



April 23, 2018

**OPPOSE THE CONFIRMATION OF ANDREW OLDHAM TO THE
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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 Andrew Oldham to the U.S. Court of Appeals for the Fifth Circuit.

At age 39, Mr. Oldham is one of the youngest people ever nominated for a federal circuit court judgeship. But despite being just 13 years out of law school and barely clearing the American Bar Association's minimum years of practice standard to be rated qualified, he has done significant damage to civil and human rights during his short career. He has worked to restrict voting rights and other critical civil rights including immigrant rights and women's health, as well as seeking to undermine environmental protection and gun safety. Mr. Oldham is a conservative ideologue who would not be a fair-minded jurist and should not be given a lifetime appointment on the federal judiciary – an appointment which, given his age, could span half a century.

Worked to Restrict Voting Rights: The right to vote is foundational to our democracy. Throughout our nation's history, African Americans and other marginalized communities have faced systemic barriers to accessing the ballot. One such barrier in recent years has been the passage of photo ID laws. As deputy solicitor general in Texas, Mr. Oldham defended the use of photo ID laws in a 2013 Supreme Court amicus brief he filed on behalf of Texas in the case *Shelby County v. Holder*.¹

In his brief, Mr. Oldham vigorously defended Texas's discriminatory photo ID law, SB 14. A federal district judge subsequently struck down this law, holding that "SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The Court further holds that SB 14 constitutes an unconstitutional poll tax."² The district court ruling was upheld by the conservative Fifth Circuit.³

Mr. Oldham's brief also savaged the U.S. Department of Justice's Civil Rights Division for declining to preclear the discriminatory Texas photo ID law under Section 5 of the Voting Rights Act. Mr. Oldham wrote that "for nearly two years, the Civil Rights Division of the Department of Justice has used every weapon in its arsenal to thwart the implementation of a

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¹ 570 U.S. 529 (2013).

² <https://electionlawblog.org/wp-content/uploads/20141009-TXID-Opinion.pdf>.

³ <https://www.texastribune.org/2016/07/20/appeals-court-rules-texas-voter-id/>.



law that this Court has recognized as a legitimate and constitutional fraud-prevention measure.”⁴

Mr. Oldham not only defended the discriminatory Texas photo ID law, he also advanced the extreme argument that Section 5 of the Voting Rights Act – the heart of this historic federal civil rights law – should be invalidated. Mr. Oldham wrote: “The preclearance proceedings involving Texas’s voter-identification law illustrate the enormous burdens of the section 5 regime.... The only way for this Court to alleviate these unwarranted and burdensome federalism costs is to declare the reauthorization of section 5 unconstitutional.”⁵ Although Mr. Oldham’s defense of the Texas photo ID law was rejected by federal courts, his attack on the Voting Rights Act was upheld in the infamous 5-4 *Shelby County* ruling.

Fought Fair Chance Hiring: Mr. Oldham has been an opponent of bipartisan efforts to remove barriers to employment for people with arrest or conviction histories. In 2012, the Equal Employment Opportunity Commission (“EEOC”) updated its employer guidance on the use of background checks, advising employers that they could be in violation of Title VII if they inappropriately considered a person’s arrest or conviction history in employment decisions. The guidance advised employers to adopt fair chance hiring policies like “ban the box” and to delay inquiry into an applicant’s conviction history until later in the hiring process. In 2014, Mr. Oldham filed a complaint against the EEOC and the U.S. Department of Justice on behalf of Texas, arguing in sweeping terms that “The State of Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and neither the EEOC nor [Attorney General] Holder has authority to say otherwise.”⁶

The Texas NAACP moved to intervene to defend the EEOC guidance on behalf of victims of unreasonably rigid Texas hiring policies. One such victim, Beverly Harrison, a 58-year-old African-American grandmother who lives in Dallas, was denied a job as a school crossing guard due to a third-degree felony assault conviction that dated back to 1975 that was later dismissed.⁷ An NAACP official stated: “We are deeply troubled by Attorney General Abbott’s attempt to use this meritless lawsuit to not only attack the EEOC’s thoughtful and well-reasoned guidance, but also to try and undermine vital civil rights laws and protections. At a time when millions of people are still struggling to find work, the Texas attorney general should not be working to erect barriers to employment, particularly when those barriers disproportionately and unfairly affect workers of color.”⁸

