

September 25, 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: Lambda Legal Opposes the Confirmation of Lee Rudofsky to the Eastern District of Arkansas

Dear Chairman Graham and Ranking Member Feinstein:

Lambda Legal, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to oppose the confirmation of Lee Rudofsky to the Eastern District of Arkansas. After a comprehensive review of his record, we have concluded that Mr. Rudofsky's record leaves us with grave doubt that he is capable of administering fair and impartial justice towards LGBT people and other marginalized communities. There are over 75,000 people who identify as LGBT who live in Arkansas, a state with no state-wide or local nondiscrimination protections for LGBT people.¹ Mr. Rudofsky's long record of opposing protections for LGBT people and his politically-expedient reversal on the question marriage equality leaves us with serious doubt that he will be able to administer fair and impartial justice to LGBT litigants appearing before him. We strongly urge you to oppose his nomination.

Mr. Rudofsky repeatedly attempted to undermine protections for LGBT people as the Arkansas Solicitor General. For example, in *Pavan v. Smith*, Mr. Rudofsky successfully argued to the Arkansas Supreme Court that both parents of a child born to a same-sex married couple were not automatically entitled to appear on the child's birth certificate, notwithstanding the existence of an Arkansas statute guaranteeing that right to married different-sex couples.² The U.S. Supreme Court summarily reversed the Arkansas Supreme Court, emphasizing that its decision in *Obergefell* guaranteed same-sex couples the full "constellation of benefits linked to marriage," including specifically the presumptive right to appear on their child's birth certificate.³ Mr. Rudofsky's attempt to nullify one of the key protections of marriage

¹ http://www.lgbtmap.org/equality-maps/profile_state/AR.

² *Pavan v. Smith*, 137 S. Ct. 2075 (2017). The Arkansas statute provides that the "husband" of the woman who gave birth was automatically presumed to also be the parent of the child, regardless of biology. Ark. Code Ann. § 20-18-401(f)(1) (2014).

³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 192 L. Ed. 2d 609 (2015) at 11 ("These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; *birth and death certificates*;

extended to same-sex couples by *Obergefell* demonstrates not only disdain for the legal rights of LGBT families but also a troubling disregard for stare decisis, both of which should be viewed as disqualifying traits in any nominee for a lifetime appointment to the federal judiciary.

Mr. Rudofsky also aggressively pursued a challenge against a local ordinance that extended nondiscrimination protections to LGBT people in the city of Fayetteville, Arkansas.⁴ Mr. Rudofsky succeeded in stripping these protections from the people of Fayetteville by arguing that the ordinance violated the state's preemption law.⁵ Mr. Rudofsky also signed on to a brief arguing for the creation of a constitutional exemption from laws prohibiting discrimination against LGBT people by businesses otherwise purporting to serve the public when a proprietor asserts a religious objection to same-sex marriage.⁶ Mr. Rudofsky's extensive efforts to relegate LGBT people to second-class status under the law demonstrates his inability to serve as an impartial arbiter of justice.

Mr. Rudofsky and his supporters will surely attempt 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. Rudofsky as an attorney. However, many Senators have closely scrutinized the positions taken by judicial nominees on behalf of their clients, and argued that these positions can and should be taken into account when considering a nominee's fitness for the bench.⁷ This scrutiny of records should not apply only when the nominee has a history of progressive advocacy. When considering someone for a lifetime appointment, every aspect of their record should be closely scrutinized and, when there is doubt that they can administer fair and impartial justice, the doubt should be resolved in favor of the integrity of the courts.

Likewise, our concerns are not allayed by Mr. Rudofsky's ephemeral support for marriage equality. When questioned by Chairman Graham about the two amicus briefs that he had previously joined articulating a conservative case for marriage equality,⁸ Mr. Rudofsky renounced his involvement by

professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.” (emphasis added)

⁴ *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 28, 566 S.W.3d 105 (2019)

⁵ City of Fayetteville Ordinance 5781 (June 9, 2015), available at <https://www.fayettevilleflyer.com/wp-content/uploads/2015/06/new-civil-rights-law.pdf>; Ark. Code Ann. § 14-1-403 (2015).

⁶ Brief for the states of Texas, Arkansas, Alabama, Arizona, Idaho, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, West Virginia, and Wisconsin, the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, and Paul R. Lapage. Governor of Maine, as Amicus Curiae in Support of Petitioners at 3, *Arlene Flowers, Inc. v. State of Washington, et al.*, 138 S.Ct. 2671 (2017) (No. 17-108)

⁷ 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*.⁷ 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.”⁷ The judicial nomination of William J. Martinez met similar opposition by then-Senator Sessions who accused Martinez of having “ACLU DNA.”

⁸ See: Brief of Amici Curiae Kenneth B. Mehlman et al. supporting Respondents at 22, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (No. 12-144) (“The right to marry indisputably falls within the narrow band of specially protected liberties that this Court ensures are protected from unwarranted curtailment.”); Brief of Amici Curiae Kenneth B. Mehlman et al. supporting Petitioners at 26, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (No.14-556) (“To be sure, some Americans hold deep-seated religious objections to same-sex couples marrying. But amici do not believe that civil marriage rights can or need be withheld from same-sex couples for fear that the religious freedom of the faithful will be infringed.”)



pleading that he was not an expert in Fourteenth Amendment jurisprudence when he joined the briefs.⁹ This explanation, however implausible, should certainly cast doubt on Mr. Rudofsky's ability to serve as a careful and diligent jurist. A more likely explanation of Mr. Rudofsky's reversal is that he is either unwilling or unable to put fidelity to the law ahead of his desire to curry favor with those who might advance his personal interests or policy preferences. It is rare to see this kind of troubling display of political opportunism from a nominee during his confirmation hearing, but that does not mean that the Committee should overlook it when it happens, as it has here. For all of these reasons, we urge you to reject Mr. Rudofsky's nomination 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 Sasha Buchert, Senior Attorney, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal

⁹ Nominations Hearing, Committee on the Judiciary (July 31, 2019) (“[w]hen I joined these amicus briefs, I was not an expert in 14th Amendment jurisprudence. Since that time, I’ve become much more familiar with this area of law as Solicitor General and if I had it to do over again, as a legal matter, I would not join the legal arguments in those briefs.”) <https://www.judiciary.senate.gov/meetings/07/31/2019/nominations>