



September 25, 2019

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## OPPOSE THE CONFIRMATION OF LEE RUDOFSKY TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

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 Lee Rudofsky for the U.S. District Court for the Eastern District of Arkansas.

Mr. Rudofsky, 40, a former Solicitor General of Arkansas and now a corporate executive at Walmart, has worked to advance an extreme right-wing agenda on LGBTQ rights, reproductive freedom, and racial justice, among other issues. He would bring a clear bias to the bench and should not be confirmed for a lifetime judgeship.

**Opposes LGBTQ Equality:** Mr. Rudofsky has defended numerous efforts to restrict the rights and freedoms of LGBTQ individuals. In *Arlene's Flowers, Inc. v. Washington*, he signed a brief arguing that florists are “artists” and therefore should have a license to discriminate against LGBTQ couples seeking floral arrangements for their weddings.<sup>1</sup> And he wrote that the plaintiffs in this case – who were denied public goods and services on the basis of their sexual orientation – “have suffered no tangible harm.”<sup>2</sup> These types of discriminatory arguments did not prevail at the Supreme Court in *Arlene's Flowers* or in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.

Mr. Rudofsky also fought LGBTQ equality in a case involving the rights of same-sex couples to be listed on their children’s birth certificates. In *Pavan v. Smith*, he unsuccessfully defended an Arkansas law that required a married woman’s husband to be listed as the second parent on a birth certificate when the woman gave birth using an anonymous sperm donor, but did not permit a same-sex spouse to be listed on the birth certificate.<sup>3</sup> The Supreme Court struck down the Arkansas law because it “denied married same-sex couples access to the ‘constellation of benefits that the Stat[e] ha[s] linked to marriage.’”<sup>4</sup>

<sup>1</sup> <https://www.scotusblog.com/wp-content/uploads/2017/08/17-108-cert-tsac-states-of-texas.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.scotusblog.com/wp-content/uploads/2017/04/16-992-BIO.pdf>.

<sup>4</sup> *Pavan v. Smith*, 137 S. Ct. 2077, 2078 (2017).

In addition, in *Protect Fayetteville v. City of Fayetteville*, Mr. Rudofsky fought to stop a local ordinance passed by the city of Fayetteville, Arkansas that would have prohibited discrimination against LGBTQ residents and visitors.<sup>5</sup> Mr. Rudofsky argued that local jurisdictions were not authorized to provide protections above and beyond what the state provided. His arguments were rejected by a trial court judge but later adopted by the state supreme court.

Equally troubling is Mr. Rudofsky's renouncement of briefs he previously signed in which he had advocated for marriage equality. In the landmark *Obergefell v. Hodges* and *Hollingsworth v. Perry* cases, Mr. Rudofsky joined amicus briefs arguing that the Fourteenth Amendment's equal protection clause required equal access to marriage. However, in response to a question at his Senate hearing about whether he stood by his position in those briefs, he said he did not. He testified that he was "not an expert in Fourteenth Amendment jurisprudence" at the time he signed on to the briefs, and that he now regretted doing so.<sup>6</sup> And he reinforced that response in his written responses, where he stated that "if I could go back in time and do it over again, I would not have joined the amicus briefs."<sup>7</sup>

In addition, Mr. Rudofsky has given three speeches – in 2016 and 2017 – to the homophobic organization Alliance Defending Freedom, whose positions are so extreme that it has been officially designated as a "hate group" by the Southern Poverty Law Center.<sup>8</sup> The Alliance Defending Freedom has defended proposed laws to require sterilization of transgender individuals seeking to change their name and gender on their birth certificate, and they have defended criminalizing same-sex sexual activity.<sup>9</sup> Mr. Rudofsky's affiliation with this organization is deeply troubling.

**Tried to Restrict Access to Reproductive Health Care:** Mr. Rudofsky has worked to impede women's access to reproductive health care, and he effectively asked the Supreme Court to overturn *Roe v. Wade* and *Casey v. Planned Parenthood*. In *Beck v. Edwards*, he defended Arkansas's blatantly unconstitutional ban on abortions after 12 weeks if embryonic cardiac activity was detected. Such abortions constitute 20 percent of all abortions in Arkansas.<sup>10</sup> Having failed in the lower courts, Mr. Rudofsky appealed to the Supreme Court to overturn its past precedents. He wrote:

[T]his case is about the impropriety of a judicially-imposed rule – free from any serious constitutional mooring – that sets in stone "viability" as the point before which the State's profound interests must give way to a woman's desire to terminate her pregnancy. Just as *Casey* reevaluated the wisdom and constitutional necessity of the rigid trimester framework imposed by the Court in *Roe v. Wade*, it is now time for the Court to reevaluate the rigid viability rule imposed in *Casey*.<sup>11</sup> [citations omitted.]