Opposed Disparate Impact Claims Under Fair Housing Act: In 2014, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*,⁹ Mr. Oldham filed a brief on behalf of Texas, challenging the use of disparate impact claims to enforce the Fair Housing Act (“FHA”). Disparate impact claims are critical to the success of federal civil rights law enforcement because they recognize the reality of policies and practices that appear to be neutral but result in a disproportionate impact on a protected group. Such claims are consistent with congressional intent in passing anti-discrimination statutes. Yet Mr. Oldham argued: “The text of the Fair Housing Act unambiguously precludes the ‘disparate impact’ interpretation adopted by HUD and the court of appeals” and “HUD’s ‘disparate impact’ interpretation will give agencies undue powers over the administration of anti-

⁴ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_texas.authcheckdam.pdf.

⁵ Id.

⁶ <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-EEOC-13-cv-00255-NDTX-Texas-Amended-Complaint-Oldham.pdf>.

⁷ <https://www.afj.org/wp-content/uploads/2018/04/NAACP-Law360-Article.pdf>.

⁸ Id.

⁹ 135 S. Ct. 2507 (2015).

discrimination laws.”¹⁰ The Supreme Court rejected Mr. Oldham’s arguments, explaining that “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose” and “it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988.”¹¹

Undermined Disability Rights: When he worked in the Texas attorney general’s office, Mr. Oldham and his office aggressively sought to limit the ability of people with disabilities from using federal courts to vindicate their rights. Mr. Oldham was interviewed for a 2014 *Dallas News* article entitled “Greg Abbott pushes to block disabled Texans’ lawsuits against states.” The article stated: “Deputy Solicitor General Andy Oldham said there are good reasons why the state tries to block lawsuits from going to court, even when it has a strong case. Good lawyers use all the tools at their disposal, he said.”¹² But good lawyers must recognize binding case law, and Mr. Oldham’s abuse of the sovereign immunity doctrine suggests an unwillingness to do so. The article noted: “In at least nine ADA cases identified by *The News*, the state has claimed sovereign immunity in federal court and lost” and “Advocates for the disabled say Abbott’s office has worked to deny ADA protections by repeatedly and falsely claiming that impaired Texans don’t have the right to sue the state for discrimination.”¹³

Hostile to Immigrant Rights: As deputy solicitor general of Texas, Mr. Oldham led the charge to challenge the constitutionality of the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program and an expansion of the Deferred Action for Childhood Arrivals (“DACA”) program, to provide relief to additional Dreamers and the undocumented parents of U.S. citizens or lawful permanent residents. In a memo he authored on behalf of the Texas attorney general, Mr. Oldham wrote in regard to DAPA and DACA that “the President’s unprecedented, unilateral actions undermine the rule of law and should be reviewed by the courts” and “[i]f unchallenged, the President’s actions threaten to forever change the Nation’s constitutional foundation.”¹⁴ He then filed a lawsuit on behalf of Texas and 13 other states challenging the constitutionality of DAPA. In the complaint, Mr. Oldham alleged that “DACA led directly to a flood of immigration across the Texas-Mexico border and a ‘humanitarian crisis’ in Texas.... The DHS Directive [DAPA and DACA+] is a much larger step than DACA, and it will trigger a larger response. The DHS Directive will increase human trafficking in the Plaintiff States.” These allegations are baseless. As lead counsel, Mr. Oldham argued the preliminary injunction motion that led to a nationwide blockage of DAPA.¹⁵ The injunction was ultimately upheld by a deadlocked Supreme Court in 2016¹⁶ because the Senate refused to allow a vote on the pending Supreme Court nominee.

Sought to Restrict Women’s Health: Mr. Oldham has 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, HB 2, that would have required any physician performing an abortion to

¹⁰ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_pet.authcheckdam.pdf.

¹¹ https://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf.

¹² <https://www.dallasnews.com/news/local-politics/2014/02/15/greg-abbott-pushes-to-block-disabled-texas-lawsuits-against-state>.

¹³ Id.

¹⁴ <https://rewire.news/wp-content/uploads/2017/03/Rewire-Responsive.pdf>.

¹⁵ <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-U.S.-14-cv-00254-SDTX-PI-HEARING-TRANSCRIPT.pdf>.

