

**United State Senate  
Committee on Health, Education, Labor and Pensions  
Michael Enzi (Wyo.), Ranking Member**



**RANKING MEMBER REPORT:**

**The Nomination of M. Patricia Smith of New York, Nominee to Serve as Solicitor of Labor, U.S. Department of Labor: Accuracy of Senate Testimony**

**U.S. Senate**

**111th Congress**

**Committee on Health, Education, Labor and Pensions**

**February 1, 2010**

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## I. EXECUTIVE SUMMARY

During Commissioner Patricia Smith's May 1, 2009 interview with Health, Education, Labor and Pensions (HELP) Committee staff, her May 7, 2009 confirmation hearing and in subsequent questions for the record, she was asked about a program called Wage and Hour Watch that she and her subordinates implemented in the State of New York. The Wage and Hour Watch program recruits and trains union organizers and public interest groups to go into businesses with compliance literature and interview employees to discover violations of wage and hour law.<sup>1</sup> The State of New York gives participants materials to disseminate and official cards identifying them and their group as being part of the program for when they enter businesses and speak with employers and employees.

Ms. Smith testified to various aspects of the program in the hearing and in questions for the record from four Senators, including former Chairman Kennedy. Her responses when compared to official records of the State of New York are inaccurate in a number of significant areas:

- **Plans for Expansion:** Ms. Smith denied that she had plans to expand the Wage and Hour Watch program. However, documents obtained from the State of New York contain more than 50 specific references to program expansion. E-mails sent immediately before and after her hearing show that expansion efforts were well under way.
- **Education vs. Enforcement:** Ms. Smith stated the program was designed to be an educational effort. However, documents and her own speeches show it was designed as an enforcement program from the beginning and she even set up a hotline for union organizers and community activists. ID cards were distributed so that these groups could enter businesses to question employees and employers.
- **Internal vs. External Development:** Ms. Smith stated that the program was created internally, by her staff, in her State Labor Department. However, the program was actually promoted and designed by a head union organizer and a community activist organization -- working in concert with her senior staff.

The record specifically shows she provided inaccurate characterizations and factually incorrect testimony in five instances over the course of several months, both orally and in writing. Importantly, in each instance of inaccurate testimony, her statements had the

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<sup>1</sup> January 26, 2009 New York State Labor Department press release (hereinafter "Jan.26 release") (available at [http://www.labor.state.ny.us/pressreleases/2009/Jan26\\_2009.htm](http://www.labor.state.ny.us/pressreleases/2009/Jan26_2009.htm)) (Exhibit).

effect of downplaying the extent of the Wage and Hour Watch program, which Ms. Smith knew was a concern of many Committee Members. Only when questioned on these inconsistencies did she admit three months after her testimony in a confirmation hearing that she had “misspoken.” The program Ms. Smith launched is highly controversial for other reasons also:

- **Targeting Small Business:** The program targets small- and medium-sized businesses, but Ms. Smith did not consult with the business community while creating the program. It was only after small business representatives raised concerns about potential abuse that she met with them. This happened more than a month after the program was launched and too late to make significant changes.
- **Invasion of Privacy:** The program directed participants to gather personal telephone numbers, vehicle license plates and home addresses of business owners. Labor organizers and community activists were even allowed to use this information and the contact information for employees for their own organizing activities.
- **Labor Organizing:** Ms. Smith stated the program would not be used for union organizing. Documents obtained from the New York State Labor Department and a union newsletter show plans specifically to use the program for union organizing throughout New York.

This report provides a detailed summary and citation to official documents obtained from New York to demonstrate factual inconsistencies in Ms. Smith’s testimony and other concerns raised. It concludes that Ms. Smith’s statements to the Committee were in direct contradiction with documents provided to the HELP Committee.

Letters to the President from Senators Enzi and Senator Isakson and a letter to Chairman Harkin signed by all ten Republican members of the HELP Committee request Ms. Smith’s nomination be withdrawn because she does not meet the high standards required and will not have the confidence of the United States Senate if confirmed.

## **II. BACKGROUND**

### ***A. Role of the Solicitor of Labor***

The Solicitor of Labor plays a key role in nearly every policy, regulatory and enforcement decision at the U.S. Department of Labor, and is responsible for ensuring that all stakeholders, including small businesses, are given fair treatment. As the third highest official and the head law enforcement officer, the Solicitor of Labor leads one of the largest legal offices in the federal government with a staff of more than 400 attorneys. The Solicitor is counted on to be fair in enforcing the law and candid in his or her interactions with the public and its representatives in Congress while doing so.

With nine Divisions in the National Office and 8 regional offices and 6 sub-regional offices, the attorneys who work in the Office of Solicitor play a national role in labor law enforcement in wage and hour matters, mine safety and health, occupational safety and health, internal union elections, equal employment opportunity for federal contractors, whistleblower protections, and pensions and health plans, among other things.

Unlike most legal offices in cabinet agencies, the Department of Labor has independent litigation authority from the Department of Justice and the Solicitor of Labor exercises that authority on behalf of the Department. Under many of the statutes enforced by the Labor Department, the Solicitor has prosecutorial discretion in cases he or she and staff bring.

The importance of the Solicitor is also likely to increase demonstrably over the next few years as the Administration greatly expands the number of investigators in the agencies that the Solicitor legally supports. For example, the Department of Labor's proposed FY 2010 budget notably adds 1,000 new employees, including about 670 investigators for Departmental enforcement agencies.<sup>2</sup>

### ***B. Commissioner M. Patricia Smith***

According to the New York State Department of Labor (NYDOL), Commissioner M. Patricia Smith has been involved in labor matters for over 30 years.<sup>3</sup> Before coming to the Labor Department as an appointee of former Governor Elliott Spitzer, Ms. Smith served as Chief of the Labor Bureau in the Office of the New York State Attorney General under Elliott Spitzer for eight years. For 11 years, Ms. Smith served as Deputy

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<sup>2</sup> See President's 2010 Budget (<http://www.whitehouse.gov/omb/budget/fy2010/assets/lab.pdf>); May 7, 2009 U.S. Department of Labor Press Release (<http://www.dol.gov/opa/media/press/oasam/OASAM20090489.htm>).

<sup>3</sup> <http://www.labor.state.ny.us/agencyinfo/executivestaffbio.shtm>.

Bureau Chief and Section Chief of the Labor Bureau, conducting and overseeing labor law litigation in state and federal courts. In 1996 and 1997 as Deputy Bureau Chief, she argued two Employment Retirement Income Security Act cases before the United States Supreme Court. Before joining the Office of the Attorney General, Commissioner Smith worked for various Legal Services Organizations representing unemployment claimants, minimum wage workers, workers in federal job training programs and job seekers.

Since becoming Commissioner of Labor for New York State in early 2007, Ms. Smith launched a number of initiatives including Wage and Hour Watch and the Bureau of Immigrant Workers' Rights inside the New York Department of Labor. Like Wage and Hour Watch, the Bureau was designed to expand "partnering with unions, labor and immigrant groups to target our enforcement efforts to keep our most vulnerable workers from being exploited." Ms. Smith had also undertaken similar programs and initiatives while in the Attorney General's Office including a Green Grocer Code of Conduct; partnering with advocacy groups; targeting enforcement efforts on an industry-wide basis; and focusing on low-wage and immigrant workers.<sup>4</sup>

The Deputy Commissioner for Wage and Immigrant Services in New York is Terri Gerstein. Ms. Gerstein joined the Labor Department in March, 2007. Prior to her current position, Ms. Gerstein worked in the Labor Bureau of the New York State Attorney General's Office. She has worked with Ms. Smith for the last five years and moved with her from the Attorney General's Office to the Labor Department.

### ***C. Wage and Hour Watch***

On January 26, 2009, Wage and Hour Watch<sup>5</sup> was launched as "a new tool in the fight against labor law violations in New York State. New York Wage Watch will focus on a variety of illegal practices, jointly referred to as wage theft...Modeled in part after the Neighborhood Watch program, [the program] will help promote labor law compliance through formal partnerships between the New York State Labor Department and community groups" and "provide ordinary people with a formal and systematic role in the fight against wage theft." In the press release, Commissioner Smith is quoted as follows: "New York Wage Watch will increase labor law compliance by giving regular

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<sup>4</sup> Id.

<sup>5</sup> A number of documents, including the initial January 26, 2009 press release from the New York State Department of Labor named the program simply "Wage Watch." Due to intellectual property issues the program was later renamed "Wage and Hour Watch."

people a formal role in creating lawful workplaces statewide, and thereby improving the quality of life in their communities.”<sup>6</sup>

The program was launched with several groups in New York City and Long Island reportedly for the first six months, and would “then be opened up to interested groups from throughout the state.” Participating pilot groups were required to select a geographic zone, and hold know-your-rights training and provide employers with compliance information. They also were to distribute “literature to workers in supermarkets, laundromats, nail salons, and other community settings...” and “will have a designated point person for referrals in the Labor Department’s Division of Labor Standards, which enforces wage and hour laws.”

#### ***D. Unions and Consumer Groups***

The six groups NYDOL decided to partner with because they were appropriately active in labor issues and had referred cases in recent years were: Centro del Immigrante in Staten Island;<sup>7</sup> Chinese Staff and Workers' Association;<sup>8</sup> Retail, Wholesale and Department Store Union (RWDSU);<sup>9</sup> Make the Road New York;<sup>10</sup> United Food and

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<sup>6</sup> See Jan. 26 release.

<sup>7</sup> El Centro de Immigrante serves Staten Island with a focus on providing services and assistance to Hispanic/Latino immigrants and refugees and their families.  
[http://www.silive.com/news/index.ssf/2008/11/project\\_hospitality\\_hosting\\_3.html](http://www.silive.com/news/index.ssf/2008/11/project_hospitality_hosting_3.html)

<sup>8</sup> The Chinese Staff & Workers' Association (CSWA) brings together “workers across trades to fight for change in the workplace as well as in the community-at-large” and has a membership of over “1,300 workers from various trades and ages, injured and non-injured, documented and undocumented” that work in restaurants, garment and construction, and caregiving, as well as disabled workers, retirees, and youth. [http://www.cswa.org/www/about\\_us.asp](http://www.cswa.org/www/about_us.asp).

<sup>9</sup> The Retail, Wholesale and Department Store Union represents and organizes members who work in a wide variety of occupations that range from food processing to retail to manufacturing to service and health care. <http://rwdsu.info/about.htm>.

