorporate the public comments and analysis already produced during the extensive planning process for the pay data collection.

Answer: The process of revising the EEO-1 form must take into account the concerns of the commenters on the original process. I am committed to addressing each major category of concern, and to include all stakeholders in the revision process.

e. If you are confirmed, will you commit to supporting a process to finalize and implement pay data collection by EEOC, including through a public hearing and other diverse stakeholder engagement efforts, and to submitting a revised pay data collection proposal to OMB for its review within 6 months of your confirmation?

Answer: I am committed to the mission of the agency, and believe that pay discrimination is both illegal and immoral. I intend to work with the Commissioners to ensure the EEOC has the information necessary to enforce America's anti-discrimination laws. I am not willing to prejudge the outcome of the discussions that we will have related to this issue, nor am I willing to commit to a 6-month deadline. I am not familiar with the timelines involved in such a project. However, I believe that it would be helpful if the agency updates Congress at regular intervals.

Question 13. The EEO's analysis supporting the pay data collection explained in detail the agency's justification for adding pay data to the EEO-1, the process by EEOC used to choose the W-2 data collection mechanism, and the stakeholders the EEOC consulted with. For example, the EEOC analysis explains that the Commission considered giving different measures of earnings, and detailed the strengths and weaknesses of the various measures. The EEOC analysis also explained that the Commission convened a 2-day working group of employer representatives, statisticians, human resources information system (HRIS) experts, and information technology specialists to inform its revision of the EEO-1. also reviewed over 900 public comments while adopting the EEO-1 pay data collection. OMB's decision to review and stay the previously approved EEO-1 pay data collection was not subject to a public notice and comment process and the publicly available explanation provided by OMB for its decision to set aside this extensively reviewed pay data collection was just two paragraphs long. Do you agree with OMB's change in position?

Answer 13. OMB, and Members of Congress, had a number of serious concerns with the process and its result. I am committed to a way forward that takes those concerns into account.

Question 14. The EEO-1 pay data collection currently under review, ensures reporting of compensation data by gender and racial/ethnic groups within each of ten job categories, rather than by an employer's own job titles or job classification system to allow analysis and comparison of wage data for firms employing workers in

the same job class, in the same industry, in the same location, and in the same year. Do you agree that the pay data collection facilitates the consistent comparison of pay disparities in job categories among employers in a given industry and geographic area? If not, why not?

Answer 14. I am committed to spending time with the professionals who designed the data reporting requirement prior to proposing any changes to their work. Some commenters believed that the categories were too broad (for example, listing surgeons and X-ray technicians together as “professionals”). Those kinds of concerns should be taken into account.

Question 15. Do you believe that OMB should fully disclose the basis for its stay, the analysis underlying its conclusion, and the process by which it reached that conclusion, including any outside interest groups with which it consulted?

Answer 15. I am not familiar with OMB processes and how much public disclosure of those processes is appropriate. While I am generally in favor of transparency and openness, it is the prerogative of the White House to determine the extent to which its deliberative materials should be made public.

Question 16. OMB’s decision to stay the pay data collection rested in part on the assertion that EEOC provided “data file specifications” for employers to directly upload pay data only after OMB approved the equal pay data collection. Are you aware that this is just one voluntary option to submit the data that is offered by the EEOC for employer convenience?

Answer 16. I am not familiar with how employers may provide this information. As a general matter, any required data should be able to be submitted in a way that is convenient to the employer and sufficient for the legitimate governmental purposes that it serves.

Question 17. Do you believe that OMB’s decision to stay the pay data collection was justified, given that OMB approved the data collection last year fully aware that EEOC would post the data file specifications afterwards?

Answer 17. If confirmed, I look forward to reviewing OMB’s decision closely.

Question 18. President Trump’s 2018 budget proposed merging the Office of Federal Contract Compliance Programs (OFCCP) and EEOC and significantly reducing the offices’ budget. What is your position on the proposed merger?

Answer 18. While I am familiar with that proposal, I am not ready to take a position on it as I would need time to review it in greater detail. If the OFCCP and EEOC are merged, it should be done in such a way to ensure that the critical mission of combatting discrimination is not negatively affected.

Question 19. Do you agree with the EEOC’s position in *Baldwin v. Dep’t of Transportation* (EEOC Appeal No. 0120133080, July 15, 2015) that sexual orientation discrimination is a form of sex discrimination?

Answer 19. I am personally opposed to sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 20. Do you agree with EEOC’s position in *Lusardi v. Dep’t of the Army* (EEOC Appeal No. 0120133395, March 27, 2015) that an employer who denies an employee access to a restroom that matches their gender identity is a form of sex discrimination?

Answer 20. I am personally opposed to gender identity discrimination. Any change to the EEOC position should be made only with close consultation among the Commissioners, as well as an open and transparent process. I am committed to enforcing the law as written by Congress and interpreted by the courts.

Question 21. Do you agree with EEOC’s position in *Macy v. Dep’t of Justice* (EEOC Appeal No. 0120120821, April 20, 2012) that discrimination against someone because they are transgender is a form of sex discrimination?

Answer 21. Please see my answer to question #20, above.

Question 22. At the hearing, you stated that if confirmed, one of your priorities would be to review the EEOC’s strategic enforcement plan. Do you agree with the substantive area priorities and strategies set forth in the current strategic enforcement plan? Please be specific about priorities you would add or seek to remove.