¹⁶ *United States v. Texas*, 136 S. Ct. 2271 (2016).



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.¹⁷ This TRAP law was struck down by the Supreme Court in 2016 in *Whole Women's Health v. Hellerstedt*.¹⁸ In addition, Mr. Oldham defended a Texas regulation that defunded Planned Parenthood by banning organizations that provided abortion services from receiving funds through Texas's Women's Health Program.¹⁹ A study was conducted on the impact of this regulation, and the authors concluded that it affected not only access to abortions but also access to contraception: "The exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception."²⁰ Mr. Oldham also filed an amicus brief in a case that challenged the constitutionality of the Patient Protection and Affordable Care Act.²¹ He was unsuccessful.

Opposed to Gun Safety: Mr. Oldham has defended Texas laws that provide expansive rights for gun owners, and he has opposed laws in other states that have sought to implement common-sense gun safety measures. He wrote a memo in 2015 that took an expansive view of the Texas concealed handgun law and concluded that such handguns could lawfully be brought into certain government buildings.²² Mr. Oldham's interpretation was criticized by local public officials who expressed concern that weapons could be brought into government offices such as those of the district attorney and tax assessor.²³

In a 2015 case involving a San Diego, California law that required people to show "good cause" to carry a concealed firearm in public, Mr. Oldham filed an amicus brief with the Ninth Circuit arguing that the law violated the Second Amendment.²⁴ He wrote that "the whole point of the Constitution's text is to protect certain *unpopular* rights from the zeal of a government bent on squelching them."²⁵

And in a 2016 speech, Mr. Oldham criticized a Highland Park, Illinois ban on AR-15 assault weapons – the type of weapon that has been used in several school shootings in recent years, including Parkland, Florida in which 17 people were killed. Mr. Oldham stated: "The AR-15 or modern sporting rifle is the most popular rifle in the United States, and you know, the ban in Highland Park is a categorical ban. I mean, it is straight up, just like the California ban is on that category of weapons. So I agree with you that there should be Supreme Court constitutional scrutiny on categorical bans on types of weapons."²⁶

Challenged Environmental Protections: Mr. Oldham has not only challenged the Environmental Protection Agency's enforcement power under the Clean Air Act and Clean Power Plan, he has called into question the very existence of the EPA. In a 2016 speech to the Federalist Society, Mr. Oldham used anti-government rhetoric of the far right. He said: "One of the reasons why the administrative state is engaging is not that you disagree with what the EPA does, although I do disagree with a lot of what it

¹⁷ <https://www.statesman.com/news/trial-abortion-law-ends-decision-pending/a5E5y6lGOiKzdeUSpKhL6L/>.

¹⁸ 136 S. Ct. 2292 (2016).

¹⁹ <https://afj.org/wp-content/uploads/2018/04/PP-of-Hidalgo-County-v.-Suehs-appellant-brief-5th-Circuit.pdf>.

²⁰ <http://www.nejm.org/doi/full/10.1056/NEJMsa1511902>.

²¹ https://www.afj.org/wp-content/uploads/2018/04/14-20039_Amicus-Brief.pdf.

²² http://www.texaspolicechiefs.org/sites/default/files/2015_12GovMemo.pdf.

²³ <https://www.houstonchronicle.com/neighborhood/woodlands/news/article/Montgomery-County-officials-voice-worries-over-6701402.php>.

²⁴ http://michellawyers.com/wp-content/uploads/2010/11/Peruta_Amici-Curiae-Brief-for-the-Governors-of-Texas-Louisiana-Maine-Mississippi-Oklahoma-and-South-Dakota-in-Support-of-Plaintiffs-Appellants.pdf.

²⁵ *Id.*

²⁶ <https://www.youtube.com/watch?v=lg0yrAF-XUE>.

does. That’s not the thing that makes it enraging. It’s the illegitimacy of it.”²⁷ In his speech, Mr. Oldham criticized the EPA’s Clean Power Plan, designed by the Obama administration to limit carbon dioxide emissions and combat climate change. He called the Clean Power Plan “the ultimate example, I think, of rule by bureaucrat” and “no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate.”²⁸

In at least two cases, Mr. Oldham challenged the efforts of the EPA to enforce the Clean Air Act. In a brief he filed (and joined by then-Oklahoma Attorney General Scott Pruitt) in *Utility Air Regulatory Group v. EPA*,²⁹ Mr. Oldham referred to the “far-reaching and near-ridiculous regulatory burdens required by EPA’s decision to regulate greenhouse-gas emissions” and wrote that “[t]he Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions.”³⁰ And in *EPA v. EME Homer City Generation*,³¹ Mr. Oldham wrote another brief joined by Pruitt that challenged the EPA’s Transport Rule, which was issued under the Clean Air Act to address air pollution emitted in one state that causes harm in another.³² The Supreme Court ruled against Mr. Oldham in both cases.

