



October 4, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: National, State and Local LGBT Organizations Oppose Confirmation of Eric S. Dreiband

On behalf of Lambda Legal and the 62 undersigned national, state and local organizations serving the lesbian, gay, bisexual and transgender (LGBT) community, we write to again oppose the nomination of Eric S. Dreiband to serve as the Assistant Attorney General for the Civil Rights Division at the U.S. Department of Justice (“Justice Department” or “DOJ”). During his confirmation hearing, Mr. Dreiband was evasive and non-responsive to many of the questions, and he has refused to answer key questions regarding LGBT protections for the record. Therefore, we continue to oppose his nomination. Experienced and principled leadership is needed to ensure the civil rights of our most vulnerable populations are protected and enforced. Mr. Dreiband’s record of opposing civil rights renders him ill-suited to provide that kind of leadership to the Civil Rights Division.

This year marks the 60th anniversary of the Civil Rights Division (“Division”). Throughout its history, the Division has defended and vindicated the civil rights of vulnerable Americans. In the face of increased violence and pervasive discrimination against the LGBT community, our organizations know that the work of the Division is more important than ever. In response to this crisis, however, DOJ has gone beyond merely abdicating its obligation to defend civil rights, and, with respect to many vulnerable and marginalized communities, including LGBT people, DOJ has been using its authority to inflict harm.

Attorney General Jeff Sessions began unraveling LGBT protections at the Justice Department on day one and has not stopped since. One of his first moves as Attorney General was to halt the Justice Department’s defense of important guidance documents defending transgender people from discrimination. Specifically, at Jeff Sessions’ direction, DOJ shamefully withdrew its challenge to a poorly reasoned Texas District Court’s nationwide preliminary injunction that halted the enforcement of the guidance issued by the Department of Education regarding transgender students, and jeopardized other important federal guidance documents dealing with anti-LGBT discrimination.¹ Shortly thereafter, the Acting Assistant Attorney General for Civil Rights, along with his counterpart at the Department of Education, rescinded their joint Dear Colleague Letter providing important assistance to school officials

¹ *Texas v. U.S.*, 679 F. App’x 320 (5th Cir. 2017), No. 16-11534, Def.-App. Notice of Withdrawal of Mot. For Part. Stay Pending App. And Jnt. Mot. To Canc. Oral Arg. (February 10, 2017).

about their obligations to transgender and gender non-conforming students under Title IX, thereby jeopardizing the safety of vulnerable transgender students.²

DOJ continued its aggressive roll-back of LGBT protections by withdrawing its defense of the nondiscrimination regulations implementing the Affordable Care Act that prohibited, among other things, discrimination in the provision of medically necessary health care to transgender people. Instead of defending the civil rights of transgender people in the litigation, DOJ acquiesced to the district court's order enjoining enforcement of these important protections, and asked the Court to remand the case to the Department of Health and Human Services ("HHS") to "address the issues raised in the litigation," by (among other things) considering the possibility of reopening these regulations.³ And just a few weeks ago, DOJ filed an amicus brief in the U.S. Court of Appeals for the Second Circuit urging that court to adopt an interpretation of Title VII that would deny protection to LGBT workers.⁴ In doing so, the Department directly contradicted the Equal Employment Opportunity Commission, which for years has advanced the position that Title VII's prohibition on sex discrimination protects against discrimination on the basis of sexual orientation and gender identity. The Second Circuit Court of Appeals recently questioned the role of the Civil Rights Division in the development of the DOJ's position, and every indication suggests that rather than defend civil rights for LGBT people within the DOJ, that Dreiband will simply fall in line with this discriminatory position.⁵ Indeed, when faced with the question of how he would interpret Title IX's protections for transgender students during his confirmation hearing, Mr. Dreiband responded by pivoting to a response focused on hate crime legislation that specifically enumerates sexual orientation and gender identity as protected characteristics. Dreiband's emphasis on enumerated legislation likely reveals his view that unenumerated protections against discrimination based on sex under Title IX do not encompass sexual orientation and gender identity.

