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January 9, 2018

OPPOSE THE CONFIRMATION OF HOWARD NIELSON TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Howard Nielson to be a U.S. District Judge for the District of Utah.

Nominees to the federal courts must be committed to respecting the law, Constitution, and core American values of justice, fairness, and inclusivity. Mr. Nielson does not meet this standard. He has worked throughout his legal career to restrict the rights and freedoms of marginalized communities. He has attempted to justify the use of torture. And he was involved with a Justice Department screening committee that was rebuked for its discrimination against job applicants who had worked for progressive public interest organizations – many of which are members of our coalition – or Democratic public officials. Confirming Mr. Nielson to a lifetime appointment on the federal bench would be an affront to the civil and human rights community in America.

Biased Conduct at the Justice Department: When Mr. Nielson served as a political appointee in the Ashcroft Justice Department, he politicized the hiring process and undermined the credibility of the nation's chief law enforcement agency. According to a 2008 report written by the Justice Department's Inspector General and Office of Professional Responsibility, Mr. Nielson was part of a working group of political appointees that wrested control of the hiring process away from career attorneys. The report stated: "As our report describes, in 2002 the Honors Program [the Department's program for hiring junior attorneys] and SLIP [Summer Law Intern Program] hiring process was fundamentally changed by an Attorney General's Working Group to enable the Department's senior leadership to have more input into the selection of candidates. Prior to that time, career employees within each component administered the interview and selection process for the Honors Program and SLIP." [1]

Moreover, according to the report, Mr. Nielson appears to have served on a four-person screening committee in 2002 that discriminated against job applicants who had either worked for civil rights or liberal public interest groups, or for Democratic officials. The screening committee discriminated against job applicants who had affiliations with dozens of different civil rights and public interest organizations including 13 that are members of The Leadership Conference coalition: American Civil Liberties Union, Amnesty International, Brennan Center for Justice, Center for Reproductive Rights, Human Rights Campaign, Lambda Legal, Lawyers' Committee for Civil Rights Under Law, Mexican American Legal

[1] https://www.justice.gov/sites/default/files/opr/legacy/2008/06/24/oig-opr-investigation-hire-slip.pdf.

Defense and Educational Fund, NAACP Legal Defense and Educational Fund, Inc., National Consumer Law Center, National Organization for Women, Planned Parenthood, and Sierra Club.

After career officials recommended approximately 900 candidates for interviews for the elite Honors Program, the four-person screening committee pared down the list to 600. The report analyzed the backgrounds of the roughly 300 deselected candidates, and the results were extremely troubling. Of the 100 applicants determined to be "liberal" based on their organizational affiliations, 80 were deselected and denied interviews. Of the 46 applicants determined to be "conservative" based on affiliations, only four were deselected. That is, 80 percent of perceived liberal applicants for the Honors Program were deselected, but only 9 percent of conservative applicants. Among the most academically qualified applicants, the report determined that 83 percent of liberal applicants were deselected but not a single conservative was deselected. The same politicization occurred for the prestigious summer intern program during the time Mr. Nielson likely served on the screening committee: 84 percent of liberal SLIP applicants were deselected (68 of 81) for interviews, while only 3 percent of conservatives were deselected (1 of 29). Similar disturbing disparities were found to exist for applicants who had worked for Democratic elected officials versus Republicans, and for applicants who were members of the American Constitution Society versus the Federalist Society.

The Inspector General of the Justice Department, Glenn Fine, testified about two reports of politicization at the Justice Department – including this one – at a July 30, 2008 hearing before the Senate Judiciary Committee. At the hearing, Mr. Fine stated: "Department policy and Federal civil service law prohibit discrimination on the basis of political affiliations. However, the evidence in our investigation showed that a Screening Committee established by the Department in 2002 deselected for interviews those candidates with Democratic Party and liberal affiliations apparent on their applications at a significantly higher rate than applicants with Republican Party, conservative, or neutral affiliations…. These were inexperienced, junior people to some extent; they rose to high-level positions, and they were allowed to implement these actions and changes unchecked without adequate supervision, without adequate oversight, and it resulted in very serious damage to the Department of Justice."[2]

Mr. Nielson was not disciplined for his actions because he had left the Justice Department by the time of the IG/OPR report, but when testifying about political appointees involved in a similar hiring scandal, Mr. Fine testified that "people did leave the Department so they cannot be disciplined by the Department, but we have recommended that they never get a job with the Department again, hopefully never with the Federal Government again."[3] We agree and believe the same applies to Mr. Nielson.