Answer 22. The current strategic enforcement plan should be reviewed by the full commission to determine whether it plots the proper course into the future. I am not currently willing to prejudge that process, but am committed to a process that

is open and transparent to all stakeholders, including Members of Congress and others.

Question 23. The EEOC's strategic enforcement plan currently includes "protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex." Do you intend to amend the inclusion of protections for LGBT workers in the strategic enforcement plan?

Answer 23. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 24. Do you commit to continuing to advocate that Title VII prohibits employers from discriminating on the basis of sexual orientation and gender identity in circuit courts where the question has not been decided?

Answer 24. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 25. At the hearing, you stated you believed that "most discrimination is unintentional." Have you reviewed data that supports this position? Given your statement at the hearing, do you believe that a focus on disparate impact discrimination should be a top priority of the EEOC?

Answer 25. I base that assertion on a belief that most discrimination (or alleged discrimination) never makes it to the formal complaint process. Instead, a worker who believes that he has been discriminated against may tell his supervisor, and she may make on-the-spot corrections involving the parties who may have caused offense. For example, people with disabilities often hear the word "retard" used as a synonym for "foolish." Most people, when informed that the word "retard" is considered to be an ableist slur, will cease using it. That is an example of unintentional discrimination that does not rise to the level of a formal complaint, and where education and increased awareness will generally suffice.

Disparate impact discrimination is real, common, and a cause for action in many cases. Each of those cases should be judged based on its own merits, and I support EEOC efforts in that regard.

Question 26. The EEOC's systemic program has successfully ensured workers discriminated against in their employment receive justice. Commissioner Jenny Yang and her staff reviewed the systemic program from 2013-2014 and found that the program has contributed to a tripling of monetary relief recovered for victims. In all, they found that the systemic program has had a 10-year success rate of 94 percent. Will you commit to continuing to pursue coordinated, systemic litigation on behalf of those subject to discriminatory patterns, practices, or policies?

Answer 26. Systemic litigation is a powerful tool, and when deployed appropriately, can be used to remedy some kinds of discrimination. Like any powerful tool, it should be used carefully, and I firmly believe that any systemic enforcement action should be undertaken after careful consideration by the full Commission.

Question 27. Please describe in detail when you believe that the EEOC should use systemic litigation.

Answer 27. Systemic litigation is appropriate where a pattern or practice of discrimination is uncovered that affects a broad group of people, even if they do not know that they have been discriminated against. In particular, the most vulnerable workers (migrants, people with disabilities, part-time workers, and others) may not know that they have been discriminated against, and systemic litigation may be appropriate in those cases.

Question 28. Please explain any challenges you believe face the systemic program.

Answer 28. The main challenge facing systemic litigation is that it can be used inappropriately, and can divert agency resources away from cases in which there is a specific complainant. Each decision to pursue systemic cases should be undertaken as a policy choice, not simply a litigation choice.

Question 29. In 2012, the EEOC issued criminal history guidance. In your opinion, when can employers appropriately use criminal history background checks when making employment decisions and when is it unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer 29. Ex-offenders face a difficult path to full reintegration, and this path can certainly be made steeper by discriminatory practices. A blanket bar to employment based on criminal history may affect Black and Hispanic men at a higher rate than others, and be the basis of a valid disparate impact claim. I would need to study this issue in greater depth, and consult with the other commissioners and career staff, before making any policy determinations in this area.

Question 30. Do you support maintaining the current EEOC criminal history guidance that has been in place for 5 years and is generally understood by employers? If not, why not?

Answer 30. I would need to study this issue in greater depth, and consult with the other commissioners and career staff, before making any policy determinations in this area. Any change to that guidance should be done after a full and open consultation with the Commissioners and relevant stakeholders.

Question 31. Title II of the Genetic Information Nondiscrimination Act (GINA) and Title I of the Americans with Disabilities Act (ADA) protect an employee's privacy in the workplace and ensure that employers can only request or obtain genetic and medical information when an employee provides it voluntarily. In a recent ruling by the U.S. District Court for the District of Columbia on *AARP v. EEOC*, the EEOC's rules about the fees employers can assess workers who do not participate in workplace wellness programs were deemed arbitrary. However, rather than vacate the rules, the court has requested EEOC to "address the rules' failings in a timely manner". Please explain your understanding of why the court sent the wellness rules back to the EEOC.

Answer 31. My understanding is that the court sent the wellness rules back to the EEOC because it was not convinced that the EEOC's "30 percent rule" was in accordance with the other relevant laws, and because it felt that the adoption of that rule was arbitrary. I support wellness programs, and believe that the EEOC plays an important role in protecting the rights of workers (especially people with disabilities and adverse genetic histories).

Question 32. Do you agree that workplace wellness programs do not need to collect and retain employees' genetic and medical information to be effective?

Answer 32. I look forward to reviewing the regulation and the court decision in an open, collaborative way. Medical and genetic information are exceptionally powerful tools, and use of them in a wellness program should be carefully balanced with the civil rights of the persons involved. Some basic medical information may be relevant (BMI, blood pressure, cholesterol, etc.), but these pieces of information should be carefully considered with an eye toward protecting the privacy and dignity of each employee.

Question 33. As the Commission redrafts rules on how Title II of GINA and Title I of ADA apply to workplace wellness programs, will you work to ensure that an employee (or spouse) should not be subject to steep financial pressure by their employer or health plan to disclose their genetic and medical information?

Answer 33. Yes. At some level of "incentive", the financial pressure may become coercive. The level of incentive may vary according to the financial resources of the person involved, and should be considered as this regulation is redesigned.

