


**5 C.F.R. § 2635.502 AUTHORIZATION FOR RACHEL BRAND**

Pursuant to 5 C.F.R. § 2635.502(d), I hereby authorize Rachel L. Brand, Associate Attorney General, Department of Justice, to participate in *Metlife v. Financial Stability Oversight Council*.

This authorization does not otherwise affect Ms. Brand's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

  
\_\_\_\_\_  
Scott Schools

7/24/17  
Date

**5 C.F.R. § 2635.502 AUTHORIZATION FOR RACHEL BRAND**

I hereby grant an impartiality authorization, pursuant to 5 C.F.R. § 2635.502(d) for Rachel L. Brand, Associate Attorney General, Department of Justice, to participate in *State of Hawaii, et al. v. Trump* and *International Refugee Assistance Project v. Trump*.

This authorization does not otherwise affect Ms. Brand's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

  
\_\_\_\_\_  
Scott Schools

6/9/17  
Date

**5 C.F.R. § 2635.502 AUTHORIZATION FOR RACHEL BRAND**

Pursuant to 5 C.F.R. § 2635.502(d), I hereby authorize Rachel L. Brand, Associate Attorney General, Department of Justice, to participate in *Public Citizen v. Trump*.

This authorization does not otherwise affect Ms. Brand's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

  
\_\_\_\_\_  
Scott Schools

  
\_\_\_\_\_  
Date

AUTHORIZATION

Pursuant to 5 CFR 2635.502(d), I hereby authorize Jesse Panuccio to participate in matters involving *In re National Prescription Opiate Litigation*, MDL No. 2804.



Scott Schools  
Associate Deputy Attorney General

1/29/18  
Date

**From:** [Parker, Rachel \(OASG\)](#)  
**To:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** RE: request for authorization  
**Date:** Tuesday, August 29, 2017 3:37:03 PM

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Hi Cindy –

Rachel is out of town this week but she asked me to communicate her concurrence with your recommendation. Please let me know if you have any questions.

Rachel P.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, August 28, 2017 1:18 PM  
**To:** Brand, Rachel (OASG) <rbrand@jmd.usdoj.gov>  
**Cc:** Parker, Rachel (OASG) <racparker@jmd.usdoj.gov>  
**Subject:** request for authorization

Hello,

Attached is a request for an authorization for Acting AAG for the Antitrust Division, Andrew Finch, to participate in the proposed Bayer/Monsanto merger. His authorization would be limited to signing pre-complaint subpoenas, known as Civil Investigative Demands (“CIDs”). ATR requests this authorization because, under the Antitrust Civil Process Act, (ACPA), 15 U.S.C. § 1311, et seq., only the Attorney General can sign CIDS in cases in which the Acting Assistant Attorney General for the Antitrust Division is recused on a civil antitrust investigation. In order to avoid needing to go to the AG for such administrative duties, this authorization is necessary.

If this authorization is granted, DOJ will seek an Ethics Pledge waiver from the White House.

DEO supports ATR’s request for the authorization and will make the Ethics Pledge waiver recommendation to the White House.

You may register your decision either in a return email to me or by signing the attached approval document and sending it back via pdf to this office.

Thank you for your time.

Sincerely,

Cindy Shaw

**Cynthia K. Shaw**  
Director  
Departmental Ethics Office

U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196

## Shaw, Cynthia K. (JMD)

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**From:** Schools, Scott (ODAG)  
**Sent:** Monday, July 24, 2017 5:34 PM  
**To:** Shaw, Cynthia K. (JMD)  
**Subject:** RE: Brand 502-time sensitive

I have signed the approval. You should have it shortly.

**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, July 24, 2017 3:56 PM  
**To:** Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>  
**Subject:** Brand 502-time sensitive

Scott,

Rachel Brand requests that you authorize her to participate in a case originating in the Environment and Natural Resources Division (ENRD) involving a constitutional challenge to the Endangered Species Act (ESA). The case, *People for the Ethical Treatment of Property Owners (PETPO) v. United States Fish and Wildlife Service, et al. and Friends of Animals*, is now pending in the Tenth Circuit. Her office has requested that, if possible, she receive authorization so that she may review a brief due this Wednesday.

The authorization is requested because the U.S. Chamber of Commerce has filed amicus briefs in the case, most recently in May 2017 in the rehearing *en banc* request. Until August 2016, Rachel was employed by the Chamber, although the last work she actually did for the organization was in 2014. Rachel has confirmed that she had no involvement in the preparation of the Chamber's amicus brief at either the district court or circuit court level.

Under the Standards of Conduct addressing impartiality in the performance of duties (5 CFR 2635.502), Rachel has a covered relationship with the Chamber until August 2017 and therefore she may not participate in a matter in which the Chamber is or represents a party until then. In this matter, however, the Chamber is an amicus, and an amicus is not a party. The long-standing practice of the Departmental Ethics Office has been to analyze participation in a matter in which a former employer is an amicus under the impartiality regulation's "catch-all" provision at 5 CFR 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" would cause a reasonable person to question his impartiality may determine whether he should participate. The regulations further provide that, even if a reasonable person could question the employee's impartiality, the employee may seek an authorization to participate.

In this matter, any potential concern about whether the circumstances would cause a reasonable person with knowledge of the relevant facts to question Rachel's impartiality is outweighed by the value to ENRD in allowing her to supervise this matter. The relationship that gives rise to the apparent conflict of interest is that of a former employee to her former employer. The only role that Rachel's former employer plays in the litigation at hand is one of several amici. Rachel herself has no continuing financial relationship with the Chamber and has no financial interest in the outcome of the case. She did not participate in preparation in the litigation or preparation of the briefs when at the Chamber. Whatever allegiance the impartiality regulations assume she has to her former employer is rapidly diminishing, since within weeks it will be a year

since she was employed by the Chamber and she will cease having a covered relationship with it. Finally, at the same time the risk of a reasonable person questioning her impartiality is low, the government's interest in her participation is high. The Associate Attorney General is the third highest position at the Department. In this role, Rachel advises the Attorney General in all matters related in pertinent part to civil litigation. Her guidance in this matter is important to the Attorney General and the Department. Moreover, this specific case is of national importance [REDACTED] (b) (5)

I recommend you authorize Rachel's participation in the above litigation. ENRD's analysis, attached to this email, contains further details regarding the litigation and a line for your signature. If you concur, you may either sign ENRD's analysis and return it to the Departmental Ethics Office or indicate your decision in a return email to me.

Cindy

**Cynthia K. Shaw**  
Director  
Departmental Ethics Office  
U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196





U.S. Department of Justice

Environment and Natural Resources Division

Law and Policy Section  
P.O. Box 7415  
Washington, DC 20044

Telephone (202) 514-1442  
Facsimile (202) 514-4231

July 23, 2017

MEMORANDUM

Re: Request for a Determination Pursuant to 5 C.F.R. § 2635.502 to Allow Associate Attorney General Rachel Brand to Work on Certain Particular Matters

I am writing to recommend that you make a determination pursuant to 5 C.F.R. § 2635.502 to allow Associate Attorney General Rachel Brand to work on a case originating in the Environment and Natural Resources Division (ENRD) involving a constitutional challenge to the Endangered Species Act ("ESA"). The specific case is titled *People for the Ethical Treatment of Property Owners (PETPO) v. United States Fish and Wildlife Service, et al. and Friends of Animals*, (Case No. 14-4151 and 14-41650), 10<sup>th</sup> Cir..

