



June 6, 2018

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OPPOSE THE CONFIRMATION OF J. CAMPBELL BARKER TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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 opposition to the confirmation of J. Campbell Barker for the U.S. District Court for the Eastern District of Texas.

Mr. Barker, 37, is a young, conservative ideologue who has devoted the last several years to restricting voting rights, LGBT equality, immigrant rights, reproductive freedom, environmental protection, and fairness for criminal defendants. Mr. Barker does not possess the neutrality and fair-mindedness necessary to serve in a lifetime position as a federal judge.

Worked to Restrict Voting Rights: As Texas's Deputy Solicitor General since 2015, Mr. Barker has defended Texas's discriminatory photo ID law in the case *Abbott v. Veasey*. This law was partially struck down by the Fifth Circuit, which ruled that the law was passed with discriminatory purpose or effect in violation of Section 2 of the Voting Rights Act. Mr. Barker filed a petition for a writ of certiorari and asked the Supreme Court to overturn the Fifth Circuit. In his brief, Mr. Barker perpetuated the voter fraud myth, stating that the Texas law "was enacted to prevent voting fraud and to preserve voter confidence in the integrity of elections."¹ In a reply brief, Mr. Barker wrote that "the Court should review this question now to reject the grave charge that the Texas Legislature acted with a racially invidious purpose."² The Supreme Court denied Mr. Barker's petition.

Sought to Undermine LGBT Rights: Mr. Barker wrote amicus briefs for the State of Texas in which he argued that business owners should have the right, based on their religious beliefs, to deny wedding-related services to LGBT couples. In an amicus brief in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Mr. Barker wrote: "Public-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations (like restaurants and hotels), the artist plainly did not act out of invidious discrimination, and complainants had immediate access to other artists."³ Although the Supreme Court recently ruled in favor of the baker in this case, it was a narrow ruling, and the Court rejected Mr. Barker's sweeping argument about public accommodation laws. Mr. Barker made similar arguments in an amicus brief in *Arlene's Flowers, Inc. v. Washington*, in which he defended the right of a florist not to provide flowers for a same-sex wedding.⁴ The Supreme Court has not yet decided whether to grant certiorari in that case.

¹ <http://www.scotusblog.com/wp-content/uploads/2016/10/16-393-cert-petition.pdf>.

² <http://www.scotusblog.com/wp-content/uploads/2016/12/16-393-cert-reply.pdf>.

³ http://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_States-of-Texas.pdf.

⁴ <http://www.scotusblog.com/wp-content/uploads/2017/08/17-108-cert-tsac-states-of-texas.pdf>.

Hostile to Dreamers and Immigrant Rights: Mr. Barker has been at the center of right-wing legal challenges to the fair and just treatment of immigrants: (1) he has challenged the legality of Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”); (2) he has supported President Trump’s discriminatory Muslim bans; and (3) he has defended legislation that banned so-called “sanctuary cities.”

In case after case, Mr. Barker has sought to invalidate the DACA and DAPA programs. In an amicus brief filed with the Supreme Court challenging DACA, in *Arizona v. Arizona Dream Act Coalition*, Mr. Barker wrote: “DACA’s conferral of lawful presence violates Congress’s extensive statutory framework defining when aliens are authorized to be present in the country.”⁵ In *U.S. Department of Homeland Security v. Regents of the University of California*, Mr. Barker wrote an amicus brief and argued that “DACA was unlawful to begin with because it altered substantive rights yet was issued without the required APA notice-and-comment procedure.” In *In re United States*, he boasted in an amicus brief that “Texas has consistently, clearly, and publicly explained for years how DACA is unlawful.”⁶ And in *United States v. Texas*, Mr. Barker sought to invalidate DAPA, asserting: “DAPA Is Contrary to Law and Violates the Constitution.”⁷ In addition to the disturbing arguments Mr. Barker advanced in these cases, it is troubling that, in response to written questions from Senator Hirono, Mr. Barker refused to commit to recusing himself in cases regarding DACA (other than those he has worked on).⁸

Mr. Barker has also filed amicus briefs in support of President Trump’s discriminatory travel bans against Muslims. In defense of the March 2017 Muslim ban, Mr. Barker wrote an amicus brief in *Trump v. International Refugee Assistance Project* and argued that Mr. Trump’s bigoted, anti-Muslim campaign comments should not be considered by federal courts. Mr. Barker argued: “Campaign-trail statements regarding a potential future policy are far from the clearest proof needed to overcome the strong presumption of validity...”⁹ The Fourth Circuit in this case ruled otherwise, striking down the Muslim ban and ruling that “Then-candidate Trump’s campaign statements reveal that on numerous occasions, he expressed anti-Muslim sentiment, as well as his intent, if elected, to ban Muslims from the United States.”¹⁰ The Supreme Court has yet to rule on the challenge to the Muslim ban.

Mr. Barker has defended Texas’s ban on so-called “sanctuary cities.”¹¹ The Texas law, Senate Bill 4, allows local law enforcement officers to question the immigration status of people they arrest or detain and punishes local government officials (with possible jail time) who don’t cooperate with federal immigration agent requests to turn over immigrants subject to possible deportation. Senate Bill 4 was largely struck down by a federal district judge but mostly upheld by the Fifth Circuit on appeal.