Question 34. What are some possible ways the wellness program rules can be redrafted to protect employee health privacy, ensure voluntary employee participation, and comply with Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA)?

Answer 34. I do not want to commit to or prejudice any result of the policymaking process. However, any wellness regulations that are allowed should be able to meet the needs of the employer while protecting the civil rights of the employee (and her family). I am committed to protecting privacy, ensuring voluntary participation, and complying with the ADA and GINA.

Question 35. In your opinion, when is it appropriate for an agency to use sub-regulatory guidance?

Answer 35. Sub-regulatory guidance serves an important educational role. However, any time the agency uses such guidance, it should do so in an open and transparent process.

Question 36. EEOC under the leadership of Chair Yang has conducted a public process when considering sub-regulatory guidance. Do you agree additional transparency has improved the process and the final guidance?

Answer 36. Yes. Transparency is always better than its inverse.

Question 37. Every year, EEOC receives tens of thousands of harassment complaints. For example, in fiscal year 2016, nearly 30,000 harassment complaints were filed with the EEOC. In 2015, EEOC convened a bipartisan Select Task Force on the Study of Harassment in the Workplace. After 18 months of examination, the Task Force released a lengthy report on workplace harassment, along with recommendations for a range of stakeholders, including the EEOC. Do you commit to supporting the bipartisan task force recommendations? If not, which task force recommendations to you oppose? Please explain your answer in detail.

Answer 37. I have not reviewed the Task Force report in detail. However, any process that involves stakeholders in an open and collaborative process should be given tremendous weight.

Question 38. Do you have any concerns with EEOC's 2017 Proposed Enforcement Guidance on Unlawful Harassment? Do you believe the guidance needs to be rescinded or revised in any way?

a. Do you support the Proposed Enforcement Guidance's expansion of the interpretation of sex-based harassment to include harassment based on gender stereotypes and nonconformance with gender norms, gender identity and sexual orientation?

Answer: Because this is a rapidly developing area of the law, I am committed to working with the stakeholders and advocates to understanding this issue prior to forming an opinion. As a general matter, I support the efforts of the EEOC to combat workplace harassment, and look forward to assisting with education and outreach along those lines.

b. Do you believe that the Proposed Enforcement Guidance should make clear that sex-based harassment includes harassment on the basis of pregnancy, childbirth, or other related conditions, including reproductive health decisions?

Answer: Since 1978, Title VII has included protections based on pregnancy, childbirth, and related matters (lactation, pregnancy-related health care, etc.). I support the continued enforcement of those laws, and I will commit to assisting in those efforts.

Question 39. Do you have any concerns with EEOC's 2016 Enforcement Guidance on National Origin Discrimination? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 39. I have no concerns with this guidance, and support EEOC's work to prevent national origin discrimination.

Question 40. Do you have any concerns with EEOC's 2016 Enforcement Guidance on Retaliation and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 40. I have no concerns with this guidance, and support EEOC's work to prevent retaliation.

Question 41. Do you have any concerns with EEOC's 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues? Do you believe the guidance needs to be rescinded or revised in any way?

Answer 41. I have no concerns with this guidance, and support EEOC's work to prevent pregnancy-related discrimination.

Question 42. Do you commit to inform the members of this Committee if you intend to undertake any review or revision of any existing or ongoing enforcement guidance?

Answer 42. Yes, I am committed to openness and transparency with members of this Committee and other interested parties.

Question 43. The 50th anniversary of the Age Discrimination in Employment Act ("ADEA") is this year. While we have made substantial progress in the last five decades in reducing discrimination faced by older workers, there is much progress left to be made. What specific steps will you recommend EEOC take to reduce age discrimination in the workforce?

Answer 43. I am committed to enforcing the ADEA in all actions with which I am involved. I generally support the effort in Congress to return the ADEA to its pre-Gross interpretation, and support EEOC efforts like that in the Texas Roadhouse case. Older workers are a critical part of our society and workforce, and they should be protected to the maximum extent of the law.

Question 44. What is your opinion about whether minority members of the Health, Education, Labor, and Pensions (“HELP”) Committee have the authority to conduct oversight of the EEOC?

Answer 44. I support the right of minority members to conduct oversight, and will respond in a timely way to requests from members in the minority.

Question 45. If confirmed, do you agree to provide briefings on EEOC business to members of the HELP Committee, including minority members, if requested?

Answer 45. Yes.

Question 46. If confirmed, do you commit to answer promptly any letters or requests for information from individual members of the HELP Committee including request for EEOC documents, communications, or other forms of data?

Answer 46. Yes, provided that the documents are properly protected in cases where they contain personally identifiable information (PII), or that it is not information protected by statute, or is pre-decisional in nature.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR SANDERS

Question 1. Dr. Gade, thank you for your service and sacrifice to our country. The EEOC is an independent Federal agency that seeks to “eradicate employment discrimination at the workplace.” You have a distinguished military career, yet you do not have the traditional legal background of other commissioners. What challenges do you anticipate, given your lack of a background in discrimination law? If confirmed, you would be the only non-lawyer on the Commission. How do you view your role as a Commissioner of the EEOC?

Answer 1. I do bring a unique perspective to the EEOC. If confirmed, my policy training and background, in addition to my extensive work advocating for people with disabilities and Veterans, will be a valuable additional insight to the Commission’s work. I will rely on attorneys for advice on specific legal matters, but trust that they can rely on me for well-developed judgment, policy expertise, and leadership in the critically important coordinating role that the EEOC often plays.

