Lambda Legal
making the case for equality

May 21, 2019

To the Honorable Members of the United States Senate

RE: 35 LGBT Groups Oppose Confirmation of Howard Nielson

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 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 higher 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, as well as his deeply offensive attack 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 discriminatory ban, Mr. Nielson filed a motion asking to vacate the ruling.[5,6] The motion[7] argued that the judgment should be vacated (1) because the presiding judge, Chief Judge Vaughn Walker—a George H.W. Bush appointee who was randomly assigned the case—did not reveal that he was in a long-term same-sex relationship, and that, (2) because he was in such a relationship, Chief Judge Walker necessarily had a personal interest (namely, an intention to marry) that could be substantially affected by

[1] Movement Advancement Project, *Quick Facts About Utah*, *available at* http://www.lgbtmap.org/equality_maps/profile_state/UT.

[2] Frank Newport and Gary J. Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, GALLUP NEWS (March 20, 2015), *available at* http://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx.

[3] *See* Lambda Legal, *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.

[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] Mr. Nielson's motion further argued that Chief Judge 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 lesbian, gay and bisexual judges 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.

the outcome of the proceeding.[8] The motion advanced the offensive argument that the public could not have confidence that Chief Judge Walker had rendered a fair and impartial decision unless he "unequivocally disavowed any interest in marrying his partner." [9] Moreover, in presenting these arguments, Mr. Nielson further impugned Chief Judge Walker's integrity by arguing that the "the unprecedented, irregular, and/or peremptory nature of [his] rulings is difficult – very difficult – to take as the product of an objective, impartial mind."[10]

Mr. Nielson's reliance on Judge Vaughn Walker's same-sex relationship as evidence of partiality reflects Mr. Nielson's poor judgment, at best, and strongly suggests a biased disposition that is incompatible with judicial service. His decision to advance such arguments harkens back to an ugly history of attempts to disqualify federal judges on the basis of their personal characteristics. Similar arguments challenging the impartiality African-American judges to decide civil rights cases or of women to decide cases involving gender have long been discredited.[11]

Mr. Nielson's attempt to distinguish Chief Judge Walker's sexual orientation from his same-sex relationship cannot withstand scrutiny. A rule that requires the disqualification of judges in same-sex relationships effectively amounts to the disqualification of lesbian and gay judges. As-then California Attorney General Kamala Harris pointed out in her opposition to Mr. Nielson's 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 her brief stressed, 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 against Chief Judge Walker. As the court rightly recognized, disqualifying Chief Judge 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

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

[9] *See supra* note 6.

[10] *Id.*

[11] *See Blank v. Cromwell*, 418 F.Supp. 1 (1975) (requesting 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. Sup. 155 (1974) (challenging the impartiality of 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).

judges that would "infer subjective future intent on the basis of a judge's membership in a particular class."[15]

Mr. Nielson continues to believe that his motion was proper. When questioned by Senator Klobuchar about the propriety of filing such a motion during his confirmation hearing, Mr. Nielson maintained that he felt that the motion was "in the fair bounds of advocacy."[16] Yet by placing Chief Judge Walker's sexual orientation at issue, Mr. Nielson effectively cast doubt on the impartiality of all lesbian, gay, and bisexual judges, which threatens to undermine public confidence in the judiciary and the value of diversity.

Mr. Nielson's attacks on the integrity of Chief 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 Chief Judge Walker; he sought to cast doubt on the concept of sexual orientation itself. Despite scientific consensus that sexual orientation is immutable,[17] 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.[18] During cross-examination, Mr. Nielson maintained that there is no way to distinguish being lesbian, gay, or bisexual from being "confused or maladjusted."[19] In seeking to undercut the fact that gay, lesbian and bisexual individuals make up a discrete group, Mr. Nielson erased 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,[20] 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.[21]

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

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[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] *Senate Judiciary Committee; Nominations*, 115 Cong. (2018) (Statement of Howard Nielson).

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

[18] 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.

[19] *Id.*

[20] Ilian H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Population: Conceptual Issues and Research Evidence*, 12 PSYCHOL. BULL. 674 (2003).

[21] 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.

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."[22] 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.[23]

The decision to advance such reckless arguments strongly suggests that the positions advanced in his briefs are based on views that he personally believes to be reasonable, which calls into question whether he would administer equal justice under the law to LGBT people. While Mr. Nielson has a duty as counsel to provide zealous advocacy, his reliance on specious and insulting arguments targeting LGBT people deserves and demands 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 The Leadership Conference on Civil and Human Rights and others about Mr. Nielson's approach to civil rights generally.[24] For example, as Counselor to the U.S. Attorney General, Mr. Nielson was one of the attorneys named in a 2008 Department of Justice report as having politicized the hiring process for Honors Program attorneys by applying inappropriate—and illegal political litmus tests to screen out "liberal" candidates.[25]

From these and other aspects of his record, it appears that Mr. Nielson's appointment to the federal bench would 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.

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[22] *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.

[23] *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.

[24] The Leadership Conference on Civil and Human Rights, *Oppose the Confirmation of Howard Nielson to the U.S. District Court for the District of Utah* (Jan. 9, 2018), *available at* https://civilrights.org/oppose-confirmation-howard-nielson-u-s-district-court-district-utah/.

[25] 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.

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 Sasha Buchert, Federal Judicial Nominations Lead and Senior Attorney for Lambda Legal, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal
American Atheists
CenterLink: The Community of LGBT Centers
Equality Alabama
Equality Arizona
Equality California
Equality Florida
Equality Illinois
Equality Maine
Equality North Carolina
Equality Ohio
Equality South Dakota
Equality Texas
Equality Utah
Fair Wisconsin
Family Equality Council
FORGE, Inc.
FreeState Justice
Georgia Equality
GLMA: Health Professionals Advancing LGBTQ Equality
LGBT Bar Association of New York
MassEquality
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for LGBT Health
National Equality Action Team (NEAT)
National LGBT Bar Association
National LGBTQ Task Force Action Fund
Modern Military Association of America

Silver State Equality
Southern Arizona Gender Alliance, Inc.
Transgender Law Center
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members