<sup>10</sup> “Make the Road New York promotes economic justice, equity and opportunity for all New Yorkers through community and electoral organizing, strategic policy advocacy, leadership development, youth and adult education, and high quality legal and support services.”  
<http://www.maketheroad.org/whoware.php>. According to its website, over a dozen unions and union trusts, including two of the other Wage and Hour Watch groups, contribute support to Make the Road.

Commercial Workers (UFCW) Local 1500;<sup>11</sup> and The Workplace Project in Long Island.<sup>12</sup>

According to the January 26, 2009 press release, the Department of Labor cited as part of the genesis for Wage and Hour Watch, its prior relationships with RWDSU and Make the Road in an investigation of a commercial strip in Bushwick, Brooklyn.<sup>13</sup>

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<sup>11</sup> The United Food and Commercial Workers Union Local 1500 represents workers throughout the Metropolitan New York area. <http://www.ufcw1500.org/content/page/title/History>.

<sup>12</sup> The Workplace Project assists Latino immigrant workers of Long Island. [http://www.workplaceprojectny.org/index\\_files/Page385.htm](http://www.workplaceprojectny.org/index_files/Page385.htm)

<sup>13</sup> See Jan. 26 release.



### III. CHRONOLOGY OF MS. SMITH'S NOMINATION

- April 20, 2009 - The President nominated Commissioner M. Patricia Smith to be Solicitor of Labor at the U.S. Department of Labor.
- May 1, 2009 - Commissioner Smith met with staff for the HELP Committee in a telephone interview to discuss her nomination, including the Wage and Hour Watch program.
- May 7, 2009 - Ms. Smith testified at a confirmation hearing before the HELP Committee. During the hearing Ms. Smith was asked about the Wage and Hour Watch program.<sup>14</sup>
- May 13, 2009 - Ms. Smith responded to Questions for the Record (QFRs) from Senators. In her responses, she declined to provide Wage and Hour Watch documents, stating that the documents were the property of the State of New York and referring the Committee to the State.<sup>15</sup>
- June 4, 2009 - Pursuant to Ms. Smith's response to QFRs, the Ranking Member of the HELP Committee, Senator Enzi, requested Wage and Hour Watch documents from the State of New York under its Freedom of Information Law (FOIL).<sup>16</sup>
- June 16, 2009 through the first week of July - The State of New York responded with several deliveries of documents.<sup>17</sup>
- July 28, 2009 - Ms. Smith responded to a second round of QFRs from Senator Enzi regarding Wage and Hour Watch.<sup>18</sup>

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<sup>14</sup> Hearing before the U.S. Senate Health Education Labor and Pensions Committee, Thursday, May 7, 10:00 a.m., available at [http://www.help.senate.gov/Hearings/2009\\_05\\_07/2009\\_05\\_07.html](http://www.help.senate.gov/Hearings/2009_05_07/2009_05_07.html) (hereinafter "Confirmation Hearing").

<sup>15</sup> Ms. Smith responded to the first round of Questions for the Record on May 13, 2009 (hereinafter "May 13 Responses").

<sup>16</sup> Senator Enzi's letter is attached as an Exhibit.

<sup>17</sup> See June 16, 2009 Letter from Joan Connell, Deputy Counsel for the New York Department of Labor to Senator Enzi attached as an Exhibit. In order to access documents that would ordinarily be withheld from a non-Chairman request, the Ranking Member and Chairman agreed to treat confidential materials produced by New York under Senate Rule XXIX.5. Accordingly, there are other documents that cannot be disclosed or referenced without agreement from the HELP Committee Chairman. This report only references information contained in the documents identified by the State of New York as non-confidential.

- August 24, 2009 - Senator Enzi officially requested the White House withdraw Ms. Smith's nomination.<sup>19</sup>
- September 9, 2009 - Ms. Smith responded to QFRs from Chairman Kennedy.<sup>20</sup>
- September 10, 2009 - Senator Isakson asked President Obama to withdraw Ms. Smith's nomination.<sup>21</sup>
- October 6, 2009 - All Republican Members sent a letter to Chairman Harkin stating their opposition to Ms. Smith.<sup>22</sup>
- October 7, 2009 - The HELP Committee approved Ms. Smith's nomination on a party-line vote of 13-10, and forwarded the nomination for floor consideration.<sup>23</sup>

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<sup>18</sup> The responses to Senator Enzi's July QFRs are attached as an Exhibit.

<sup>19</sup> Senator Enzi's letter is attached as an Exhibit.

<sup>20</sup> The responses to Senator Kennedy are attached as an Exhibit (September 9 Responses).

<sup>21</sup> Senator Isakson's letter is attached as an Exhibit.

<sup>22</sup> The joint letter is attached as an Exhibit.

<sup>23</sup> A copy of Senator Enzi's Remarks at the Markup are attached as an Exhibit.

## **IV. FACTUAL INCONSISTENCIES BETWEEN SENATE TESTIMONY AND STATE OF NEW YORK DOCUMENTS**

### **A. ISSUE: EXPANSION OF WAGE AND HOUR WATCH**

At the May 7, 2009, confirmation hearing, Senator Burr specifically asked Ms. Smith about the Wage and Hour Watch program and potential expansion:

Senator Burr. Have you had any discussions relative to your being at the Department of Labor that would extend Wage Watch in any fashion on a Federal level?

Smith Response. No, we have not had any discussions of that. I have not had any discussions with the Department of Labor in New York about whether we would extend it across New York State. Again, it is a pilot program which we just did in January. We specifically limited it to a small number of groups, and we limited it to a small geographic area. We limited it to basically New York City, Long Island, the lower Hudson Valley so that we could assess what the successes would be, what the problems would be.<sup>24</sup>

On May 13, 2009, Ms. Smith also responded in writing to Questions for the Record from several Senators about Wage and Hour Watch and potential expansion of the program. In each case, she responded as follows:

Smith Response: This initiative was designed as a local model in a limited geographic area in a state, for a particular issue under a particular statute. It was not designed for other laws or to be used on the federal level. Until the pilot is completed and evaluated, I would not advocate expanding it to other areas in New York, to other areas of the country, to the federal level or to other federal or state laws.<sup>25</sup>

On April 9, 2009, an email from NYDOL's Director of Strategic Enforcement to Ms. Smith's Deputy, Terri Gerstein, lists Wage and Hour Watch expansion groups, including NYS Laborers Organizational Fund, NY Labor Organizing Fund, Concrete Workers District Council, NYCOSH, Hudson Valley Community Coalition, and Westchester Hispanic. A separate email on the same day names two additional groups and their contact info so Ms. Gerstein can "send them an email and the application form."<sup>26</sup>

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<sup>24</sup> See Confirmation Hearing (emphasis added).

<sup>25</sup> See Ms. Smith's May 13 Responses (emphasis added).

<sup>26</sup> See April 8, 2009 email from Ms. Gerstein to seven Department of labor employees.

On May 15, 2009, an email was sent from the New York State's official Wage and Hour Watch account<sup>27</sup> to over 20 individuals announcing preparations to "expand Wage and Hour Watch" and soliciting the groups' involvement. An application form is attached to sign up for the program with a deadline for submission of June 15, 2009.

**FINDING: MS. SMITH MISLED THE COMMITTEE ABOUT WHETHER NYDOL PLANNED TO EXPAND WAGE AND HOUR WATCH**

**Although Ms. Smith stated in response to questions at her confirmation hearing and again in questions for the record that there were no plans to expand the program until there was a thorough evaluation of the pilot, she and her subordinates were exhorting groups to join, sending out applications and promoting and committing to expansion to news media, their own staff, the pilot groups and others both before and after she testified.**

*Additional Evidence Regarding Expansion*

Dozens of documents, including both internal and external NYDOL communications, detail plans to expand the program to up-state and/or statewide with many stating a June 2009 deadline. Initial plans to expand the program and how to do so are part of the November 7, 2008 write-up created by the State of New York, RWDSU, Make the Road and the National Employment Law Project. The document includes specific references to both upstate and downstate contact persons with plans to "expand to include a broader range of groups" after a pilot/trial run. Ms. Smith is referenced as having named the program during this email exchange and carbon copied on the email exchanges.<sup>28</sup> Notably, program expansion is also included in the very first public press release:

After a six-month pilot period with these groups, the Labor Department will begin seeking additional groups who wish to participate statewide. Each group should be a non-governmental, non-profit entity, such as a community group, religious organization, student group, labor union, business association, or neighborhood association. Groups must have at least six members and must select a geographic region to focus upon – this may be as small as several blocks in an

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<sup>27</sup> New York created a separate email account to correspond with those wanting to join the program and those already involved. Ms. Gerstein and her secretary generally sent all email from this account and reviewed incoming requests.

<sup>28</sup> November 7, 2008, email from Ms. Gerstein to several NY DOL staffers and outside groups noting that Smith had developed the name for the project "Wage Watch" and soliciting comments on proposal write-up.

urban setting or as large as several counties elsewhere. Groups need not have prior labor-related experience.... To find out what you can do to establish a New York Wage Watch group in your community, send an email to [NewYorkWageWatch@labor.state.ny.us](mailto:NewYorkWageWatch@labor.state.ny.us) or call 1-888-52-LABOR.<sup>29</sup>

Likewise, the materials developed for distribution to both employers and employees as part of the program provide: “We are from an official ‘Wage Watch’ group, working in conjunction with the New York State Department of Labor to promote labor law compliance in our community and throughout the state” (emphasis added).

The *New York Times* covered the launch and in relevant part noted: “after the first experiment in New York City and on Long Island, the Labor Department will seek additional groups for the program. The groups must be nongovernmental and nonprofit, and can include religious organizations, student groups, labor unions, business associations and neighborhood groups.”<sup>30</sup>

Documents from the State of New York and press reports quoting NYDOL show the following over twenty references to expansion plans:

- On December 1, 2008, Ms. Smith and her Deputy, Ms. Gerstein, received a list of fourteen upstate groups compiled by the head of the New York Labor Department’s Bureau of Immigrant Worker Rights to be considered for the program.
- On December 22, 2008, an email sent from Ms. Gerstein to the New York Labor Department’s Director of Strategic Enforcement and other NYDOL staff states “once the pilot has been under way for a requisite time period(perhaps six months), the program would be expanded to other interested groups.”
- On January 15, 2009, Ms. Smith sent an email to all relevant NYDOL staff announcing the program: “After six months, once we have had the chance to get the program rolling, we would like to expand to other groups (particularly upstate), including community based organizations; student groups; churches and other faith-based organizations; and labor unions....This is an exciting new initiative, and one which could potentially be replicated elsewhere in the country. I hope that you will make every effort to help the program succeed.”