Question 2. In your testimony before the Committee, you emphasized outreach and education as a means to achieve the EEOC’s mission. What educational and outreach approaches would you add, change, or remove in order to support the EEOC’s mission?

Answer 2. I have the heart of a teacher, and treasure the time I spent teaching at West Point. I believe that education is far preferable to litigation, and intend to assist the chair and the other commissioners with conducting a holistic review of the educational and outreach functions of the agency. I am excited about learning the current processes, and in contributing to their ongoing evolution.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR CASEY

Question 1. I would like to look at a position that the EEOC has already taken that has to do with sexual orientation. The EEOC has determined that the prohibition on sex discrimination in Title VII of the Civil Rights act includes sexual orientation.

a. Do you agree with that decision?

Answer: I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

b. Do you agree that Title VII covers those who are gay or lesbian?

Answer: I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

c. Do you agree that Title VII covers those who are transgender?

Answer: I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final

determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

d. If confirmed, will you maintain the EEOC's position on sexual orientation discrimination and support bringing cases to defend workers discriminated against because they are gay, lesbian, or transgender?

Answer: I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 2. In your opening statement at the nomination hearing before the Senate HELP Committee you said, "I would like to spend time on the educational and outreach functions of the EEOC, in the sincere belief that most discrimination is unintentional and could be prevented with better information."

a. Please define the term "unintentional discrimination" and provide an example of what you consider to be unintentional discrimination in your response.

Answer: As a person with a disability, and having spent more than a decade working in the disability area, I have become very sensitive to the term "retard". This term can have two meanings: the most common use of the word is as a synonym for "foolish". When used in this way, the user of the term may be thought of as having been discriminatory, even though she did not mean it to be so. This type of discrimination can often be corrected with education, and rarely or never needs to resort to litigation. In most human interactions, I find the offending party does not mean to be offensive, and leadership and climate in the organization will assist in correcting undesirable behavior.

b. In order to hold employers responsible for disparate treatment of people with disabilities, EEOC must show that the disparate treatment is intentional. Given that unintentional discrimination is much harder to remedy under Title VII, how do you intend to take action on this issue?

Answer: One of the educational functions of the EEOC is in this specific area. Employers may use overbroad job testing for historical reasons ("that's the way we've always done it") without regard for the fact that poorly designed job testing may have a disparate impact. I believe that educational outreach about pre-employment testing is a key area for preventing this kind of discrimination.

c. EEOC data on charges of employment discrimination and resolutions for FFY 2016 do not appear to support your claim that most employment discrimination is, in fact, unintentional. For example, this data show there were more charges filed alleging discharge on the basis of disability than alleging a failure to accommodate. Therefore, how did you arrive at this conclusion?

Answer: It is true that the cases that eventually result in a formal claim of discrimination are not typically cases of "unintentional" discrimination. However, by my definition of unintentional discrimination, those incidents are often handled formally or informally at the employer level and generally do not rise to the level of a formal complaint. My larger point in that statement was simply that most people seek to treat others with respect, and that most discrimination can be prevented by simply treating others in that way. As an example, when I am discriminated against based upon my use of a novel mobility device (Segway), my primary approach is to educate the person involved on the relevant law rather than to resort to litigation. Once I explain the reason for my use of the Segway, it becomes accepted in almost all cases.

d. Since most of EEOC's education, outreach, and technical assistance is provided upon request, how would this method prevent discrimination that is, as you have put it, unintentional? In the case of an employer, doesn't contacting an EEOC outreach program coordinator presume the employer is aware of an issue?

Answer: I agree that once an employer or an employee reaches out for assistance, there has already often been an incident of discrimination. However, the EEOC has a critically important role to play in combatting discrimination by compliance education and assistance more generally. I am committed to using my position to enhance these efforts whenever possible.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR FRANKEN

Question. President Trump recently announced a policy to ban transgendered individuals from military service. If an employer were to institute a similar ban in their workplace, do you believe this sort of ban would be discriminatory? If confirmed, what sort of action would you recommend the EEOC take in response to such an employer's actions?

Answer: The President, in conjunction with the Secretary of Defense and the Service Secretaries, makes policy with respect to who is allowed to serve. My personal belief is that anyone who meets those physical and mental standards should be allowed to serve, but I have not been involved in the military's policymaking process.

I am opposed to discrimination based on transgender status. I am committed to enforcing the laws as written by Congress and interpreted by the Courts.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR WHITEHOUSE

Question 1. Do you believe that the ADA strikes the right balance between employment opportunity for people with disabilities and business efficiency?

Answer 1. Yes. While there is always room for improvement, the ADA is a wonderful law that was only strengthened by the ADA Amendments Act of 2008.

Question 2. Do you support or oppose the ADA Education and Reform Act of 2017 (H.R. 620)?

Answer 2. I am not familiar with that legislation. I would need to review it in greater detail, and discuss its potential implications with relevant stakeholders, before I could make a determination about supporting or opposing it. I will certainly enforce any provision of law that involves the EEOC, and encourage improvement of existing laws where they are insufficient.

Question 3. Do you agree with EEOC's current interpretation that Title VII prohibits discrimination on the basis of gender identity and sexual orientation under the category of sex discrimination?

Answer 3. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

a. If not, do you support an amendment of Title VII to explicitly include those protections?

