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November 14, 2017

The Leadership Conference

OPPOSE THE CONFIRMATION OF DON WILLETT 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 opposition to the confirmation of Don Willett to the U.S. Court of Appeals for the Fifth Circuit.

Don Willett, a justice on the Texas Supreme Court since 2005, has advanced a right-wing agenda throughout his career, both on and off the bench. Justice Willett's record of extreme legal views earned him a place on then-candidate Trump's list of 21 potential Supreme Court nominees assembled last year by the far-right Federalist Society and Heritage Foundation. Justice Willett lacks the impartiality and temperament necessary to serve as a federal judge, a lifetime appointment.

Conservative Bias: The Texas Supreme Court is an all-Republican court and one of the three most conservative state supreme courts in the country.[1] Justice Willett has gone out of his way to boast about being the most conservative member of this extremely conservative court. In a 2012 interview, Justice Willett said:

> "I've built a record that is widely described – well, universally described – as the most conservative of anybody on the [Texas] Supreme Court. I've garnered support from every corner of the conservative movement. There's no ideological daylight to the right of me…. I'm universally regarded to be the most conservative member of the court, which is a label that I accept with, frankly, gladness and gusto."[2]

In a 2012 re-election campaign ad that Justice Willett approved and used, a narrator said: "Texas Supreme Court Justice Don Willett is widely hailed as our most conservative justice. Conservative leaders even describe Don Willett as the judicial remedy to Obamacare, drafting the legal roadmap to reign in big government. Don Willett helped defend the right of Texas to display the Ten Commandments and fought the liberals who tried to remove the words 'Under God' from our Pledge."[3]

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[1] https://ballotpedia.org/Political_outlook_of_state_supreme_court_justices.
[2] https://www.youtube.com/watch?v=ImznoCBCrnE.
[3] https://www.youtube.com/watch?v=WJQFioXc4Mg.

The last reference in his 2012 campaign ad refers to Mr. Willett's work in the Texas Attorney General's office from 2003-2005, when he wrote legal briefs defending the display of a Ten Commandments monument on the Texas Capitol grounds and defending (in an amicus brief) a California school district's policy of daily recitation of the Pledge of Allegiance in the classroom.

The reference to Justice Willett as the "judicial remedy to Obamacare" stemmed from a concurring opinion he wrote in the case *Robinson v. Crown Cork & Seal Co.*,[4] where Justice Willett joined the majority in striking down a tort reform law as unconstitutionally retroactive, but where he wrote separately to deliver an anti-government lecture. He wrote that the case "teaches a vital lesson about diminished liberty stemming from government overreaching,"[5] and "Texans long ago and since have embraced constitutional, meaning limited, government,"[6] and he concluded: "Summing up: Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction."[7]

Echoing the sentiment expressed in his *Robinson* concurrence, Justice Willett criticized the Affordable Care Act (ACA) in remarks he made in January 2012, months before the Supreme Court upheld the constitutionality of the ACA. According to a news account: "Texas Supreme Court Justice Don Willett, speaking before [Texas Attorney General] Abbott, praised the attorney general for leading the fight against 'Obamacare.' Willett said a U.S. Supreme Court decision upholding the law would destroy the notion of limited federal powers. 'Government will have carte blanche to control every sphere of your everyday life,' Willett said."[8] Justice Willett's hyperbolic analysis and slippery slope argument were echoed for years by those on the conservative fringe who sought to deny the authority of Congress to pass comprehensive health care reform.

Justice Willett's extreme agenda was also on display in his concurring opinion in *Patel v. Texas Department of Licensing & Regulation*,[9] where his court struck down a state statute that required 750 hours of training for a license to practice commercial eyebrow threading. Justice Willett concurred and issued another judicial rant about government overreach. He wrote: "This case is fundamentally about the American Dream and the unalienable human right to pursue happiness without curtsying to government on bended knee. It is about whether government can connive with rent-seeking factions to ration liberty unrestrained, and whether judges must submissively uphold even the most risible encroachments."[10] The dissent in this case lambasted both the majority opinion and Justice Willett's concurrence: "The Court disregards the federal courts' experience with substantive due process in *Lochner* and its progeny, invents a new test unprecedented in American jurisprudence, and ushers in a new era of government by judges.

[4] 335 S.W.3d 126 (Tex. 2010).
[5] Id. at 159 (Willett, J., concurring).
[6] Id. at 163.
[7] Id. at 165.
[8] Lowell Brown, "Abbott shares insight Texas attorney general speaks on wide range of topics – at GOP meeting," Denton Record-Chronicle, January 20, 2010.
[9] 469 S.W.3d 69 (Tex. 2015).
[10] Id. at 93 (Willett, J., concurring).

