



February 6, 2018

VIA EMAIL

The Honorable Charles Grassley
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Senators Grassley and Feinstein,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for 45 years, I write to express serious concerns regarding the nomination of Howard Nielson to the United States District Court for the District of Utah.

Review of Mr. Nielson's record pertaining to women's rights, civil rights, and the rights of LGBTQ individuals raises grave concerns. In particular, his record in these areas gives reason to doubt that he would uphold core constitutional rights and protections or treat all litigants fairly if confirmed to a lifetime position on the federal bench.

Mr. Nielson is a partner at the private law firm of Cooper & Kirk, PLLC. He has defended his record, in several of the instances described below, by stating that he was representing clients, and that the litigation positions taken as part of such representation cannot be ascribed to him personally. Yet Mr. Nielson's litigation positions and legal arguments on these issues not only raise troubling substantive questions, but also show a concerning consistency making arguments hostile to women's rights and LGBTQ rights that are ultimately rejected by the U.S. Supreme Court.

Women's Health and Reproductive Rights

Mr. Nielson co-authored an amicus brief on behalf of Members of Congress to the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt* -- a case concerning a sweeping measure that imposed numerous restrictions on access to abortion, which was passed by the Texas legislature under the guise of protecting women's health.¹ Mr. Nielson's brief argued courts must give "strong deference" to state legislatures' claims when restricting abortion and gave credence to widely discredited medical views about the need for the arbitrary restrictions at issue in the case.² The U.S. Supreme Court resoundingly rejected these arguments, making clear that courts must not defer to a legislature's claims that the restriction has the purported

¹ Brief of Amici Curiae Bipartisan Group of 174 U.S. Senators and Members of the U.S. House of Representatives in Support of Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

² *Id.* at 6.

benefits but instead that there is “an independent constitutional duty to review factual findings where constitutional rights are at stake.”³ After examining the health benefits of the regulations and comparing them to the burdens imposed by the restrictions, the Court struck down the restrictions as unconstitutional.⁴

Mr. Nielson co-authored amicus briefs in both *King v. Burwell* and *Halbig v. Sebelius*—cases challenging a core provision of the Affordable Care Act (ACA) that helps low and moderate income individuals purchase health insurance.⁵ In these briefs, Mr. Nielson argued that the ACA does not allow the Internal Revenue Service (IRS) to provide tax credits to individuals who purchase coverage through a federally-facilitated health insurance Marketplaces.⁶ The U.S. Supreme Court rejected these arguments, concluding that Congress could not have intended for the IRS to only provide tax credits in some Marketplaces and not others.⁷ If the arguments Mr. Nielson made in each of these briefs had prevailed, it would have thwarted one of the main objectives of the ACA—to make health insurance more affordable and thus attainable for millions across the country—and put approximately 4.2 million women at risk of losing their health insurance.

In each of these cases Mr. Nielson made arguments hostile to women’s rights that were ultimately rejected by the Supreme Court.

LGBTQ Rights

Mr. Nielson co-authored a brief arguing that Judge Vaughn Walker should have recused himself from a case considering the constitutionality of Proposition 8, which would have amended the California constitution to bar same-sex marriage.⁸ The brief took the extraordinary view that because Judge Walker was gay and in a long-term relationship, he had a personal interest in the outcome of the litigation that brought his impartiality into question.⁹

³ Whole Woman’s Health, *supra* note 1, at 2310.

⁴ *Id.*

⁵ Brief of Amici Curiae Senator John Cornyn et al. in Support of Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015); Brief of Amici Curiae Senator John Cornyn et al. in Support of Appellants, *Halbig v. Burwell*, 785 F.3d 390 (D.C. Cir. 2014).

⁶ *Id.*

⁷ *King v. Burwell*, *supra* note 5 at 2492-94.