Pursuant to the requirements of 5 C.F.R. § 2635.502 and Executive Order 13770 ("the Ethics Pledge") an employee generally may not participate in a matter involving his former employer for a period of two years following the date of his employment. Ms. Brand worked for the U.S. Chamber Litigation Center ("Chamber Litigation Center") from 2011 through November 2014, serving as Chief Counsel for Regulatory Litigation. After 2014 she did no legal work for the Chamber Litigation Center or the U.S. Chamber of Commerce. The Chamber Litigation Center is a separately incorporated affiliate of the U.S. Chamber of Commerce. As stated on its website, the Chamber Litigation Center "fights for business at every level of the U.S. judicial system, on virtually every issue affecting business, including class actions and arbitration, labor and employment, energy and environment, securities and corporate governance, financial regulation, free speech, preemption, government contracts, and criminal law." The Chamber Litigation Center is staffed by a team of five experienced in-house litigators. It retains private law firms to litigate cases on its behalf.

Although Ms. Brand's employment with the Chamber Litigation Center ended in 2014, she has indicated in her recusal memorandum that she will recuse from any matter in which the Chamber Litigation Center is a party in litigation or represents a party in litigation. Although they do not appear as a party in the PETPO litigation, amicus curiae briefs were filed on behalf of the U.S. Chamber of Commerce in the litigation by attorneys from the Chamber Litigation Center and private counsel, first in 2015 in the initial appeal of the district court decision to the 10<sup>th</sup> Circuit Court of Appeals, and more recently in May, 2017 in the rehearing *en banc* request

for this case. Ms. Brand has confirmed that both of these briefs were filed after she left the employ of the Chamber Litigation Center and that she had no involvement in the preparation of either of these briefs.

Pursuant to 5 C.F.R. § 2635.502, an employee must take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Where there is a potential impartiality concern under that rule, an employee may be authorized to participate in a matter if you, as the agency designee, determine that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

As discussed below, ENRD believes that any potential concern about whether the circumstances here are such that they would cause a reasonable person with knowledge of the relevant facts to question Ms. Brand's impartiality in working on these matters are outweighed by the value to ENRD in allowing her to supervise this matter. I agree with that assessment and seek the determination of the Deputy Attorney General that Ms. Brand be allowed to work on this matter.

## **Background**

This case concerns the threatened Utah prairie dog, which is the smallest of five prairie dog species and is found only in central and southwestern Utah. In 2012, the U.S. Fish and Wildlife Service ("FWS" or the "Service") issued a rule under the Endangered Species Act ("ESA") specifying protections for the Utah prairie dog (the "Rule"). People for the Ethical Treatment of Property Owners ("PETPO") challenged the rule as unconstitutional, i.e., beyond the enumerated powers of Congress. The Federal District Court for the District of Utah granted summary judgment for PETPO, holding that neither the Commerce Clause nor the Necessary and Proper Clause of the U.S. Constitution authorizes Congress to regulate the take of the Utah prairie dog on nonfederal land. The United States appealed the district court's opinion. On March 29, 2017, the Tenth Circuit reversed the district court and upheld the Rule. The Court applied the *Gonzalez v. Raich* framework for analyzing the challenged rule under the Commerce Clause and found that Congress had a rational basis to believe that (1) the Rule constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce and (2) inclusion of purely intrastate species is an essential part of the scheme. PETPO has petitioned for rehearing *en banc*.

On May 26, 2015 the law firm of Consovoy McCarthy PLLC filed an amicus curiae brief in the PETPO case on behalf of the Chamber of Commerce of the United States ("US Chamber of Commerce") and the National Federation of Independent Business (NFIB) in support of the plaintiffs-appellees PETPO. Three attorneys from the firm filed the brief together with two counsel for the U.S. Chamber Litigation Center, Inc. and two attorneys for the NFIB Small Business Legal Center. Rachel Brand did not participate in the preparation of that brief. On May 22, 2017 Consovoy McCarthy again filed an amicus curiae brief on behalf of the US Chamber of Commerce and NFIB supporting plaintiffs-appellees PETPO's request for a rehearing *en banc*. That brief urged the Tenth Circuit to grant rehearing *en banc* and block the FWS's regulation of the Utah prairie dog on private land arguing that the regulation of a species located entirely within one state exceeds the FWS's authority under the Commerce Clause. The same three attorneys from the law firm filed the brief together with the same attorneys from the

Chamber Litigation Center and the NFIB Small Business Legal Center. Rachel Brand also did not participate in the preparation of the second brief.

Numerous other parties filed amicus curiae briefs in this matter including various non-governmental organizations, environmental and conservation groups, various constitutional law professors, the National Association of Home Builders, various industry and agricultural interest groups, ten States, and a group of ten U.S. Congressmen.

On June 22, 2017 ENRD filed a motion with the Tenth Circuit requesting a temporary stay of appellate proceedings for a period of 135 days to allow the Department of the Interior's FWS to assess whether it should revise the rule that is the subject of the litigation. In the alternative that the Court denied the stay request, ENRD requested a thirty day extension of the period of time in which to file a response to the pending *en banc* petition. Also on June 22, 2017, the FWS initiated a review to determine whether the Rule at issue remains "necessary and advisable to provide for the conservation of [the Utah prairie dog]."

(b) (5)

Given Ms. Brand's role as the Associate Attorney General and her expertise on issues of administrative and constitutional law, ENRD management wishes to brief her on the PETPO litigation and get her input on the brief to be filed this Thursday. As the Associate Attorney General, of course, Ms. Brand generally supervises the work on ENRD.

### **Analysis**

Pursuant to 5 C.F.R. § 2635.502, an employee must take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Where an employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question her impartiality in the matter, she should not participate in the matter without informing an agency official and receiving authorization to participate. An employee may be authorized to participate in the matter if the agency designee determines that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Here, Ms. Brand had no involvement whatsoever in the preparation of filing of the amicus curiae briefs at issue, both of which occurred after she had left the employ of the Chamber Litigation Center. Even if it could be argued that Ms. Brand might make decisions that could benefit her former employer, the Chamber Litigation Center, and the Chamber of Commerce, we would note that the Chamber of Commerce was only one of many amicus participants in the PETPO litigation and it is hard to see how the outcome of the case will have any direct and predictable impact on either the US Chamber of Commerce or the Chamber Litigation Center.

In my opinion, any concerns regarding the potential for impartiality in Ms. Brand's official actions are outweighed by the strong value to the Department in allowing her to participate in this matter. Ms. Brand is a recognized expert on issues of administrative and

constitutional law. This case is of national importance

(b) (5)

For these reasons, I recommend that you make a determination pursuant to 5 C.F.R. § 2635.502 that the interests of the government in Ms. Brand's work on this matter outweighs any concern that a reasonable person may question the integrity of the agency's programs and operations.

**Consent and Determination**

Pursuant to 5 C.F.R. § 2635.502(d) and in light of the relevant circumstances, I hereby determine that the interest of the government in Rachel Brand's work on the PETPO case identified above outweighs any potential concern that a reasonable person may question the integrity of the agency's programs and operations.