LGBT Animus: Mr. Nielson has made offensive arguments in LGBT rights cases in recent years. In 2011, after District Judge Vaughn Walker issued an injunction prohibiting the state of California from enforcing the Proposition 8 ban on marriage equality, and in the wake of press reports that Judge Walker was gay, Mr. Nielson filed a motion to vacate the judgment. Mr. Nielson wrote: "Given that Chief Judge Walker was in a committed, long-term, same-sex relationship throughout this case (and for many years before the case commenced), it is clear that his 'impartiality might reasonably [have been] questioned' from the outset…. The pall cast by the palpable appearance of judicial partiality upon one of the most prominent and widely publicized constitutional cases in this Country's history threatens deep and lasting

[2] https://www.gpo.gov/fdsys/pkg/CHRG-110shrg44237/html/CHRG-110shrg44237.htm.
[3] Id.

harm to the public's confidence in our nation's judicial system."[4] Mr. Nielson's motion was denied by a different judge.

Leading civil rights leaders rightfully took Mr. Nielson to task for the argument he advanced in this case. Sherrilyn Ifill (then a law professor and now president of the NAACP Legal Defense and Educational Fund, Inc.) wrote that "the suggestion that Judge Walker's sexual orientation is evidence of bias is the kind of argument that was firmly discredited in a series of cases challenging the impartiality of black judges to decide civil rights cases…. The argument that a gay judge would be biased in favor of upholding the constitutionality of gay marriage carries with it the opposite implication: that a heterosexual judge would be biased in favor of upholding a ban on gay marriage. If both of these propositions are true, then no judge would be sufficiently impartial to decide the Prop 8 case."[5]

In 2015, Mr. Nielson wrote an amicus brief in the landmark Supreme Court case *Obergefell v. Hodges* in which he argued against marriage equality. In his brief, Mr. Nielson made the insulting insinuation that same-sex couples were not capable of being capable parents, writing that "through the institution of marriage, societies seek 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."[6] He also wrote that "it is plainly reasonable for a State to maintain a unique institution to address the unique societal risks and benefits that arise from the unique procreative potential of sexual relationships between men and women."[7] Fortunately, the Supreme Court rejected his arguments.

Support for Torture: During his service in the Office of Legal Counsel (OLC) at the Ashcroft Justice Department, Mr. Nielson authored a memo that has been criticized as justifying torture. Mr. Nielson's 2005 memo, entitled "Whether Persons Captured and Detained in Afghanistan are 'Protected Persons' under the Fourth Geneva Convention," argued that the Geneva Convention only protected civilians in enemy custody held on U.S. territory, not abroad.[8] According to Stanford Law School Professor Beth Van Schaack, who recently served as the Deputy to the Ambassador-at-Large for War Crimes Issues at the State Department, Mr. Nielson's memo set forth "a crazy (and dangerous) theory about the applicability of the Geneva Conventions that would also countenance the extraterritorial torture of civilians."[9] She also noted: "If Nielson's theory of the treaty were to prevail, United States personnel could torture civilians – so long as they did so outside the United States – without breaching the treaty…. This warped interpretation finds no support in international or domestic jurisprudence, the treaties' drafting history, the treaties' humanitarian object and purpose, or legal scholarship (even scholarship advancing conservative readings of the treaties)…. This approach makes a mockery of the proper role of the OLC, which is to give candid, apolitical, and accurate legal advice to the White House."[10] Professor Van Schaack urged members of the Senate Judiciary Committee to ask Mr. Nielson questions at his upcoming hearing about

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[4] https://www.afj.org/wp-content/uploads/2017/12/Perry-v.-Hollingsworth-motion-to-vacate.pdf.
[5] https://www.theroot.com/challenging-judge-walker-1790880570.
[6] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-556_amicus_resp_scholars.authcheckdam.pdf.
[7] Id.
[8] https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-080505.pdf.
[9] https://www.justsecurity.org/50290/judicial-nominee-howard-c-nielsons-torture-memo/.
[10] Id.

the following issues: "1. His role in the production of the suite of torture memos produced by the OLC, including those ostensibly authored by his boss [Steven Bradbury]. 2. Whether he still stands by his opinion that the Geneva Conventions do not constrain how the United States treats civilians in its custody or control outside of the United States. 3. Whether he still thinks the torture memos articulate valid legal advice for the White House."[11]

Mr. Nielson co-authored a letter to the editor in October 2007 in which he defended the work of Mr. Bradbury, the head of OLC. The letter responded to a *Washington Post* editorial, entitled "More Torture Memos," which criticized OLC's role in justifying torture techniques such as waterboarding during the Bush administration. Mr. Nielson wrote that "Mr. Bradbury is a careful lawyer of unimpeachable integrity and sound judgment."[12] Senator McCain and 46 other members of the Senate apparently disagree with Mr. Nielson, voting against Mr. Bradbury's recent nomination to serve as general counsel of the Department of Transportation. In an op-ed entitled "There Can Be No Justification For Torture," Senator McCain wrote that he voted against Mr. Bradbury because of the torture memos he wrote while in OLC.[13] We share that concern and believe it also applies to Mr. Nielson.