The Supreme Court denied Mr. Rudofsky's extreme ideological request, and the radical Arkansas law remained struck down as unconstitutional.

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<sup>5</sup> <https://www.judiciary.senate.gov/imo/media/doc/Lee%20Rudofsky%20SIQ%20-%20PUBLIC.pdf>.

<sup>6</sup> <https://www.judiciary.senate.gov/meetings/07/31/2019/nominations>.

<sup>7</sup> <https://www.judiciary.senate.gov/imo/media/doc/Rudofsky%20Responses%20to%20QFRs.pdf>.

<sup>8</sup> <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

<sup>9</sup> *Id.*

<sup>10</sup> <https://reproductiverights.org/case/edwards-v-beck>.

<sup>11</sup> Petition for Writ of Certiorari, *Beck v. Edwards*, No. 15-448 (2015).

Mr. Rudofsky wasn't just representing the views of a client in *Beck v. Edwards*. These are his personal views. In a 2016 Federalist Society podcast, he stated: "I think the framers of the Fourteenth Amendment would suggest that banning abortions, prohibiting abortions, regulating abortions, did not violate the Fourteenth Amendment."<sup>12</sup> The Fourteenth Amendment is the constitutional basis of the Supreme Court's abortion rights jurisprudence.

In addition, Mr. Rudofsky defended Arkansas's efforts to defund Planned Parenthood. A press release issued by the Arkansas Attorney General's office on Mr. Rudofsky's departure stated: "[Mr. Rudofsky] will depart the office having advised Attorney General Rutledge on several key proceedings, including being the only state in America to successfully terminate Medicaid program funding to Planned Parenthood."<sup>13</sup> Planned Parenthood challenged this policy in federal court, and, according to a press report, Mr. Rudofsky defended it at a court hearing by citing secretly-taped and discredited videos: "Arkansas Solicitor General Lee Rudofsky argued that the videos raise concerns about the possibility that Planned Parenthood may be selling human tissue for a profit and altering abortion procedures to ensure it obtains tissue it can sell."<sup>14</sup> The district court rejected his deceptive argument and ruled for Planned Parenthood, but the conservative Eighth Circuit reversed the district court in a 2-1 decision, thus permitting Arkansas to deprive reproductive health care to thousands of low-income women.

**Defended Voting Restrictions:** Mr. Rudofsky has defended barriers to the ballot box. On his Senate questionnaire, he listed *Haas v. Martin* as his most significant case, in which he defended a discriminatory Arkansas photo ID law. The law was struck down by a trial court but ultimately upheld by the state supreme court over a dissent that noted: "Requiring a voter to show a photo identification card at a polling place is simply not part of the voter registration process."<sup>15</sup>

In 2012, as Deputy General Counsel of the Romney for President campaign, Mr. Rudofsky wrote a letter to the Virginia State Board of Elections demanding that they criminally investigate a progressive public interest organization, the Voter Participation Center, for its use of voter registration forms, some of which inadvertently contained inaccurate information.<sup>16</sup> The Virginia State Board of Elections declined to conduct an investigation.<sup>17</sup>

**Hostile to Equal Opportunity Education Programs:** Mr. Rudofsky is strongly opposed to equal opportunity university admissions programs. In a 2000 op-ed, he asserted that "affirmative action perpetuates and maintains a system of racial stereotyping: individuals are lumped into categories arbitrarily based upon nothing but their race. This serves to undermine the fight against racism which

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<sup>12</sup> <https://fedsoc.org/commentary/podcasts/the-texas-abortion-case-in-the-supreme-court-whole-woman-s-health-v-hellerstedt-oral-argument-preview-podcast>.

<sup>13</sup> <https://www.arkansasag.gov/media-center/news-releases/rutledge-names-nicholas-bronni-as-solicitor-general/>.

<sup>14</sup> <https://www.arkansasnews.com/news/arkansas/judge-hears-preliminary-arguments-planned-parenthood-lawsuit#sthash.xq8NQAk1.dpuf>.

<sup>15</sup> *Martin v. Haas*, 556 S.W.3d 509, 518 (Hart, J., dissenting).

<sup>16</sup> <https://afj.org/wp-content/uploads/2019/07/Letter-re-Voter-Participation-Center.pdf>.

<sup>17</sup> [https://www.richmond.com/news/virginia/government-politics/virginia-elections-officials-warn-of-group-s-confusing-mailers-about/article\\_b90f3d98-9d77-5c0f-8887-ae9ac527cf80.html](https://www.richmond.com/news/virginia/government-politics/virginia-elections-officials-warn-of-group-s-confusing-mailers-about/article_b90f3d98-9d77-5c0f-8887-ae9ac527cf80.html).

supporters of affirmative action allege to so vehemently oppose.”<sup>18</sup> Though expressed several years ago, these views are consistent with Mr. Rudofsky’s present-day right-wing ideology.