APPROVED:

  
\_\_\_\_\_  
Scott Schools

  
\_\_\_\_\_  
Date

DISAPPROVED:

\_\_\_\_\_  
Scott Schools

\_\_\_\_\_  
Date



U.S. Department of Justice

Federal Bureau of Investigation

Office of Integrity and Compliance

Washington, D.C. 20535

August 30, 2017

MEMORANDUM

To: Scott Schools  
Office of the Deputy Attorney General

Via: Cynthia K. Shaw *CKS Shaw*  
Director, Departmental Ethics Office

From: Patrick W. Kelley *Patrick W. Kelley*  
FBI Deputy Designated Agency Ethics Official

Re: Request for a Limited Waiver Pursuant to 18 U.S.C. 208(b)(1) for Christopher A. Wray

Pursuant to 18 U.S.C. § 208(b)(1), I hereby request a waiver from the prohibition in 18 U.S.C. § 208(a) for Christopher A. Wray, Director, Federal Bureau of Investigation (FBI). Under Section 208(a), an employee of the United States is prohibited from participating personally and substantially in a particular matter that will have a direct and predictable effect on his financial interest unless he obtains a waiver under Section 208(b). Section 208(b)(1) provides that a waiver may be granted upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from the employee. This waiver is sought in accordance with Mr. Wray's Ethics Agreement, entered into June 29, 2017, amended August 11, 2017.<sup>1</sup>

In the Ethics Agreement, Mr. Wray agreed to remedy conflicts of interest arising from stock held outright by himself (b)(6), (b)(7)(C) per FBI

As stated in the Ethics Agreement, within 90 days of Mr. Wray's confirmation (b)(6), (b)(7)(C) per FBI

however, requires some time (b)(6), (b)(7)(C) per FBI  
Mr. Wray will divest of the assets within 90 days of his confirmation (b)(6), (b)(7)(C) per FBI

(b)(6), (b)(7)(C) per FBI and preparing to divest all the stock, Mr. Wray requires the ability to perform the full duties of his position as Director. He therefore seeks a waiver under Section 208, pending his request for a Certificate of Divestiture and divestment.

<sup>1</sup> The amendment was a deletion of one asset in the Ethics Agreement Attachment. Because the asset was a widely diversified mutual fund, it did not require divestiture. The amendment deleted that asset from the Attachment's list of assets requiring divestiture.

Memorandum for the Deputy Attorney General for Administration

Re: Request for a Limited Waiver Pursuant to 18 U.S.C. 208(b)(1) for Christopher A. Wray

The waiver is for particular matters involving any of the entities in Attachment A of the Ethics Agreement, except for certain entities identified here. First the waiver will not extend to companies in whose stock (b)(6), (b)(7)(C) per FBI own more than \$50,000, as indicated in Part 6 of his Public Financial Disclosure Report (OGE-278e), with the corresponding line numbers:

Company	Share of Liability	Amount of Holding to which Mr. Wray is entitled
#26: Coca Cola, Common Stock (KO)		~\$50,001 - \$100,000
#29: Suntrust Bank, Common Stock (STI)		~\$100,001 - \$250,000
#33.8: Home Depot, Common Stock (HD)		~\$500,001 - \$1,000,000
#33.12: Coca Cola Co., Common Stock (KO)		~\$250,001 - \$500,000
#33.13: McDonald's Corp, Common Stock, (MCD)		~\$100,001 - \$250,000
\$33.24: Exxon Mobil Corp., Common Stock (XOM)		~\$100,001 - \$250,000

Second, the waiver will not include stock that has a value close to \$50,000, depending on his shares and stock market fluctuations, as indicated in Part 6 of his Public Financial Disclosure Report (OGE-278e), with the corresponding line numbers:

Company	Share of Liability	Amount of Holding to which Mr. Wray is entitled
#28: Regions Financial, Common Stock (RF)		~\$15,001 - \$50,000
#33.11: Kimberly-Clark, Common Stock (KMB)		~\$15,001 - \$50,000
#33.20: Southern Company, Common Stock (SO)		~\$15,001 - \$50,000
#33.21: AT&T, Common Stock (T)		~\$15,001 - \$50,000
#33.25: Apple Inc., Common Stock		~\$15,001 - \$50,000
\$33.150: Microsoft Corp		~\$15,001 - \$50,000

The stocks named above, therefore, are outside the scope of this waiver. Should Mr. Wray need to participate in a particular matter that will have a direct and predictable effect on any of these companies, he must seek a waiver based on the individual facts of that matter.

Memorandum for the Deputy Attorney General for Administration

Re: Request for a Limited Waiver Pursuant to 18 U.S.C. 208(b)(1) for Christopher A. Wray

A waiver for the remaining assets in amended Attachment A is appropriate. Section 208(b)(1) provides that a waiver may be granted upon a written determination that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from the employee. See 5 C.F.R. § 2640.301. In this case, the interest giving rise to the conflict is stock and other securities. The interests belong variously to Mr. Wray (b)(6), (b)(7)(C) per FBI. The vast majority of the assets in Attachment A are under the regulatory de minimis exemption of \$15,000 that allows a federal employee to participate in a matter in which the disqualifying financial interest arises from stock ownership. See 5 C.F.R. § 2640.202. Each of those stocks above the \$15,000 threshold that are subject to this waiver represent (b)(6), (b)(7)(C) per FBI of Mr. Wray's non-real estate investment portfolio, which is approximately (b)(6), (b)(7)(C) per FBI. Additionally, the total value (b)(6), (b)(7)(C) per FBI (b)(6), (b)(7)(C) per FBI which represents (b)(6), (b)(7)(C) per FBI non-real estate investment portfolio.

(b)(6), (b)(7)(C) per FBI The one account has an investment strategy of widely diversifying its investments; it includes individual stock holdings in weighted approximation to the S&P 500. The other account does not have a stated policy of concentrating its investments in any industry, business, or single country and the holdings in that account that are the subject of this waiver also do not have such a concentration. It is highly unlikely that Mr. Wray would participate in any particular matter that would have a direct and predictable effect on any more than a small number of those holdings. Further, every holding through (b)(6), (b)(7)(C) per FBI that is covered by this waiver represents (b)(6), (b)(7)(C) per FBI of Mr. Wray's imputed interests (b)(6), (b)(7)(C) per FBI. As stated above, each of these holdings is also (b)(6), (b)(7)(C) per FBI (b)(6), (b)(7)(C) per FBI non-real estate investments. In short, Mr. Wray's financial interest in any one of the stocks on amended Attachment A is tiny compared to his total non-real estate investment portfolio.

Moreover, this waiver will be in effect only for a limited period of time. (b)(6), (b)(7)(C) per FBI (b)(6), (b)(7)(C) per FBI this waiver will no longer be necessary. If divestiture will exceed the 90-day period required by his Ethics Agreement, Mr. Wray will seek advice from his ethics officials, who will determine whether this waiver remains appropriate. This waiver will remain in effect until you are notified of the determination made by the ethics officials.

As a condition of this waiver, Mr. Wray understands that this waiver covers only the shares owned as of this date in the companies identified above, and any additional shares that may accrue as a result of dividend reinvestments or a stock split. Mr. Wray is not permitted to purchase any additional shares in those companies, nor may he own any additional shares as a result of interests that are imputed to him. Accordingly, he will advise appropriate persons who oversee funds that are imputed to him that the stock from the companies above may not be purchased as part of any account.