Answer: I am personally opposed to discrimination on the basis of sexual orientation or gender identity. I would need to review proposed legislative language before committing to support it.

Question 4. You have stated that you are personally opposed to discrimination on the basis of sexual orientation and gender identity, but you have equivocated when asked whether you would continue the EEOC's current interpretation of Title VII on these issues. When making decisions as a member of the EEOC your personally held views are not as relevant as the effects of your decisions. If you are confirmed as a member of the EEOC, will you make decisions that promote or tolerate employment discrimination against LGBT people?

Answer 4. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 5. During your interview you said that you do not believe anyone should be fired on the basis of their sexual orientation or gender identity.

a. What actions by an employer regarding a transgender employee would constitute disparate treatment?

Answer: Firing a transgender person because of their transgender status would be an example of disparate treatment. However, depending on the court of jurisdiction, this may or may not be a protected category under Title VII. I am personally opposed to gender identity discrimination. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime,

I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

b. What actions by an employer regarding a transgender employee would constitute harassment?

Answer: As an example, allowing an employee to use disparaging words in such a way that it creates a hostile environment may constitute harassment. However, depending on the court of jurisdiction, this may or may not be a protected category under Title VII. I am personally opposed to gender identity discrimination. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

c. What actions by an employer regarding a transgender employee would constitute a valid Title VII sex discrimination claim?

Answer: This could be a highly fact-specific question depending on the court of jurisdiction. I am committed to enforcing the laws as passed by Congress and interpreted by the courts.

Question 6. During your interview you described policy entrepreneurship as being undesirable, and said that it was your view that definitions were locked in at the time legislation passed.

a. *Is that an accurate description of your views?*

Answer: I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

b. *What sources will you use to determine what definitions were locked in at the time legislation passed?*

Answer: I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

c. *Do you think Title VII prohibits male-on-male sexual harassment?*

Answer: I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. The Supreme Court decided this question in *Oncale* (1998). I commit to faithfully enforcing the law, as it is written and interpreted.

d. *Do you think that conduct is what Congress was thinking about when it passed Title VII?*

Answer: I believe that it is the role of Congress to make the laws, and the courts to resolve disputes about the interpretation of the laws. I commit to faithfully enforcing the law, as it is written and interpreted.

Question 7. Why do you think disparities on the basis of sex and race exist in America today?

Answer 7. I assume that this question refers to pay disparities. Certainly, illegal (and immoral) discrimination is a part of the reason for disparities. Such discrimination is illegal, immoral, and odious.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR WARREN

EEO-1 Data and Pay Discrimination

The Civil Rights Act of 1967 and the Equal Employment Opportunity Act of 1972 require employers with 100 or more employees to annually submit EEO-1 forms to the EEOC. EEO-1 forms capture information on the gender and race of employees.¹ In January 2016, the Obama administration proposed an update to the EEO-1 that would have required employers to report additional information on workers' wages, broken down by race, ethnicity, and gender. The form was officially revised in September 2016. The goal of this revision "which would have required companies to start submitted data by March 2018—was to provide EEOC with additional wage data to track and combat wage discrimination."²

¹ U.S. Equal Employment Opportunity Commission, "EEO-1: Legal Basis for Requirements" (online at <https://www.eeoc.gov/employers/eo1survey/legalbasis.cfm>).

² President Barack Obama, "FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act," The White House of President Barack Obama (January 29, 2016) (online at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>).

Describing the new EEO-1 requirements—particularly its “data file specifications for employers”—as “unnecessarily burdensome,” the Office of Management and Budget (OMB) recently halted the implementation of the EEO-1 pay data collection requirements. During your nomination hearing, you committed to “make finalizing a transparent pay data collection by the EEOC a priority” in a “timely matter.”

Question 1. Do you agree with the OMB’s assessment that the EEOC’s recent efforts to change the EEO-1 form are “unnecessarily burdensome” for employers? If not, please describe what steps the EEOC will take under your leadership to ensure that the EEO-1 form is amended to collect pay data by gender and race. If so, please provide a detailed description of how you will alter the EEOC’s pay data collection proposal to make the regulation less “burdensome” while still collecting pay data by gender and race.

Answer 1. Any data collection effort by the EEOC should serve three purposes: to allow employees to compare their pay to the pay of other, similarly situated employees; to allow employers to conduct self-checks to ensure compliance with the law; and to allow the EEOC or other enforcement agencies to ensure compliance with the law. I am committed to examining whether the EEO-1 report could better meet those three goals, but I am not willing to prejudge the outcome of that process.

Question 2. Changes to the EEO-1 form were meant to “help focus public enforcement of our equal pay laws.” How would you direct the EEOC to utilize additional race-and gender-related pay data, should the EEOC manage to successfully collect it?

Answer 2. As one of five commissioners, I will not have the authority to “direct” the use of the data. However, any such data should be useful for enforcement and educational functions.

Question 3. Do you think measures to increase transparency by providing employees with information about pay is an effective tool to combat discrimination? If so, what specific measures—in addition to improving pay data collection at the EEOC—do you support?

Answer 3. Yes, more transparency is always a good thing, because it gives employees the ability to advocate for themselves and employers the ability to self-police. I support EEOC data distribution as part of research or educational functions, either internal to the agency or in partnership with university and non-profit partners.

