

# Congress of the United States

Washington, DC 20515

November 1, 2023

The Honorable Katherine Tai  
U.S. Trade Representative  
Office of the U.S. Trade  
Representative  
600 17<sup>th</sup> Street NW  
Washington, D.C. 20508

The Honorable Antony Blinken  
Secretary of State  
Department of State  
2201 C Street NW  
Washington, D.C. 20520

Dear Ambassador Tai and Secretary Blinken:

We are writing to express our concern about the investor-state dispute settlement (ISDS) regime and its use by corporations to attack governments—including the United States—for pursuing important public policies. President Biden took powerful action when he shut down the Keystone XL pipeline project, preventing the construction of a tar sands oil pipeline that would have devastated the environment and threatened the safety, health, and sovereignty of tribal nations. But TC Energy (formerly known as TransCanada) – the company behind the now-defunct pipeline – has filed an ISDS claim for billions of dollars to be litigated not in an American court, but in a shady international tribunal. We are glad that the Biden administration opposes ISDS and remains committed not to include ISDS provisions in future trade or investment agreements.<sup>1</sup> Yet many of the United States’ existing free trade agreements (FTAs) still contain ISDS provisions that foreign corporations like TC Energy continue to exploit. We urge you to pursue any and all options at your disposal—including new regional frameworks like the Americans Partnership for Economic Prosperity (APEP), which your agencies are spearheading<sup>2</sup>—to remove ISDS from existing U.S. trade deals.

Large multinational corporations successfully lobbied for the right to bypass domestic courts in past international trade deals and continue to exploit that benefit by challenging American laws in a process not offered to workers or consumers.<sup>3</sup> Through ISDS mechanisms in trade and investment agreements, foreign corporate investors can challenge governments for adopting policies – including labor and environmental protections – that they claim violate their investor protections and negatively impact their investments. These corporate complaints are handled not through the judicial systems of the United States or our trading partners, but through industry-friendly arbitration tribunals that can order taxpayers to shell out massive sums to big

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<sup>1</sup> Letter from Ambassador Tai to Senator Warren and Rep. Doggett, May 25, 2023, on file with the Office of Senator Elizabeth Warren.

<sup>2</sup> U.S. Department of State, “Americas Partnership for Economic Prosperity,” <https://www.state.gov/americas-partnership-for-economic-prosperity/>.

<sup>3</sup> See e.g., Public Citizen, “At Hill Forum, Conservative and Progressive Trade and Legal Experts Support Removal of ISDS From NAFTA, Revealing Isolation of Corporate Lobby Defending NAFTA Job Outsourcing Incentives,” press release, December 5, 2017, <https://www.citizen.org/news/at-hill-forum-conservative-and-progressive-trade-and-legal-experts-support-removal-of-isds-from-nafta-revealing-isolation-of-corporate-lobby-defending-nafta-job-outsourcing-incentives/>.

corporations, with no opportunity to appeal.<sup>4</sup> Unlike the courts, ISDS arbitrations lack “set procedures or precedents” and standards of evidence, and “mistruths or exaggerations go unpunished.”<sup>5</sup> And the arbitrators in these cases are not judges but corporate lawyers, presenting the potential for significant conflicts of interest: an arbitrator can hand down a business-friendly ruling one day, then argue a case based on that very same ruling before a tribunal the next.<sup>6</sup> ISDS tilts the playing field even further in favor of large corporations, incentivizing offshoring, fueling a global race-to-the-bottom in worker and environmental protections, and undermining the sovereignty of the United States and other governments.<sup>7</sup>

The Biden Administration has taken a strong stand against ISDS. President Biden committed early on not to include ISDS in future trade agreements.<sup>8</sup> And in recent letters, USTR and the State Department both reaffirmed that commitment, saying that “President Biden ... opposes the ability of private corporations to attack labor, health, and environmental policies through ISDS”<sup>9</sup> and that Ambassador Tai and Secretary Blinken “share these views” and are “pleased the United States is not currently pursuing any trade or investment agreements that would establish ISDS.”<sup>10</sup>