The LGBT community is not the only community that has suffered as a result of the Department of Justice's abdication of its role in defending civil rights. This administration's blatant hostility toward the Muslim community, for example, has been just as unveiled and vicious. Likewise, DOJ has abandoned its mission of ensuring and promoting constitutional policing by pulling back from consent decrees with police departments under investigation for failing to protect people of color and other vulnerable populations from discrimination and abuse.⁶ The Educational Opportunities Section of the Civil Rights Division has been directed to focus on challenging race-conscious admissions policies, notwithstanding schools' clear legal authority to use such tools to promote important educational goals,⁷

² U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office of Civil Rights "Dear Colleague Letter" (February 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³ *Franciscan All. Inc., v. Price*, No. 7:16-cv-0010 (N.D. Tex.), Def. Mot. For Vol. Remand and Stay (May 2, 2017); *Franciscan All., Inc., v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (preliminary injunction prohibiting the enforcement of regulation's prohibition of discrimination on the basis of gender identity and termination of pregnancy).

⁴ *Zarda v. Altitude Exp.*, No. 15-3775 (2nd Cir.), Brief for the United States as Amicus Curiae. (July 26, 2017), available at <https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf>.

⁵ *Id.*, available at <https://www.courtlistener.com/audio/31962/zarda-v-altitude-express-inc/>.

⁶ See, e.g., Memorandum for Heads of Department Components and United States Attorneys (March 31, 2017) available at <https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf>. <https://www.justice.gov/opa/press-release/file/954916/download>; *U.S. v. Police Dept. of Baltimore*, No. 1:17-cv-00099-JKB, (D. Md.) Mot. for Cont. Of Pub. Fairness Hearing (Apr. 4, 2017), available at <https://htv-prod-media.s3.amazonaws.com/files/motion-doc-1491267565.pdf>.

⁷ See Detail Opportunity, Office of the Assistant Attorney General Announcement (last visited August 16, 2017), available at <https://assets.documentcloud.org/documents/3911982/DOJ-job-posting-asks-lawyers-to-investigate-and.pdf>.

and, at every opportunity, the Department has abdicated its statutory and moral obligation to defend voting rights.⁸ In recent months, the Department of Justice has abandoned longstanding litigation in Texas and North Carolina involving laws that courts have denounced for their racially discriminatory effect, and in some cases, intentionally discriminatory purposes. More recently, DOJ joined forces with the Pence / Kobach Commission's efforts to suppress the vote, first by sending a letter to 44 states instructing them of their duty to purge voter rolls and demanding they provide information about voter purging requirements within 30 days,⁹ and then by urging the Supreme Court to allow States to eliminate people from voter registration rolls based merely on their failure to vote in recent elections.¹⁰

The foregoing examples illustrate the extent to which those currently leading the Department of Justice have embarked on an anti-civil rights crusade. Against this backdrop, and in light of the moral crisis facing this country in the wake of Charlottesville and related events such as the presidential pardon of Joe Arpaio who was convicted of criminal contempt for racial profiling, we are struck by the message that is being sent by the nomination of Eric S. Dreiband. His overwhelmingly anti-civil rights record and his personal involvement in cases seeking to diminish the rights of LGBT people and other vulnerable communities strongly suggests that he will continue to promote the anti-civil rights agenda of this administration, rather than exercise the kind of strong leadership and willingness to defend civil rights that is needed from the head of the Civil Rights Division perhaps now more than ever.

Instead, Mr. Dreiband chose to represent the University of North Carolina when it was sued by civil rights groups and the U.S. Department of Justice after North Carolina passed a law (HB2) restricting transgender people's ability to access public restrooms. The nomination of an attorney who volunteered to join a litigation team seeking to frustrate the Civil Rights Division's efforts to block a North Carolina law restricting transgender people's access to public restrooms (HB2) is insulting not only to the LGBT community but to the career men and women of the Division who valiantly litigated that case for many months (until the Sessions Justice Department abandoned the litigation following a modification of the law). His nomination embodies this Justice Department's lack of commitment to defending the civil rights of LGBT people.