Ideological Jobs and Affiliations: Conservative apologists for President Trump’s extreme judicial nominees argue that these nominees were simply representing clients, whose views don’t necessarily represent the nominees’ views. But credentialed lawyers like Mr. Oldham can pick and choose which clients to represent. For the past six years, he has worked for right-wing Texas politician Gregory Abbott. In addition to the litigation positions discussed in this letter that Mr. Oldham pursued on behalf of Abbott, Mr. Oldham was involved in conceptualizing the radical legal theories behind them. According to a recent article:

Oldham was working for Abbott when he launched a long-shot idea: a second convention of the states, the first since 1787, to consider new amendments to the U.S. Constitution. The amendments Abbott proposed would, he said, “restore the rule of law” by reining in federal power and save the country from overreaching federal institutions, most notably the U.S. Supreme Court and the “alphabet soup” of federal agencies governing everything from environmental protection to education. Oldham was “heavily involved,” [Texas Supreme Court Justice Jimmy] Blacklock said, with crafting the plan. And Oldham was also sent out across the state and the country to promote it at law schools and chapters of the conservative legal group the Federalist Society.³³

Earlier in his career, Mr. Oldham served as a law clerk for two of the nation’s most conservative judges: Supreme Court Justice Samuel Alito and D.C. Circuit Judge David Sentelle. In between clerkships, Mr. Oldham served for two years in the Bush Justice Department’s Office of Legal Counsel, which was notorious for authorizing the use of torture. In addition, Mr. Oldham is a long-time member of the Federalist Society, joining this group in 2002 during his first year of law school. This out-of-the-mainstream legal organization represents a sliver of America’s legal profession – just four percent – yet over 80 percent of Trump’s circuit court nominees, and a significant number of his district court

²⁷ <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law>.

²⁸ Id.

²⁹ 134 S. Ct. 2427 (2014).

³⁰ <https://www.kattenlaw.com/files/upload/Broome/Merits-Brief-Texas-et-al.pdf>.

³¹ 134 S. Ct. 1584 (2014).

³² https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-118212-1183_resp_sl_authcheckdam.pdf.

³³ <https://www.texastribune.org/2018/04/03/greg-abbott-andrew-oldham-fifth-circuit-judicial-appointees/>.



nominees, have been Federalist Society members. Mr. Oldham is also a member of the National Rifle Association. In light of Mr. Oldham's own comments, his ideologically conservative affiliations, and his brief legal career, he has shown that he shares the views of the clients and employers he has represented. He would not serve as a neutral and fair-minded jurist.

Lack of Diversity: In addition, the nomination of Mr. Oldham is a continuation of the troubling Trump administration record of diminished diversity on the federal bench. Judicial diversity is critical to instilling confidence in the justice system, and a diversity of judicial perspectives helps ensure that the Constitution works for everyone. President Trump has nominated the least diverse group of judicial nominees in decades. Over 90 percent of his nominees are White, and nearly 80 percent are men.³⁴ He has made 103 Article III judicial nominations,³⁵ and only one is African-American. By comparison, during the Obama administration, 38 percent of judicial nominees were persons of color and 43 percent were women. Mr. Oldham has been nominated to replace the only Hispanic on the 17-member Fifth Circuit, Judge Edward Prado. This is of particular concern because Texas – the largest state in the Fifth Circuit and the location of the vacancy to which Mr. Oldham has been nominated – has the second highest number of Hispanics of all 50 states both as a percentage of population (39 percent) and in raw numbers (10.4 million).³⁶

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Andrew Oldham to the U.S. Court of Appeals for the Fifth Circuit. 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

³⁴ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.

³⁵ https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump.

³⁶ <http://www.pewhispanic.org/2016/09/08/4-ranking-the-latino-population-in-the-states/>.