

January 14, 2019

The Honorable Lindsey Graham
Chair
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 William Barr

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of Lambda Legal and the 32 undersigned national, state and local organizations serving the lesbian, gay, bisexual and transgender (LGBT) community and individuals living with HIV, we write to oppose the nomination of William Barr to serve as Attorney General at the U.S. Department of Justice (“Justice Department” or “DOJ”). Given the intense polarization of our national politics at present, respected and principled leadership is needed urgently to ensure public confidence in the Justice Department and to protect the civil rights of our most vulnerable populations. However, as discussed below, Mr. Barr instead has an established track record of impeding and resisting civil rights. This is a counterproductive selection for this office at this time.

Before discussing Mr. Barr’s record, it is important to consider the backdrop of his nomination. The Department of Justice has worked relentlessly over the past two years to roll back LGBT and HIV nondiscrimination protections—in the courts and through agency action. While the entire list of the attacks is too lengthy to itemize in this letter, a few notable examples are listed below.

Nondiscrimination Protections:

- One of the first moves directed by former Attorney General Jeff Sessions was for DOJ, along with the Department of Education, to rescind guidance to school officials about their obligations to transgender and gender non-conforming students under Title IX.¹
- DOJ withdrew its defense of the nondiscrimination regulations implementing the Affordable Care Act (ACA) that prohibited discrimination in health care against transgender patients.²

¹ U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office of Civil Rights “Dear Colleague Letter” (Feb. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

² *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).

- DOJ later abdicated its responsibility to defend a challenge to constitutionality of the ACA's individual mandate, resulting in a ruling striking down the entire statute, including protections for those with preexisting conditions like HIV.³
- At Sessions' direction, DOJ has reversed its position that Title VII's protections against sex discrimination prohibit discrimination against individuals who are transgender,⁴ and has urged federal courts to adopt an interpretation of Title VII that would deny protection to LGBT workers.⁵

Weaponizing Religious Liberty

- The First Amendment should shield every person's religious freedom. Unfortunately, the Department of Justice under Attorney General Sessions has used religious liberty as a sword rather than as a shield. Attorney General Sessions created a task force to implement the religious liberty guidance he issued last year.⁶ This memo has been credited by at least one agency issuing guidance likely to adversely impact LGBT people.⁷ It also led to the creation of an entirely new office within the Department of Health and Human Services to enforce religious exemption claims.⁸
- The creation of the task force follows the Justice Department's decision to side with legal efforts to hollow out LGBT protections from nondiscrimination law in *Masterpiece Cakeshop*.⁹ The guidance and task force are clearly part of an effort to accomplish what the Department did not accomplish in the Supreme Court – to create special federal protections for religious groups that choose to discriminate against LGBT people.¹⁰

³ Office of the Attorney General letter to Speaker Ryan regarding *Texas v. United States* (June 7, 2018), available at <https://www.justice.gov/file/1069806/download>.

⁴ Office of the Attorney General Memorandum to all United States Attorneys on the Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), available at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵ *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>. [Add cite to DOJ brief in Harris Funeral Homes where they disavow EEOC's T7 position]

⁶ Attorney General Sessions Delivers Remarks at the Department of Justice Religious Liberty Summit (July 30, 2018), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit>

⁷ U.S. Department of Labor Office of Federal Contract Compliance Programs Directive 2018-03 (Aug. 10, 2018), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

⁸ U.S. Health & Human Services, *HHS Announces New Conscience and Religious Freedom Division* (Jan. 18, 2018), available at <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>

⁹ Supreme Court of the United States, Oral argument transcript in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-11, (Dec. 5, 2017), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-11_f314.pdf

¹⁰ Office of the Attorney General Memorandum For All Executive Departments And Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), available at <https://www.justice.gov/opa/press-release/file/1001891/download>.