While our concerns about his approach to issues of direct concern to LGBT Americans are significant, they are only the tip of the iceberg when it comes to this nominee. As is manifest from his record, Mr. Dreiband has an extensive track record of working to undermine civil rights in other spheres as well. For example, he represented Abercrombie & Fitch before the Supreme Court in a case where he made the losing argument that Muslim women should have to remove their headscarf in order to comply with the store's "look" if they do not first explain to the company that the headscarf is worn as part of the Muslim religion. Fortunately, the Supreme Court rejected the position advanced by Mr. Dreiband in an 8-1 decision,¹¹ but as with his participation in the HB2 case, his involvement in the Abercrombie case casts doubt on Mr. Dreiband's capacity to lead the civil rights work of the Department of Justice.

⁸ See, e.g., *Veasey v. Abbot*, No. 2:13-cv-193 (S.D. Tex.), U.S. Mot. For Vol. Dis. Of Disc. Purp. Claim without Prej. (Feb. 27, 2017), available at https://www.brennancenter.org/sites/default/files/legal-work/2017.02.27_Motion-Dismissal.pdf.

⁹ Memorandum from the DOJ Civil Rights Division to the North Carolina State Board of Elections (June 28, 2017) available at <https://assets.documentcloud.org/documents/3881855/Correspondence-DOJ-Letter-06282017.pdf>.

¹⁰ Brief for the United States as Amici Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Institute, Et Al.*, (August 7, 2017), available at https://www.justice.gov/sites/default/files/briefs/2017/08/07/16-980_husted_v_randolph_institute_ac_merits.pdf.

¹¹ *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2031 (2015).

Moreover, Mr. Dreiband represented a group of organizations in the Supreme Court seeking religious exemptions from the contraceptive requirement in the Affordable Care Act, an exemption which, if granted, would have made it much more difficult for women to access birth control through an employer-provided health plan.¹² He advocated on behalf of Bloomberg, L.P. against 60 women who were challenging the company's pregnancy leave practices. And perhaps most revealing of his personal views, Mr. Dreiband testified as a private citizen (not on behalf of a client) before Congress against the Lilly Ledbetter Fair Pay Act, a law that helped ensure women can sue for discrimination even if the employer is able to keep the discrimination hidden.¹³ Mr. Dreiband asserted that the Ledbetter Fair Pay Act would not advance the public interest. Dreiband is non-responsive on whether he views the Ledbetter Act as advancing the public interest, and he continues to advocate for legislating equitable tolling and equitable estoppel, judicial theories that are already available and rarely successful for pay discrimination victims such as Ms. Ledbetter.

Mr. Dreiband has also spent the vast majority of his career working to defeat worker protections. Notably, Mr. Dreiband has leveraged his experience with the EEOC to testify *against* worker protections before Congress as a private citizen. For example, Mr. Dreiband testified in support of Federal legislation that would have significantly limited the EEOC's ability to initiate or intervene in litigation. The bills failed to advance, but if passed, would have placed a chilling effect on future EEOC enforcement action by requiring the agency to prove their conciliation efforts were made in "good faith." In his testimony, Mr. Dreiband noted the EEOC's findings that African Americans and Hispanics are arrested and incarcerated at rates disproportionate to their numbers, but testified in favor of legislation that would have made it more difficult for the EEOC to discourage employers from asking for criminal background information in the hiring process.¹⁴ Mr. Dreiband has repeatedly taken issue with measures such as "ban the box," which would limit the unfair use of a job applicant's criminal history in the hiring process.¹⁵ Mr. Dreiband also testified in his personal capacity against the Protecting Older Workers Against Discrimination Act, legislation that would have lowered the burden on older workers to prove age discrimination.¹⁶

At a time when the civil rights protections of vulnerable minorities are under unprecedented assault, it is not a coincidence that the budget proposed for the Justice Department would defund and deprioritize civil rights enforcement. Specifically, the proposed 2018 budget eliminates 121 positions, including 14 attorneys, and rolls back efforts to combat discrimination against LGBT people and people with

¹² *Zubik v. Burwell*, 194 L. Ed. 2d 599 (Mar. 29, 2016) (the U.S. Supreme Court did not rule on the merits).

¹³ See, Statement of Eric S. Dreiband before the United States Senate Committee on Health, Education, Labor and Pensions Committee about the Fair Pay Restoration Act (January 24, 2008), *available at* <https://www.help.senate.gov/imo/media/doc/dreiband.pdf>.