The Court, and Justice Willett's concurring opinion in its wild championing of economic liberty, seems oblivious to the reality that social liberty is no less important."[11]

Justice Willett's apparent interest in reviving *Lochner* is highly troubling because it would undermine the government's ability to regulate workplace safety, employment discrimination, and minimum-wage requirements. As one commentator noted in discussing Justice Willett's *Patel* concurrence: "Even Robert Bork, the late conservative judicial icon, called *Lochner* 'the symbol, indeed the quintessence, of judicial usurpation of power.'"[12] The commentator also observed that Justice Willett's *Patel* concurrence "has been hailed as one of the most important conservative opinions of recent years" and is "one of the main reasons Willett's name appeared on President Trump's short list for the U.S. Supreme Court."[13]

Sex Discrimination: As an aide to Governor George W. Bush, Mr. Willett wrote a memo in 1998 in which he expressed antipathy to women's rights in the workplace. In opposing a proclamation declaring "Business Women's Week" in Texas, Mr. Willett wrote: "I resist the proclamation's talk of 'glass ceilings,' pay equity (an allegation that some studies debunk), the need to place kids in the care of rented strangers, sexual discrimination/harassment, and the need generally for better 'working conditions' for women (read: more government)."[14] These offensive remarks reflect a profoundly sexist mindset and call into question whether Justice Willett would uphold federal civil rights laws like Title VII and the Lilly Ledbetter Fair Pay Act. After his memo was leaked to a reporter in 2000, Governor Bush's office "sought to distance Bush from the memo" and a Bush spokesperson stated that the Willett memo was "one person privately expressing his personal opinion to a colleague."[15]

LGBT Issues: In 2005, according to a press report, Mr. Willett attended an event by the Texas Restoration Project, a group of conservative religious leaders.[16] The article stated that "there is no mistaking the fever-pitched gay-bashing theme of most of the speeches" at this event, and it said that a pastor from Ohio "lambasted the 'homosexual agenda'" while a Texas minister "delivered a hellfire condemnation of gays and lesbians, climaxing his address with the biblical story of the fire that destroyed Sodom and Gomorrah."[17]

Justice Willett was part of a Texas Supreme Court majority in *Pidgeon v. Turner*[18] that held in June 2017 that city employees who were married in other states did not have any automatic rights to benefits, despite the U.S. Supreme Court's 2015 holding in *Obergefell v. Hodges*. In a 2016 case, *In re State*,[19] Justice Willett wrote a concurring opinion that applied *Obergefell* but delayed its application for 45 days in light of a state law requiring 45 days' notice when a state law is challenged on constitutional grounds. Justice Willett declared: "By a 5-4 vote, the Highest Court in the Land has mandated the recognition of same-sex

[11] Id. at 147-148 (Hecht, C.J., dissenting).
[12] http://www.governing.com/topics/public-justice-safety/gov-don-willett-conservative-justice.html.
[13] Id.
[14] Ken Herman, "Bush advisor's memo critical of women's issues," Austin American-Statesman, July 15, 2000.
[15] Id.
[16] Amy Smith, "Preying for Votes: The Governor's Preachers," Austin Chronicle, September 2, 2005.
[17] Id.
[18] 2017 Tex. LEXIS 654 (June 30, 2017).
[19] 489 S.W.3d 454 (Tex. 2016).

marriage from sea to shining sea. People of goodwill can debate the merits of that ruling, but no one can debate the clarity of section 402.010. A Texas court's notice duty is mandatory – zero exceptions."[20]

An inveterate user of Twitter, Justice Willett has ridiculed the LGBT community in some of his tweets, which were discussed in an article entitled "Trump's LGBT-Unfriendly Supreme Court Picks."[21] In one of his many intemperate tweets, issued the day after the Supreme Court oral argument in 2015 in *Obergefell v. Hodges*, Justice Willett wrote: "I could support recognizing a constitutional right to marry bacon."[22] In 2014, Justice Willett retweeted a Fox News story about a transgender student making a girls' softball team, and he wrote: "Go away, A-Rod."[23]

Voting Rights: When he worked in the Texas Attorney General's office from 2003-2005, Mr. Willett participated in two voting rights cases in which he defended Texas from claims of Voting Rights Act violations. In *Barrientos v. Texas*,[24] he drafted a brief asking the U.S. Supreme Court to affirm a lower court decision that dismissed a complaint filed by 11 state senators who alleged that the Voting Rights Act had been violated when the Texas legislature passed a second congressional redistricting plan after the 2000 Census. The Supreme Court did affirm the lower court. In *Session v. Perry*,[25] Mr. Willett assisted with trial preparation in another challenge to the Texas congressional redistricting plan. In this case, the Supreme Court struck down one of the congressional districts because it diluted Latino voting power and violated the Voting Rights Act,[26] but Mr. Willett had left the office by then and did not work on the Supreme Court briefing.