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<sup>29</sup> Jan. 26 release (emphasis added).

<sup>30</sup> “Street-Level Groups Enlisted to Report Labor Violations,” *New York Times*, Sewell Chan and Colin Moynihan, January 28, 2009.

- On January 18, 2009 an article in *The Times Union* by Eric Anderson noting that the NYDOL had “announced the formation New York Wage Watch, described as a tool to fight wage theft statewide.”<sup>31</sup> Ms. Smith nor NYDOL spokespersons appear to have sent a correction request that Wage and Hour Watch was only regional or a pilot program.
- On January 24, 2009, an email sent to and from Ms. Smith regarding materials to prepare for the press conference launching Wage and Hour Watch include numerous references to plans to expand the program, as well as suggestions of taking it nationwide. The memorandum describing the press event provides: “The idea would be to replicate this kind of model, first in the city, then across the state and eventually take this program nationwide. Just like ‘Neighborhood Watch,’ the sky’s the limit...Once the pilot has been under way for a requisite time period (perhaps six months), the program will expand to other interested groups.” Similarly, talking points prepared for the rollout sent to and from Ms. Smith contain the following: “Our goal with Wage Watch is to pilot it in a few select areas in New York City, bring it to upstate New York, build a movement and let it spread across the country like a wildfire...As we roll the program upstate in the near future, it may be a town, city, county or set of counties...you’ll be tasked with training future Wage Watchers. You’re the beginning of a movement, and the movement begins here...But until the day comes [when employers fully comply], we’ll continue to do everything in our power to prevent wage theft in this state. And Wage Watch will be a key component in the fight.”
- Questions and Answers attached to the Jan. 24, 2009 email exchange with Ms. Smith include the following expansion references:

**When can we anticipate an upstate rollout?** It really depends on the success of the downstate rollout. We’re working hard ...to build these relationships upstate with the hope of rolling this out sometime in the near future...

**Where can ordinary citizens who want to be a part of Wage [and Hour] Watch contact the Department of Labor?** They can email us at [wagewatch@labor.state.ny.us](mailto:wagewatch@labor.state.ny.us) or call us at 1-888-52-LABOR. Please keep in mind that we’ll be rolling out this pilot slowly, with the ultimate goal of rolling out city and statewide....

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<sup>31</sup> <http://www.timesunion.com/AspStories/story.asp?storyID=761009&TextPage=1>.

**You're starting with six organizations. How many would like to end with in 2009?** I'd say realistically, we'd like to double to 12 organizations in New York City by the end of the year, while laying the foundation to expand the program to various parts of Long Island and upstate New York. We're creating a movement here, and the more the merrier....

As we roll the program upstate in the near future, it may be a town, city, county or set of counties.

- A January 27, 2009, *Epoch Times* reported: "If proven successful, the Department will extend the program to the entire city, State and recommend it be adopted nationally."<sup>32</sup>
- On February 2, 2009, Ms. Gerstein sends emails from the Wage and Hour Watch email account to two individuals advising on how to start a Wage and Hour Watch group: "Are there any other people who might want to form a Wage Watch group with you? The idea of the program is to involve groups of six or more people" and "We are starting the program with six groups but hope to expand in a few months. We are looking for groups of six or more people to form a New York Wage Watch group."
- A February 13, 2009, article in *The Nation*, quoting Ms. Smith in part, notes: "A pilot program targeting low-wage industries where abuses are rampant will launch in New York City and Long Island before expanding statewide."<sup>33</sup>
- On February 18, 2009, Ms. Gerstein sent an email to two NYDOL personnel stating "We will be expanding the program in several months," and soliciting names and information on interested groups.
- On February 27, 2009, an email from Ms. Gerstein outlines a meeting with pilot groups and includes a paragraph on future expansion and the need to set up training in June in both New York City and upstate.
- On March 9, 2009, Ms. Gerstein sends an email discussing the sign up application form for expansion.
- Also on March 9, 2009, an email from Ms. Gerstein also discusses developing a website including application forms for groups to sign up.

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<sup>32</sup> <http://www.theepochtimes.com/n2/content/view/11008>.

<sup>33</sup> "Watching Wages," Max Fraser, *The Nation*, [www.thenation.com/doc/20090302/noted?rel=hp\\_subs](http://www.thenation.com/doc/20090302/noted?rel=hp_subs).

- On March 20, 2009, an email from Brian O’Shaughnessy, Executive Director of the New York State Labor-Religion Coalition, sent to Ms. Gerstein states: “Pat[ricia] spoke at [a] dinner a week ago and said something like ‘Labor-Religion Coalitions are perfect fits for the Wage and Hour Watch program.’ I agree, especially our Coalitions in Buffalo, Syracuse and Albany. Can you make sure we get on the list as possible new community organizations for the next phase of ...trainings?...Might it be possible to include a day’s training on Wage and Hour Watch [in the fall]?” Ms. Gerstein responds with a proposed teleconference.
- Materials used at an April 2, 2009 press event by Ms. Gerstein regarding Wage and Hour Watch state in relevant part: “But working in partnership with concerned citizens like all of you, we can most definitely expand our reach. You may not know it yet, but everyone here today is laying the foundation for something big. You’re the beginning of a wave that could spread across the state and nation. We’re getting calls from community groups around the state, as well as other states and they all have one question: How can we be a part of this new movement?...One citizen at a time, one community at a time, we will build coalitions across the state – beginning with all of you.”<sup>34</sup> In what appears to be notes for her speech, she also states: “After six months ...we would expand to other groups (particularly upstate)...” and later “This is an exciting new initiative, and one which could potentially be replicated elsewhere in the country.”
- In an April 7, 2009, email from Ms. Gerstein, she solicits feedback from Wage and Hour Watch participants on their experiences and a draft application form for the “next expansion” of Wage Watch.<sup>35</sup>
- A May 13, 2009, email from Mr. Eichler of RWDSU that is carbon copied to Ms. Gerstein states: “Listed below is the requested information for two groups that are interested in becoming Labor and Hour Watch groups.”
- On May 14, 2009, Mr. Eichler requests updates from Ms. Gerstein on “joining and training schedules” for expansion plans.
- A May 19, 2009, *National Public Radio* article quoting Ms. Smith and Ms. Gerstein notes: “New York’s Wage Watch is just a few months old, and officials

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<sup>34</sup> Undated Talking Points for Ms. Gerstein to be used at April 2, 2009 event.

<sup>35</sup> It is unclear if the program had already expanded at this point or if this statement incorrectly implies there has already been an expansion.



say it's too soon to measure success. But the pilot program is set to expand across the state this summer.”

- A May 26, 2009 email to members of the New York State Labor-Religion Coalition from Brian O’Shaughnessy attaches a NYDOL document that is “NOT in final form and for internal use ONLY of those on this email) from DOL that I believe may answer many of your questions” about the program and plans for expansion.<sup>36</sup>
- A June 3, 2009, email to several dozen outside third parties and NYDOL individuals forwards a solicitation from the Worker’s Rights Center offering “an unusual training opportunity that could strengthen worker power and enforcement of labor laws in our region...being considered for nomination to the Wage and Hour Watch Program...We will be submitting the names of at least six individuals who will serve as ‘Wage and Hour Watch members’ for a period of two years. Those people will be provided with one day of training (in Syracuse, most likely), and possibly additional training as needed.” Nominations are asked for “by June 9, 2009 at 4:30p.m.”
- On June 9, 2009, a formal application facsimile is sent to Ms. Gerstein from the NY Laborers Organizing Fund for joining wage watch in the construction industry as part of the expansion.
- In addition to expanding in her own state, Ms. Smith and her staff of NYDOL officials provided outlines of the program to government employees in Ohio and San Francisco to explore launching their own Wage and Hour Watch programs.<sup>37</sup>

Over four months after her nomination hearing, Ms. Smith responded to questions from HELP Committee Chairman Kennedy as follows:

At the time of my confirmation hearing I had no discussions about a potential expansion of Wage and Hour Watch with anyone, other than generally indicating that if it were proved successful, my goal would be to expand it to other areas of New York State. At that time, I had not authorized my staff to proceed with a

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<sup>36</sup> In a July QFR response from Ms. Smith, the Committee was later informed that this document is a copy of the original version of the agreement between pilot groups and the Department of Labor.

<sup>37</sup> See, e.g., February 19, 2009 email from the NYDOL Director of Strategic Enforcement to the San Francisco Office of Labor Standards Enforcement (San Francisco also describes its program “Community-Based Labor Enforcement” in the subject line and provides a contract it entered with La Raza Cebtro Legal, Inc. to perform general outreach on labor law also).

statewide expansion of the program, nor had I discussed them with any steps that were preliminary to a possible expansion. My first substantive discussion about the steps needed to be taken to evaluate any potential expansion of Wage and Hour Watch occurred in late May 2009 with my Executive Deputy Commissioner.<sup>38</sup>

However, even this attempt to correct her original oral and written responses is factually inconsistent with documents provided to the Committee by the State of New York. In fact, there did not appear to be any documents in the over 2,000 pages provided that support Ms. Smith's subsequent statements that there were no plans for expansion.

A key example of this contradiction is an undated set of speech talking points for Ms. Smith to an upstate labor-religion coalition group sometime after January 2009 but before Ms. Smith testified at her confirmation hearing: "We're currently piloting [Wage and Hour Watch] with six distinct labor unions and advocacy organizations in New York City and Long Island, and plan to roll it out across the state in coming months and years. We *will* be expanding the program, and when it does come upstate, we'll need the help of many of you to roll it out." (emphasis in original). As with all of the above documents, there is no discussion of program evaluation or other qualifier on this commitment to expand. As such, this public statement prepared for Ms. Smith sometime in March or April of 2009,<sup>39</sup> contradicts her later statements on expansion plans before the Senate approximately a month and a half later.

Contrary to her testimony, the State also expanded the program in scope as well as geography -- from wage and hour issues to occupational safety and health enforcement. An email from the New York Committee for Occupational Safety and Health (NY COSH), a safety and health public interest group with ties to organized labor,<sup>40</sup> sent to Ms. Gerstein on February 6, 2009, notes: "we will contact each of the participating groups and their organization training on what safety and health issues they should be looking for while conducting the oversight for wage and hour issues." Ms. Gerstein

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<sup>38</sup> Kennedy QFR September 9, 2009 response (emphasis added).