**Disrespectful Comments about Senators’ Vital Role in Confirmation Process:** In an op-ed he wrote last year during the Kavanaugh confirmation hearing, Mr. Rudofsky made extreme statements about Senate Democrats who had asked the nominee hard questions. After specifically criticizing the questions of Ranking Member Feinstein and Senator Whitehouse, Mr. Rudofsky asserted: “I could go on and on. But, in sum, what the Democrats managed to do on the first day of the hearings was to show they don’t really give a hoot about Judge Kavanaugh’s credentials or whether Judge Kavanaugh is a mainstream judge. Instead, they only care about whether they think Judge Kavanaugh will vote the way they want him to vote on their pet policies.... The Senators who indulge and push this approach do us all and our republic a grave disservice.”<sup>19</sup> These hyperpartisan and intemperate comments further demonstrate Mr. Rudofsky’s lack of fitness for the federal bench.

**Ideological and Partisan Affiliations:** Mr. Rudofsky has been a member of the far-right Federalist Society since 2002, his first year of law school. He has given a dozen speeches to the Federalist Society, and he currently serves as the Vice President of the Federalist Society’s Northwest Arkansas Lawyers’ Chapter.<sup>20</sup> He previously served on the Federal Society’s Executive Committee for International and National Security Law Practice Group, and he was the Colloquia Chair of the Federalist Society’s Harvard Law School Chapter. This out-of-the-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 50 percent of his district court nominees are members of the Federalist Society.

Mr. Rudofsky is also a longtime member (since 2004) of the right-wing Republican National Lawyers Association.<sup>21</sup> This organization stridently opposed the Sonia Sotomayor and Elena Kagan nominations to the Supreme Court, and it routinely advocates for voter suppression tactics and other anti-civil rights laws and policies.

Mr. Rudofsky has also been a member of the National Rifle Association, which has engaged in a massive lobbying campaign over the years to oppose common-sense gun safety laws. They have opposed such laws even in the wake of tragic mass shootings that have become commonplace in our nation due to the ease with which dangerous individuals can acquire weapons of war.

Moreover, Mr. Rudofsky has served as a political operative and fundraiser. He has contributed nearly \$17,000 to Republican politicians and organizations,<sup>22</sup> and he has worked on many Republican political campaigns. He has written letters of support to the Senate for many of President Trump’s most extreme and ideological nominees: J. Campbell Barker, Andrew Brasher, Daniel Bress, Stuart Duncan, Britt

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<sup>18</sup> <https://afj.org/wp-content/uploads/2019/07/Affirmative-action.pdf>.

<sup>19</sup> [https://lawprofessors.typepad.com/appellate\\_advocacy/2018/09/guest-post-in-day-one-of-hearings-democrats-show-only-that-kavanaugh-is-a-mainstream-judge.html](https://lawprofessors.typepad.com/appellate_advocacy/2018/09/guest-post-in-day-one-of-hearings-democrats-show-only-that-kavanaugh-is-a-mainstream-judge.html).

<sup>20</sup> <https://www.judiciary.senate.gov/imo/media/doc/Lee%20Rudofsky%20SJQ%20-%20PUBLIC.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> <https://classic.fec.gov/finance/disclosure/norindsea.shtml>.

Grant, Jeffrey Mateer, Eric Murphy, Andrew Oldham, Brett Talley, and Patrick Wyrick.<sup>23</sup> Like these nominees – all of whom The Leadership Conference opposed – Mr. Rudofsky has an obvious ideological bias and would not be capable of serving as a neutral, fair-minded jurist.

**Disturbing Lack of Diversity:** President Trump’s lack of commitment to diversity on the federal judiciary is deeply disturbing. Mr. Rudofsky, like the vast majority of the president’s judicial nominees, is white and male. President Trump has appointed the least diverse group of nominees in decades.<sup>24</sup> 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 and many others – including Mr. Rudofsky’s disgraceful efforts to restrict environmental protections, immigrant rights, criminal justice, educational equality, workers’ rights, and consumers’ rights – The Leadership Conference urges you to oppose the confirmation of Lee Rudofsky for the U.S. District Court for the Eastern District of Arkansas. 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

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<sup>23</sup> <https://www.judiciary.senate.gov/imo/media/doc/Lee%20Rudofsky%20SJQ%20-%20PUBLIC.pdf>.

<sup>24</sup> <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/>.