However, legitimate U.S. policy remains vulnerable to corporate attacks under old trade deals that include ISDS. Until recently, foreign corporations could sue the U.S. government using the now-defunct North American Free Trade Agreement’s (NAFTA) ISDS mechanism. NAFTA’s successor, the United States-Mexico-Canada Agreement (USMCA), set that provision to sunset on July 1, 2023,<sup>11</sup> three years after USMCA entered into force. While this was a significant and historic improvement over traditional investment treaties,<sup>12</sup> it still left enough time for companies to exploit NAFTA’s ISDS provision. One giant energy company is doing just that, suing the U.S. government for billions of dollars for canceling the disastrous Keystone XL pipeline.<sup>13</sup> While

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<sup>4</sup> Public Citizen, “More Information on Investor-State Dispute Settlement,” <https://www.citizen.org/article/more-information-on-investor-state-dispute-settlement/>; Congressional Research Service, “U.S. International Investment Agreements (IIAs),” Martin A. Weiss and Shayerah I. Akhtar, April 1, 2022, <https://crsreports.congress.gov/product/pdf/IF/IF10052>.

<sup>5</sup> The American Prospect, “How Biden Can End Secretive Corporate Tribunals,” Sarah Lazare, February 2, 2023, <https://prospect.org/world/2023-02-02-investor-state-dispute-settlement/>.

<sup>6</sup> Public Citizen, “More Information on Investor-State Dispute Settlement,” <https://www.citizen.org/article/more-information-on-investor-state-dispute-settlement/>.

<sup>7</sup> Green America and American Sustainable Business Council, “Small Business Leaders to Trump: End Advantage for Multinationals Over U.S. Small Businesses in NAFTA,” press release, July 12, 2017, [https://www.citizen.org/wp-content/uploads/small\\_business\\_letter.pdf](https://www.citizen.org/wp-content/uploads/small_business_letter.pdf)

<sup>8</sup> United Steelworkers endorsement questionnaire for Joe Biden, May 17, 2020, <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf>.

<sup>9</sup> Letter from Ambassador Tai to Senator Warren and Rep. Doggett, May 25, 2023, on file with the Office of Senator Elizabeth Warren.

<sup>10</sup> *Id.*; Letter from Naz Durakoğlu, Assistant Secretary for Legislative Affairs, State Department, to Senator Warren and Rep. Doggett, June 26, 2023, on file with the Office of Senator Elizabeth Warren.

<sup>11</sup> Lexology, “Investors’ rights to bring Investment Claims under the NAFTA Investment Chapter expires soon,” Nicholas A. Lawn and Adriana Pérez-Gil, March 13, 2023, <https://www.lexology.com/library/detail.aspx?g=6abdca5d-ae9c-4b66-a244-a5eeeb40ba0e#:~:text=Accordingly%2C%20the%20legacy%20clause%20will,submitted%20before%20July%201%2C%202023.>

<sup>12</sup> ArentFoxSchiff, “NAFTA Chapter 11 (Investments): Time to bring “Legacy Investment” Claims Running Out Soon,” Riyaz Dattu et al., March 8, 2023, <https://www.afslaw.com/perspectives/international-arbitration-dispute-resolution-blog/nafta-chapter-11-investments-time>.

<sup>13</sup> *TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration (June 24, 2016). Available at:

NAFTA's ISDS mechanism has since expired, the U.S. still has more than 50 trade and investment agreements, most containing ISDS clauses,<sup>14</sup> meaning that corporations can continue to file this type of dangerous, extra-judicial lawsuit.