<sup>39</sup> The speech references a February 26, 2009 announcement from the Department of Labor having occurred several weeks before. Based on this reference and a discussion of other contemporary activities, the timeframe would fall sometime in mid-March most likely.

<sup>40</sup> NYCOSH "is a non-profit coalition of 200 local unions and more than 400 individual workers, physicians, lawyers and other health and safety activists - all dedicated to the right of every worker to a safe and healthful job. Part of a nation-wide network of 25 union-based safety and health organizations, NYCOSH fights job hazards where the fight is needed most: on the shop floor."  
[http://www.nycosh.org/about\\_NYCOSH/about.html](http://www.nycosh.org/about_NYCOSH/about.html).

solicits a list of things to train wage and hour watchers to look out for, and NY COSH responds with a list as well suggesting that the groups take pictures of working conditions they believe unsafe.<sup>41</sup>

In summary, the official State of New York records show that both before and after Ms. Smith testified at her nomination hearing before the Senate that there were no plans to expand the program, Ms. Smith's agency had been promoting expansion, signing up additional groups and sent out and accepted applications to groups to join Wage and Hour Watch.<sup>42</sup> Ms. Smith knew about these activities since she is copied on or involved in interviews or discussions in which those commitments and plans are discussed. As a result, she misled the U.S. Senate in denying there were any expansion plans.

## **B. ISSUE: WAGE AND HOUR WATCH DEVELOPMENT IN HOUSE BY NYDOL**

At Ms. Smith's confirmation hearing the following exchange occurred regarding the Wage and Hour Watch program's genesis:

"Senator Burr. But you reached out to individuals and groups to help craft the specifics of [Wage and Hour Watch]—

"Ms. Smith. Actually, no, Senator, we did not. This was an internally crafted group. It was only after we sat down and crafted it ourselves that we reached out to groups to see if they would be interested."<sup>43</sup>

Similarly, in response to Senate QFRs on May 13, Ms. Smith stated: "My staff had done considerable work researching Neighborhood Watch and developing the concept of this initiative and felt it was time to present the Department's ideas for what is now known as Wage and Hour Watch, to gauge the possible interest of these two groups with whom we had worked and to get feedback."<sup>44</sup>

The State of New York's official records actually show that two of the pilot groups, the Retail Warehouse and Department Store Union (RWDSU) along with Make the Road, a public interest entity financed in part by unions and loosely allied with ACORN on

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<sup>41</sup> February 6, 2009 email exchange between Ms. Gerstein and NY COSH.

<sup>42</sup> E.g., May 15, 2009 email to interested groups requesting form submittal by June 15, 2009; June 1, 2009 email to interested groups.

<sup>43</sup> Confirmation Hearing.

<sup>44</sup> May 13 Responses to Sen. Enzi.

various issues according to its own representative,<sup>45</sup> were heavily involved in developing all aspects of the program from April 2008 forward. They, along with the National Employment Law Project, another public interest group, participated in: a) deciding participant eligibility, b) drafting program documents, c) creating training materials and conducting training, d) developing press strategies, as well as other contributions to the development of Wage and Hour Watch. The documents provided by New York in fact show almost no purely internal government development of the program.

On April 16, 2008 Jeff Eichler, coordinator for retail organizing projects for RWDSU sends an email to Terri Gerstein, Deputy Commissioner of NYDOL, also forwarded to the NYDOL Director of Strategic Enforcement, with four pages of attached research explaining potential models for “our concept of wage and hour enforcers.”

On August 15, 2008, another email from Mr. Eichler to Ms. Gerstein describes various other models including one used by the Service Employees International Union in Los Angeles to infiltrate janitorial contractors. There is a follow-up email exchange between Mr. Eichler and Ms. Gerstein on September 18, 2008, regarding additional “neighborhood watch” research.

A meeting is held on November 7, 2008, which Commissioner Smith also attends, between NELP, Make the Road, RWDSU and the New York Labor Department.

**FINDING: MS. SMITH MISLED THE COMMITTEE ABOUT THE INTERNAL DEVELOPMENT OF WAGE AND HOUR WATCH**

**Ms. Smith misled the Committee when she stated in response to questions at her confirmation hearing and again in questions for the record that the Wage and Hour Watch program was developed internally and only then did the New York Department of Labor approach outside groups. Official records actually show union and community organizer involvement from the very beginning.**

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<sup>45</sup> See [http://www.maketheroadny.org/whoweare\\_oursupport.php](http://www.maketheroadny.org/whoweare_oursupport.php); February 2, 2009 email from Make the Road to T. Gerstein, Deputy Commissioner of Labor for New York regarding relationship with ACORN.

## ADDITIONAL COMMUNICATIONS WITH OUTSIDE GROUPS

- On November 7, 2008, Ms. Gerstein sent an email to several NYDOL staffers and the outside groups that had attended the meeting noting “that Smith had developed the name for the project Wage Watch” and soliciting comments on the meeting minutes. Commissioner Smith is carbon copied on the email.
- On November 11 and 13, 2008, the RWDSU and NELP sent in comments on the meeting minutes. The November 13, 2008 email from the groups recommends designating wage and hour watch participants as authorized representatives of the State. The comments are forwarded to Ms. Smith via carbon copy on Nov.28.
- On December 2, 2008, an email from NELP discusses developing a standardized form for the State to use for investigation referrals by the pilot groups.
- A January 6, 2009, email from Make the Road to the development group discusses obtaining outside private funding for the pilot groups involved in the program: “Foundation funding would certainly make it more feasible for us and other organizations to dedicate real staff time to the project.” In response, Ms. Gerstein agrees to support the pursuit of funding for the outside groups. Ms. Smith is carbon copied on both exchanges.
- A January 23, 2009 email from Make the Road to Ms. Gerstein and others attaches a draft violation reporting form.<sup>46</sup>

A January 24, 2009, memorandum to Ms. Smith preparing to launch Wage and Hour Watch on January 26, 2009 discusses her agency’s close relationships with community organizers and unions, noting that Make the Road “submitted a written memo to legislators on our departmental bills last year” and that UFCW Local 1500 “was outstanding in reaching out to many other unions as well to contact legislators on other departmentals such as WARN. He has already asked to meet with Alyssa Talanker once our departmental for this year are announced to see how he can help.”<sup>47</sup>

When asked to reconcile the outside union and community organizing group involvement in all aspects of developing and implementing the program, Ms. Smith

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<sup>46</sup> Copies of these documents are attached as an Exhibit.

<sup>47</sup> See January 24, 2009 Memorandum to Ms. Smith (attached to email sent from Ms. Smith to Ms. Gerstein on January 24, 2009).

acknowledged in response to QFRs from Chairman Kennedy in September that the program apparently was not of internal construction:

Until I saw the emails supplied to the Committee in July 2009, I had no knowledge of anyone outside the Department being involved in the origins of the program or in its development prior to November 2008. However, even if I had knowledge that someone outside the Department had been involved, that would not have influenced, in a positive or negative way, my consideration of the program. I was judging the advisability of such a program on its merits alone. (emphasis added).

Notably, Ms. Smith admits that she saw the emails but did not correct her testimony until directly asked about the contradictions by former Chairman Kennedy in September -- which was four months after her testimony had been given and two months after documents had been provided to the Committee. The State of New York's documents actually show that the program was initially researched, promoted and developed by a union organizer and community activist group instead of New York State officials as Ms. Smith stated in May.

### **C. ISSUE: WAGE AND HOUR WATCH AS AN EDUCATION PROGRAM AND NOT AN ENFORCEMENT PROGRAM**

Ms. Smith stated at her hearing that the Wage and Hour Watch program was developed for educational purposes:

The second thing is that we have limited resources in New York as we do everywhere in government. And I am very committed to the concept of education, both employer education and worker education. So the substance of Wage Watch's purpose is to engage groups to help us with education. So we have a pilot program which we have just begun. We have six groups which were picked on the basis of our prior experience with them, so I knew they were reliable and sensible groups. We developed training. We developed an agreement, and they have agreed to do educational events both for workers and employers.<sup>48</sup>

However, NYDOL officials, including the Director of Strategic Enforcement, the union organizer and the public interest group that helped design the program, characterized the program participants in emails as "enforcers" from the beginning.<sup>49</sup> Later materials,

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<sup>48</sup> Confirmation Hearing.

<sup>49</sup> See, e.g., April 16, 2008 email from RWDSU to Terri Gerstein, Deputy Commissioner of New York State Department of Labor (explaining potential models for "our concept of wage and hour enforcers").

including an email discussing the training and a training synopsis document describe participants as “community enforcers.”<sup>50</sup> The groups involved in developing the program also suggested deputizing participants as official State investigators for certain purposes and recommended a program model where participants would “infiltrate” businesses or conduct “surveillance” of businesses.<sup>51</sup>

Any educational aspects of the program were not emphasized by NYDOL, Ms. Smith in her speeches, or in the public media. In the email sent to NYDOL officials to announce the program on January 15, 2009, Ms. Smith notes that the groups are not replacing staff or going to be official representatives of her agency but “[t]he goal of the program, as with all our enforcement efforts, is labor law compliance throughout the state”(emphasis added).<sup>52</sup> Ms. Smith’s talking points for her speech to launch the program state: “What we’re rolling out today is labor law enforcement at its grassroots core.” According to the Questions and Answers developed for the January announcement of Wage and Hour Watch:

**What is the focus of New York Wage [and Hour] Watch? Will they be referring all violations they identify or maybe just the most egregious cases?** The goal of Wage Watch group is to help [the New York Department of Labor] identify the most egregious violators, and also to extend [the Department of Labor’s] reach in the area of labor law enforcement.

**Will Department of Labor staff be going out with Wage Watchers?** Since the purpose is to “watch” different neighborhoods and to multiply enforcement efforts, sending our staff and the wage watchers together to the same events may be duplicative.<sup>53</sup>

An internal memorandum sent to Ms. Smith on January 24, 2009, describing the program also noted the intent to elevate the standing of the pilot groups: “An employer is more apt to listen to an ordinary citizen if there is some kind of sanctioned affiliation

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<sup>50</sup> See Dec. 1, 2008 email from The Director of Strategic Enforcement to RWDSU, Make the Road and Gerstein; Proposed Outline for Training Curriculum “The Role of the Community Enforcer (one and a half hours).”.