Sexual Orientation and Gender Identity Discrimination

Title VII of the *Civil Rights Act* prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”³ The EEOC currently “interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation “regardless of any contrary State or local laws.”⁴ Numerous court decisions⁵ support EEOC’s conclusion that “sex discrimination provisions in Title VII protect lesbian, gay, bisexual, and transgender (LGBT) applicants and employees against employment bias.”⁶ Since beginning data collection on LGBT discrimination in 2013, the EEOC has collected \$6.4 million in monetary relief for individuals who have experienced LGBT-related discrimination.⁷ During your confirmation hearing on September 19th, you stated that you were “personally opposed to discrimination on the basis of gender identity or sexual orientation.”

Question 4. The EEOC has laid out its position on Title VII in numerous Federal sector court cases.⁸ Do you agree with the EEOC’s legal interpretation that Title VII prohibits sex discrimination on the basis of sexual orientation and gender iden-

³U.S. Equal Employment Opportunity Commission, “Title VII of the Civil Rights Act of 1964” (online at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>).

⁴U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

⁵U.S. Equal Employment Opportunity Commission, “Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII” (online at https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm).

⁶U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

⁷U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers” (online at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

⁸U.S. Equal Employment Opportunity Commission, “Federal Sector Cases Involving Transgender Individuals” and “Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals” (online at https://www.eeoc.gov/Federal/reports/lgbt_cases.cfm).

tity? If so, please highlight the specific EEOC cases that align with your legal interpretation of Title VII, as well as provide rebuttals to arguments that Title VII does not prohibit sex discrimination on the basis of sexual orientation and gender identity.

Answer 4. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 5. Would you continue to uphold the EEOC's current position on Title VII, including in currently pending cases?

Answer 5. I am personally opposed to gender identity and sexual orientation discrimination. I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Question 6. On January 27, 2017, the Department of Justice (DOJ) filed an *amicus* brief in an LGBT-discrimination case that Title VII "does not...reach[] sexual orientation discrimination." DOJ also stated that the EEOC was "not speaking for the United States" in its opposing brief on the matter.⁹

a. Do you believe that the DOJ or the EEOC "speaks for the United States" on the issue of Title VII discrimination?

Answer: Both do, despite their disagreement. This is a situation which cries out for judicial or legislative resolution.

b. Should disagreements between the EEOC and other Federal agencies over the interpretation of Title VII arise in the future, how will you work to defend the EEOC's role as the "preeminent" arbiter of workplace discrimination issues?

Answer: My goal as an EEOC commissioner will be to defend the Constitution and the laws enacted under it. I am committed to fighting discrimination in all of its forms, and will work with Congress to update laws that are unclear.

Question 7. The EEOC's Strategic Enforcement Plan (SEP) for 2013–2016 listed the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an "emerging or developing" issue that EEOC should "prioritize."¹⁰ The EEOC's SEP for 2017–2021 lists the protection of LGBT Americans from discrimination based on sex as an "emerging and developing issue" priority, but notes that "the Commission may choose to add or remove particular issues as the law develops."¹¹ Would you support continuing to prioritize the protection of LGBT Americans from sex discrimination as an "emerging and developing" issue?

Answer 7. I am personally opposed to gender identity and sexual orientation discrimination. The current Circuit Court split, as well as the current disagreement between the EEOC and the DOJ, make this an issue that is ripe for final determination by the Supreme Court or the Congress. I am committed to enforcing the law as written by Congress and interpreted by the courts. In the meantime, I am not aware of, nor will I drive, any current efforts to refine the EEOC position on this issue.

Wellness Programs

The EEOC is responsible for enforcing the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Among other requirements, the ACA "prohibits employers from requiring medical exams or inquiring as to whether an individual has a disability unless the inquiry is both 'job related' and 'consistent with business necessity'— though employers may collect this information if its collection is "voluntary."¹² GINA, meanwhile, "prohibits employers from re-

⁹ Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," *New York Times* (July 27, 2017) (online at <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>).

¹⁰ U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: fiscal year 2013-2016?" (online at <https://www.eeoc.gov/eeoc/plan/sep.cfm>).

¹¹ U.S. Equal Employment Opportunity Commission, "Strategic Enforcement Plan: Fiscal Years 2017-2021?" (online at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>).

¹² Epstein Becker & Green, "EEOC's Wellness Program Incentive Regulations Rejected by the District Court," *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eeoc-wellness-program-incentive-2781/>).

questing, requiring, or purchasing genetic information from employees or their families.”¹³

To help reduce the cost of healthcare, the Affordable Care Act (ACA) allows employers to offer financial incentives to encourage employee participation in wellness programs. In 2013, the Departments of Labor, Health and Human Services, and the Treasury (the Departments) issued regulations implementing the ACA that permit employers to offer financial incentives of up to 30 percent of healthcare premiums for participation in “health contingent” wellness plans. In 2016, EEOC issued regulations designed to align the ADA and GINA with the Department’s wellness program regulations.¹⁴ The EEOC’s regulations asserted that programs with a 30 percent financial incentive were “voluntary” under the ADA, and would have permitted employers to condition financial incentives on the participation of an employee’s spouse in a program that collects their genetic information. On July 13, 2015, and February 2, 2016, I sent letters to the EEOC expressing my concerns with this approach.¹⁵

In August 2017, a district court ruled in *AARP v. U.S. Equal Employment Opportunity Commission* that the EEOC’s regulations violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).¹⁶ The EEOC was directed to rewrite its regulations defining how employers can incentivize participation in wellness programs.¹⁷

Question 8. Will you commit to preserving GINA protections in the EEOC’s upcoming revision of its wellness program regulations?