The Keystone XL case clearly shows the dangers of allowing ISDS mechanisms to persist. In 2016, Canadian company TC Energy brought a case against the U.S. government under the NAFTA ISDS provision.<sup>15</sup> TC Energy alleged that the Obama administration's denial of permits required for construction of its new 1,200-mile Keystone XL pipeline contravened its investor protections under the trade agreement.<sup>16</sup> In its initial claim, TC Energy demanded an astounding \$15 billion from the U.S. government, claiming that in addition to its initial \$3.1 billion investment in the pipeline, American taxpayers should compensate the company for lost expected future profits.<sup>17</sup> Under President Trump, TC Energy purportedly used its ISDS claim as collateral to successfully resubmit its permits for construction.<sup>18</sup> Legal questions swirled around the permitting process for years, until President Biden unequivocally put an end to the pipeline on his first day in office.<sup>19</sup> In retaliation, TC Energy lodged a second ISDS complaint against the U.S. in 2021, once again seeking \$15 billion in damages.<sup>20</sup>

The Biden administration has rightfully shut the door on continuation of the Keystone XL pipeline,<sup>21</sup> which would have undermined tribal sovereignty, devastated the surrounding environment, and hastened climate change. Along its path from Alberta to south Texas, Keystone XL would have "directly threatened scores of imperiled plants and animals."<sup>22</sup> The pipeline would have "crossed more than 340 perennial water bodies and [risked] contaminating the

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<https://www.italaw.com/sites/default/files/case-documents/italaw7407.pdf>.

<sup>14</sup> The American Prospect, "How Biden Can End Secretive Corporate Tribunals," Sarah Lazare, February 2, 2023, <https://prospect.org/world/2023-02-02-investor-state-dispute-settlement/>; International Trade Administration, "Free Trade Agreements," [https://tcc.export.gov/Trade\\_Agreements/Free\\_Trade\\_Agreements/index.asp](https://tcc.export.gov/Trade_Agreements/Free_Trade_Agreements/index.asp); International Trade Administration, "Bilateral Investment Treaties," [https://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp).

<sup>15</sup> *TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration (June 24, 2016). Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7407.pdf>.

<sup>16</sup> *Id.*; U.S. Chamber of Commerce Global Energy Institute, "Background of Keystone XL," <https://www.globalenergyinstitute.org/background-keystone-xl#:~:text=The%20Keystone%20XL%20pipeline%20is,barrels%20of%20oil%20a%20day.>

<sup>17</sup> *TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration (June 24, 2016). Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7407.pdf>; Public Citizen, "Case Studies: Investor-State Attacks on Public Interest Policies," [https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies\\_4.pdf](https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4.pdf).

<sup>18</sup> Public Citizen, "Case Studies: Investor-State Attacks on Public Interest Policies," [https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies\\_4.pdf](https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4.pdf).

<sup>19</sup> Ballotpedia, "Keystone XL Pipeline political timeline," [https://ballotpedia.org/Keystone\\_XL\\_Pipeline\\_political\\_timeline.](https://ballotpedia.org/Keystone_XL_Pipeline_political_timeline.)

<sup>20</sup> Public Citizen, "U.S. May Face \$15 Billion Penalty for Rejection of Keystone XL Pipeline," Alex Durham and Sally King, November 21, 2022, <https://www.citizen.org/news/u-s-may-face-15-billion-penalty-for-rejection-of-keystone-xl-pipeline/>.

<sup>21</sup> The White House, "Fact Sheet: President-elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises," press release, January 20, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/>.

Ogallala Aquifer — the main source of drinking water for millions of Americans.”<sup>23</sup> The oil transmitted by the Keystone XL pipeline would have been extracted from tar sands, a fuel source that “release[s] significantly more carbon pollution” – by some estimates roughly 81 percent more – than the average crude oil used in the U.S.,<sup>24</sup> requires input of three barrels of water per barrel of oil, and has been dubbed “game over” for averting the climate crisis.<sup>25</sup> The expansion of tar sands oil production to feed the pipeline would also have decimated Alberta’s Boreal forest, a critical carbon sink, raising emissions even further by up to 47.3 million metric tons of carbon dioxide equivalent.<sup>26</sup> Broadly, over its 50-year project timeline, the Keystone XL pipeline would have added “more carbon to our atmosphere . . . than the combined tailpipe emissions of every single car in America over an entire year,” or roughly 1.2 billion metric tons.<sup>27</sup> In addition, the construction of the Keystone XL pipeline would have posed a real threat to the safety and sovereignty of Native nations, violating treaties and desecrating tribal lands, and causing irreparable harm to essential tribal water sources.<sup>28</sup> Tar sands oil development in Canada has already wreaked havoc on the water and land of Canadian First Nations communities and has threatened the local wildlife, with adverse effects on human health.<sup>29</sup> And as the December 2022 oil spill from a separate TC Energy-built Keystone pipeline demonstrated, tar sands oil spills take years to clean up<sup>30</sup> and have far graver consequences for the surrounding community than standard oil spills.<sup>31</sup> Tribes have repeatedly sued the U.S. government to protest the lack of adequate consultation with affected tribal governments in awarding the requisite permits to TC Energy, stating that the Trump administration’s permitting process “overlooked tribal treaties with the federal government.”<sup>32</sup>

