

December 12, 2017

To the Honorable Members of the United States Senate  
Washington, D.C. 20510

**RE: 35 LGBT Groups Oppose Confirmation of Don Willett**

Dear Senator:

We, the undersigned 35 national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, urge you to oppose the nomination of Don Willett to the U.S. Court of Appeals for the Fifth Circuit. After reviewing the judicial record of Justice Willett and his personal writings, we have concluded that his views on civil rights issues are fundamentally at odds with the principles of equality, liberty, justice and dignity under the law, particularly with regard to LGBT Americans.

Justice Willett has boasted about being the “most conservative justice”<sup>1</sup> on the Texas Supreme Court and has stated that “there is no ideological daylight to the right of me.”<sup>2</sup> He has opposed equality for women in the workplace and has minimized concerns of sexual harassment.<sup>3</sup> Justice Willett’s enduring bias against LGBT people is visible not just on his Twitter feed, where he has trivialized marriage equality and disparaged transgender people,<sup>4</sup> but also in his judicial opinions. In 2016, Justice Willett wrote a scathing concurrence criticizing a Texas trial court for approving the state’s first same-sex marriage petition. He excoriated that court for failing to notify Attorney General Ken Paxton of the move so that Paxton would have the opportunity to defend the marriage ban.<sup>5</sup> Before *Obergefell* was decided, Justice Willett also attacked the Texas Supreme Court for failing to take up a case on the validity of a same-sex divorce (and marriage) in Texas because he was eager to uphold the ban.<sup>6</sup> Most recently in 2017, Justice Willett signed onto a Texas Supreme Court decision holding that *Obergefell* does not guarantee equal publicly funded benefits for the spouses of gay and lesbian public employees.<sup>7</sup> Defying the Supreme Court’s ruling in *Obergefell* as well as its summary reversal earlier that week in *Pavan v. Smith*, stating explicitly that states may not treat same-sex married couples differently than other married couples, the Texas Supreme Court (including Justice Willett) argued that “*Obergefell* is

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<sup>1</sup> *Justice Don Willett Commercial: Conservative*, YOUTUBE (May 7, 2012), available at <https://www.youtube.com/watch?v=WJQFioXc4Mg>.

<sup>2</sup> *Justice Don Willett – The Arlington Voice – 2012 TCGOP Straw Poll*, YOUTUBE (Feb. 6, 2012), available at <https://www.youtube.com/watch?v=ImznoCBCmE>

<sup>3</sup> Ken Herman, Bush advisor’s memo critical of women’s issues, AUSTIN AMERICAN-STATESMAN (July 15, 2000).

<sup>4</sup> See, e.g., Don Willett @JusticeWillett, “I could support recognizing a constitutional right to marry bacon.” (Apr. 29, 2015, 5:43p.m. Tweet) <https://twitter.com/JusticeWillett/status/593591597641531392>; “Go away, A-Rod.” “@FoxNews: California’s transgender law allows male high schooler to make girls’ softball team.” (Feb. 14, 2014, 2:48p.m. Tweet) <https://twitter.com/justicewillett/status/434474201638920192>.

<sup>5</sup> *In re State*, 489 S.W.3d 454, 456 (Tex. 2016).

<sup>6</sup> *State v. Naylor*, 466 S.W.3d 783, 795 (Tex. 2015) (Justice Willett, joined by Justice Guzman and Justice Devine, dissenting) (Willett asks in his dissent whether the marriage ban rests “properly” with state voters and their elected representatives or with judges).

<sup>7</sup> *Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017).

not the end” and cited other pending cases to deny benefits for the spouses of gay and lesbian public employees.<sup>8</sup> In light of his proudly held antipathy toward the equal rights of LGBT people, it is an inescapable conclusion that LGBT people will not be able to obtain a fair hearing from him.

Justice Willett espouses views about the role of the state to regulate commerce that would turn the clock back 100 years at the expense of important gains in workers’ protections and civil rights by urging courts to be more vigorous in reviewing and invalidating acts of government designed to protect health and safety. If this theory were to gain traction, it would return us to the “*Lochner*” era when workplace protections were frequently struck down because the court did not consider the regulation a valid exercise of the state’s power to protect the public welfare.<sup>9</sup> Specifically, rather than applying traditional “rational basis review,” Justice Willett has advocated that even economic regulations should be assessed against a searching standard of judicial review that gives significant weight to “individual liberty.” Justice Willett argues in a long concurrence (in a case striking down a licensing requirement) that “occupational freedom, the right to earn a living as one chooses, is a nontrivial constitutional right entitled to nontrivial judicial protection.”<sup>10</sup> Justice Willett unpersuasively asserts that much economic regulation is driven less by a desire to protect workers than by a desire to drive out competitors. Justice Willett’s views take direct aim at important workplace protections, including nondiscrimination protections, and were they to gain currency, his views would seriously undermine civil rights laws. Not only does Justice Willett’s approach fly in the face of longstanding deferential standard of review in federal law and throughout the country, it would cause serious harm if this view were to gain traction.

All of the above should cause any reasonable person to seriously doubt Justice Willett’s willingness or capacity to faithfully adhere to constitutional precedent and principles and administer justice equally to litigants of various racial backgrounds, and all genders and sexual orientations. We have grave doubts concerning his ability to impartially interpret the law and serious concerns about his strict approach to judicial review of economic regulations that would impact LGBT workers and all workers. We strongly urge you to reject his nomination.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at [smcgowan@lambdalegal.org](mailto:smcgowan@lambdalegal.org).

Very truly yours,

Lambda Legal  
Advocates for Youth  
Alaskans Together For Equality  
CenterLink: The Community of LGBT Centers  
Equality Alabama

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<sup>8</sup> *Id.* at 12.

<sup>9</sup> See *Lochner v. New York*, 198 U.S. 45 (1905) (the Supreme Court struck down an economic regulation limited working hours in bakeries to 60 hours per week based on the freedom to contract).

<sup>10</sup> *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

Equality California  
Equality Illinois  
Equality New Mexico  
Equality North Carolina  
Equality Ohio  
Equality Pennsylvania  
Equality South Dakota  
Equality Texas  
Equality Utah  
Family Equality Council  
FORGE, Inc.  
Forum for Equality Louisiana  
FreeState Justice  
Garden State Equality  
Gender Justice League  
Georgia Equality  
Mazzoni Center  
National Black Justice Coalition  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Coalition for LGBT Health  
National LGBT Bar Association  
National LGBTQ Task Force  
OutFront Minnesota  
SC Equality  
The Trevor Project  
Trans Women of Color Collective  
Transgender Law Center  
Whitman-Walker Health  
Witness to Mass Incarceration