

January 10, 2018

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: LGBT Groups Oppose Confirmation of Howard Nielson

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 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 Howard Nielson to the U.S. District Court for Utah. There are over 70,000 LGBT people who live in the state of Utah.¹ Salt Lake City has the seventh highest percentage of adult LGBT people in the country—even larger than New York City.² It is critical that members of this vulnerable minority, like everyone else, have access to equal justice under the law when they enter the courtroom. Unfortunately, Mr. Nielson’s long record of working to undermine protections for LGBT people, and his highly offensive attacks on the integrity of a gay federal judge, demonstrate that he will not be able to impartially administer equal justice.

Like nearly one-third of the judicial nominees that have been put forward by this administration, Mr. Nielson has a long history of working to strip LGBT people of their legal protections.³ Mr. Nielson represented the proponents of Proposition 8, a ballot measure passed in California in 2008 that denied same-sex couples the freedom to marry.⁴ Almost a year after a district court struck down the

¹ *Quick Facts About Utah*, MOVEMENT ADVANCEMENT PROJECT, available at http://www.lgbtmap.org/equality_maps/profile_state/UT.

² Frank Newport and Gary J. Gates, GALLUP NEWS (2015), available at <http://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx>.

³ See Lambda Legal Analysis, *Nearly One-Third of Trump’s Judicial Nominees Have Anti-LGBT Records* (Dec. 20, 2017), available at https://www.lambdalegal.org/news/dc_20171220_nearly-one-third-of-judicial-noms.

⁴ Proposition 8 limited the validity of marriages in California to only between a man and a woman. It was approved Nov. 4, 2008, eff. Nov. 5, 2008 and codified in Cal. Const. art. I, § 7.5.

discriminatory ban, Mr. Nielson filed a motion asking to vacate the ruling.^{5,6} The motion⁷ argued that the judgment should be vacated because the presiding judge, Judge Vaughn Walker—a Reagan appointee who was randomly assigned the case—did not reveal that he was in a long-term same-sex relationship, and that because he was in such a relationship, he must have an interest (namely, an intention to marry) that could be substantially affected by the outcome of the proceeding.⁸ The motion insultingly asserted that the public could not be confident that Judge Walker did not have a direct personal interest in the outcome unless he “unequivocally disavowed any interest in marrying his partner.”⁹ In referring to the procedural and substantive rulings issued by Judge Walker in the case, the motion makes the highly offensive assertion that “the unprecedented, irregular, and/or peremptory nature of these rulings is difficult – very difficult – to take as the product of an objective, impartial mind.”¹⁰

Just as President Trump’s attack on the integrity of courts have shocked the nation, Mr. Nielson’s suggestion that Judge Vaughn Walker’s same-sex relationship is evidence of bias is as degrading to the judiciary as it is to LGBT people. Merely sharing characteristics in common with members who will be affected by a ruling is not a basis for disqualification. Similar arguments challenging the impartiality of women to decide cases involving gender or African-American judges to decide civil rights cases had been discredited long before Mr. Nielson put forth his insulting argument.¹¹ Mr. Nielson’s attempt to distinguish Judge Walker’s sexual orientation from his same-sex relationship was equally misguided. As then California Attorney General Kamala Harris pointed out in her opposition to the motion, “this distinction is without a difference and courts have seen such requests for what they are: thinly veiled attempts to disqualify judges” based on personal characteristics.¹² As Ms. Harris’ brief stresses, every single one of the attempts to disqualify judges on the basis of their race, gender, or religious affiliation has been rejected by other courts.¹³ Furthermore, the Supreme Court has refused to distinguish between status and conduct in sexual orientation.¹⁴ Lastly, there was zero evidence to sustain such an untenable accusation of bias. As the court rightly recognized, disqualifying Judge

⁵ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), and *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

⁶ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), and *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); Motion to Vacate (Apr. 25, 2011), 2011 WL 1544807 (N.D.Cal.).

⁷ Nielson’s motion further argued that Walker, “had a duty to disclose not only the facts concerning his relationship, but also his marriage intentions.” The motion arbitrarily elevates the standard for the duty of LGBT individuals to recuse to a higher level than that required of heterosexual judges, who are not required to list intimate details of their personal lives or intentions with their significant others.

⁸ Civil L.R. 3-3(a); General Order No. 44§ D (2) (Jan. 4, 2010).

⁹ *Supra* note 6.

¹⁰ *Id.*

¹¹ *See, Blank v. Cromwell*, 418 F.Supp. 1 (1975) (request that judge Constance Baker Motley—an African-American woman—recuse herself from hearing a case brought by women lawyers at the firm); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, et al*, 388 F.Supp. 155 (1974) (challenge to the impartiality of federal district judge A. Leon Higginbotham—an African-American man—regarding claims of African-American union members who charged that a local contractors’ union discriminated against them).

¹² *Perry v. Schwarzenegger*, State Defendants’ Opposition to Motion to Vacate Judgment (June 13, 2011), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/05/Prop.-8-state-respmse-re-vacate-5-12-11.pdf>.

¹³ *Id.*

¹⁴ *See Christian Legal Soc’y v. Martinez*, 130 S. Ct 2971, 2990 (2010).