<sup>51</sup> August 15, 2008 email from Mr. Eichler to Ms. Gerstein and response from Ms. Gerstein to Mr. Eichler on August 18 re: infiltrating businesses and additional research.

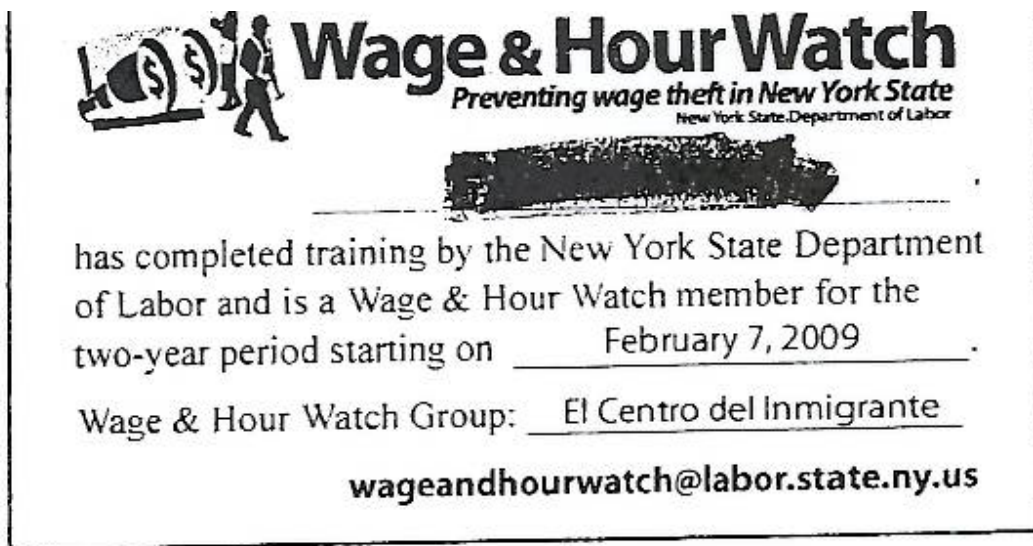
<sup>52</sup> January 15, 2009 email from Ms. Smith to NY Department of Labor staff.

<sup>53</sup> See January 19, 2009 Questions and Answers. The Department does also mention educational aspects of the program tangentially in the question and answer responses: “When do the Wage [and Hour] Watchers start? Hopefully, by the end of February, we should have Wage Watchers out there, talking to workers, talking to businesses, and raising awareness of labor laws in their communities.”

with DoL, and thus will be more inclined to take them seriously.” Similarly, the Department highlighted in the Questions and Answers the fact that it intended to provide identification cards to the unions and community organizing groups to show that their members were affiliated with the Department of Labor:

**Will Wage [and Hour] Watchers have some sort of identification that states their affiliation with the Labor Department?** We’re still working logistics of this out and we hope to have it ironed out by the time these men and women receive training next month. It may be a certificate, and it will probably be small enough to fit in a wallet.

The Labor Department eventually created official State Identification cards for the Wage and Hour Watch participants and issued the following to the pilot group participants:



Ms. Smith’s talking points for the launch of the program also included the following exhortation: “Never forget when you’re out in public, you are a reflection of our agency and its mission, and you’ll be held to a high standard.”<sup>54</sup> While the press release does mention the educational aspects of the program, the pilot groups’ spokespersons also focused on the enforcement and investigatory nature of the program in the press release as follows:

“In our experience, community monitoring of employer conduct is critical to ensure that employers caught violating the law today actually pay their workers correctly tomorrow. Employers will be dramatically less likely to violate wage and

<sup>54</sup> January 24, 2009 Talking Points for Ms. Smith’s January 26, 2009 press conference.



hour law when they know that trained community members are on the ground as the eyes and ears of the DOL's wage enforcement units." - Amy Carroll of Make the Road

"New York Wage Watch is labor law enforcement at the purest, most grassroots level. This program will allow unions, community groups and churches to engage in the fight against the exploitation of workers in our neighborhoods." -- Stuart Applebaum, President of RWDSU<sup>55</sup>

"The Wage Watch program will now allow us to link a trained community team to work closely with the New York State Department of Labor, so that employers will not be able to abuse workers with impunity. The Workplace Project is excited to participate in this innovative partnership with the DOL and looks forward to engaging many more community members to stop wage theft through this collaboration." -- Nadia Marin-Molina, Executive Director of the Workplace Project<sup>56</sup>

On February 9, 2009 -- two days after the training of the participants was complete and the State identification cards issued -- five small business trade associations noted the program's clear enforcement purpose and other specific concerns to Ms. Smith by letter:

To give quasi-enforcement capabilities to certain, seemingly hand-selected constituencies sets a troubling precedent that could spread among the spectrum of state agencies. We wonder how such an effort can create an atmosphere of anything other than vigilantism where every honest employer will have a legitimate concern for the preservation of his or her rights as a taxpaying business owner in the state of New York. The image painted by the Department of Labor in its January 26, release is of a posse of activists, duly deputized by the weighty imprimatur of the Department, demanding access to any employer in the state whom they have chosen either at random, or by prejudice.<sup>57</sup>

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<sup>55</sup> RWDSU's media advisory on January 14, 2009 also emphasized that Wage and Hour Watch was "a new program designed to protect workers from wage theft by their employers."

<sup>56</sup> Jan. 26 release.

<sup>57</sup> See February 9, 2009 letter to Commissioner Smith from the Food Industry Alliance of New York, NY Restaurant Association, Empire State Restaurant & Tavern Association, Retail Council of New York, and New York Association of Convenience Stores (hereinafter "Trade Association Letter") (attached as an Exhibit).

Ms. Smith attempted to downplay the fears of the small business groups; however, the record shows Wage and Hour Watch participants were closely aligned with and involved in NYDOL enforcement actions. For example, a February 26, 2009, NYDOL media advisory announcing a press conference on a significant enforcement action noted that UFCW Local 1500 and other Wage and Hour Watch participants would be attending the press conference held by Ms. Smith. Later, an April 1, 2009 New York State Media Advisory regarding Wage and Hour Watch discusses the fact that pamphleteering and compliance is part of the program but also states in relevant part: "Grassroots labor law enforcement is hitting the streets in a big way this Thursday at the kickoff even for Wage and Hour Watch!...After working on cases like Ollie's Chinese Restaurants and Amish Gourmet Markets, it's evident that employers need to know that someone is 'watching.' You are welcome to shadow one of our groups as they march in the communities." (emphasis added).

Press reports pointed out the investigatory nature and enforcement side of the program: "To crack down on businesses that pay less than the minimum wage, fail to pay overtime to pay wages altogether, steal tips or commit other unfair labor violations, the New York State Department of Labor is starting an experimental program that will rely on community organizations to monitor compliance with labor laws."<sup>58</sup> The New York City cable news channel, New York 1, stated: "Among the businesses in New York, what's described as an invisible crime is about to be attacked by a new and longer arm of the law. ...On Monday, the department of labor launched a wage enforcement program called Wage Watch."<sup>59</sup>

The pilot Wage and Hour Watch groups also promoted the enforcement message independently. Make the Road's supervising attorney Amy Carroll is quoted in a *New York Times* article: "We want employers to know there are costs for violating the law. They can't get away with it."<sup>60</sup> In its June 2009 union newsletter, UFCW Local 1500 congratulated Ms. Smith on her nomination to be Solicitor of the U.S. Department of Labor and described the program as follows: "modeled after crime-fighting

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<sup>58</sup> "Street-Level Groups Enlisted to Report Labor Violations," *New York Times*, Sewell Chan and Colin Moynihan, January 28, 2009 (hereinafter "Street Level Groups")

<sup>59</sup> See [www.ny1.com/content/top\\_stories/92854/labor-laws-focus-of-new-watch-program/default.aspx](http://www.ny1.com/content/top_stories/92854/labor-laws-focus-of-new-watch-program/default.aspx); see also *Watching Wages*, *The Nation* " Max Fraser, [www.thenation.com/doc/20090302/noted?rel=hp\\_subs](http://www.thenation.com/doc/20090302/noted?rel=hp_subs). ("New York Wage Watch will train grassroots organizations to monitor working conditions in their communities and refer violations to the Division of Labor Standards.").

<sup>60</sup> "Street-Level Groups," *New York Times*.

neighborhood watch groups, in which community organizations, immigrant groups and labor unions will help serve as the department's eyes and ears to report violations."<sup>61</sup>

The groups' involvement in the program also included participating in enforcement actions developed from their referrals. In written Questions and Answers, the NYDOL publicly committed to sharing information on the case referrals with all the pilot groups: "Will the Department of Labor have specific staff assigned to this pilot program? There will be a point of contact within the Division of Labor Standards who will be responsible for providing wage watch groups with an update on the cases they refer to us."<sup>62</sup>

In March 2009, Ms. Smith's talking points for a speech to an upstate labor-religion coalition group provided in relevant part: "Just as Neighborhood Watch programs reduce crime by involving ordinary citizens in the effort to keep their communities safe, New York Wage [and Hour] Watchers will strengthen labor law compliance through labor law enforcement at the grassroots level."<sup>63</sup>

Accordingly, Ms. Smith's own words, as well as other NYDOL officials and her staff's internal and public statements and deliberations, and the groups involved in the program all emphasized and portrayed Wage and Hour Watch as an enforcement program from its very beginning. It was only at her nomination hearing before the U.S. Senate when she was questioned about the program, that Ms. Smith chose to portray the program's "substance" as educational in nature.

**FINDING: MS. SMITH MISLED THE COMMITTEE THAT WAGE AND HOUR WATCH IS AN EDUCATIONAL PROGRAM**

**Ms. Smith characterized Wage and Hour Watch as an educational program at her confirmation hearing. The State of New York's documents as well as public pronouncements by those involved, including Ms. Smith, consistently emphasized that Wage and Hour Watch was designed and implemented as an enforcement program.**

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<sup>61</sup> "Ms. Smith Goes to Washington," The Register, June 2009 (available at <http://www.ufcw1500.org/files/shared/JUNE09.pdf>). The newsletter notes the educational aspects as a secondary aspect: "In addition, those groups will help educate local employers on what they need to do to comply with the law."

<sup>62</sup> See Questions and Answers prepared for the Jan. 26, 2009 rollout (attached to Jan.24 email from Ms. Smith).

<sup>63</sup> See Ms. Smith's undated Talking Points for March Speech (emphasis added).