Finally, as the Director of the FBI, Mr. Wray exercises supervisory authority over all of the Bureau's criminal investigations and related matters, and he is expected to personally and substantially participate in many of them. These matters have deep significance to the public

Memorandum for the Deputy Attorney General for Administration

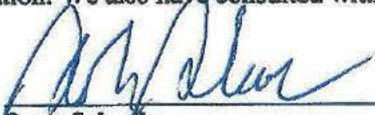
Re: Request for a Limited Waiver Pursuant to 18 U.S.C. 208(b)(1) for Christopher A. Wray

safety and national security of the United States. Recusing Mr. Wray on a case-by-case basis is impracticable for the efficient operation of the Bureau especially given the small potential effect of his participation in any one particular matter on the values of his assets.

Pursuant to 5 C.F.R. § 2640.304, a copy of this waiver will be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304(b).

For the above reasons, I recommend that you grant Mr. Wray a waiver from the prohibition in 18 U.S.C. § 208(a) for financial interests identified above because those interests are not so substantial as to be deemed likely to affect the integrity of the service that the government may expect from Mr. Wray. We have consulted with the Departmental Ethics Office, which has no objection to this recommendation. We also have consulted with the Office of Government Ethics.

APPROVED:

  
\_\_\_\_\_  
Scott Schools  
Office of the Deputy Attorney General

9/7/17  
Date

DISAPPROVED:

\_\_\_\_\_  
Scott Schools  
Office of the Deputy Attorney General

\_\_\_\_\_  
Date



5 CFR 26356.502(d) AUTHORIZATION FOR CHRISTOPHER WRAY

Pursuant to 5 CFR 2635.502(d), I hereby authorize Christopher Wray's participation in matters involving a confidential client named in the FBI's August 31, 2017, request for authorization.



Scott Schools  
Associate Deputy Attorney General



Date



**U.S. Department of Justice**

Justice Management Division

*Departmental Ethics Office*

*Washington, D.C. 20530*

September 13, 2017

**MEMORANDUM**

TO: Scott Schools  
Associate Deputy Attorney General

FROM: Cynthia K. Shaw, Director *CKShaw*  
Departmental Ethics Office

I recommend that you authorize Noel Francisco to continue to participate in *Trump v. Hawaii*, now pending before the U.S. Supreme Court, and related immigration litigation. This and related cases involve a challenge to implementation of the President's January 27, 2017, Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States ("immigration order").

Earlier in 2017, Mr. Francisco's former law firm, Jones Day, filed an amicus brief in a related immigration matter, *Washington v. Trump*, in the U.S. Court of Appeals for the Ninth Circuit. Mr. Francisco requested and was given authorization pursuant to 5 C.F.R. § 2635.502(d) to work on the case despite his former law firm's representation of an amicus. I recommend that he now be authorized to continue participating in all immigration litigation arising from the President's immigration order in which either a former client submits an amicus brief or his former firm represents a client submitting an amicus brief.

The need for this and past authorizations arises because Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties, a federal employee may not participate in a matter where circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality and when a person with whom he has a covered relationship is or represents a party to a matter. 5 C.F.R. § 2635.502(a). An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

Although Mr. Francisco has a covered relationship with Jones Day, a filer of an amicus brief is not a party to a matter. He therefore need not recuse pursuant to 5 C.F.R. § 2635.502(a). The practice of the Departmental Ethics Office, however, is to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than

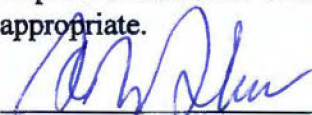
those specifically described in this section” could cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 C.F.R. § 2635.502(d).

An authorization to participate in a matter may be given if the agency designee determines that the government’s interest in the employee’s participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations. 5 C.F.R. § 2635.502(d). Assuming out of an abundance of caution that a reasonable person could question Mr. Francisco’s impartiality in cases in which a former client is an amicus or his former employer represents amici, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest that is the basis of this authorization is that of a former partner to a former law firm or former attorney to a client. The role of these persons with whom Mr. Francisco has a covered relationship is that of filers of amicus briefs. They are not parties. They do not have a party’s direct interest in the outcome of the litigation. The immigration litigation was not pending while Mr. Francisco represented his clients or was a partner at Jones Day. These facts mitigate any appearance of loss of impartiality in Mr. Francisco’s participation in the immigration litigation.

The nature and importance of Mr. Francisco’s role in the immigration litigation, on the other hand, is high. This authorization extends to the time when Mr. Francisco may serve as Solicitor General, but is effective immediately, while he participates in the work of the Department of Justice as a member of the Office of the Associate Attorney General (OASG). In OASG, Mr. Francisco’s participation is crucial. He directed the Administration’s litigation on the immigration cases while he served as Acting Solicitor General. His experience with and insight into the litigation is irreplaceable to OASG. Likewise, as Solicitor General, he will lead the Administration’s legal strategy in these extremely high profile cases. His work will entail not only fast-moving litigation, but also coordination among cases in various appellate courts and the Supreme Court. In such landmark cases it is important that the United States be represented by the Solicitor General. While it could be possible to assign the immigration cases to another member of the Office of the Solicitor General, to require such recusal when the source of the conflict is an amicus brief is a remedy disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco’s continued participation outweighs the concern that a reasonable person may question the Department’s integrity in the immigration cases. We recommend that you authorize his participation. However, we leave it to Mr. Francisco in the future to determine whether an amicus brief filed by a former client or law firm entails other facts, not addressed by this authorization, that could raise impartiality concerns. In such a case, he should consult with the Departmental Ethics Office to determine whether his continued participation in the immigration cases is appropriate.

  
\_\_\_\_\_  
Approved

9/13/17  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Disapproved

\_\_\_\_\_  
Date

**From:** [Schools, Scott \(ODAG\)](#)  
**To:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** RE: Francisco 502  
**Date:** Monday, September 25, 2017 7:09:31 PM

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Approved.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, September 25, 2017 6:41 PM  
**To:** Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>  
**Subject:** Francisco 502

Scott,

I recommend that you authorize Noel Francisco to participate in *Husted v. A. Philip Randolph Institute*, now pending before the U.S. Supreme Court. This case arose when A. Philip Randolph Institute (APRI) sued Ohio's secretary of state, alleging that the state's system for removing people from voter registration lists violated the National Voter Registration Act of 1993 (NVRA). Ohio's system removed people from the voter registration lists if they did not vote during a two-year period, failed to respond to the state's subsequent confirmation notice, and then did not vote again over a four-year period. A federal district court upheld the State's system, but the Sixth Circuit reversed.

On August 7, 2017, after the State's petition for cert was granted, the United States filed an amicus in the case in support of the State. On the same day, Jones Day filed an amicus brief on behalf of the Buckeye Institute in support of the State. Mr. Francisco learned of the Jones Day amicus brief today, September 25. He is scheduled to participate as amicus in the oral argument on November 8, 2017.