Transgender Military Ban

- The Department of Justice also continues to target LGBT people and specifically transgender people in more direct ways. In particular, the Department has gone to extraordinary lengths to defend President Trump’s blatantly discriminatory effort to ban military service by transgender people, including seeking expedited review by the Supreme Court. The Department of Justice has also continued to vigorously defend the military’s outdated and scientifically unsupported restrictions on military service for people living with HIV.¹¹

These efforts targeting LGBT people are only one component of former Attorney General Sessions’s anti-civil rights campaign, which has included voter suppression,¹² separation of refugee children from their families,¹³ and other racist, xenophobic, and misogynistic policies. As set forth below, Mr. Barr’s own statements leave little doubt that he intends to continue this pattern of assault on civil rights generally, and will continue to undermine the rights of LGBT people and people living with HIV specifically. Mr. Barr has made plain that he does not believe that LGBT civil rights protections belong on the same plane as other civil rights protections—a position that he has not changed in the thirty years since he served as Attorney General in 1991. He also has embraced stigma rather than science regarding treatment of people living with HIV. For these reasons, he is unfit for the position of Attorney General.

Mr. Barr on LGBT nondiscrimination protections

Mr. Barr has asserted that LGBT people are not worthy of being treated as equal to others. While serving as Attorney General in the early 1990s, Mr. Barr gave a speech warning against laws that “put on the equal plane, conduct that was previously considered immoral.”¹⁴ Mr. Barr then criticized a nondiscrimination statute in the District of Columbia that required Georgetown University to treat an LGBT student group (whom Barr described as “homosexual activist[s]”) as it did other student groups, arguing that, “this kind of law dissolve[s] any kind of moral consensus in society.”¹⁵ Mr. Barr also expressed his disapproval of laws that prohibit landlords from discriminating against unmarried couples—with obvious legal implications for same-sex couples at the time.¹⁶

¹¹ See, Brief Defendants’ Reply Memorandum of Law in Support of Motion to Dismiss, *Harrison v. Mattis*, No. 1:18-CV-00641-LMB-IDD (Sept. 7, 2018), available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/harrison_va_20180907_reply-memo-of-law-in-support-of-motion-to-dismiss.pdf.

¹² Brief for the United States as Amicus Curiae Supporting Petition, *Husted v. A. Philip Randolph Institute*, No. 16-980 (Aug. 7, 2017), available at https://www.justice.gov/sites/default/files/briefs/2017/08/07/16-980_husted_v_randolph_institute_ac_merits.pdf.

¹³ See Aric Jenkins, *Jeff Sessions: Parents and Children Illegally Crossing the Border will be Separated* (May 7, 2018), available at <http://time.com/5268572/jeff-sessions-illegal-border-separated/>.

¹⁴ William Barr Senate Questionnaire Attachment 12(d), p.434, *Catholic League for Religious and Civil Right Dinner* (Oct. 6, 1992), available at [https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20Attachment%2012\(d\).pdf](https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20Attachment%2012(d).pdf). Mr. Barr was sufficiently committed to publicizing his views that he turned this speech into a law review article. See, William P. Barr, *Legal Issues in A New Political Order*, 36 Cath. Law. 1 (1995).

¹⁵ See William P. Barr, *Legal Issues in A New Political Order*, 36 Cath. Law. 1 (1995) (discussing *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. Cir. 1987)).

¹⁶ In the same law review article, Mr. Barr used as another example laws proposed to treat a cohabitating couple exactly as one would treat a married couple, stating, “[T]his kind of law declares, in effect that people, either individually or collectively, may not make moral distinctions or say that certain conduct is good but another bad (discussing *Attorney General v. Desilets*, 636 N.E.2d (Mass. 1994); *Foreman v. Anchorage Equal Rights Comm’n*, 779 P.2d 1199 (Alaska 1989)).