Fought Fairness for Criminal Defendants: Mr. Barker has taken extreme positions on behalf of Texas in criminal justice cases. In *Buck v. Davis*, defendant Duane Buck’s lawyer called an expert witness who testified that Mr. Buck was statistically more likely to act violently because he is African-American. Under Texas law, a jury can only impose the death penalty if they conclude that the defendant was likely to commit future violence. Mr. Barker argued that Mr. Buck did not have a Sixth Amendment ineffective

⁵ <http://www.scotusblog.com/wp-content/uploads/2017/05/16-1180-cert-amicus-texas-et-al.pdf>.

⁶ https://www.supremecourt.gov/DocketPDF/17/17-801/23751/20171213160859056_17-801%20tsac%20State%20of%20Texas.pdf.

⁷ <http://www.scotusblog.com/wp-content/uploads/2016/01/15-674 bio State of Texas et al.2.pdf>.

⁸ <https://www.judiciary.senate.gov/imo/media/doc/Barker%20Responses%20to%20QFRs.pdf>.

⁹ <http://www.scotusblog.com/wp-content/uploads/2017/06/16-1436-tsac-states-of-texas.pdf>.

¹⁰ <http://coop.ca4.uscourts.gov/171351.P.pdf>.

¹¹ <https://www.afj.org/wp-content/uploads/2018/05/Defense-of-Banning-Sanctuary-Cities.pdf>.

assistance of counsel claim, arguing that “notwithstanding [the expert’s] opinion that race was probative of future dangerousness, his report and testimony played a limited role at trial.”¹² In a 6-2 opinion, the Supreme Court rejected Mr. Barker’s argument. Writing for the Court, Chief Justice Roberts concluded: “But when a jury hears expert testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.”¹³

In *Texas v. Hartfield*, African-American defendant Jerry Hartfield sat in jail for 32 years, from the time his conviction was overturned on appeal in 1983 to his retrial in 2015. His 2015 conviction was dismissed in 2017 by the Texas Court of Appeals, which held that Mr. Hartfield’s Sixth Amendment right to a speedy trial had been violated. The Texas Court of Appeals noted: “For the next thirty-two years, Hartfield remained incarcerated effectively holding a post-indictment, pre-trial status and was under no conviction or sentence.... The State’s negligence in this case created a criminal justice nightmare for Hartfield and the system at-large, as he sat in the custody of the Texas Department of Criminal Justice for thirty-two years without a conviction.”¹⁴ Despite these unconscionable facts, Mr. Barker asked the Supreme Court to reverse the Texas appellate court’s decision on the grounds that Mr. Hartfield had waived his speedy trial claim.¹⁵ The Supreme Court denied Mr. Barker’s certiorari petition, and Mr. Hartfield has been released from prison.

Sought to Restrict Access to Women’s Health: Mr. Barker has worked to restrict women’s access to critical health care services. He authored amicus briefs in three different Supreme Court cases (consolidated in *Zubik v. Burwell*) attacking the Affordable Care Act’s contraceptive access requirement.¹⁶ In one brief, he argued that the Obama administration’s justification for the law – “safeguarding women’s health” and “assuring that women have equal access to health care services” – did not constitute compelling government interests.¹⁷ The Supreme Court remanded *Zubik* and requested that the parties attempt to find a mutually satisfactory accommodation to provide contraceptive access.

Mr. Barker has also worked to restrict reproductive freedom for women in Texas by defending Targeted Regulation of Abortion Providers (“TRAP”) laws. He helped defend a draconian Texas law, House Bill 2, that would have required any physician performing an abortion to have admitting privileges at a hospital within 30 miles of where the abortion was performed, and also would have required that all abortion clinics comply with standards for ambulatory surgical centers. This TRAP law was struck down by the Supreme Court in 2016 in *Whole Women’s Health v. Hellerstedt* because it imposed an undue burden on women seeking access to health care.

Challenged Environmental Protections: The Clean Power Plan (“CPP”) was an important Obama administration Environmental Protection Agency (“EPA”) initiative to help curb power plant carbon pollution that drives dangerous climate change. Mr. Barker sought to stop the CPP. He worked on the

¹² <http://www.scotusblog.com/wp-content/uploads/2016/09/15-8049-responent-brief.pdf>.

¹³ https://www.supremecourt.gov/opinions/16pdf/15-8049_f2ah.pdf.

¹⁴ <http://www.scotusblog.com/wp-content/uploads/2017/10/17-394-opinion-below.pdf>.

¹⁵ <http://www.scotusblog.com/wp-content/uploads/2017/10/17-394-petition.pdf>.

¹⁶ <http://www.scotusblog.com/wp-content/uploads/2016/01/20-States-LSP-Amicus.pdf>; <http://www.scotusblog.com/wp-content/uploads/2015/10/scotus-15-35-hous.-baptist-univ.-v.-burwell-filed-amicus-brief.pdf>; and http://www.scotusblog.com/wp-content/uploads/2015/08/15-105_Amics-Brief-of-the-states-of-Texas-et-all.pdf.

¹⁷ <http://www.scotusblog.com/wp-content/uploads/2016/01/20-States-LSP-Amicus.pdf>.



Texas litigation team in 2016 that challenged the CPP in court, and he argued before the D.C. Circuit in *West Virginia v. EPA* that the CPP constituted a final rule that had never been properly proposed.¹⁸ The CPP litigation is on hold in light of the Trump administration's decision in October 2017 to issue a notice proposing to repeal the CPP on the grounds that it exceeds EPA's statutory authority.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of J. Campbell Barker for the U.S. District Court for the Eastern District of Texas. Thank you for your consideration of our 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

¹⁸ <https://www.afj.org/wp-content/uploads/2018/05/Barker-CPP-oral-arg.pdf>.