#### D. DEFENSES OFFERED FOR INCONSISTENCIES

Some have argued, including Members at the October 2009 Executive Session in the HELP Committee, that Wage and Hour Watch was a minor program and that Ms. Smith's lack of candor in testifying about it was because she was busy and uninformed.<sup>64</sup> Ms. Smith echoed this line of defense in response to a QFR from former Chairman Kennedy:

I had little personal involvement in the early development of the Wage and Hour Watch pilot program. To put this in perspective, as the Commissioner of the NYSDOL, I am charged with running an over \$4 billion agency (since January 2009 it has grown to an \$11 billion agency) with approximately 4,000 employees in over 80 locations across the state. This is a small pilot program costing less than \$6,000. While the pilot was being developed, New York was in the worst economic crisis it has faced since the great depression. The main focus of my attention in the past year has been attending to the unemployment insurance and workforce development side of the Department which make up more than 85% of its workload.<sup>65</sup>

However, Wage and Hour Watch was the topic of numerous discussions between Ms. Smith and NYDOL officials and her staff and more importantly between Ms. Smith and the New York Governor's Office. In response to a prior QFR, Ms. Smith stated as follows:

Beginning in the late fall of 2008, I also discussed the pilot on numerous occasions with Jeff Mans, the Deputy Secretary to the Governor for Labor and Financial Regulation. I have no written notes from the conversations and can not tell you on what days the discussions took place as I speak with Mr. Mans at least three times a week and there was never a conversation specifically devoted to the pilot. The purpose of the conversations was to apprise him of the Labor Department's ideas for the pilot and to get the approval of the Governor's office.... I had a telephone conversation with the Assistant Counsel David Weinstein of the Governor's counsel's office, and Deputy Secretary Mans, on February 4th. I answered questions about how the program operated.<sup>66</sup>

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<sup>64</sup> October 7, 2009, Executive Session of the HELP Committee.

<sup>65</sup> September 9 Response to Kennedy, No. 3.

<sup>66</sup> May 13 Response to Sen. Enzi QFR, No. 5.

Similarly, Wage and Hour Watch is included in as one of three topics in an update sent to the New York Governor's office on January 15, 2009, which is also carbon copied to Ms. Smith.<sup>67</sup> It was also a specific topic in periodic accomplishments reports for the Department of Labor, including being item number three of six in one report.<sup>68</sup> The program is also prominently referenced in other Memoranda preparing Ms. Smith for public events and meetings. For example, Wage Watch is discussed for two paragraphs in materials prepared for Ms. Smith's appearance at a February 11, 2009 event organized by the New York Community Trust to discuss unemployment issues.<sup>69</sup> It is also a topic in preparation materials for Ms. Smith's meeting with the Parliamentary State Secretary in the German Ministry of Labour and Social Affairs on February 23, 2009.<sup>70</sup>

Other arguments have been raised that Ms. Smith's deputy, Terri Gerstein, may have misled Ms. Smith and been acting outside of her authority and therefore responsible for Ms. Smith's factually inconsistent testimony. While the records show that much of the day-to-day matters with Wage and Hour Watch were orchestrated by Ms. Gerstein, Ms. Smith had an active role in the program, including naming it, defending it to five trade associations concerned about misuse, and promoting it. The record, in fact, shows Ms. Smith was involved in close to 100 communications -- either being referenced in email conversations regarding the program or as a sender or recipient of email and documents. Notably, she personally sent an email to her staff announcing the program and asking for their support, launched the program and also promoted it in her speeches and interviews with news media.<sup>71</sup> Ms. Smith also admitted that she personally approved the terms of the agreements entered with the outside groups.<sup>72</sup> As noted above, the State of New York documents show that Ms. Smith was personally involved in public statements and decisions that directly contradict her testimony to the HELP Committee.

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<sup>67</sup> January 15, 2009 email to Jeffrey Mans from Mr. Rosales of NY DOL (attached as an Exhibit).

<sup>68</sup> E.g., February 17, 2009 email from Joseph Morissey to Leo Rosales re: "DoL Accomplishments."

<sup>69</sup> See February 11, 2009 Memoranda to Ms. Smith. Notably, the contact for this event is from NELP, one of the groups involved in crafting the Wage and Hour Watch program.

<sup>70</sup> See February 23, 2009 Memorandum to Ms. Smith; see also February 26, 2009 Memorandum regarding talking points for appearance at Regional Association of Grant Makers Panel.

<sup>71</sup> Jan. 15 email from Smith; Jan. 19 release, undated two speeches, NPR report.

<sup>72</sup> September Kennedy Response, No. 2.

Also, it is difficult to see how it would be appropriate to blame a breakdown between Ms. Smith and Ms. Gerstein for Ms. Smith's misleading testimony. Ms. Smith worked with Ms. Gerstein for more than five years. When Governor Elliott Spitzer appointed Ms. Smith to the New York Labor Department, news articles note that she brought her protégé, Ms. Gerstein with her to be her deputy.<sup>73</sup> Also, if Ms. Gerstein was acting outside of her authority or misled Ms. Smith, it does not appear Ms. Smith has disciplined her to date or sent her any emails asking to curtail her actions.

Ms. Smith's lack of knowledge of inconsistencies is also hard to square with her thirty years of experience as an attorney.<sup>74</sup> Notably, she served in the Attorney General's Office under then Attorney-General Eliot Spitzer during his prosecutions of corporate officials, including some who were primarily accused of not overseeing their subordinates properly. She was also well aware of the Committee's interest in this program from a staff interview on May 1, 2009. Finally, her level of personal involvement, particularly where she made it a topic of conversation with the Governor's Office, renders that argument difficult to support.<sup>75</sup> Ms. Smith's own words in responding to a question from former Chairman Kennedy also do not support the contention she was uninformed about the program:

Although I delegated the day to day responsibility of developing and then implementing the pilot to my Deputy Commissioner for Wage Protection and Immigrant Affairs, final responsibility for the program has always remained with me.<sup>76</sup>

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<sup>73</sup> "In Replacing Patricia Smith, Chance for Patterson to Mend Fences with Unions," April 27, 2009, Chris Bragg, NY Capitol Report.

<sup>74</sup> See <http://www.labor.state.ny.us/agencyinfo/executivestaffbio.shtml>.

<sup>75</sup> E.g., May 13 Response to Sen. Enzi QFR, No. 5.

<sup>76</sup> September Senator Kennedy Response, No. 3.

## V. OTHER ISSUES WITH THE NOMINEE

### A. TARGETING SMALL BUSINESSES

The Wage and Hour Watch program specifically targets small- and medium-sized businesses, including for example “supermarkets, laundromats, nail salons,”<sup>77</sup> for State authorized investigations by unions and community groups. According to a letter sent by five trade associations representing small and medium businesses in New York, the program was launched without consulting or seeking input from any small business representatives.<sup>78</sup>

The business community was concerned about this program and exclusion of their input in developing Wage and Hour Watch: “Without that opportunity [for a meeting to discuss concerns], we and our members only can assume that the program is little more than a dangerous deputizing of groups looking for a platform to harass, infiltrate, and publicly embarrass the taxpaying employers that fuel this state’s economy.”<sup>79</sup>

Ms. Smith met with the small business trade associations on March 17, 2009 – 130 days after meeting with the unions and consumer groups and 38 days after conducting training for the Wage and Hour Watch participants and issuing them identification cards. During the meeting, Ms. Smith committed to banning the pilot participants from promoting their individual organizations simultaneously with Wage and Hour Watch activities. In discussing the meeting, Ms. Smith stated as follows: “[The Trade Associations] asked for one change in the agreement, that Wage and Hour Watch groups be prohibited from giving out information about their group when they are doing Wage and Hour Watch activities. I agreed to make that change going forward and we have orally instructed the groups to refrain from that activity.”

However, it does not appear the agreement was ever modified or revised as Ms. Smith promised. In fact, on May 26, 2009, an email to members of a labor-religion coalition from its leader Brian O’Shaughnessy with a carbon copy to Ms. Gerstein attaches a DOL document that is: “NOT in final form and for internal use ONLY of those on this email) from DOL that I believe may answer many of your questions.” The HELP Committee was later informed that this document was a copy of the original version of the agreement between pilot groups and the NYDOL in a July QFR response from Ms. Smith:

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<sup>77</sup> Jan. 26, 2009 release.

<sup>78</sup> February 9, 2009 Trade Association Letter.

<sup>79</sup> Id.

The document was a blank copy of the Wage and Hour Watch Agreement which the Committee already has been provided. I have attached another copy as Attachment C. The document was described as “not in final form” because we are anticipating that some changes may be made in the agreement if the pilot is expanded. This is the document that would have been sent to any group that requested more information, but my staff believes that no other group requested more information.

The email distributing the “not in final form” original agreement to new applicants for Wage and Hour Watch also contains no reference to limitations in accord with Ms. Smith’s March 17<sup>th</sup> commitment to the small business trade associations. The Committee is also unaware of any revisions implementing Ms. Smith’s commitment being even discussed in any of the over 2,000 pages of materials produced by New York. Indeed, the record shows that two months after Ms. Smith personally committed to revising the agreement to address the concerns of the trade associations, no such action had been undertaken, and the NYDOL was actually distributing the same agreement to additional groups to review for purposes of anticipated expansion.

Ms. Smith later expanded her answer to the Senate on the issue of her commitment to the small business trade associations. In discussing her agreement to prevent group self-promotion at Wage and Hour Watch events: “Within a week of March 17<sup>th</sup> meeting, I directed [Director of Strategic Enforcement] to call all of the Wage and Hour Watch groups, inform them that this issue came up at a meeting with various trade associations, that the issue was not directly covered in the agreement, and to instruct them that, to the extent they had materials about their organization, they should refrain from giving out these materials when they were doing Wage and Hour Watch activities. Within a week after that she reported back to me that she had spoken to each of the groups, they understood the instruction, and would comply.”<sup>80</sup>

Ms. Smith was asked what she would have done if she had found a violation of this agreement by former Chairman Kennedy:

“Were you personally aware of any instance where a Wage & Hour Watch partner group gave out information about their group while engaging in wage watch activities after the March, 2009 meeting? If so, how did you respond to such activity? If not, how would you have responded to any such activity?”

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<sup>80</sup> May 13 Responses to Sen. Enzi; July 27 Responses to Sen. Enzi.



Smith Response: "I am not personally aware of any instance where a Wage and Hour Watch participant gave out information about their group while engaging in Wage and Hour Watch activities. If I had been aware of this happening, I would have decided to terminate them."<sup>81</sup>

Exactly one week after March 17, however, the documents show the Director of Strategic Enforcement for NYDOL helping Make the Road create self-promotion stickers to attach to the State's Wage and Hour Watch materials.<sup>82</sup> This action, almost a week later, by the person entrusted with implementing Ms. Smith's commitment to the small business trade associations would appear to violate the agreement. Neither are the State of New York Wage and Hour Watch identification cards altered to remove the groups' names. In fact, there are no documents discussing or suggesting there was any implementation of Ms. Smith's agreement with the trade association members regarding preventing cross-promotion of groups.

The limited engagement with the small business community and close ties to organized labor and community organizing groups of Ms. Smith's Labor Department are well documented. Governments often work with organized labor and interest groups when appropriate, which Ms. Smith noted in response to a QFR:

I believe unions, community groups, and for-profit businesses are all entities that may have legitimate, albeit different, interests in labor law enforcement that align with the Department of Labor's enforcement efforts. Additionally, each of these three types of entities often has knowledge of significant labor law violations that could support the government's own enforcement efforts. Therefore I believe it may be appropriate for government to work with these, and other entities, that have interests that align with the government's own enforcement efforts.<sup>83</sup>

Ms. Smith and her Department, however, worked exclusively with unions and community groups to develop a program to specifically target small businesses in an

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<sup>81</sup> September Kennedy Response, No. 2.

<sup>82</sup> See March 24, 2009 email from the NYDOL Director of Strategic Enforcement to Terri Gerstein et al.; Jan.12, 2009 email from RWDSU to T. Gerstein re: affixing pilot group contact information to Wage and Hour Watch materials provided by State. The plan to place individual groups promotional/identifications ticker son the State Wage and Hour Watch materials had been suggested by RWDSU in January 2009.

<sup>83</sup> July 27 Responses to Sen. Enzi.

enforcement program -- without any input from the small business community. This attitude towards business, particularly small businesses, and the apparent lack of any record demonstrating the Department of Labor honored Ms. Smith's personal commitment to the trade associations raises serious concerns with her ability to work with small businesses on a national level across all agencies with the U.S. Department of Labor whether they involve wage and hour, occupational safety and health, employee benefits and pension issues, or other federal laws.

## **B. PRIVACY AND RELATED ISSUES**

In reviewing the State of New York documents, it is clear that certain aspects of the Wage and Hour Watch program raise safety and security and invasion of privacy issues that Ms. Smith and NYDOL officials and staff either ignored or consciously decided were not important.

As discussed above, NYDOL gave training and State identification cards to individuals in various unions and community organizing groups to investigate businesses. However, in doing so, NYDOL conducted no background checks on those they trained and gave State identification cards to. In response to a Senate QFR, Ms. Smith described the decision not to conduct any vetting for Wage and Hour Watch participants:

There is no formal vetting process for the New York State Department of Labor to partner with an entity. Instead, the Department relies primarily on prior experience working with the group. For the Wage and Hour Watch pilot, the Department selected the groups that were asked to join based on prior experience working with them on a more informal basis. Groups were rejected in the sense that some groups the Department had worked with were not asked to join the pilot based on past experience with them. Currently, for the potential expansion of Wage and Hour Watch, the New York State Department of Labor has a written application, which the Committee has been provided. I have attached an additional copy as Attachment B. The Department did consider the possibility of background checks on the groups but ultimately rejected that idea after inquiring as to whether Neighborhood Watch groups are subjected to background checks. The Department was informed that the groups participating in this more sensitive crime prevention partnership were not subject to a check.

In her Senate QFR response, Ms. Smith in part explains the lack of a background check because the program is modeled on the National Sheriff Association's Neighborhood Watch program. Notably, however, unlike Wage and Hour Watch, Neighborhood Watch is a purely an observe and report program. Participants do not investigate crimes

and are strongly cautioned against doing so, nor are they allowed to enter private property or businesses in conducting their operations.<sup>84</sup> Calling the police about suspicious activity in a public area is significantly different than investigating the wages and hours of individual employees and recording their personal contact information.

This decision to allow those who may have criminal records or may not be legal residents in the United States to be trained and gather information under cover of New York State authority is also compounded by the types of information being gathered. Ms. Smith authorized the training provided to participants that directed them to gather the personal telephone number, vehicle license plate, and home address of business owners they visited.<sup>85</sup> As noted above, the State also allowed that information to be kept and used for other purposes outside of Wage and Hour Watch.

Similarly, NYDOL agreed to share ongoing investigatory information with the pilot groups: “Will the Department of Labor have specific staff assigned to this pilot program? There will be a point of contact within the Division of Labor Standards who will be responsible for providing wage watch groups with an update on the cases they refer to us.” (emphasis added).<sup>86</sup> The involvement of union and community organizers in ongoing NYDOL enforcement cases developed from Wage and Hour Watch referrals creates serious concerns with the agency’s independence and more importantly privacy issues for both workers and their employers who might be under investigation.

As noted above, Ms. Smith stated that the Wage and Hour Watch groups would be monitored and individuals dismissed if they violated the terms of the Wage and Hour Watch agreement or used their positions inappropriately. However, that commitment becomes unenforceable if the State also intentionally provides the groups with mechanisms to avoid accountability. In a Memorandum to Ms. Smith in January, 2009, NYDOL officials point out that all pilot groups would be taught “guidance on what level of information is needed for an ‘anonymous’ Wage and Hour Watch tip.”<sup>87</sup> Notably,

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<sup>84</sup> See <http://www.usaonwatch.org/assets/publications/WatchManual.pdf>.

<sup>85</sup> January, 2009 Training Materials prepared for Wage and Hour Watch.

<sup>86</sup> See questions and answers prepared for the rollout; see also undated Speech Talking Points for Ms. Smith: “[UFCW Local 1500] organized a fact-finding meeting between the Labor Department, union representatives and workers, who were brought right here to Varick Street to speak to DoL investigators. One other meeting took place at the Central Labor Council offices in New York City where labor standards [sic] our staff met with additional workers.”

<sup>87</sup> See January 24, 2009 internal memorandum preparing Ms. Smith for Jan.26 press conference and training materials.

once such an anonymous tip is successfully made by a union organizer or community organizing group, a small business might rightfully be investigated and required to prove innocence to a State investigator. Neither Ms. Smith nor the small business owner would have any ability to confront their accuser or hold them accountable if an anonymous tip was inaccurate and/or maliciously issued.<sup>88</sup>

### **C. WAGE AND HOUR WATCH MODELED AFTER UNION ORGANIZING INITIATIVES**

The Wage and Hour Watch program closely mirrors programs developed by RWDSU that were used to organize businesses previously, and other documents show that this program was going to be used for union organizing. There is also no evidence to support Ms. Smith's statement that the two unions who were selected for the pilot program were ever told not to use the program for union organizing.

Following her May hearing, Ms. Smith was asked the following QFR and gave the following answer in writing:

“Since most of the organizations involved were labor unions did the Department ever consider that such groups might seek to use their status as Wage Watch participants to further their efforts to unionize unorganized employers?”

Smith Response: “In order to avoid the possibility you raise, we instructed them not to use their status as Wage and Hour Watch groups as a union organizing tool. In order to implement this instruction, in the required training sessions, participants are taught to introduce themselves using their name and their group, not by Wage and Hour Watch or the Department of Labor.”<sup>89</sup>

New York State documents show, however, that union organizers participated in designing and implementing the Wage and Hour Watch program. There is a close relationship between organized labor and the NYDOL. For example, Commissioner Smith's NYDOL maintains a senior executive position for outreach to organized labor. Colleen Crawford Gardner is the Associate Commissioner for Labor Affairs and reports “directly to Labor Commissioner M. Patricia Smith, [and] is a key link between the labor

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<sup>88</sup> In this context, it is relevant to note that Wage and Hour Watch participant UFCW Local 1500 stated in its June 2009 newsletter that it was able to organize a grocery store in part by filing “dozens of charges with the Federal and State government.”

<sup>89</sup> May 13 Responses to Sen. Enzi.

movement and the Department.”<sup>90</sup> Notably there is no such equivalent role for outreach to small business.<sup>91</sup>

A few facts show the level of union organizer involvement in the Wage and Hour Watch program:

- As noted above, the Coordinator of Retail Organizing Projects for RWDSU, Jeff Eichler, is prominently involved in developing and implementing the program from the beginning.<sup>92</sup>
- RWDSU senior union organizers conducted part of the program training.<sup>93</sup>
- The United Food and Commercial Workers Local 1500 in their written application stated that they plan to use Wage and Hour Watch in “all of our Organizing Campaigns,” including those outside their designated Wage and Hour Watch area (emphasis added).<sup>94</sup>
- A March 2009 UFCW union newsletter states the union will specifically investigate “non-union” groceries as part of the program.<sup>95</sup>
- Union organizers are the signatories for the pilot program agreements for the two unions and appear to attend all of the program training as well as received state identification cards.<sup>96</sup>

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<sup>90</sup> “Prior to joining the Labor Department, Ms. Gardner worked for 23 years for the New York State AFL-CIO as Director of Organizing and Community Services. In that position, she assisted unions with new member organizing campaigns; provided research, strategic planning, mobilization, one-on-one, and outreach support; built member, political, and community support for the Voice @ Work campaign; and served as the liaison between the State Labor Federation and eight area labor federations and 30 central labor councils throughout the state. She began her career as a business agent for Service Employees International Union Local 32BJ and represented and organized immigrant building service workers in midtown Manhattan from 1981-1983.” <http://www.labor.state.ny.us/agencyinfo/executivestaffbio.shtml>.

<sup>91</sup> According to the Bureau of Labor Statistics, in 2008 only 26.3% of those employed in New York were represented by a union and only 24.9% were union members. <http://www.bls.gov/news.release/union2.t05.htm>.

<sup>92</sup> See Note 9.

<sup>93</sup> Dec. 1, 2008 email from RWDSU to Ms. Gerstein.

<sup>94</sup> Mar. 17, 2009 UFCW Local 1500 Wage and Hour Watch Work Plan email sent to Ms. Gerstein and the NY Labor Department’s Director of Strategic Enforcement.

<sup>95</sup> “UFCW Local 1500 joins the neighborhood wage watch program,” The Record, March 2009 (available at <http://www.ufcw1500.org/files/shared/March2009.pdf>).