Contrary to Mr. Barr’s characterization, nondiscrimination laws are an important tool for ensuring that all people – including LGBT people – are treated equally under the law. Mr. Barr views such laws as aimed at interfering with an individual’s moral beliefs, the D.C. Court of Appeals correctly explained that such laws “[do] not seek to compel uniformity in philosophical attitudes by force of law,” but rather only “require equal treatment.”¹⁷ In the same article, Mr. Barr bemoaned that the “homosexual movement” is treated with “such solicitude”¹⁸ despite being a small population, and warned that laws prohibiting discrimination based on sexual orientation would lead to attempts to override matters of conscience.¹⁹ These public statements were more than the expressions of a public figure’s personal religious beliefs. Mr. Barr issued these statements while serving as the chief law enforcement officer of the United States. And he repeatedly urged State action to enforce those beliefs.²⁰

Mr. Barr also has made it clear that he supports limiting fundamental liberty rights guaranteed by the Constitution. During his 1991 Senate Judiciary Committee hearing, Mr. Barr frankly asserted that the constitutional right to privacy does not extend to abortion.²¹ This refusal to respect as settled law the right to make personal medical decisions regarding abortion should be disqualifying in its own right. We note that Mr. Barr’s views, if extended to other fundamental personal freedoms, would result in dramatic limitations on individual liberty, including the right of LGBT people to enter into consensual adult intimate relationships, to marry, and to raise children.

Mr. Barr’s approach to LGBT nondiscrimination protections in 2018

Some might argue that Mr. Barr’s personal statements regarding LGBT people should be discounted or even excused because they were a product of a different era, but Mr. Barr’s views concerning the legal equality of LGBT people seemingly have not changed. In an op-ed published just four weeks ago, Mr. Barr praised former Attorney General Jeff Sessions for his move to withdraw “...policies that expanded statutory protections based on gender identity that Congress had not provided in law.”²² This unprincipled conclusion ignores the overwhelming trend of circuit and district court authority holding (on various grounds) that discrimination based on sexual orientation or gender identity is discrimination based on sex.²³ In the same opinion piece, he praised DOJ’s participation in cases seeking to create a

¹⁷ *Gay Rights Coal. Of Georgetown Univ. Law Ctr.*, 536 A.2d 1, 5 (D.C. 1987)

¹⁸ William P. Barr, *Legal Issues in A New Political Order*, 36 Cath. Law. 1 (1995).

¹⁹ *Id.* at 10.

²⁰ *E.g.*, William Barr, *Legal Issues in a New Political Order* (“...we have to act collectively to deal with manifestations of these social problems.”); William P. Barr, Attorney General of the United States, Remarks at the Catholic League for Religious and Civil Rights Dinner, Park Hyatt Hotel, Washington, D.C., (Oct. 6, 1992) (“Society does this [‘set and communicate moral standards’]...through its formal laws—the application of natural law to the circumstances of the day.”).

²¹ Ronald J. Ostrow, *Barr Opposed to Roe vs. Wade Decision: Justice Dept.: The Attorney General-designate tells Senate panel right to privacy does not extend to obtaining an abortion* LOS ANGELES TIMES (Nov. 14, 1991), available at http://articles.latimes.com/1991-11-14/news/mn-1917_1_wade-decision.

²² William P. Barr, Edwin Meese III and Michael B. Mukasey, *We are former attorneys general. We salute Jeff Sessions*, WASHINGTON POST (Nov. 7, 2018), available at https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html?noredirect=on&utm_term=.7fe9f643950b.

²³ *See*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express*, 855 F.3d 76 (Apr. 18, 2017); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017); *Dodds v. U.S. Dept. of Education*, 945 F.3d 217 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*,

legal right of business owners to have a religious license to discriminate against LGBT people. It is clear that Mr. Barr's ongoing animus toward LGBT people makes him unfit to serve as the country's top lawyer, charged to ensure that all Americans can receive equal justice under law.

Mr. Barr's response to the HIV Epidemic

Mr. Barr's response to the HIV crisis during his tenure as Attorney General in the 1990s should also cause grave concern about his ability to serve in this position of public trust. The role of Attorney General requires not only deep respect for the rule of law, but also a willingness to make decisions based on facts rather than convenient fictions. By contrast, Mr. Barr's response to the HIV crisis while serving as President George H.W. Bush's Attorney General reveals his willingness to ignore science and medicine in order to advance his moralistic and punitive view of the justice system, as well as his penchant for using federal policy to promote hostility and punishment targeting disfavored groups rather than to advance health and equity.