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<sup>22</sup> Center for Biological Diversity, “KEYSTONE XL PIPELINE,” [https://www.biologicaldiversity.org/programs/public\\_lands/energy/keystone\\_xl\\_pipeline/](https://www.biologicaldiversity.org/programs/public_lands/energy/keystone_xl_pipeline/).

<sup>23</sup> *Id.*

<sup>24</sup> Sierra Club, “Fail: How the Keystone XL Tar Sands Pipeline Flunks the Climate Test,” [https://content.sierraclub.org/grassrootsnetwork/sites/content.sierraclub.org/activistnetwork/files/teams/documents/FAIL\\_KeystoneClimateReport\\_08\\_print%20%281%29.pdf](https://content.sierraclub.org/grassrootsnetwork/sites/content.sierraclub.org/activistnetwork/files/teams/documents/FAIL_KeystoneClimateReport_08_print%20%281%29.pdf); Natural Resources Defense Council, “Climate Impacts of the Keystone XL Tar Sands Pipeline,” October 2013, <https://www.nrdc.org/sites/default/files/tar-sands-climate-impacts-IB.pdf>.

<sup>25</sup> Center for Biological Diversity, “Keystone XL Pipeline,” [https://www.biologicaldiversity.org/programs/public\\_lands/energy/keystone\\_xl\\_pipeline](https://www.biologicaldiversity.org/programs/public_lands/energy/keystone_xl_pipeline)

<sup>26</sup> Natural Resources Defense Council, “Climate Impacts of the Keystone XL Tar Sands Pipeline,” October 2013, <https://www.nrdc.org/sites/default/files/tar-sands-climate-impacts-IB.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> Native American Rights Fund, “KEYSTONE XL PIPELINE (ROSEBUD SIOUX TRIBE V. TRUMP),” <https://narf.org/cases/keystone/>.

<sup>29</sup> Environmental Conservation Laboratory, “Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta,” Stéphane M. McLachlan and Clayton H. Riddell, July 7, 2014, [https://landuse.alberta.ca/Forms%20and%20Applications/RFR\\_ACFN%20Reply%20to%20Crown%20Submission%206%20-%20TabD11%20Report\\_2014-08\\_PUBLIC.pdf](https://landuse.alberta.ca/Forms%20and%20Applications/RFR_ACFN%20Reply%20to%20Crown%20Submission%206%20-%20TabD11%20Report_2014-08_PUBLIC.pdf).

<sup>30</sup> Salon, “Cleanup is underway for the US’s second-largest tar sands oil spill,” John McCracken, December 19, 2022, [https://www.salon.com/2022/12/19/cleanup-is-underway-for-the-uss-second-largest-tar-sands-oil-spill\\_partner/#:~:text=This%20oil%20spill%2C%20which%20took,spill%20in%20the%20nation's%20history](https://www.salon.com/2022/12/19/cleanup-is-underway-for-the-uss-second-largest-tar-sands-oil-spill_partner/#:~:text=This%20oil%20spill%2C%20which%20took,spill%20in%20the%20nation's%20history).

<sup>31</sup> NPR, “The Keystone pipeline leaked in Kansas. What makes this spill so bad?,” Jaclyn Diaz, December 17, 2022, <https://www.npr.org/2022/12/17/1142675809/cleanup-for-keystone-pipeline-oil-spill-kansas>.