⁸ See Defendant-Intervenors’ Motion to Vacate Judgment, *Perry v. Hollingsworth*, Case No. 09-CV-2292 JW (July 11, 2011), available at <https://www.afj.org/wp-content/uploads/2017/12/Perry-v.-Hollingsworth-motion-to-vacate.pdf>. Mr. Nielson also, as part of his cross-examination of a plaintiffs’ witness during the trial in that case, challenged an expert’s testimony that sexual orientation is an innate characteristic. See Howard Mintz, *Prop 8 Trial Day Nine: Live from the Courtroom*, SAN JOSE MERCURY-NEWS (Jan. 12, 2010), <https://www.mercurynews.com/2010/01/22/prop-8-trial-day-9-live-coverage-from-the-courtroom/>. During another cross-examination, he disputed an expert’s testimony that LGBTQ individuals and members of other minority groups experience stress and mental health effects because of discrimination. See Howard Mintz, *Prop 8 Trial Day Four: Live from the Courtroom*, SAN JOSE MERCURY-NEWS (Jan. 14, 2010), <https://www.mercurynews.com/2010/01/14/prop-8-trial-day-4-live-coverage-from-the-courtroom/>.

⁹ Defendant-Intervenors’ Motion to Vacate Judgment, *supra*.

At his hearing, Mr. Nielson was asked how this argument could be distinguished from well-established caselaw holding that African-American judges, for example, did not face a conflict of interest in deciding cases involving civil rights – even though they might themselves, as members of the public, benefit.¹⁰ Senator Harris further asked him whether, under the argument advanced in the brief, women judges would be required to recuse themselves in cases involving abortion.¹¹ Mr. Nielson responded by saying that judges need not recuse themselves because of their status.¹² But, as Senator Harris wrote in opposition to the motion in *Perry*, when she served as California Attorney General, “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.¹³

Mr. Nielson also co-wrote an *amicus* brief in *Obergefell v. Hodges* that argued that states should be allowed to prohibit same-sex marriages “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.”¹⁴ This argument both endorses the profoundly biased view that same-sex parents do not provide “stable and enduring family units” and ignores the animus against same-sex couples that would lead states to deny them the benefits of marriage.

Taken as a whole, Mr. Nielson’s record would give litigants bringing claims related to women’s rights, civil rights, or LGBTQ rights reason to question whether they would receive a fair hearing before Mr. Nielson, if he were confirmed.

For all of the foregoing reasons, the nomination of Howard Nielson to a lifetime position on the U.S. District Court for the District of Utah raises serious concerns for the National Women’s Law Center. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,

¹⁰ See State Defendants’ Opposition to Motion to Vacate Judgment, *Perry v. Schwarzenegger*, Case No. 3:09-cv-02292-JW (June 13, 2011), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/05/Prop.-8-state-respse-re-vacate-5-12-11.pdf>; see also Brief of Amici Curiae Hon. Judith S. Kaye (Ret.), Profs. Stephen Gillers, Charles G. Geyh, and James J. Alfini, and Mark I. Harrison in Support of Respondents, *Hollingsworth v. Perry*, No. 12-144, available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_075198.pdf; Sherrilyn Ifill, *Challenging Judge Walker*, THE ROOT, (Aug. 10, 2010), <https://www.theroot.com/challenging-judge-walker-1790880570>.

¹¹ SENATE JUDICIARY COMMITTEE, HEARING: NOMINATIONS (Jan. 10, 2018), <https://www.judiciary.senate.gov/meetings/01/10/2018/nominations>.

¹² *Id.*, see also HOWARD NIELSON, QUESTIONS FOR THE RECORD, SENATE JUDICIARY COMMITTEE (Jan. 17, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/Nielson%20Responses%20to%20QFRs.pdf>.

¹³ See State Defendants’ Opposition to Motion to Vacate Judgment, *supra* note 10.

¹⁴ Brief of Amici Curiae Scholars of History and Other Related Disciplines In Support of Respondents, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, and 14-574, available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-556_amicus_resp_scholars.authcheckdam.pdf.



Fatima Goss Graves
President and CEO
National Women's Law Center

cc.: Judiciary Committee