Affirmative Action: In a 1999 law review article, Mr. Willett praised the Fifth Circuit's decision in *Hopwood v. Texas*,[27] which ruled in favor of four white plaintiffs who challenged the constitutionality of race-conscious criteria in college admissions. Mr. Willett and his co-author wrote: "*Hopwood* has given Texas the chance to build a new vision based on affirmative opportunity for all instead of affirmative action for some."[28] They also stated: "The courts and the public have rightly recognized that conventional affirmative action has failed," and "[t]he judgment of history is clear that the vast majority of minorities are not held back by racial bigotry, but by fractured families and poor K-12 schools that deny them the credentials required to enter elite social institutions."[29]

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[20] Id. at 456 (Willett, J., concurring).
[21] https://www.advocate.com/election/2016/5/18/trumps-lgbt-unfriendly-supreme-court-picks.
[22] Id.
[23] Id.
[24] 541 U.S. 984 (2004).
[25] 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated sub nom. Travis County v. Perry*, 543 U.S. 941 (2004); *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2004), *aff'd in part, vacated in part, rev'd in part sub nom. LULAC v. Perry*, 548 U.S. 399 (2006).
[26] *LULAC v. Perry*, 548 U.S. 399 (2006).
[27] 78 F.3d 932 (5th Cir. 1996).
[28] T. Vance McMahan & Don R. Willett, "Hope from *Hopwood*: Charting a Positive Civil Rights Course for Texas and the Nation," Stanford Law & Policy Review, Spring 1999.
[29] Id. at 169.

Trump Litmus Test: Justice Willett's extreme ideology earned him a place on the Federalist Society and Heritage Foundation's list of potential Supreme Court nominees. During last year's presidential campaign, Mr. Trump created unseemly litmus tests and expressly stated he would only appoint Supreme Court justices who opposed abortion rights and gun safety laws. Asked in a presidential debate if his Supreme Court appointees would vote to overturn *Roe v. Wade*, candidate Trump said: "If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the court."[30] In the same debate, he stated: "I'm very proud to have the endorsement of the NRA and it was the earliest endorsement they've ever given to anybody who ran for president…. We are going to appoint justices that will feel very strongly about the second amendment."[31] Justice Willett – who has been a member of the Federalist Society since 1992 and has served on the board of advisors of the Austin Lawyers Chapter of the Federalist Society since 2003[32] – presumably passed these litmus tests.

Contempt for Senate Judiciary Committee: From 2002-2003, Mr. Willett served as a Deputy Assistant Attorney General in the Office of Legal Policy at the U.S. Department of Justice, a position in which he "assisted with selection and vetting of nominees to the federal courts."[33] In a 2010 speech, Justice Willett discussed his role in assisting President Bush's judicial nominees, and he expressed cynicism and disdain for the important role that members of the Senate Judiciary Committee play in evaluating judicial nominees. Justice Willett said:

> "Once upon a time, I worked at the U.S. Department of Justice, helping vet and scrub federal judicial nominees and then trying to shepherd these innocent lambs through the odious confirmation gauntlet. We routinely put nominees through the meat grinder of mock confirmation hearings, and Lesson One we tried to brand on their noggin was, 'Don't take the bait – don't engage; don't joust.' Judicial confirmation hearings are not honest debating societies. They are not occasions for elegant and high-minded give and take. It is raw political bloodsport, and the panel's goal is partisan point-scoring, so we told our nominees to bob and weave, be the teeniest tiniest target you can be, and whatever you do, do not commit the cardinal Bork-ian sin of trying to convince the panel that you're right and they're wrong. You want to be as bland, forgettable and unremarkable as possible."[34]

Now that Justice Willett himself is a federal judicial nominee, Senate Judiciary Committee members must be vigilant and not permit him to employ the same manipulative strategy he counseled past nominees to pursue in testifying before the Senate. Instead, he must be questioned about his unabashedly extreme views and arrogance about the role judges play in our democracy.

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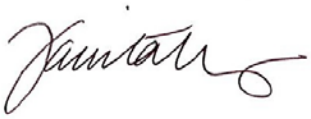
[30] http://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[31] Id.
[32] https://www.judiciary.senate.gov/imo/media/doc/Willett%20SJQ.pdf.
[33] Id.
[34] Don Willett, Remarks at Retirement of Texas Supreme Court Justice Scott Brister, State Bar of Texas, Austin, Texas, January 20, 2010.

The Leadership Conference

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Don Willett 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,



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