The need for an authorization arises because Mr. Francisco was, until January 20, 2017, a partner at Jones Day. Under the Standards of Conduct addressing impartiality in the performance of duties, a federal employee may not participate in a matter where circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality and when a person with whom he has a covered relationship is or represents a party to a matter. 5 C.F.R. § 2635.502(a). An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

Although Mr. Francisco has a covered relationship with Jones Day, a filer of an amicus brief is not a party to a matter. He therefore need not recuse pursuant to 5 C.F.R. § 2635.502(a). The practice of the Departmental Ethics Office, however, is to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" could cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 C.F.R. § 2635.502(d).

An authorization to participate in a matter may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d). Assuming out of an abundance of caution that a reasonable person could question Mr. Francisco's impartiality in cases in which his former employer represents an amicus in a case in which the United States is also an amicus, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest that is the basis of this authorization is that of a former partner to a former law firm. However, the firm is not a party, and neither is the United States. Mr. Francisco did not work on the Buckeye Institute's amicus brief while he was at Jones Day. There is very little likelihood that a reasonable person would question Mr. Francisco's impartiality in this matter.

The nature and importance of Mr. Francisco's role in litigation interpreting voting rights legislation, on the other hand, is high. As Solicitor General, he speaks for the United States, representing the views of the Administration on the proper interpretation of the NVRA. While it could be possible to assign the case to another member of the Office of the Solicitor General, to require such recusal when the source of the conflict is an amicus brief is a remedy disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco's participation outweighs the concern that a reasonable person may question the Department's integrity in the NVRA case. We recommend that you authorize his participation.

You may indicate your decision in a return email to me.

Cindy

**Cynthia K. Shaw**  
Director  
Departmental Ethics Office  
U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196

**From:** [Schools, Scott \(ODAG\)](#)  
**To:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** RE: Francisco 502 Cakeshop litigation  
**Date:** Thursday, October 05, 2017 7:10:01 PM

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I authorize his participation. Thanks.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Wednesday, October 4, 2017 7:16 PM  
**To:** Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>  
**Subject:** Francisco 502 Cakeshop litigation

Scott,

I recommend that you authorize Noel Francisco to participate in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, now pending before the U.S. Supreme Court. A former client of Mr. Francisco, the U.S. Conference of Catholic Bishops (USCCB), filed an amicus brief in the case on September 7, 2017, the same day the United States filed its amicus brief. Oral argument is tentatively scheduled for December 6.

The high-profile case addresses whether Colorado's public accommodations law requires a baker to make a custom wedding cake for a same-sex marriage.

The need for an authorization arises because, until January 20, 2017, Mr. Francisco represented USCCB, although not in the matter at issue in the current litigation. Under the Standards of Conduct addressing impartiality in the performance of duties, a federal employee may not participate in a matter where circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality and when a person with whom he has a covered relationship is or represents a party to a matter. 5 C.F.R. § 2635.502(a). An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

Although Mr. Francisco has a covered relationship with USCCB, the filer of an amicus brief is not a party to a matter. He therefore need not recuse pursuant to 5 C.F.R. § 2635.502(a). The practice of the Departmental Ethics Office, however, is to analyze participation in a matter in which a former employer represents an amicus under the impartiality regulation's "catch-all" provision at 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" could cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 C.F.R. § 2635.502(d).

An authorization to participate in a matter may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d). Assuming out of an abundance of caution that a

reasonable person could question Mr. Francisco's impartiality in a case in which his former client has filed an amicus brief and the United States is itself an amicus, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest that is that of an attorney to a former client. His former client has filed an amicus brief in a case in which the United States has an interest, but also is not a party. Mr. Francisco did not work on the USCCB's amicus brief while he represented the organization. These facts greatly temper any appearance of loss of impartiality in Mr. Francisco's participation in the Masterpiece Cakeshop litigation.

The nature and importance of Mr. Francisco's role in the Masterpiece Cakeshop litigation, on the other hand, is high. This is a potentially precedent setting case. As Solicitor General, he speaks for the United States, representing the Administration on its interpretation of the intersection between public accommodations law and the First Amendment.

While it could be possible to assign the case to another member of the Office of the Solicitor General, to require such recusal when the source of the conflict is an amicus brief of a former client is a remedy disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco's participation outweighs the concern that a reasonable person may question the Department's integrity in the Masterpiece Cakeshop case. We recommend that you authorize his participation.

You may indicate your response in a return email.

Cindy

**Cynthia K. Shaw**  
Director  
Departmental Ethics Office  
U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196



**U.S. Department of Justice**  
Justice Management Division  
*Departmental Ethics Office*

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*Washington, D.C. 20530*

October 13, 2017

**MEMORANDUM**

**TO:** Scott N. Schools  
Associate Deputy Attorney General

**FROM:** Cynthia K. Shaw, Director  
Departmental Ethics Office

**SUBJECT:** Recommendation for Limited Authorization Pursuant to 5 C.F.R. § 2635.502(d) for Noel Francisco

I recommend that you authorize Noel Francisco to participate in all matters in which the appearance of a conflict of interest arises from an amicus brief filed by a former client or his former employer, Jones Day. I recommend this based on the precepts of the ethics rules and the needs of the Office of the Solicitor General.

Among the foundations of the ethics rules is the prohibition that employees may not work on matters that will cause a reasonable person to question their impartiality. The Standards of Conduct on Impartiality in Performing Official Duties state:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

5 C.F.R. § 2635.502(a).

An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv). Acknowledging that circumstances arise in which impartiality might be questioned, the Standards of Conduct provide that an authorization to participate in a matter may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d).



As a general rule the Departmental Ethics Office does not recommend non-case specific authorizations, and instead evaluates the need for authorizations on the individualized facts of each case. However, the experience of the Departmental Ethics Office and the Office of the Solicitor General in the last year has indicated that, going forward, requiring case-specific authorizations in some circumstances may create an inefficiency without a benefit.

Mr. Francisco was a partner at Jones Day until January 20, 2017. Until January 20, 2018, Mr. Francisco will have a covered relationship with Jones Day; he has a covered relationship with any clients he served within the last year. In the meantime, Jones Day and, to a lesser extent, Mr. Francisco's former clients are filing amicus briefs in cases in which the United States is a party or is filing an amicus.

The filer of an amicus brief is not a party and does not represent a party to a matter. The filing of an amicus brief by a former employer or former client, therefore, does not trigger the need to recuse under the rules addressing covered relationships. The practice of the Departmental Ethics Office, however, is to consider whether the filing of an amicus brief by a former employer or former client triggers the need to recuse under the impartiality regulation's "catch-all" provision, 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" could cause a reasonable person to question his impartiality should determine whether he should participate.

In every matter involving amicus briefs filed by Mr. Francisco's former employer or former clients, we have assumed, out of an abundance of caution, that a reasonable person could question Mr. Francisco's impartiality, and have analyzed the facts of each matter and concluded that authorizations for his participation were appropriate. When balancing the minimal appearance of loss of impartiality against the government's interest in Mr. Francisco's participation we have repeatedly found the interest of the government to outweigh the potential appearance concerns.