<sup>32</sup> The World, “Native American tribes unite to fight the Keystone pipeline and government ‘disrespect,’” Robert Boos, February 19, 2015, <https://theworld.org/stories/2015-02-19/native-american-tribes-unite-fight-keystone-pipeline-and-government-disrespect>.

The stakes of allowing projects like the Keystone XL pipeline to move forward are extremely high – for some communities, they are life-and-death. It is critical that any decisions about what happens in our communities are made at home, in America. That means corporations cannot be allowed to push the concerns of environmentalists, Indigenous communities, and the U.S. government itself to the side through the use of the deeply flawed and imbalanced ISDS process.

Moreover, when a foreign corporation lodges an ISDS complaint against the United States, American taxpayers must pay the price. The U.S. government has already spent as much as \$250,000 simply to cover the initial fees of the tribunal for the TC Energy ISDS claim, in addition to the costs of U.S. government officials and attorneys who must spend time defending against the claim.<sup>33</sup> This means the very people who would have been harmed by the project must foot the bill for the Canadian company’s spurious claim – and not just for the initial fees, but potentially for the more than \$15 billion demanded by the company. This system is particularly harmful for developing countries, for which claims to the tune of tens of billions of dollars can represent huge fractions of their annual budgets.<sup>34</sup> Losing an ISDS case and being forced to shell out massive awards to foreign corporations can mean cutting critical social welfare and aid programs for their people. The U.S. government cannot continue to allow corporations to bankrupt developing nations using ISDS. And American taxpayers should not have to shell out thousands – let alone billions – of dollars to line the pockets of foreign corporations.

Your agencies have an opportunity to put an end to this system of corporate exploitation of developing countries, Indigenous communities, the environment, and workers and consumers worldwide. You have announced plans to negotiate the Americas Partnership for Economic Prosperity with 11 partner countries in the Western Hemisphere.<sup>35</sup> Ten of those partner countries have existing FTAs or investment treaties with the United States that contain ISDS provisions.<sup>36</sup> ISDS cases are especially rife in Latin America: as of December 2022, 22 Latin American nations had faced 371 ISDS claims, representing nearly a third of worldwide ISDS cases.<sup>37</sup> There are many ways your agencies could harness the APEP process to remove ISDS from U.S. trade and investment agreements in the Americas, and we note that USTR has signaled its openness to using APEP to revisit the substance of those agreements, as occurred with respect to ISDS in the USMCA.<sup>38</sup>

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<sup>33</sup> Public Citizen, “U.S. Government Seeks to Dismiss Keystone XL Pipeline Case, While Taxpayers Have Already Spent \$250,000 to NAFTA Arbitration Tribunal,” press release, January 19, 2023, <https://www.citizen.org/news/u-s-government-seeks-to-dismiss-keystone-xl-pipeline-case-while-taxpayers-have-already-spent-250000-to-nafta-arbitration-tribunal/>.

<sup>34</sup> See e.g., Letter from Senator Warren to Amb. Tai and Sec. Blinken, May 2, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.05.02%20Letter%20to%20Tai,%20Blinken%20re%20elimination%20of%20ISDS.pdf>.

<sup>35</sup> U.S. Department of State, “Americas Partnership for Economic Prosperity,” <https://www.state.gov/americas-partnership-for-economic-prosperity/>.

<sup>36</sup> The White House, “Joint Declaration on The Americas Partnership for Economic Prosperity,” press release, January 27, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/27/joint-declaration-on-the-americas-partnership-for-economic-prosperity/>; Office of the U.S. Trade Representative, “Free Trade Agreements,” <https://ustr.gov/trade-agreements/free-trade-agreements>.