For example, Mr. Barr played a key role in thwarting a push to remove HIV from the list of communicable diseases prohibiting the travel or immigration to the United States of people living with HIV. In 1991, the U.S. Department of Health and Human Services ("HHS") proposed to remove HIV/AIDS from the list of communicable diseases posing public health risks that warranted exclusion of immigrants from the United States.²⁴ The rule clarified that HIV+ immigrants do not pose a significant risk to public health because HIV is not transmitted through casual contact, and that the risk of transmission in contexts in which an actual risk exists is not contingent upon the nationality of the person living with HIV.

Mr. Barr proudly led efforts within the Bush Administration to oppose this proposed rule change.²⁵ In an interview years later, Mr. Barr boasted about the fact he felt entitled to disregard the medical determination made by then-HHS Secretary Dr. Sullivan because, as the "top lawyer in the administration," he had the power to declare the rule illegal.²⁶ Beyond his assertion of raw power, Mr. Barr also attempted to justify his disregard for Dr. Sullivan's medical opinion by arguing it was completely impractical for an immigration examiner to make a sophisticated analysis of an immigrant's infection and health insurance coverage to determine whether that person might become a public charge

378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

²⁴ Medical Examinations of Aliens, Federal Register 56 FR 2486 (p. 68) (Jan. 23, 1991) available at <https://cdn.loc.gov/service/ll/fedreg/fr056/fr056015/fr056015.pdf> (concluding that after a "careful consideration of epidemiological principles and current medical knowledge leads us to believe that allowing HIV-infected aliens into this country will not impose a significant additional risk of HIV infection to the US population.").

²⁵ Robert Pear, *Health Dept. Loses in AIDS Rule Dispute*, New York Times (May 28, 1991), available at <https://www.nytimes.com/1991/05/28/us/health-dept-loses-in-aids-rule-dispute.html>.

²⁶ Presidential Oral Histories, William P. Barr Oral History Transcript, (Apr. 5, 2001), UVA Miller Center Interview <https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history-assistant-attorney-general> ("... I'm not only in charge of immigration, but I'm a lawyer for the administration, and I have problems with this. How can you possibly say that HIV is not a disease of public health significance?" "Well, blah, blah, blah. He's the top doctor, he's the doctor of the administration, and this is his position, and that's it." "So I said, 'Okay, well I'm the top lawyer in the administration, and that's it that rule is illegal, so I'm not clearing it.'").

in five or 10 years.²⁷ But questions of public health risk and of health insurance coverage are two unrelated issues. And as to both, Mr. Barr was choosing to dismiss the studied conclusions of experts and to substitute his own biased opinions to justify a blanket travel and immigration ban against people living with HIV. It is clear is that Mr. Barr saw himself as free to use any conceivable argument, no matter how off point or uninformed, to prevent the proposed rule lifting the ban from moving forward.

Mr. Barr also defended the indefinite detention of a group of HIV+ Haitian refugees who were placed in severely squalid conditions in what one federal court called an “HIV prison camp” at Guantanamo Bay.²⁸ The detainees were forced to sleep on cots and had to tie garbage bags around the sides of their tents in order to keep out the rain and were surrounded by razor wire. They were unable to move freely, were frequently subjected to punishment, and did not have access to adequate medical care.²⁹ One INS agent reportedly shrugged off the detainees’ need for medical care by telling media, “they’re going to die anyway, aren’t they?”³⁰ Rather than allowing the group to properly immigrate to the U.S. as asylees, Mr. Barr callously recommended instead that they be returned to Haiti—even though they had already legally demonstrated credible fear of the consequences should they return.³¹

Equally troubling are Mr. Barr’s personal statements in response to the epidemic. Rather than being guided by science and medicine, Mr. Barr vilified efforts to prevent the epidemic by distributing condoms, and instead touted policies focused on “sexual responsibility.”³² Mr. Barr urged that there be a cost to “misconduct” in order to stop the perpetuation of the disease.³³ Mr. Barr did not explicitly set forth the ways in which he believed the government could raise the “cost” of what he viewed as misconduct, but the attitude is both profoundly misguided and chilling.