Opposition to Equal Opportunity: In 2013, Mr. Nielson wrote an amicus brief on behalf of a White law school applicant, Eric Russell, who was denied admission to the University of Michigan law school, in the case *Schuette v. Coalition to Defend Affirmative Action*. Mr. Nielson defended the constitutionality of a Michigan initiative, Proposition 2, which prohibited public employers like universities from pursuing equal opportunity and affirmative action. The initiative was sponsored by right-wing activists such as Ward Connerly who were critical of the Supreme Court's 2003 ruling in *Grutter v. Bollinger* that permitted the University of Michigan to use race as a factor (among many others) in selecting students. The Sixth Circuit struck down the Michigan initiative, but the Supreme Court reversed and upheld the initiative in a plurality opinion. According to Mr. Nielson's Senate questionnaire, Mr. Nielson handled the *Schuette* case pro bono, and it is the only specific pro bono case he listed on his Senate questionnaire.[14]

Hostility to Women's Health Care: Mr. Nielson authored amicus briefs on behalf of Republican members of Congress who challenged the legality of the Affordable Care Act (ACA) in *King v. Burwell* and *Halbig v. Sebelius*.[15] In these cases, Mr. Nielson argued that as a result of the wording of the ACA, the federal government is not authorized to help Americans pay for health insurance in the 34 states that decided not to set up their own health insurance exchanges. The Supreme Court rejected Mr. Nielson's arguments.

Mr. Nielson also filed an amicus brief on behalf of Republican members of Congress in *Whole Woman's Health v. Hellerstedt,* arguing that the Supreme Court should give substantial deference to the Texas

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[11] Id.
[12] http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101102148_pf.html.
[13] https://medium.com/@SenatorJohnMcCain/there-can-be-no-justification-for-torture-2f2e2307ccb1.
[14] https://www.judiciary.senate.gov/imo/media/doc/Nielson%20SJQ.pdf.
[15] http://www.judicialnetwork.com/wp-content/uploads/2014/02/Halbig-Members-of-Congress-Amicus.pdf; https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/14-114_amicus_pet_Cornyn.authcheckdam.pdf.

legislature and uphold restrictions to a woman's right to an abortion that would have required that outpatient abortions be performed only by doctors with admitting privileges at nearby hospitals and at facilities that comply with the regulations that govern ambulatory surgical centers.[16] The Supreme Court rejected Mr. Nielson's arguments and struck down the draconian Texas law, which would have significantly harmed women's access to health care.

Opposition to Common-Sense Public Safety Laws: Mr. Nielson has worked for the National Rifle Association and its conservative allies to push an extreme gun rights agenda. While serving in the Ashcroft Justice Department in 2004, Mr. Nielson authored a memo arguing that the Second Amendment secured an individual right to bear arms,[17] which was an inaccurate reflection of precedent at the time. In private practice, he has represented the NRA and its allies in at least three cases in which they fought against common-sense public safety laws that sought to reduce gun violence. In *Friedman v. City of Highland Park*,[18] Mr. Nielson challenged Chicago's ban on semiautomatic rifles and large capacity magazines. In *National Rifle Association v. McCraw*,[19] Mr. Nielson argued that a ban on people between the ages of 18 and 20 publicly carrying firearms was a violation of the Second Amendment. And in *National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*,[20] Mr. Nielson challenged a ban on handgun purchases for people under 21. In all three cases, Mr. Nielson lost at the circuit court, and the Supreme Court denied certiorari.

Anti-Environment Record: Mr. Nielson filed a brief on behalf of Republican members of Congress in *Utility Air Regulatory Group v. Environmental Protection Agency*, in which he argued that EPA lacked the legal authority to regulate greenhouse gases emitted by large industrial polluters.[21] The Supreme Court rejected Mr. Nielson's arguments in a 7-2 decision, holding that the EPA did have this authority.

Federalist Society: Like many of President Trump's judicial nominees, Mr. Nielson has been active in the Federalist Society. He joined the Federalist Society in 1997, and he served as the programs vice chair of the organization's litigation practice group. This out-of-the-mainstream legal organization represents a sliver of America's legal profession – just 4 percent – yet 94 percent of Trump's circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members. President Trump has openly outsourced his judicial selection to the Federalist Society and the Heritage Foundation in an effort to pursue his radical right agenda in the courts.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Howard Nielson to be a U.S. District Judge for the District of Utah. Thank you for your consideration of our

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[16] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/15-274_amicus_resp_USsenators.authcheckdam.pdf.
[17] https://www.justice.gov/file/18831/download.
[18] http://blog.californiarighttocarry.org/wp-content/uploads/2015/08/Friedman-v-Highland_Petition-for-Writ-of-Certiorari1.pdf.
[19] http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/13-390-NRA-v-McCraw-Cert-Pet-09-24-13.pdf.
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[21] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-1272_pet_amicus_mitch_mcconnell_members_congress.authcheckdam.pdf.

views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO