



October 29, 2019

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OPPOSE THE CONFIRMATION OF LAWRENCE VANDYKE TO THE U.S. COURT OF APPEALS FOR THE NINTH 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 Lawrence VanDyke to the U.S. Court of Appeals for the Ninth Circuit.

Mr. VanDyke has labored throughout his career to undercut civil and human rights, including LGBTQ equality, reproductive freedom, environmental protection, and gun safety, among other critical issues. He has used his government positions – currently as a Trump administration official and previously as the solicitor general in Montana and Nevada – to push an activist, far-right agenda. He lacks the support of his home-state senators, which traditionally would have stopped his nomination in its tracks. The Senate must reject Mr. VanDyke for a lifetime position on the Ninth Circuit, the nation's largest circuit court.

Attacked LGBTQ Rights: Mr. VanDyke has attacked LGBTQ equality on multiple fronts throughout the past 15 years, beginning with a strident, anti-marriage equality op-ed he wrote in 2004. He asserted that “children on average fare best in stable, two parent families” and “[t]his, combined with the correlative evidence of the decline in the family unit in Scandinavia, where de facto same-sex marriage has been around for about a decade, does provide ample reason for concern that same-sex marriage will hurt families, and consequentially children and society.”¹ He complained that in Canada, “courts are forcing same-sex marriage on the populace;” in England, “police investigated a bishop for his advocacy of the view that homosexuals can leave the homosexual lifestyle;” and that “Sweden has just passed a sweeping ‘hate crimes’ law forbidding criticism of homosexuality.”² He declared that “the trend of intolerance towards religion as homosexual ‘rights’ become legally entrenched is not merely an overseas phenomenon,”³ and he criticized the “chimera of ‘tolerance’ affiliated with homosexual rights.”⁴

¹ <https://web.archive.org/web/20180402060657/http://hlrecord.org/2004/03/one-students-response-to-a-response-to-glendon/>.

² *Id.*

³ *Id.*

⁴ *Id.*

In 2010, Mr. VanDyke authored an amicus brief in the case *Christian Legal Society v. Martinez*, where he argued that college student groups had a First Amendment right to exclude LGBTQ students from membership.⁵ He wrote that university policies that prohibited discrimination by campus organizations were “oppressive and irrational,” and “[h]owever noble its educational or nondiscrimination goals, Hastings’ policy is both self-defeating and unconstitutional.”⁶ The Supreme Court rejected that position and ruled in favor of LGBTQ students. It is telling that on his Senate questionnaire, Mr. VanDyke listed this as one of the ten most significant cases of his career.

In 2013, while serving as the Montana Solicitor General, Mr. VanDyke advocated for joining amicus briefs that attacked LGBTQ equality.⁷ In his brief in *Hollingsworth v. Perry*, where he defended state bans on marriage equality, Mr. VanDyke argued that “a state’s decision to ratify the sexual union between a man and a woman confirms a deeply significant understanding of human relationships and encourages such unions as the standard for the human family.”⁸ In his brief in *United States v. Windsor*, Mr. VanDyke defended the Defense of Marriage Act, which prevented the federal government from recognizing any marriages between gay or lesbian couples for the purpose of federal laws or programs, even if those couples were considered legally married by their home state. Mr. VanDyke’s brief stated that “opposite-sex couples are the *only* procreative relationships that exist, which means that such couples are the only ones the government has a need to encourage.”⁹ The Supreme Court rejected Mr. VanDyke’s discriminatory arguments in both of these cases.

Mr. VanDyke also advocated for Montana to join a 2013 amicus brief in the case *Elane Photography v. Willock*, where he argued that photographers should be entitled to deny their services at wedding ceremonies of same-sex couples.¹⁰ In an internal email that has been made public via the Freedom of Information Act, Mr. VanDyke described an Alabama-led amicus brief asking the Supreme Court to rule on behalf of anti-LGBTQ photographers who had lost in the lower courts, and he wrote in bold font that “I strongly recommend we DO JOIN this brief.”¹¹ The Supreme Court denied certiorari, thus leaving in place a New Mexico Supreme Court opinion that rejected Mr. VanDyke’s position.

Mr. VanDyke has represented, given speeches to, and worked as a legal intern for the homophobic Alliance Defending Freedom, an organization so extreme that it has been designated as a “hate group” by the Southern Poverty Law Center.¹² The Alliance Defending Freedom has defended proposed laws to require sterilization of transgender individuals seeking to change their name and gender on their birth

⁵ <https://afj.org/wp-content/uploads/2019/10/College-of-Hastings-Brief.pdf>.

⁶ *Id.*

⁷ <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p122-23.pdf>; <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p154.pdf>.

⁸ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144_pet_amcu_merits_soi-et-al.pdf.

⁹ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_resp_amcu_merits_soi-et-al.pdf.

¹⁰ <https://www.scribd.com/document/206232554/Elane-Photography-Amicus-Brief-of-Alabama-et-al>.

¹¹ <https://s3.amazonaws.com/s3.documentcloud.org/documents/1284252/foi-request-re-montana-solicitor-sept-2014.pdf> (page 196).

¹² <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

certificate, and they have defended criminalizing same-sex sexual activity.¹³ Mr. VanDyke's deep and lasting ties to this fringe organization demonstrate his acceptance of its radical agenda.

Fought Against Reproductive Freedom: Mr. VanDyke has tried to diminish reproductive rights in America. In a brief he filed in the case *Horne v. Isaacson*, he defended an Arizona law that would have banned abortions after 20 weeks, before the fetus was viable. He asked the Supreme Court to "revisit" the landmark *Roe v. Wade* decision. Mr. VanDyke wrote: "If the Ninth Circuit correctly held that its decision is compelled by this Court's precedent in *Roe v. Wade* and its progeny, should those precedents be revisited in light of the recent, compelling evidence of fetal pain and significantly increased health risk to the mother for abortions performed after twenty weeks gestational age?" The Supreme Court rejected Mr. VanDyke's certiorari petition and left the Ninth Circuit opinion striking down Arizona's law in place.

Mr. VanDyke advocated for Montana to join an amicus brief in *McCullen v. Coakley*, a case about the constitutionality of Massachusetts' buffer zone for reproductive health care clinics. The amicus brief was written on behalf of anti-abortion activists challenging the Massachusetts law. One of Mr. VanDyke's colleagues counseled against joining the brief because Montana had a nearly identical buffer zone law, writing: "Because the A.G. would be charged with defending Montana's statute if it were challenged, I recommend against joining this brief, which some will interpret as a willingness to forgo defending laws for moral or policy reasons."¹⁴ Mr. VanDyke prevailed and Montana joined the brief. The Supreme Court ultimately invalidated the Massachusetts law, but the Court rejected the sweeping arguments made in Mr. VanDyke's brief.

In another reproductive rights case, *Planned Parenthood of Montana v. State of Montana*, Mr. VanDyke defended a restrictive parental consent law that required all Montana minors under the age of 18 seeking an abortion to obtain either notarized consent from a parent, or a judicial bypass.¹⁵ Mr. VanDyke argued that the restriction was constitutional, but a Montana state court disagreed and struck it down. The law remains enjoined and unenforceable.¹⁶

Undermined Environmental Protections: Mr. VanDyke has repeatedly advanced positions that would weaken environmental protections for our air and water, and would open public lands to corporate mining and fossil fuel drilling. His anti-environment views would be particularly harmful on the Ninth Circuit, whose states cover nearly three quarters of the nation's public lands and which resolves more environmental law cases than other federal circuit courts.¹⁷ A leading environmental organization – the League of Conservation Voters (LCV) – opposes Mr. VanDyke and stated the following about his troubling environmental record while serving in state government:

¹³ *Id.*

¹⁴ <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p267-281.pdf>.

¹⁵ 2014 WL 2573512.

¹⁶ <https://www.prochoiceamerica.org/state-law/montana/>.

¹⁷ <https://legal-planet.org/2018/01/03/the-ninth-circuit-court-of-appeals-most-important-environmental-law-decisions-of-2017/>.

VanDyke opposed permit guidance for surface mining, which sought to prevent dangerous mining pollution from entering waterways. His brief countered that Montana and other states have sufficient rules in place and the federal government didn't have the authority to act, arguments which were rejected by the D.C. Circuit.... He joined with three mining companies opposing bipartisan efforts to protect sage-grouse habitats, which importantly prevented the need to list the sage-grouse as an endangered species.... [H]e aggressively opposed efforts to protect water and air quality; VanDyke challenged the proposed Clean Water Rule, despite it being an important step forward for restoring the true scope of the Clean Water Act and protecting our nation's waterways. He also sided with a major coal mine operator in a lawsuit to slow implementation of the Clean Air Act, opposed the EPA's Clean Power Plan to address climate change, and opposed the protection of one million acres of Grand Canyon watershed from the harms of uranium mining.¹⁸

For the past year, Mr. VanDyke has served as a high-level official in the Trump Justice Department, and he has continued his assault on environmental protection. According to LCV: "As one of the lead attorneys for the Justice Department's Environment and Natural Resources Division, VanDyke defended the dirty and dangerous Keystone XL pipeline, and argued for the repeal of a 2015 rule designed to protect water, wildlife and public health from the harmful effects of hydraulic fracturing on federal and tribal lands. He repeatedly defended the federal government's failure to consider the impact of drilling before issuing permits...."¹⁹ Mr. VanDyke has a clear, anti-environmental agenda, and he would be incapable of serving as a fair and impartial arbiter in environmental disputes.

Supporter of NRA Agenda: Mr. VanDyke has been a longtime member of the National Rifle Association (NRA), which has engaged in a massive lobbying campaign over the years to oppose common-sense gun safety laws. Mr. VanDyke is also a member of the International Defensive Pistol Association and the Western Nevada Pistol League, for which he serves as treasurer. In an email made public through the Freedom of Information Act, Mr. VanDyke urged Montana to join an amicus brief opposing a federal law that banned people under the age of 21 from purchasing handguns. He wrote: "I'm not sure I agree with the strategy of bringing this case to the SCOTUS, but I think we want to be on record as on the side of gun rights (and the NRA)."²⁰ In another case, in which Mr. VanDyke defended a Montana law that said firearms made in Montana were beyond the scope of Congress's Commerce Clause power, he acknowledged: "I'm having trouble coming up with any plausible (much less good) arguments of how to get around *Raich*. I'd like to make some sort of cooperative federalism argument that when a state passes a law cordoning off certain intrastate activities, that triggers some sort of heightened scrutiny. But I don't know if that passes the straight-face test."²¹

Other Extreme Litigation: Mr. VanDyke has participated in many other cases that attempted to hinder civil and human rights in America. For example:

¹⁸ <https://www.lcv.org/wp-content/uploads/2019/10/LCV-Letter-Opposing-nomination-of-Lawrence-VanDyke-to-the-United-States-Court-of-Appeals-for-the-Ninth-Circuit.pdf>. (citations omitted)

¹⁹ *Id.* (citations omitted)

²⁰ <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p81.pdf>.

²¹ <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p319-20.pdf>.

- Mr. VanDyke served as lead counsel in a challenge to the legality of an Obama administration rule that would have increased eligibility for employees to receive overtime pay under the Fair Labor Standards Act.²²
- He worked on litigation challenging the Obama administration's expansion of the Deferred Action for Childhood Arrivals (DACA) program, and he has supported the Trump administration's efforts to withhold federal funding for jurisdictions that choose to protect vulnerable immigrant communities.²³
- Mr. VanDyke wrote a brief asking the Supreme Court to overturn a Ninth Circuit decision that granted critical water rights to the Agua Caliente Band of Cahuilla Indians, whose reservation is located in the southern California desert.²⁴ The Supreme Court denied certiorari and rejected Mr. VanDyke's effort to deny the Indian tribe of its groundwater rights.

Other Indicia of Far-Right Ideology: Mr. VanDyke's extreme, right-wing activism is further demonstrated by the following:

- In an unsuccessful campaign for the Montana Supreme Court in 2014, Mr. VanDyke was the beneficiary of \$640,000 from right-wing special interests including the Koch brothers.²⁵ Mr. VanDyke justified this unprecedented level of funding (in a Montana judicial election) by claiming it was the only way he could prevail against what he called "the trial lawyer money machine."²⁶ Montana trial lawyers spent far less money in this campaign than extreme, right-wing groups.²⁷ Mr. VanDyke was publicly opposed by six retired state supreme court justices, and one of them, Justice Terry Trieweiler, said "VanDyke's election would totally shift the balance on the court in the direction of right-wing activism in total service of the corporate agenda. Environmental laws, consumer protection laws and labor laws are all at risk."²⁸
- Mr. VanDyke has been a member of the ultraconservative Federalist Society since 2005, and he has served on that organization's Religious Liberties Practice Group Executive Committee, Federalism & Separation of Powers Practice Group Executive Committee, and its State & Local Government Working Group's Regulatory Transparency Project.²⁹ A Federalist Society official referred to Mr. VanDyke as a "long-time Federalist Society sympathizer."³⁰ This out-of-the-

²² Lawrence VanDyke, Questionnaire for Judicial Nominees, Senate Judiciary Committee.