Walker would have resulted in an unreasonable disqualification standard based on assumptions about the future and elusive desires of judges on a wide range of issues and would place an enormous burden on minority judges that would “infer subjective future intent on the basis of a judge’s membership in a particular class.”¹⁵

Mr. Nielson’s attacks on the integrity of Judge Walker must also be viewed in the larger context of the arguments that he advanced during the Proposition 8 litigation. Mr. Nielson did not stop with aiming to discredit Judge Walker; he sought to cast doubt on the concept of sexual orientation itself. Despite the scientific consensus that sexual orientation is immutable,¹⁶ Mr. Nielson went to extraordinary lengths to sidestep that consensus during the Proposition 8 litigation, including by repeatedly suggesting that there is no clear definition of “sexual orientation.”¹⁷ During cross-examination, Mr. Nielson maintained that there is no way to distinguish being lesbian, gay, or bisexual from being “confused or maladjusted.”¹⁸ In seeking to undercut the fact that gay, lesbian and bisexual individuals make up a discrete group, Mr. Nielson erases the fact that sexual orientation is a fundamental and indistinguishable part of who they are. In addition, despite the prevalence of recent studies showing that LGBT people experience poor health care outcomes as a result of discrimination,¹⁹ Mr. Nielsen sought to discredit such research by citing outdated studies purporting to show that gay, lesbian and bisexual people do not experience minority stress.²⁰

Following the Proposition 8 litigation, Mr. Nielson channeled his antipathy towards LGBT people into authoring an amicus brief opposing marriage equality in *Obergefell v. Hodges*. The brief argued that gays and lesbians should be prohibited from marrying because limiting “valid” marriages to heterosexual couples increases the likelihood that children will be born in enduring family units by “both the mothers and the fathers who brought them into the world.”²¹ This specious argument, in addition to being irrational and offensive, flies in the face of social science studies showing that children raised by same-sex parents are emotionally, socially, and educationally equivalent to their peers.²² The brief, however, demonstrates Mr. Nielson’s view of same-sex families as constituting family units that are inferior to heterosexual families.

¹⁵ *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1127 (N.D. Cal. 2011), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 570 U.S. 693, 133 S. Ct. 2652 (2013).

¹⁶ See *Baskin v. Bogan*, 766 F.3d 648, 657-58 (7th Cir. 2014) (summarizing scientific studies on homosexuality).

¹⁷ Cross-Examination by Mr. Nielson of Dr. Gregory M. Herek (Jan. 22 2010) (2059-2303), *available at* <http://afer.org/wp-content/uploads/2010/01/Perry-Vol-9-1-22-10.pdf>.

¹⁸ *Id.*

¹⁹ Ilian H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Population: Conceptual Issues and Research Evidence*, PSYCHOLOGICAL BULLETIN (2003) 12(5), 674-697.

²⁰ Cross-Examination by Mr. Nielson of Dr. Ilan Meyer (Jan. 14, 2010) (890-908), *available at* <http://afer.org/wp-content/uploads/2010/01/Perry-Vol-4-1-14-10.pdf>.

²¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Brief of Amici Curiae Scholars of History and Related Disciplines in Support of Respondents, *available at* https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Scholars_of_History_and_Related_Disciplines.pdf.

²² See *Children raised by Same-Sex Parents do as well as their Peers*, THE GUARDIAN (Oct.23 2017), *available at* <https://www.theguardian.com/australia-news/2017/oct/23/children-raised-by-same-sex-parents-do-as-well-as-their-peers-study-shows>.

While Mr. Nielson has a duty as counsel to provide zealous advocacy, his reliance on specious and insulting arguments targeting LGBT people deserve and demand scrutiny. If such impugning tactics were applied to other protected characteristics such as gender, race or religion, Mr. Nielson's ability to administer impartial justice would be seriously questioned, and his record should not be given less scrutiny because such scorched-earth tactics have targeted the LGBT community with particular fervor.

In addition to the issues that we have highlighted above, we share the concerns raised by others about Mr. Nielson's approach to civil rights generally. For example, as Counselor to the U.S. Attorney General, he was one of the attorneys identified in a 2008 report from the Department of Justice Inspector General as having corrupted the hiring process for Honors Program attorneys by applying a political litmus test to screen out candidates with Democratic and progressive affiliations that were apparent on their applications.²³ His failure to adhere to some of the most basic civil service protections also casts doubt on his suitability for a lifetime appointment to the federal bench, where he would be expected to administer impartial justice without favor for those who share his political views. From these and other aspects of his record, it appears that Mr. Nielson's prejudice is not reserved for LGBT people. His record demonstrates that his appointment to the federal bench stands to cause serious harm to the LGBT community, as well as other communities who rely on the federal judiciary. 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.

Very truly yours,

Lambda Legal
American Atheists
CenterLink: The Community of LGBT Centers
Equality California
FORGE, Inc.
Family Equality Council
National Center for Lesbian Rights
National Center for Transgender Equality
National Equality Action Team (NEAT)
National LGBT Bar Association
National LGBTQ Task Force Action Fund
Outserve-SLDN
People For the American Way
Pride at Work
Transgender Law Center

²³ Hearing before the Committee on the Judiciary United States Senate, Inspector General, Glenn A. Fine (July 30, 2008), available at <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg44237/html/CHRG-110shrg44237.htm>.



Whitman-Walker Health

cc: United States Senate Judiciary Committee Members