In every case the fact the entity with which Mr. Francisco has a covered relationship is an amicus, not a party, and not having the same direct interest in the outcome of the matter as a party, immediately minimizes any appearance of loss of impartiality. The nature and importance of Mr. Francisco's role in participation, on the other hand, has been found to be high. He is the Solicitor General. In that role, he speaks for the Administration in cases of utmost importance to the Administration. While it is possible to assign the matters to other members of the Office of the Solicitor General, the cases in which Mr. Francisco participates personally and substantially are among the most important to the Administration. To require recusal when the source of the conflict is an amicus brief has been determined to be a remedy disproportional to the source of the conflict.

I therefore recommend that you authorize Noel Francisco to participate in all matters in which the conflict of interest arises from an amicus brief being filed by a former client or his former employer, Jones Day. This authorization is subject to limitations, however. It does not extend to participation in specific party matters in which Mr. Francisco participated before entering Government service. The authorization is limited in time; it will no longer be in effect or



**From:** [Schools, Scott \(ODAG\)](#)  
**To:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** RE: ASAP possible?  
**Date:** Tuesday, October 10, 2017 2:51:20 PM

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Approved. Hard copy to follow.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Tuesday, October 10, 2017 2:47 PM  
**To:** Schools, Scott (ODAG) <sschools@jmd.usdoj.gov>  
**Subject:** ASAP possible?  
**Importance:** High

I recommend that you authorize Noel Francisco and Jeffrey Wall to participate in *Digital Realty v. Somers*, now pending before the U.S. Supreme Court related to whether the Securities Exchange Commission (SEC) regulation provides whistleblower protection to someone who discloses a violation to other than the SEC. This case concerns the scope of the Dodd-Frank Act prohibition on employer retaliation.

The Office of Solicitor General (OSG) brief is due this afternoon and, just now, Mr. Wall, Deputy Solicitor General, uncovered that the Chamber of Commerce filed an amicus brief. Because Mr. Francisco and Mr. Wall both personally represented the Chamber of Commerce in private practice, both are barred from further participation in the case unless they received written authorization.

Under the Standards of Conduct addressing impartiality in the performance of duties, a federal employee may not participate in a matter where circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality and when a person with whom he has a covered relationship is or represents a party to a matter. 5 C.F.R. § 2635.502(a). An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

Although Mr. Francisco and Mr. Wall have a covered relationship with the Chamber of Commerce, a filer of an amicus brief is not a party to a matter. Therefore, they need not recuse pursuant to 5 C.F.R. § 2635.502(a). The practice of the Departmental Ethics Office, however, is to analyze participation in a matter in which a former client files an amicus under the impartiality regulation's "catch-all" provision at 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" could cause a reasonable person to question his impartiality may determine whether he should participate. The regulations provide that even if recusal is appropriate, an employee may seek an authorization to participate. 5 C.F.R. § 2635.502(d).

An authorization to participate in a matter may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d). Assuming out of an abundance of caution that a reasonable person could question Mr. Francisco or Mr. Wall's

impartiality in the case in which a former client is an amicus, I believe that an authorization is appropriate.

The relationship that gives rise to the apparent conflict of interest that is the basis of this authorization is that of a former attorney to a client. The role of the entity with whom Mr. Francisco and Mr. Wall have a covered relationship is that of filer of an amicus brief. The Chamber is not a party. They do not have a party's direct interest in the outcome of the litigation. Indeed, the Chamber of Commerce's amicus argues statutory interpretation rather than direct monetary harm. The litigation has been underway since 2014; however, neither Mr. Francisco nor Mr. Wall's former firms represented or provided legal advice to the Chamber of Commerce related to this case. These facts mitigate any appearance of loss of impartiality in Mr. Francisco or Mr. Wall's participation in the litigation.

The nature and importance of Mr. Francisco and Mr. Wall's roles in the litigation, on the other hand, is high. Mr. Francisco is the Solicitor General. As such, he directs all litigation for the executive branch, especially those of priority interest to the litigation strategy for the Administration. His experience and insight into the appropriate approach for all Supreme Court cases is invaluable. Likewise, until recently, Mr. Wall served as the acting Solicitor General, working up the current case. Now as the Deputy, he was fully immersed in the preparation of the Government's brief, which requires Mr. Francisco's review this afternoon. Mr. Wall has the in-depth substantive details about this case, which Mr. Francisco may require to complete the Government's brief in a timely fashion. In cases which could present landmark precedence it is important that the United States be represented by the Solicitor General with the necessary support of those within his office, in this case Mr. Wall. Due to the Supreme Court filing deadline, it would be a hardship to require recusal and reassignment of the case from both the top two positions in OSG. Such a remedy for the filing of an amicus brief is disproportional to the source of the conflict.

In conclusion, the interest of the government in Mr. Francisco and Mr. Wall's participation outweighs the concern that a reasonable person may question the Department's integrity in the case. We recommend that you authorize their participation. However, we leave it to Mr. Francisco and Mr. Wall recuse themselves should new facts or concerns, not addressed by this authorization, emerge which raise different impartiality concerns. In such a case, they should consult with the Departmental Ethics Office to determine whether continued participation in the case is appropriate.

\_\_\_\_\_  
Approved

\_\_\_\_\_  
Date

\_\_\_\_\_  
Disapproved

\_\_\_\_\_  
Date

**Cynthia K. Shaw**

Director  
Departmental Ethics Office  
U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196

**From:** [Schools, Scott \(ODAG\)](#)  
**To:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** RE: authorization for Jeff Walls  
**Date:** Monday, August 28, 2017 5:00:12 PM

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Thank you. I authorize Jeff to work on the *Wynn* matter.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, August 28, 2017 4:38 PM  
**To:** Schools, Scott (ODAG) <[sschools@jmd.usdoj.gov](mailto:sschools@jmd.usdoj.gov)>  
**Subject:** FW: authorization for Jeff Walls

Hi,

Jeff just received a request to meet with the White House about both the *Wynn Las Vegas* and *National Restaurant Association* cases. At issue in both is a DOL regulation prohibiting pooling tips among employees who do not customarily receive tips. (b) (6)

(b) (6)  
In April you explicitly authorized Jeff to work on the *National Restaurant Association* case. I believe it is appropriate for him to work, as well, on the *Wynn* case. He has no covered relationship with (b) (6) and, for the reasons set out in the April authorization below, I do not believe that a reasonable person would question his impartiality in working on the case. Out of an abundance of caution, and in order to make clear that the authorization to work in the *National Restaurant Association* case should not be interpreted as a prohibition on working on the *Wynn* case, I recommend that you authorize Jeff to work on *Wynn* in addition to *National Restaurant Association*.

You can indicate your determination in a return email to me.

Cindy

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**From:** Wall, Jeffrey B. (OSG)  
**Sent:** Monday, August 28, 2017 3:38 PM  
**To:** Shaw, Cynthia K. (JMD) <[cshaw@jmd.usdoj.gov](mailto:cshaw@jmd.usdoj.gov)>  
**Subject:** FW: authorization for Jeff Walls

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, April 10, 2017 8:19 PM  
**To:** Wall, Jeffrey B. (OSG) <[jbwall@jmd.usdoj.gov](mailto:jbwall@jmd.usdoj.gov)>  
**Subject:** Fwd: authorization for Jeff Walls

Hi Jeff,  
You are good to go.  
Cindy

Begin forwarded message:

**From:** "Schools, Scott (ODAG)" <[sschools@jmd.usdoj.gov](mailto:sschools@jmd.usdoj.gov)>  
**Date:** April 10, 2017 at 6:58:39 PM EDT  
**To:** "Shaw, Cynthia K. (JMD)" <[cshaw@jmd.usdoj.gov](mailto:cshaw@jmd.usdoj.gov)>  
**Subject:** RE: authorization for Jeff Walls

I approve Mr. Wall's participation in the NRA matter.