²³ <https://www.lcv.org/wp-content/uploads/2019/10/LCV-Letter-Opposing-nomination-of-Lawrence-VanDyke-to-the-United-States-Court-of-Appeals-for-the-Ninth-Circuit.pdf>.

²⁴ <https://afj.org/wp-content/uploads/2019/10/Coachella-Valley-Water-Dist.-v-Agua-Caliente-Band-of-Ca.pdf>.

²⁵ <https://www.nytimes.com/2014/11/03/us/montana-judicial-race-joins-big-money-fray.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ https://www.bozemandailychronicle.com/news/politics/ex-justices-say-candidate-for-supreme-court-a-corporate-puppet/article_0e4fc104-558d-11e4-8401-636fb002328c.html.

²⁹ Lawrence VanDyke, Questionnaire for Judicial Nominees, Senate Judiciary Committee.

³⁰ <https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p319-20.pdf>.

mainstream organization represents a sliver of America’s legal profession – just four percent – yet more than 80 percent of President Trump’s circuit court nominees and nearly half of his district court nominees are Federalist Society members.

- Mr. VanDyke has written letters of support to the Senate for many of President Trump’s most extreme and ideological nominees: J. Campbell Barker, Andrew Brasher, Stuart Duncan, Britt Grant, Eric Murphy, Andrew Oldham, Lee Rudofsky, and Patrick Wyrick. Like these nominees – all of whom The Leadership Conference opposed – Mr. VanDyke has an obvious ideological bias and would not be capable of serving as a neutral, fair-minded jurist.
- Mr. VanDyke served as a law clerk for one of the most ideologically extreme federal judges in the United States: Judge Janice Rogers Brown of the D.C. Circuit. As The Leadership Conference explained in opposing Judge Brown’s nomination in 2005: “Brown’s record as a California Supreme Court justice demonstrates a strong, persistent, and disturbing hostility toward affirmative action, civil rights, the rights of individuals with disabilities, workers’ rights, and the fairness of the criminal justice system.”³¹
- Mr. VanDyke has criticized fair chance hiring policies, which have a disparate impact against job applicants of color. He wrote: “The so-called ‘ban the box’ movement is another example of burdensome, if well-meaning, regulations. To help individuals with a criminal background reenter the workforce, these rules prohibit employers from inquiring about criminal history until after extending an offer. While employers are allowed to rescind an offer upon learning about a past conviction that may call into question an applicant’s capacity to do the job in question, these jurisdictions often make it procedurally difficult to withdraw an offer – even where there is good reason.”³²
- Mr. VanDyke published a law review article in which he defended the teaching of “intelligent design” (ID) in public schools. ID is a rejection of science-based evolution and a variant of creationism. Federal courts have held that neither creationism nor ID can be taught in public school science classes.³³ Mr. VanDyke was strongly criticized for the views and statements advanced in his article. A law school professor wrote that Mr. VanDyke’s article “is riddled with factual errors and misleading innuendo from start to finish” and “I trust he has no intention of entering law teaching: scholarly fraud is, I fear, an inauspicious beginning for an aspiring law teacher. And let none of the many law professors who are readers of this site be mistaken: Mr. VanDyke has perpetrated (intentionally or otherwise) a scholarly fraud...”³⁴
- Mr. VanDyke received a degree from Bear Valley Bible Institute, an unaccredited institution that openly discriminates against women students. The Institute’s online FAQ document posts the

³¹ <https://civilrights.org/resource/oppose-the-confirmation-of-janice-rogers-brown/>.

³² <https://regproject.org/wp-content/uploads/RTP-State-and-Local-Working-Group-Paper-Regulatory-Thicket.pdf>.

³³ <https://www.adl.org/sites/default/files/documents/assets/pdf/civil-rights/religiousfreedom/religfreeres/ID-NotSci-docx.pdf>.

³⁴ https://leiterreports.typepad.com/blog/2004/03/harvard_law_rev.html.

following: “Can women attend your two-year program and receive a degree? Yes. However, it is important to note that our program is design [sic] to train preachers. This obviously poses a number of problems for women in our program as we do not allow women to take classes in public speaking (with men present) and preaching.”³⁵ Elsewhere on its website, the Institute states: “It is not a part of God’s plan for women to assume leadership roles in the assemblies of His church. Based on the teachings of 1 Timothy 2:8-15 and 1 Corinthians 14:34-35, both men and women have divinely specified functions. Those functions include the men leading the worship and the women assuming a submissive position (1 Tim. 2:12).”³⁶

Temperament Concerns: Internal emails from 2014 that were made publicly available via the Freedom of Information Act reveal that Mr. VanDyke acted unprofessionally while serving as the Montana Solicitor General. One of his colleagues, Michael Black, sent an email that said: “Ever since he has arrived, Mr. VanDyke has been arrogant and disrespectful to others, both in and outside of this office. He does not have the skills to perform, nor desire to learn how to perform, the work of a lawyer.”³⁷ A colleague responded: “your frustration does not exceed ours.”³⁸ Mr. Black also wrote about Mr. VanDyke: “He’s a charlatan as far as I’m concerned, and his use of this office in an attempt to bolster his qualifications is not appropriate.”³⁹

Lack of Home-State Senator Support: The Ninth Circuit seat to which Mr. VanDyke has been nominated is based in Nevada. Mr. VanDyke doesn’t live in Nevada and practiced law there for only four years, while serving as the Nevada Solicitor General. During that time period he was criticized for his lack of commitment to practicing law in Nevada, and as one news article noted: “Nevada’s chief attorney continues to practice law despite not having taken the state bar and the expiration of his two-year temporary license.”⁴⁰ Due to his lack of Nevada connections – as well as his extreme record – Mr. VanDyke is opposed by Senators Cortez Masto and Rosen, the Nevada senators.⁴¹ Nominating an individual for a federal judgeship over the objections of home-state senators (reflected by their decision not to return the “blue slip” of approval to the Senate Judiciary Committee) departs from a century-old Senate tradition and subverts the Constitution’s advice and consent process. As former Senator Hatch observed in 2014: “Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president’s judicial appointment power. Anyone serious about the Senate’s ‘advice and consent’ role knows how disastrous such a move would be.”⁴² This institutional check has never been more important than today, with a president who undermines the legitimacy of judges and their rulings, and who prioritizes personal loyalty over fidelity to the law.

³⁵ <https://www.wetrainpreachers.com/two-year-faq>.

³⁶ <https://www.wetrainpreachers.com/doctrinal-statement>.

³⁷ <https://s3.amazonaws.com/s3.documentcloud.org/documents/1284252/foi-request-re-montana-solicitor-sept-2014.pdf> (page 667).

³⁸ *Id.* (page 666).

³⁹ https://afj.org/wp-content/uploads/2019/10/Former-colleague-criticizes-VanDyke_s-qualifications-fo.pdf.

⁴⁰ <https://thenevadaindependent.com/article/nevada-solicitor-generals-ability-practice-law-doubt>.

⁴¹ <https://www.rosen.senate.gov/rosen-cortez-masto-statement-white-house-announcement-ninth-circuit-nomination>.

⁴² <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

When Republicans controlled the Senate during the Obama administration, they did not give a hearing or vote to a single nominee who lacked support from both home-state senators. During the Trump presidency, however, Senate Republicans have employed a double standard and given a hearing to 15 circuit court nominees who were so extreme that they could not earn the support of one or both home-state senators: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, Joseph Bianco, Kenneth Lee, Daniel Collins, Daniel Bress, Peter Phipps, and Steven Menashi. Mr. VanDyke and Patrick Bumatay – scheduled for a hearing on October 30, 2019 – will be the 16th and 17th such nominees. Senate Republicans have destroyed the blue slip tradition for circuit court nominees, and future presidents and Senates are unlikely to revive it.

Disturbing Lack of Diversity: President Trump’s overall lack of commitment to diversity on the federal judiciary is deeply disturbing. President Trump has appointed the least diverse group of nominees in decades.⁴³ The 17 Trump circuit court nominees listed above who have been advanced through the Senate Judiciary Committee over home-state senators’ objections are all men, and 14 of the 17 are white. Of his 54 appellate nominations, none are African American. Only one is Latino. And only 11 are women. His district court nominees are similarly nondiverse. Our nation’s great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the ultimate guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump’s record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Lawrence VanDyke to the U.S. Court of Appeals for the Ninth 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, at (202) 466-3311.

Sincerely,



Vanita Gupta
President & CEO

⁴³ <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/>.