

June 28, 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 David Porter

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 27 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 David Porter to the U.S. Court of Appeals for the Third Circuit. Mr. Porter's record leaves us with grave doubt that he is capable of administering fair and impartial justice towards LGBT people and other marginalized communities.

Mr. Porter's history of advocacy, and his testimony before the Senate Judiciary Committee, raise serious doubts about his willingness to faithfully apply law with which he may not agree. During his representation of Penn State University in a discrimination case brought by a lesbian basketball player who claimed that the school coach had a de facto "no lesbians" policy, Mr. Porter accused the plaintiff of initiating the litigation to "create new social policy" in order to "elevate perceived sexual orientation to a fundamental substantive due process right and/or add it to the limited ranks of suspect classes that receive heightened protection under the Equal Protection Clause."¹ When asked about this brief by Senator Klobuchar during his Senate Judiciary Committee testimony, and whether he would be able to apply the law establishing heightened protection for sexual orientation, Mr. Porter responded by stating that he would have no problem doing that *if* the courts come down that way or if Congress determines to expand protected classes.² Mr. Porter's answer, however, fails to take into account the fact that the Supreme Court, on no less than four occasions, has applied a more searching form of scrutiny than "traditional rational basis" to government action discriminating on the basis of sexual orientation. Mr.

¹ Brief in Support of Defendant Maureen T. Portland's Motion to Dismiss, *Harris v. Maureen T. Portland*, No. 1:05-CV-02648 (Feb. 9, 2006).

² Senate Judiciary Hearing (June 6, 2018), David Porter (58:26-59:12), available at <https://www.judiciary.senate.gov/meetings/06/06/2018/nominations>.

Porter's reference to the need for Congressional action raises serious concern about his willingness to faithfully apply precedent with which he may disagree.³

Mr. Porter and his supporters will surely try to deflect any criticism relating to his prior advocacy by insisting that he was simply representing his client and that the values of the client should not be attributed to Mr. Porter as an attorney. It should be noted, however, that in previous years, now-Senate Judiciary Committee Chairman Grassley repeatedly withheld his support from nominees due to his belief that a nominee's prior advocacy is indeed relevant when considering the nominee's qualifications and fitness for a lifetime appointment to the federal bench.⁴ And Chairman Grassley is not alone in this regard. In fact, just over a month ago, Senator Cruz voted against a nominee because the senator felt the nominee was an "aggressive advocate" on issues such as marriage equality and the Second Amendment in his role as Attorney General for the State of Hawaii.⁵ It cannot be the case that aggressive "liberal" advocacy is disqualifying but aggressive conservative advocacy is irrelevant when assessing a nominee's suitability for the federal bench. If prior advocacy offered a view into the qualifications of candidates when a candidate of one political party was nominating them, then this aspect of the candidates record should be equally subject to scrutiny now.

In Mr. Porter's case, there are other aspects of his record that suggest that the values and philosophy that he would bring to the bench are inconsistent with the administration of fair and impartial justice for LGBT people. Mr. Porter is a trustee of Grove City College, a private religious college that was recently named the least LGBT-friendly college in the country.⁶ Notably Grove City College does not allow its students to accept federal financial aid in order to avoid complying with Title IX,⁷ a federal law critical to ensuring that LGBT students have access to an education free from discrimination and harassment. Mr. Porter is also a contributor to the Center for Vision & Values ("Center"), a think tank at Grove City College that has vigorously advocated against LGBT protections. The extreme anti-LGBT positions advanced by the Center include support for conversion therapy,⁸ which has been denounced by the American Medical Association as harmful and unethical;⁹ arguments denigrating those in same-

³ See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴ For example, Chairman Grassley opposed the nomination of Caitlin Halligan to the D.C. Circuit because, as Solicitor General of New York, "no one forced Ms. Halligan to approve and sign a brief" that made a novel legal theory *on behalf of her client*.⁴ Chairman Grassley also dismissed those who argued that the work of Edward Chen at the ACLU should not be considered by asserting that "it is hard to imagine why Judge Chen would devote so much of his professional career to the ACLU causes, if he did not believe in them deeply."⁴ The judicial nomination of William J. Martinez met similar opposition by then-Senator Sessions who accused Martinez of having "ACLU DNA."

⁵ Senate Judiciary Committee Executive Meeting (May 10, 2018) (49:40-51:14), available at <https://www.judiciary.senate.gov/meetings/05/10/2018/executive-business-meeting>.

⁶ *Top 20 most & least LGBT-friendly colleges and universities in the U.S., 2015*, CEO WORLD (Aug. 11, 2015), available at <http://ceoworld.biz/2015/08/11/top-20-most-least-lgbt-friendly-colleges-and-universities-in-the-u-s-2015/>.

⁷ *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, THE ATLANTIC (July 7, 2016), available at <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/>.