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**From:** Shaw, Cynthia K. (JMD)  
**Sent:** Monday, April 10, 2017 12:50 PM  
**To:** Schools, Scott (ODAG) <[sschools@jmd.usdoj.gov](mailto:sschools@jmd.usdoj.gov)>  
**Subject:** authorization for Jeff Walls

Scott,

Jeffrey Wall, Acting Solicitor General, is seeking authorization to participate in *National Restaurant Association (NRA) v. Department of Labor*, No. 16-920 (S. Ct.). While I do not find an impartiality concern, out of an abundance of caution I recommend that you authorize his participation.

The conflict of interest arises not from *NRA*, but from a related case, *Wynn Las Vegas v. Cesarz*, No. 16-163 (S. Ct.). (b) (6)

[REDACTED] At issue in the case was a challenge by employees against their employer regarding an alleged unlawful arrangement for pooling tips among employees. The employees alleged that the tip-pooling arrangement violated a Department of Labor's regulation prohibiting pooling tips among employees who do not customarily receive tips. The district court ruled for the employer and the employees appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit consolidated *Wynn* with *NRA*. In *NRA*, the National Restaurant Association and co-plaintiff associations (the Associations) sued DOL over the tip-pooling regulations. When the plaintiffs in that case won at the district court level, the Ninth Circuit consolidated *Wynn* and *NRA* for the purposes of oral argument. The Ninth Circuit subsequently issued a single decision upholding DOL's regulation, which resolved both the *NRA* and *Wynn* cases. The Associations filed a cert petition in *NRA*; OSG is coordinating with DOL to prepare a brief responding to *NRA*'s cert petition. *Wynn* has also filed a cert petition; the government is not a party in that case and is not responding to that petition. (b)(5)

[REDACTED]

Under the federal conflict of interest law, 18 U.S.C. § 208, an employee may not

participate personally and substantially in a particular matter which will have a direct and predictable effect upon his own financial interest or on the interests of others whose interests are imputed to him, (b) (6)

Under the Standards of Conduct addressing impartiality in the performance of duties, an employee must also recuse if he knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household. 5 CFR 2635.502(a). (b) (6)

Recusal is therefore not required under that provision. Recusal is also necessary if a party or representative of a party to the matter is one with whom the employee has a covered relationship. (b) (6)

Out of an abundance of caution, we consider whether recusal is appropriate under the impartiality regulations' "catch-all" provision. That provision states that an employee who is concerned that "circumstances other than those specifically described in this section would raise a question regarding his impartiality" may determine whether he should participate. I do not believe that a decision to recuse in *NRA*, and *Wynn*, should that case be consolidated with *NRA*, would increase the public's trust in the integrity of the government's decision making, which is a purpose of the impartiality regulations. In this instance, I do not believe that a reasonable person with knowledge of the relevant facts would question Mr. Wall's impartiality. As a result, recusal is not required.

The regulations provide that, even if recusal were appropriate, an employee may seek an authorization to participate. 5 CFR 2635.502(d). An authorization to participate in a matter may be granted if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person would question the integrity of the agency's programs and operations. 5 CFR 2635.502(d). In this matter, even if a reasonable person could question Mr. Wall's impartiality in litigation (b) (6), I believe that an authorization is appropriate.

The relationship that gives rise to the appearance of a conflict of interest is (b) (6)

Mr. Wall's (b) (6) is so remote in time— (b) (6) that any appearance problem posed by the relationship is easily outweighed by the government's interest in Mr. Wall's participation. As the Acting Solicitor General, he plays a critical role in leading the Department's legal strategy and in coordinating the Administration's policy regarding DOL's regulation. The benefit of having Mr. Wall, the Administration's Acting Solicitor General, unifying the government's approach in the tip-pooling cases outweighs any concern that the integrity of the Department's programs or operations will be questioned.

Based on these factors, I believe that you may find that the interest of the government in Mr. Wall's participation in the *NRA* outweighs any possible appearance concern. Accordingly, we recommend that you authorize Mr. Wall's participation in *NRA*, whether or not that case is consolidated with *Wynn*.



Cindy

**Cynthia K. Shaw**  
Director  
Departmental Ethics Office  
U.S. Department of Justice  
145 N Street, NE  
Washington, DC 20530  
(202) 514-8196



**U.S. Department of Justice**  
Justice Management Division  
*Departmental Ethics Office*

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Washington, D.C. 20530

October 20, 2017

**MEMORANDUM**

TO: Scott N. Schools  
Associate Deputy Attorney General

FROM: Cynthia K. Shaw, Director *CKShaw*  
Departmental Ethics Office

SUBJECT: Recommendation for Limited Authorization Pursuant to 5 C.F.R. § 2635.502(d) for Jeffrey Wall

I recommend that you authorize Jeffrey Wall to participate in all matters in which the appearance of a conflict of interest arises from an amicus brief filed by a former client or his former employer, Sullivan & Cromwell. I recommend this based on the precepts of the ethics rules and the needs of the Office of the Solicitor General.

Among the foundations of the ethics rules is the prohibition that employees may not work on matters that will cause a reasonable person to question their impartiality. The Standards of Conduct on Impartiality in Performing Official Duties state:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

5 C.F.R. § 2635.502(a).

An employee has a covered relationship with any person for whom the employee has, within the last year, served as an attorney, partner, or employee. 5 C.F.R. § 2635.502(b)(1)(iv). Acknowledging that circumstances arise in which impartiality might be questioned, the Standards of Conduct provide that an authorization to participate in a matter may be given if the agency designee determines that the government's interest in the employee's participation in a particular matter involving specific parties outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d).

As a general rule the Departmental Ethics Office does not recommend non-case specific authorizations, and instead evaluates the need for authorizations on the individualized facts of each case. However, the experience of the Departmental Ethics Office and the Office of the Solicitor General in the last year has indicated that, going forward, requiring case-specific authorizations in some circumstances may create an inefficiency without a benefit.

Mr. Wall was a partner at Sullivan & Cromwell until March 9, 2017. Until March 9, 2018, Mr. Wall will have a covered relationship with Sullivan & Cromwell; he has a covered relationship with any clients he served within the last year. In the meantime, Sullivan & Cromwell and, to a lesser extent, Mr. Wall's former clients are filing amicus briefs in cases in which the United States is a party or is filing an amicus.

The filer of an amicus brief is not a party and does not represent a party to a matter. The filing of an amicus brief by a former employer or former client, therefore, does not trigger the need to recuse under the rules addressing covered relationships. The practice of the Departmental Ethics Office, however, is to consider whether the filing of an amicus brief by a former employer or former client triggers the need to recuse under the impartiality regulation's "catch-all" provision, 5 C.F.R. § 2635.502(a)(2). That provision states that an employee who is concerned that "circumstances other than those specifically described in this section" could cause a reasonable person to question his impartiality should determine whether he should participate.