¹⁴ See Eric S. Dreiband, *Before the United States House of Representative Subcommittee on Workforce Protections of the Education and Workforce Committee Hearing on H.R. 4959, "EEOC Transparency and Accountability Act," H.R. 5422, "Litigation Oversight Act of 2014," H.R. 5423 "Certainty in Enforcement Act of 2014"* (Sept. 17, 2014), *available at* https://edworkforce.house.gov/uploadedfiles/dreiband_testimony.pdf.

¹⁵ Michael A. Carvin and Eric S. Dreiband, *The Government Check Criminal Records. Why Can't Private Employers?* Forbes Magazine, <https://www.forbes.com/sites/danielfisher/2013/06/21/the-government-checks-criminal-records-why-cant-private-employers/#329a3d996700>

¹⁶ See Eric S. Dreiband Statement before the Senate Committee on Health, Education, Labor, and Pensions on the Ensuring Fairness for Older Work Act, (May 6, 2010), *available at* <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56416/html/CHRG-111shrg56416.htm>

disabilities, and civil rights abuses by law enforcement.¹⁷ The nomination of Mr. Dreiband only further reinforces the message implicit in the 2018 budget proposal: the Civil Rights Division is no longer in the business of defending civil rights.

The Senate, however, need not roll over and let this happen. This body has an important role to play in deciding what direction the Civil Rights Division, the Department of Justice, and by extension, our country will go. Faced with the question of who will lead the Civil Rights Division, the Senate has an opportunity to send a clear message that civil rights enforcement is a key government function, and that the Department of Justice must protect and defend the rights of all citizens, not just those who command the President's attention. Mr. Dreiband, with his track record of impeding and resisting civil rights, is simply not the right man for the job.

We are also deeply concerned with Mr. Dreiband's responses to the questions for the record that were presented to him. This refusal undermines the nomination process and suggests he does not feel any obligation to respond to questions from a Congressional committee with jurisdiction and oversight responsibilities for the DOJ. Mr. Dreiband was non-responsive to critical questions and he provided zero evidence that that addressed any of the concerns listed above. Furthermore, we are deeply concerned about his response to a question regarding his representation of the University of North Carolina in the HB2 litigation. Having a nondiscrimination policy that prohibits discrimination based on gender identity means very little if you are willing to waive those protections in deference to a state law that discriminates on the basis of gender identity.

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.

Very truly yours,

Lambda Legal
Advocates for Youth
Bend the Arc Jewish Action
Bienestar Human Services
Bradbury-Sullivan LGBT Community Center
Brooklyn Community Pride Center
Canvas and Earth Studio
CenterLink: The Community of LGBT Centers
Diversity Richmond
Equality Alabama
Equality California
Equality Colorado
Equality Ohio
Equality Pennsylvania

¹⁷ See General Legal Activities, Civil Rights Division (CRT) FY 2018 Budget At A Glance, *available at* <https://www.justice.gov/jmd/page/file/968381/download>.



Equality North Carolina
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality South Dakota
Equality Utah
Fairness Campaign
Fair Wisconsin
Family Equality Council
FORGE, Inc.
GLMA: Health Professionals Advancing LGBT Equality
GLSEN
LGBT Center Orange County
LGBT Community Center of Puerto Rico
Linda F. Fazio
Los Angeles LGBT Center
Louisiana Trans Advocates
Massachusetts Transgender Political Coalition
Mazzoni Center
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition of Anti-Violence Programs
National Coalition for LGBT Health
National Council of Jewish Women
National LGBTQ Task Force Action Fund
National Women's Law Center
One Colorado
Open Arms Rape Crisis Center and LGBT+ Services
Out Boulder County
OutFront Minnesota
Outline
OutReach LGBT Community Center
OutServe-SLDN
People For the American Way
Pride at Work
Prism Youth Initiative
Resource Center (Dallas, TX)
Rockland County Pride Center
Secular Coalition for America
Sexuality Information and Education Council of the United States
Solano Pride Center
The Gay and Lesbian Community Center of Southern Nevada
The LOFT LGBT Community Services Center
The Trevor Project
Transgender Law Center
Triangle Community Center



URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health
Witness to Mass Incarceration

cc: United States Senate Judiciary Committee Members