⁸ See Warren Throckmorton, *New Book Details Benefits and Limits of Gay Change*, THE CENTER FOR VISION & VALUES (Sept. 20, 2007), available at <http://www.visionandvalues.org/2007/09/new-book-details-benefits-and-limits-of-gay-change/>

⁹ American Medical Association, H-160.991 Health Care Needs of Lesbian, Gay, Bisexual and Transgender Populations, (reaffirmed 2017), available at <https://policysearch.ama->

sex relationships and trivializing the struggle for marriage equality;¹⁰ and repeated assaults on the dignity of transgender people.¹¹ Mr. Porter's affiliation with an institution driven by such deep anti-LGBT animus should leave any reasonable person with serious doubt about his ability to fairly adjudicate issues affecting the rights of the LGBT community. Furthermore, Mr. Porter has expended significant personal effort supporting organizations and individuals who promote discrimination against LGBT people. Chief among them is former Senator Rick Santorum, who was once named as the most anti-LGBT politician in the United States.¹² In praising Mr. Santorum's 2005 book, *It Takes a Family*, Mr. Porter clearly wished to align himself with the extreme views set forth in that text, which included criticizing marriage equality, disparaging same-sex couples and their families¹³, and blaming "the influence of radical feminism" for women finding it "more socially affirming to work outside the home than to give up their careers to take care of their children."¹⁴ Mr. Porter's endorsement of Mr. Santorum's controversial book only further reinforces our concern about his ability to treat LGBT people with equality and dignity, and to fairly apply the law should LGBT people or issues come before him as a judge.

Due to these concerns and others, Senator Casey announced his opposition to Mr. Porter and has refused to return his blue slip, a decision that would have been honored in the past. And yet, Chairman Grassley has once more chosen to ignore a home state senator's refusal to return a "blue slip" in order to advance a highly controversial extremist nominee to the Court of Appeals. Notwithstanding Chairman Grassley's past dedication to and defense of the blue slip tradition (when his party was in the minority),¹⁵ Mr. Porter's nomination marks the fourth time in just over a year in which Chairman Grassley has chosen to ignore the input of a home state senator for a circuit court judicial nomination.¹⁶ In fact, as recently as 2016, Chairman Grassley respected Senator Toomey's refusal to return a blue slip for nominee Rebecca Haywood, leaving the opening for Mr. Porter's nomination.

assn.org/policyfinder/detail/Health%20Care%20Needs%20of%20Lesbian%2C%20Gay%2C%20Bisexual%20and%20Transgender%20Populations%20H-160.991?uri=%2FAMADoc%2FHOD.xml-0-805.xml.

¹⁰ T. David Gordon *Gay marriage, bigotry and the public interest*, THE CENTER FOR VISION & VALUES (Aug. 7, 2013), available at <http://www.visionandvalues.org/2013/08/gay-marriage-bigotry-and-the-public-interest/>

¹¹ *Which Bathroom Did Klinger Use?* The Center for Vision & Values, (May 19, 2016), available at

<http://www.visionandvalues.org/2016/05/which-bathroom-did-klinger-use/>; Paul G. Kengor, *Neil Gorsuch on Life, Liberty, and the Natural Law*, THE CENTER FOR VISION & VALUES (Mar. 24, 2017), available at

<http://www.visionandvalues.org/2017/03/neil-gorsuch-on-life-liberty-and-the-natural-law/>; Paul G. Kengor, *Neil Gorsuch on Life, Liberty, and the Natural Law*, THE CENTER FOR VISION & VALUES (Mar. 24, 2017), available at

<http://www.visionandvalues.org/2017/03/neil-gorsuch-on-life-liberty-and-the-natural-law/>.

¹² *The Most Anti-Gay US Politicians*, RANKER, available at <https://www.ranker.com/list/the-most-anti-gay-us-politicians/ballerina-tatyana>.

¹³ Mr. Santorum once suggested that an imprisoned father was preferable to a same-sex parent. See Michael A Memoli and Mark Z. Barabak, *Santorum Dwells on Gay Marriage*, LOS ANGELES TIMES, available at <http://articles.latimes.com/2012/jan/07/nation/la-na-campaign-20120107>.

¹⁴ RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* (2005).

¹⁵ Sen. Chuck Grassley, *Working to Secure Iowa's Judicial Legacy* (Apr. 14, 2015) DES MOINES REGISTER, available at <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.

¹⁶ Chairman Grassley has now held hearings for nominees without support from both home state senators for David Stras, Michael Brennan, Ryan Bounds and David Porter.

Chairman Grassley and others have tried to justify their abandonment of longstanding Senate traditions – traditions that were designed to promote consensus and temper extremism in judicial nominees – by suggesting that this is simply the “nuclear fallout” of ending the 60-vote filibuster. His attempt to paint a picture that is wholly untethered to the facts should perhaps come as no surprise, as he is simply following the example set by the White House. But the American people are entitled to expect better from the Senate, and from its leadership. More importantly, the removal of these norms and safeguards renders the Senate nothing more than a rubber stamp for the executive branch, whose actions become more dangerous to constitutional norms and core American values by the minute. Instead, in service of raw partisan and political interests, the Senate continues to abdicate its duty to serve as an independent check when it comes to the integrity of our federal judiciary and, by extension, the health of our democracy.

For all of the foregoing reasons, we urge you to oppose the nomination of Mr. Porter, whose record renders him unsuitable for a lifetime position to the federal bench. 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, Chief Strategy Officer and Legal Director for Lambda Legal, at smcgowan@lambdalegal.org.

Very truly yours,

Lambda Legal

Alaskans Together For Equality
American Atheists
CenterLink: The Community of LGBT Centers
Equality Alabama
Equality California
Equality Federation
Equality Florida
Equality North Carolina
Equality Pennsylvania
Equality South Dakota
Equality Texas
FORGE, Inc.
FreeState Justice
Garden State Equality
Georgia Equality
GLAAD
National Black Justice Coalition
National Council of Jewish Women
National LGBTQ Task Force Action Fund
Outserve – SLDN
The LGBT Bar Association and Foundation of Greater New York (LeGaL)



The Trevor Project
Transcend Legal
TransOhio
Whitman-Walker Health
Witness to Mass Incarceration

cc: United States Senate Judiciary Committee Members