<sup>37</sup> Center for the Advancement of the Rule of Law in the Americas, “Investor-State Dispute Settlement in Latin America and the Caribbean,” <https://isdslac.georgetown.edu/>

The ISDS system allows large corporations to hold the U.S. government and our trading partners hostage, demanding billions of dollars unless they are allowed to move forward with projects like the Keystone XL pipeline that would undermine tribal sovereignty, harm Native communities, and devastate the environment. Your agencies must take advantage of every opportunity to pursue the removal of ISDS provisions from the United States' existing trade and investment agreements, including through APEP. We respectfully request a response to this letter by December 1, and ask that in that letter you provide us with information on plans to do so.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren  
United States Senator



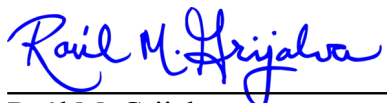
Steve Cohen  
Member of Congress



Sheldon Whitehouse  
United States Senator



Eleanor Holmes Norton  
Member of Congress



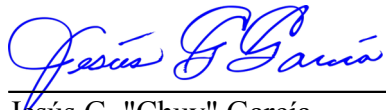
Raúl M. Grijalva  
Member of Congress



Rashida Tlaib  
Member of Congress

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<sup>38</sup> Inside U.S. Trade, “USTR official: Administration wants to update FTAs alongside APEP,” Brett Fortnam, December 14, 2022, <https://insidetrade.com/daily-news/ustr-official-administration-wants-update-ftas-alongside-apep>.



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Jesús G. "Chuy" García  
Member of Congress



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Henry C. "Hank" Johnson, Jr.  
Member of Congress



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Jamaal Bowman, Ed.D.  
Member of Congress



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Shri Thanedar  
Member of Congress



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Jamie Raskin  
Member of Congress




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Ro Khanna  
Member of Congress



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Dina Titus  
Member of Congress



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Jared Huffman  
Member of Congress



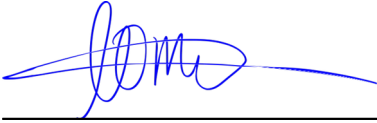
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Paul D. Tonko  
Member of Congress



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Melanie Stansbury  
Member of Congress



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Ilhan Omar  
Member of Congress



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Bernard Sanders  
United States Senator



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Frederica S. Wilson  
Member of Congress



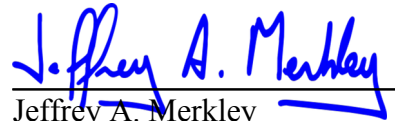
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Cori Bush  
Member of Congress



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James P. McGovern  
Member of Congress



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Jeffrey A. Merkley  
United States Senator



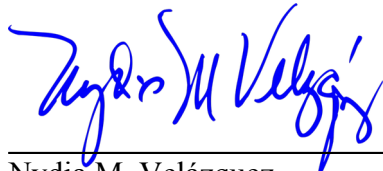
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Pramila Jayapal  
Member of Congress



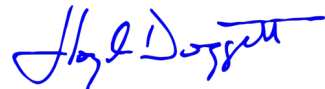
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Barbara Lee  
Member of Congress



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Nydia M. Velázquez  
Member of Congress



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Lloyd Doggett  
Member of Congress





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Summer Lee  
Member of Congress



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Jan Schakowsky  
Member of Congress



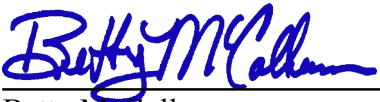
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Greg Casar  
Member of Congress



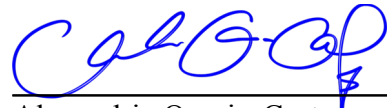
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Veronica Escobar  
Member of Congress



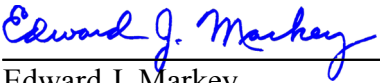
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Betty McCollum  
Member of Congress



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Alexandria Ocasio-Cortez  
Member of Congress



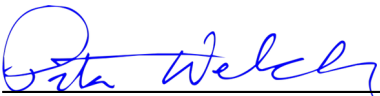
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Edward J. Markey  
United States Senator



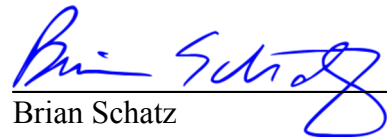
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Alma S. Adams, Ph.D.  
Member of Congress



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Peter Welch  
United States Senator



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Brian Schatz  
United States Senator



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Mark Pocan  
Member of Congress



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Donald M. Payne, Jr.  
Member of Congress



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Jim Tokuda  
Member of Congress



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Marcy Kaptur  
Member of Congress



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Rosa L. DeLauro  
Member of Congress