* * *

Thirty years have passed since Mr. Barr last served as Attorney General, and there is nothing in his record to indicate that any of the views that he has expressed regarding LGBT people or people living

²⁷ Robert Pear, *Health Dept. Loses in AIDS Rule Dispute*, New York Times (May 28, 1991), available at <https://www.nytimes.com/1991/05/28/us/health-dept-loses-in-aids-rule-dispute.html>.

²⁸ *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1037 (E.D.N.Y. 1993).

²⁹ *Id.*

³⁰ *Id.* at 1038 (INS Special assistant Duane “Duke” Austin reportedly shrugged off the failure to provide adequate medical care by telling the media that “they’re going to die anyway, aren’t they?”).

³¹ Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 187 Harv. Human Rights Jour. 11, 218 (1998), available at <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Ratner%20How%20we%20Closed%20Guantano%20camp.pdf>; (“A high-level attorney in the Bush administration told us that Attorney General Barr believed that everyone who was HIV-positive should be returned to Haiti.”)

³² William P. Barr Senate Judiciary Questionnaire Attachment 12(d): *Remarks of William P. Barr, Attorney General of the United States to the Knights of Columbus*, New York, New York, p. 677 (Aug. 5, 1992) (“The state is called upon to remove the inconvenience and costs of misconduct. So the reaction to HIV and illegitimacy is not sexual responsibility but handing out condoms”), available at [https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20Attachment%2012\(d\).pdf](https://www.judiciary.senate.gov/imo/media/doc/William%20Barr%20Senate%20Questionnaire%20Attachment%2012(d).pdf).

³³ William P. Barr Senate Judiciary Questionnaire Attachment 12(d): *Remarks of William P. Barr, Attorney General of the United States to the Knights of Columbus*, p. 677 (Aug. 5, 1992) (“While we think we are resolving problems we are actually subsidizing them. And by lowering the cost of misconduct, the government perpetuates it.”)

with HIV have changed. As a result, it is only reasonable to conclude that Mr. Barr still believes he has an obligation to “take the battlefield and enter the struggle” to protect his moral worldview.³⁴ And this world view is one that will have devastating consequences not only for LGBT people and everyone living with HIV, but for many other communities who rely on the Department of Justice to defend civil rights and the rule of law.

At this precarious moment in our nation’s history, the Senate must take seriously its obligation to ensure that those nominated to lead federal agencies are worthy of the public trust that is placed in senior executive branch officials. Faced with the specific question of who will lead the Department of Justice, the Senate has an opportunity to send a clear message that our country still is a nation of laws, that civil rights enforcement is a key government function, and that the Department of Justice must pursue justice for each and every one of us. Based on his record, it is clear that Mr. Barr is simply not the right person for the job.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information. 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
AIDS United
American Atheists
Athlete Ally
Basic Rights Oregon
CenterLink: The Community of LGBT Centers
Equality California
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality Texas
EqualityMaine
FORGE, Inc.
Garden State Equality
GLMA: Health Professionals Advancing LGBTQ Equality
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Los Angeles LGBT Center
Mazzoni Center
National Council of Jewish Women
National Center for Lesbian Rights
National Center for Transgender Equality
National LGBTQ Task Force Action Fund
One Colorado

³⁴ *Supra* note 6 at 10.



OutServe-SLDN
Positive Women's Network-USA
Reframe Health and Justice
Secular Coalition for America
Sexuality Information and Education Council of the United States (SIECUS)
South Carolina Equality
The National LGBT Bar Association
The Trevor Project
Transgender Legal Defense & Education Fund
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members