Answer 8. Yes. Any regulation that is put forth to answer the objections of the court in *AARP* must comply with the law.

Question 9. Will you commit to preserving ADA protections in the EEOC’s upcoming revision of its wellness program regulations?

Answer 9. Yes. Any regulation that is put forth to answer the objections of the court in *AARP* must comply with the law. This is an area that I am quite passionate about.

Question 10. Do you believe that participation in an employee wellness program can be “voluntary” if the terms of the program place significant financial pressure on an employee to reveal genetic information, including the medical history of the employee or a family member?

Answer 10. At some level, significant financial pressure becomes coercive. This level probably varies for different kinds of workers, and the eventual regulation should take that into account. I look forward to working on this issue with my fellow commissioners and the agency staff.

Criminal Background Checks

Question 11. In your opinion, what is the appropriate use of criminal history background checks in an employment application process?

Answer 11. Criminal history background checks should be carefully tailored to the job at hand. For example, a person with an embezzlement conviction should probably not be able to get employment in a bank, nor a child molester as a daycare worker.

Question 12. Is it ever unlawful or discriminatory for an employer not to hire workers with criminal histories?

Answer 12. Yes. Given that some racial minorities have significantly higher criminal conviction rates, a case could be made that blanket exclusion of people with criminal backgrounds is unlawful discrimination.

¹³ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eecoss-wellness-program-incentive-072781/>).

¹⁴ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eecoss-wellness-program-incentive-072781/>).

¹⁵ See Letters from Senator Warren et al. to Jenny R. Yang, Chair, EEOC, on July 13, 2015, and February 2, 2016.

¹⁶ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eecoss-wellness-program-incentive-072781/>).

¹⁷ Epstein Becker & Green, “EEOC’s Wellness Program Incentive Regulations Rejected by the District Court,” *JDSupra* (August 28, 2017) (online at <http://www.jdsupra.com/legalnews/eecoss-wellness-program-incentive-072781/>).

Question 13. Will you commit to bringing cases against employers whose use of criminal background checks has a disparate impact on protected classes under Title VII?

Answer 13. The decision as to whether to bring such a case would be highly fact specific. The use of criminal background checks can be discriminatory, but there are also legitimate circumstances under which employers can use them. I look forward to working on any such cases with my fellow commissioners and the agency staff.

Credit Checks

Question 14. In your opinion, what is the appropriate use of credit checks in an employment application process?

Answer 14. I see this as analogous to the criminal history question. In some circumstances, a bad credit history may be relevant to the job criteria. However, such use of credit checks may disproportionately disadvantage people of color and single women (or, more generally, those with limited financial resources).

Question 15. Is it ever unlawful or discriminatory for an employer not to hire workers because of their credit history?

Answer 15. This is an undeveloped area of law at this time. I will consult with the career professional staff and other commissioners on this issue.

Question 16. Will you commit to bringing cases against employers whose use of credit history has a disparate impact on protected classes under Title VII?

Answer 16. This theory has not been fully tested in the courts. However, a disparate impact case could be made, depending on the specific facts of a case.

Case Load

Question 17. Given the current case backlog at EEOC do you support the Trump administration's fiscal year 2018 budget proposal to eliminate 249 full-time positions at EEOC?

Answer 17. I am not familiar with which positions would be cut, and whether they would affect the backlog. The agency should be funded at a level that allows it to do its very important work.

Question 18. If not, will you commit to advocating against budget cuts to The White House?

Answer 18. I will participate in the internal discussions about how to best get the resources to meet the agency's goals, as well as describing those goals and constraints to Congress and the Administration.

Systemic Investigations

Question 19. What are your views on EEOC's systemic program?

Answer 19. The systemic program is a powerful tool, but should be used only where other efforts fail. It can be particularly powerful in cases where the people who are harmed are totally unable to advocate for themselves, such as migrant workers or people with disabilities. The full commission should vote on systemic cases.

Census

Question 20. As you may know, the EEOC relies on data gathered in Census products such as the American Community Survey. The President has proposed debilitating budgets to the Census and has not appointed a Director. Will you commit to advocating to the White House for a fully funded and staffed Census Bureau?

Answer 20. Yes. The Census is a critically important function, and mandated by the Constitution.

Question 21. Will you commit to informing the HELP Committee if you do not have adequate data from Census products or if the quality of Census data that you use declines?

Answer 21. Yes.

Congressional Oversight

Question 22. Please describe your views on the role of Congress in conducting oversight of the EEOC.

Answer 22. I welcome a vigorous and thorough oversight program, as it is a core function of Congress. I will advocate for internal and external transparency at all times.

Question 23. Will you commit to promptly and comprehensively answering any requests for information that you receive from any member of members of the HELP Committee?

Answer 23. I support the right of members to conduct oversight, and will respond in a timely manner to requests.

Question 24. Will you treat requests for information from Majority Members of Congress differently than you will treat requests from Minority members? If so, how?

Answer 24. No. Each request from a member represents a request from his or her constituents, the rightful source of political power. I will respond promptly and accurately.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR KAINÉ

Question 1. In light of this Administration's attacks on undocumented immigrants, it is more important than ever that the EEOC continue to vigorously enforce claims of discrimination filed by undocumented workers. Will you abide by the EEOC's guidance stating that workers are protected under Title VII regardless of their immigration status or authorization to work?

Answer 1. I am not familiar with the legislative underpinning of this question. However, I believe personally that people should be able to work in an environment free of discrimination.