In every matter involving amicus briefs filed by Mr. Wall's former employer or former clients, we have assumed, out of an abundance of caution, that a reasonable person could question Mr. Wall's impartiality, and have analyzed the facts of each matter and concluded that authorizations for his participation were appropriate. When balancing the minimal appearance of loss of impartiality against the government's interest in Mr. Wall's participation we have repeatedly found the interest of the government to outweigh the potential appearance concerns.

In every case the fact the entity with which Mr. Wall has a covered relationship is an amicus, not a party, and not having the same direct interest in the outcome of the matter as a party, immediately minimizes any appearance of loss of impartiality. The nature and importance of Mr. Wall's participation, on the other hand, has been found to be high. He is the Principal Deputy Solicitor General and, prior to Noel Francisco's confirmation as Solicitor General on September 19, 2017, served as Acting Solicitor General. Mr. Wall has been and continues to be, along with the Solicitor General, a key representative of the United States in cases of utmost importance to the Administration. While it is possible to assign the matters to other members of the Office of the Solicitor General, the cases in which Mr. Wall participates personally and substantially are among the most important to the Administration and to the Solicitor General. To require recusal when the source of the conflict is an amicus brief is a remedy disproportional to the source of the conflict.


I therefore recommend that you authorize Jeffrey Wall to participate in all matters in which the conflict of interest arises from an amicus brief being filed by a former client or his former employer, Sullivan & Cromwell. This authorization is subject to limitations, however. It does

not extend to participation in specific party matters in which Mr. Wall participated before entering Government service. The authorization is limited in time; it will no longer be in effect or necessary after March 9, 2018, when Sullivan & Cromwell and Mr. Wall's former clients are no longer entities Mr. Wall will have served within the previous year. Mr. Wall also retains the responsibility of determining whether a matter in which an amicus brief is filed by a former employer or former client entails other facts, not addressed here, that could raise impartiality concerns, for example, participation in matters in which the amicus is a former client arguing a position that Mr. Wall argued for a former client in a different party matter. In such a case, he should consult with the Departmental Ethics Office to determine whether his continued participation in the matter is appropriate.

APPROVED: ✓

DISAPPROVED: \_\_\_\_\_

DATE: 10/22/17

  
\_\_\_\_\_  
Scott N. Schools  
Associate Deputy Attorney General

**From:** [Rodgers, Janice \(JMD\)](#)  
**To:** [Francisco, Noel \(OSG\)](#)  
**Cc:** [Shaw, Cynthia K. \(JMD\)](#)  
**Subject:** FW: Recommendation for waiver under 18 USC 208  
**Date:** Tuesday, February 07, 2017 11:28:53 AM

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Noel,

Waiver granted.

Thanks-

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**From:** Schools, Scott (ODAG)  
**Sent:** Tuesday, February 07, 2017 11:26 AM  
**To:** Rodgers, Janice (JMD) <[jrodgers@jmd.usdoj.gov](mailto:jrodgers@jmd.usdoj.gov)>  
**Subject:** RE: Recommendation for waiver under 18 USC 208

I concur in your recommendation and grant the waiver. Thank you for the excellent analysis.

Scott

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**From:** Rodgers, Janice (JMD)  
**Sent:** Tuesday, February 7, 2017 9:40 AM  
**To:** Schools, Scott (ODAG) <[sschools@jmd.usdoj.gov](mailto:sschools@jmd.usdoj.gov)>  
**Cc:** Shaw, Cynthia K. (JMD) <[cshaw@jmd.usdoj.gov](mailto:cshaw@jmd.usdoj.gov)>; Rodgers, Janice (JMD) <[Janice.Rodgers@usdoj.gov](mailto:Janice.Rodgers@usdoj.gov)>  
**Subject:** Recommendation for waiver under 18 USC 208  
**Importance:** High

Scott,

I am recommending that you grant a waiver, pursuant to the authority provided by the financial conflict of interest statute, 18 USC § 208(a)(1), to Acting Solicitor General Noel Francisco, in order for him to continue to participate in *States of Washington and Minnesota v. Trump* and related cases defending the Executive Order 13769 (the Order) on immigration. The waiver is necessary because we have concluded that the outcome of the immigration cases is likely to have a direct and predictable effect on the financial interests of at least four companies in which Mr. Francisco holds stock.

Mr. Francisco anticipates divesting of the conflicting stocks, but because time is of the essence—an oral argument is scheduled tonight, which will be argued by another Department attorney—he is seeking a waiver so that he may participate in the matter today.

Mr. Francisco, a former partner with the Jones Day law firm, is now the Acting Solicitor General and in that capacity has been leading the government's work on the immigration litigation. Yesterday, February 6, 2017, Jones Day filed an amicus brief in the Ninth Circuit on behalf of 97 technology companies and others. Mr. Francisco was authorized by you to continue working on the immigration litigation case under an authorization pursuant to 5 CFR 2635.502(d). Later in the evening, Mr. Francisco became aware that he owned stock

exceeding \$25,000 in companies included in the amicus brief. As a result, his holdings exceed the amount allowed in the regulatory exemption (non-parties in a particular matter with specific parties) for participation in a particular matter than will have a direct and predictable effect on his financial interests, which is otherwise prohibited under 18 USC 208.

A "particular matter" includes matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. It does not cover consideration or adoption of broad policy options directed to the interest of a large and diverse group of persons. Particular matters include judicial proceedings. 5 CFR § 2640.103(a)(1). Under the relevant regulations, a particular matter "... will have a "direct" effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effect on the general economy does not have a direct effect within the meaning of this part... (ii). A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial." 5 CFR § 2640.103(a)(3).

The amici argue that the Order is having an immediate effect on the conduct of their businesses. We therefore assume, for the purposes of this waiver, that the litigation will have a direct and predictable effect on the companies' financial interests. Under the applicable regulations, it is not necessary that the size of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

The standard for granting a waiver of the conflicting interest is that the interest "is not so substantial as to be deemed likely to affect the integrity of employee's services to the Government." 5 CFR § 2635.301(a). Under the Department's Ethics Order, DOJ Order 1200.1 Chapter 11, and delegated authority, you have the authority to grant the waiver, with a recommendation of an ethics official.

Mr. Francisco has stock valued at approximately \$(b) (6) in Alphabet (Google), Apple, Facebook, and Microsoft combined. He estimates his total non-real estate assets at approximately \$(b) (6). He estimates the total of his individual stock holdings at \$(b) (6). He estimates that his individual stock holdings represent 3.8 percent of his total non-real estate assets, and the stock in the conflicting assets is half a percent of his non-real estate holdings. As a result, the percentage that the conflicting stock holdings represent of his total non-real estate assets is extremely small. We typically use 2% as a general benchmark, and for interests below that we will often recommend a waiver, assuming the actual dollar value of the holding is relatively modest. The value of Mr. Francisco's holdings is extremely modest. From that perspective, we believe that you may determine the interest is not so substantial as to be deemed likely to affect the integrity of his services to the Government in this case. For all of these reasons, we recommend that you grant a waiver under 18 USC 208(b)(1) of the financial conflict of interest statute.

Your response to this email will serve as your decision. If you have any questions please let me know.

**Cynthia K. Shaw**  
Director

Departmental Ethics Office  
U.S. Department of Justice  
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