- The Co-Chairman of the State's Wage and Hour Watch program is the president of the RWDSU, Stuart Applebaum.<sup>97</sup>
- A number of later applicants to join the program are entities whose sole purpose is union organizing, including the New York State Laborers Organizing Fund and the organizer for a Plumber's Local.<sup>98</sup>
- One of Make the Road's report sheets filled out in April 2009 by Wage and Hour Watch participants specifically refers to a UNITE HERE Local at a work site they visited.<sup>99</sup>

In order to support Ms. Smith's claim that unions would be told not use Wage and Hour Watch for organizing, the Committee was unable to identify any documents in the over two thousand pages of material reviewed. In addition, none of the training documents make any reference to a prohibition on using Wage and Hour Watch for union organizing. Moreover, Ms. Smith admitted that the pilot groups were specifically allowed to use information gathered as part of the Wage and Hour Watch program for "community organizing" as long as it was not conducted during Wage and Hour Watch activities:

The only use that Wage and Hour Watch groups can make of information gathered as part of Wage and Hour Watch activities, other than giving it to the Labor Department as part of a referral, is to use contact information such as names and addresses to notify individuals of the group's activities, such as meetings or community organizing events.<sup>100</sup>

Ms. Smith also admitted that she personally approved the final version of the agreement allowing the groups to use this information.<sup>101</sup> As such, the union and community

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<sup>96</sup> See Agreements between NY Labor Department and Pilot Participant Unions; Sign-in Sheet for Wage and Hour Watch Training; with UFCW Local 1500 Website Organizer list (available at [http://www.ufcw1500.org/content/page/title/Join\\_Our\\_Union](http://www.ufcw1500.org/content/page/title/Join_Our_Union)).

<sup>97</sup> Jan. 26, 2009 release; Questions and Answers prepared for January 19, 2009 event ("I'd like to take this moment to ask Stuart Applebaum to be the other co-chair on behalf of the community groups."). Internal NY DOL documents note that Mr. Applebaum is a close ally of Secretary of State Hillary Clinton.

<sup>98</sup> June 9, 2009 Facsimile Application to join Wage and Hour Watch from NY Laborers Organizing Fund; Email to Plumber's Local 1 and Local 1 Website (available at [www.ualocal1.org/leadership.asp](http://www.ualocal1.org/leadership.asp)).

<sup>99</sup> See April 2, 2009 Wage and Hour Watch form from Make the Road (in Spanish except for reference to UNITE HERE).

<sup>100</sup> July 27 Response.

<sup>101</sup> September Kennedy QFR Response, No. 2.

organizers with their State issued identification cards could enter any business in New York City, interview employees and employers under cover of that State authority, record personal contact information and then contact employees or employers the next day at their home or at the business.

Notably, this model of teaming community organizing groups with labor unions had also been used previously by RWDSU twice – both times to effectively organize businesses for the union. In 2005, the RWDSU founded a program with another New York public interest group, Good Old Lower East Side (GOLES),<sup>102</sup> called the Retail Action Project (RAP). “RAP members are retail worker activists who work together to improve conditions in retail through direct action, workplace rights education, organizing, legal action and media outreach. RAP works with community-based organization, unions, faith-based institutions, elected officials and individual volunteers.”<sup>103</sup> Amy Carroll, later of Make the Road, conducted training for RAP in 2006 from a position with MFY New York (another public interest law firm).<sup>104</sup> In RWDSU’s Winter 2009 newsletter, RWDSU detailed its success with Make the Road and Good Old Lower East Side in convincing businesses to enter neutrality agreements: “Union organizing efforts alongside community pressure helped workers at Footco win a Good Business Community Agreement, which allowed workers to choose union representation without being subjected to harassment from the company.”<sup>105</sup>

On Dec. 12, 2007, RWDSU and Make the Road teamed up publicly with NYDOL. They held a press conference announcing a sting against 19 of 26 businesses in Bushwick area of Brooklyn, New York. RWDSU and Make the Road served as informants, investigators and pledged to oversee compliance of small businesses following the investigation. Retail organizing coordinator for RWDSU Jeff Eichler states “We will continue working with the NYSDOL to ensure labor laws are enforced, and we will continue to help bring a union voice to the workers there by bringing them into the RWDSU.”<sup>106</sup>

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<sup>102</sup> A prior union organizing ally, the Good Old Lower East Side, is included in the list of groups sent by Mr. Eichler of RWDSU that were seeking to join Wage and Hour Watch when it was expanded.

<sup>103</sup> See <http://www.retailactionproject.org/>

<sup>104</sup> Id.

<sup>105</sup> The Record, Volume 56, No.4, Winter 2009.

<sup>106</sup> See <http://rwdsu.info/en/archives/12/rwdsu-partners-dept-labor-bushwick-investigation-121907.html>.

The NYDOL's press release, as well as materials developed for the Wage and Hour Watch announcement on January 26, 2009, cited this prior interaction as part of the genesis for Wage and Hour Watch.<sup>107</sup> A January 16, 2009 press conference background document sent to and from Ms. Smith states: "The origins of Wage Watch go back to December 2007, when DoL collaborated with the Retail, Wholesale and Department Store Union to investigate a commercial strip in Brooklyn and RWDSU maintained a presence in the area."

In addition, an August 2, 2006 article in the *Village Voice* details how Make the Road worked with Ms. Smith when she headed the labor bureau for Attorney General Elliott Spitzer. Notably, the article notes the owner of a business being investigated by Ms. Smith and picketed by Make the Road filed an unfair labor practice complaint stating that Make the Road was acting as a front group during an organizing campaign by RWDSU.<sup>108</sup>

It also appears NYDOL allows unions to participate in its investigations, including while interviewing workers with potential claims who may also be recruited into the union. For example, in a speech sometime after the NYDOL launched the program, Ms. Smith discusses Wage and Hour Watch and then describes an investigation where the Labor Department interviewed employees in the presence of union representatives from UFCW Local 1500: "[UFCW Local 1500] organized a fact-finding meeting between the Labor Department, union representatives and workers, who were brought right here to Varick Street to speak to DoL investigators. One other meeting took place at the Central Labor Council offices in New York City where labor standards [sic] our staff met with additional workers."<sup>109</sup>

As noted above, the pilot groups in the program were to be given information on case referrals: "Will the Department of Labor have specific staff assigned to this pilot program? There will be a point of contact within the Division of Labor Standards who will be responsible for providing wage watch groups with an update on the cases they refer to us."<sup>110</sup>

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<sup>107</sup> See [http://www.labor.state.ny.us/pressreleases/2009/Jan26\\_2009.htm](http://www.labor.state.ny.us/pressreleases/2009/Jan26_2009.htm).

<sup>108</sup> See "Workers at a Brooklyn grocery say they're not paid fairly, if at all," Kristen Lombardi, *The Village Voice*, (Aug.2, 2006)

<sup>109</sup> Undated Speech Talking Points for Commissioner Smith, p.4.

<sup>110</sup> See Questions and Answers prepared for the Jan. 26, 2009 rollout (attached to Jan.24 email from Ms. Smith).



NYDOL also planned to amend the requirements for joining the program to ensure other labor unions would be eligible. For example, the Director of Strategic Enforcement for New York DOL in an email suggested altering program participation requirements specifically to ensure up-state trade unions could be eligible to join Wage and Hour Watch.<sup>111</sup>

On the same day Ms. Smith met with five trade associations to allay concerns about the potential misuse of the program, UFCW Local 1500 sent in its work plan to NYDOL officials disclosing their intent to incorporate Wage and Hour Watch into union organizing campaigns. The State's records show no subsequent action by Ms. Smith or NYDOL officials or staff after they were told of plans to use the program for union organizing in March. In addition, no actions were taken after receiving applications and inquiries from union entities that only do union organizing as late as June, 2009.

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<sup>111</sup> November 26, 2008 email from the NYDOL Director of Strategic Enforcement to RWDSU, NELP, Make the Road, and NY Labor Department personnel.

## VI. CONCLUSION

Ms. Smith misled the Health, Education, Labor and Pensions (HELP) Committee in her May 2009 testimony concerning a program she created in New York - "Wage and Hour Watch" - that credentials union organizers and community activists to act as State enforcement surrogates. These responses contradicted official documents received from the State of New York pursuant to a freedom of information request. Ms. Smith was given the opportunity to correct her testimony in questions for the record but she continued to provide misleading and factually inaccurate responses. Three months after her testimony she responded to questions from Democratic Members claiming that she "misspoke". She was later reported out of committee on October 6, 2009, on a straight party-line vote of 13-10.

Her inconsistencies cannot be explained as inadvertent errors or be discounted as outside her reasonable knowledge. In fact, each of Ms. Smith's errors – program expansion, outside involvement in creating the program, and the enforcement instead of educational nature of the program – would, if true, have had the effect of allaying congressional concerns and bolstered prospects for her confirmation. Similarly, Ms. Smith downplayed the concerns of the small business community, potential misuse of information, and the possibility for union organizing – all of which are also serious issues raised by official documents provided by the State of New York. Ms. Smith's lack of candor before the Committee ultimately renders her unqualified to be the head legal enforcement officer at the U.S. Department of Labor.

## **Summary of Misleading Testimony:**

- **Expansion:** Ms. Smith denied that she had plans to expand the Wage and Hour Watch program. However, documents obtained from the State of New York contain more than 50 specific references to program expansion. E-mails sent immediately before and after her hearing show that expansion efforts were well under way.
- **Enforcement:** Ms. Smith stated the program was designed to be an educational effort. However, documents and her own speeches show it was designed as an enforcement program from the beginning and she even set up a hotline for union organizers and community activists. ID cards were distributed so that these groups could enter businesses to question employees.
- **Program Creation:** Ms. Smith stated that the program was created internally, by her staff, in her State Labor Department. However, the program was actually promoted and designed by a head union organizer and a community activist organization.

## **Other Concerns:**

- **Targeting Small Business:** The program targets small- and medium-sized businesses. Ms. Smith did not consult with the business community while creating the program. It was only after small business representatives raised concerns about potential abuse that she met with them. This happened more than a month after the program was launched and too late to make changes.
- **Invading Employer and Employee Privacy:** In reviewing the NY State documents, it is clear that certain aspects of the Wage and Hour Watch program raise safety and security and invasion of privacy issues that Ms. Smith and NYDOL officials and staff either ignored or consciously decided were not important.
- **Labor Organizing:** Ms. Smith stated the program would not be used for union organizing. Documents obtained from the State Labor Department and a union newsletter show plans specifically to use the program for union organizing throughout New York.