Question 2. Strong EEOC enforcement efforts are especially important in low-wage jobs because these jobs are disproportionately held by workers who are vulnerable to discrimination, including women of color. How do you plan to make sure that the EEOC is devoting sufficient resources to addressing discrimination in the industries where these low-wage jobs are concentrated?

Answer 2. I agree that the most vulnerable workers are those who are in low-wage, high-turnover jobs. I look forward to reviewing the EEOC's efforts in that regard, and in furthering protections for those workers, if possible, under the law.

Question 3. Do you believe that employee wellness programs could negatively impact individuals with disabilities? Is there tension between the Americans with Disabilities Act (ADA) and the administration of employee wellness programs? Why or why not?

Answer 3. Yes, employee wellness programs could clearly fall afoul of the spirit and letter of the ADA. As the EEOC revises its guidance and regulation on such programs, it needs to ensure that workers do not forgo their rights under either the ADA or GINA.

Question 4. The Office of Management and Budget (OMB) recently suspended the pay data collection and reporting requirement under the updated version of the EEO-1 form that was originally scheduled to take effect in March of 2018.

a. Do you believe there is a gender-base wage gap that is due in part to lack of transparency around compensation and lack of review by employers into their pay practices?

Answer: Yes.

b. Do you believe that some intervention by the EEOC is needed to gain insight into employers' pay practices?

Answer: The EEOC has an important role to play in combatting illegal pay discrimination. I look forward to consulting with the career professional staff and other commissioners to determine how the EEOC can best fulfill this important responsibility.

c. What do you think are effective strategies to address pay discrimination?

Answer: Educating employers and employees on their rights and responsibilities remains critical, and strong, consistent enforcement of pay discrimination laws will remain an important tool.

RESPONSES BY DR. DANIEL M. GADE TO QUESTIONS OF SENATOR HASSAN

Question 1. Section 14(c) of the Fair Labor Standards Act, authorizes employers to pay sub-minimum wages to workers who experience disabilities. Often times, this type of employment occurs in a secluded environment known as a sheltered workplace. In 2015, with the support of the NH business community, New Hampshire was the first State to eliminate the payment of the subminimum wage and there have been efforts in Congress to end this practice.

a. Understanding that your role is to execute the current law, do you personally support ending the practice of paying subminimum wage to individuals who experience disabilities and phasing out the practice of using sheltered workplaces in favor of Competitive Integrated Employment?

Answer: Yes, with the exception that sub-minimum wage positions can be an important stepping-stone to competitive integrated employment. People with disabilities are uniquely vulnerable to abuse and discrimination, and the laws should protect them.

Question 2. One of the biggest gaps between men and women in both education and the workforce is in the STEM fields. Women outnumber men as college graduates, but in STEM fields the numbers are quite the opposite. In turn, men have higher representation in STEM careers, which tend to pay much more than jobs in female-dominated spheres. Women who do enter into STEM fields often face heavy discrimination and hostile work environments, as many recent articles about STEM-field office cultures have demonstrated. They are also shortchanged on pay. A 2015 study by the American Association of University Women found that women in STEM fields are paid only 82–87 percent of what their male counterparts are paid.¹⁸

a. How will you work to combat this systemic gap in pay?

Answer: It is illegal and immoral to pay women less for the same work at the same education and experience levels. Enforcing the laws that prevent that as well as educating employers and employees on their rights and responsibilities will continue to close this gap.

b. How will you monitor whether this gap is closing?

Answer: I look forward to working with the professional staff, commissioners, interested groups, and other government agencies to determine how to best identify illegal pay discrimination.

c. What steps will you take to ensure that these women's rights are protected in hostile work environments?

Answer: Enforcing existing laws, and being transparent about where existing laws may be insufficient, is an important first step.

Question 3. In 2011, you commented that the notion of women in combat roles is “laughable.” You now say that your views have evolved on this matter.

a. What specific events or experiences led to your current view?

Answer: When I arrived at West Point in 2011, I was immediately exposed to the breadth and depth of the talent pool of both men and women. I mentored a number of wonderful female Cadets, and saw that they could thrive in any role if given the opportunity, desire, and ability. One of the Cadets I mentored was the first female Sapper platoon leader in the 101st Airborne Division, and another is a Ranger School graduate and platoon leader in the 82d Airborne Division. I am proud of my evolution on this issue, and fully support the idea of women serving in any role for which they are trained and equipped.

b. If you are confirmed, how will you demonstrate that your views have changed?

Answer: I firmly believe that actions speak much louder than words. I will continue to treat those around me with dignity and respect, and honor the commitment of the men and women in the agency. I will also use my personal evolution as an example to other people as part of my educational and outreach functions.

c. What data will you collect to ensure that women are being treated fairly in the workplace and across industries?

Answer: I will work with the other commissioners, professional staff, stakeholders, and lawmakers to identify the best ways to combat illegal discrimination. I strongly support a vigorous enforcement program that protects women and other workers.

d. How will you penalize companies that the data shows are not treating women fairly?

¹⁸ <http://www.aauw.org/2015/04/14/women-shortchanged-in-stem/>.

Answer: I am not fully familiar with the penalties available, or the role of a single commissioner in enacting penalties. However, I am committed to working with the other commissioners and the professional staff to ensure that our enforcement and litigation programs are robust, responsive, and targeted on those who are abusing their authority.

[Whereupon, at 11:52 a.m., the hearing was adjourned.]

