



October 25, 2017

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## OPPOSE THE CONFIRMATION OF ALLISON EID TO THE U.S. COURT OF APPEALS FOR THE TENTH 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 Allison Eid for the U.S. Court of Appeals for the Tenth Circuit.

As a member of the Colorado Supreme Court since 2006, Justice Eid has a demonstrated record of conservative extremism. She has consistently rejected civil rights and public interest claims, often in dissent. A leading Colorado appellate attorney has said: "Eid is pretty similar in judicial outlook to Justice Gorsuch and pretty similar to Justice (Antonin) Scalia."<sup>1</sup> Justice Eid's record of extreme legal views earned her 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.

**Voting Rights:** In *Hall v. Moreno*,<sup>2</sup> Justice Eid was the sole dissenter in a case upholding a congressional redistricting map following the 2010 Census, which revealed that population shifts within Colorado necessitated the creation of new districts. Although the case did not implicate the Voting Rights Act, the court majority concluded that preserving Latino voting power was an important consideration in the creation of one of the districts. In affirming the lower court's redistricting map, the Colorado Supreme Court majority stated: "The trial court found that competitive districts empower the Hispanic community by allowing its voting bloc to carry significant weight in elections. Again, the trial court reasoned that the more competitive a district, the more responsive a representative would be and the lesser chance that any voter bloc could be marginalized or ignored."<sup>3</sup> More broadly, the majority held that new districts were consistent with the Equal Protection Clause of the Fourteenth Amendment and the one-person-one-vote principle set forth in the Constitution and *Reynolds v. Sims*.<sup>4</sup> Justice Eid was the only justice on her court to reject that analysis. In her sole dissent, Justice Eid insisted that the majority had given insufficient weight to the disruption of prior district lines. Her dissent constitutes a misreading of constitutional principles.

<sup>1</sup> <http://www.denverpost.com/2017/09/19/colorados-allison-eid-whose-record-bends-trumps-conservatism-appeals-court-nomination-senate/>.

<sup>2</sup> 270 P.3d 961 (Colo. 2012).

<sup>3</sup> Id. at 981.

<sup>4</sup> 377 U.S. 533 (1964).

Justice Eid refused to distance herself from President Trump’s outrageous and baseless claim that millions of people voted illegally in the 2016 election. Senator Durbin asked her in writing (when she would have time to reflect and perform even a cursory analysis): “Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?” Justice Eid responded: “I have made no effort to investigate the basis for the President’s assertion and any answer I would provide would be mere speculation.”<sup>5</sup>

**Criminal Justice:** In a significant police misconduct case, *People v. Vigil*,<sup>6</sup> Justice Eid issued a troubling dissent. The case involved Clovis Vigil, who was severely beaten by two police officers after he tried to walk away from the officers who asked him if he possessed drugs. According to the majority opinion: “When Vigil attempted to shrug off the officer’s grab, the first officer struck him with a martial arts ‘back fist’ to his face, fracturing multiple bones in his face and dropping Vigil to his knees. The second officer attempted to spray Vigil’s eyes with OC spray, a chemical repellant, and then struck him three times with a metal baton.”<sup>7</sup> Mr. Vigil then confessed to possessing drugs. After receiving six hours of medical treatment for his injuries, Mr. Vigil was taken to the police station and interrogated by the same officers who had inflicted the injuries, and he made additional inculpatory statements. The Colorado Supreme Court affirmed the trial court ruling that suppressed the confession as involuntary, and the drugs “discovered through Vigil’s confession and unlawful arrest as the ‘fruit of the poisonous tree.’”<sup>8</sup> Justice Eid concurred with the decision to suppress the confession, but she joined a dissent that would have permitted the admission of the evidence. Justice Eid wrote: “I agree with the dissent that the prosecution properly preserved its objection to the suppression of the contraband evidence, and join the dissent to the extent that it would find the evidence should not have been suppressed.”<sup>9</sup>

In *People v. Ramadan*,<sup>10</sup> the Colorado Supreme Court ordered the suppression of statements made by Jasim Ramadan at a police station because the statements were made as a result of impermissible coercion. The police officer told him that if he didn’t tell the truth, he would be deported to Iraq, where he believed he would be beaten or killed. As set forth by the court majority: “Ramadon is a native of Iraq who the United States military brought to this country for his protection as a teenager. He was brought here after members of his immediate family were killed because of his aid to the United States during the Iraq war.”<sup>11</sup> Justice Eid again issued a dissent, concluding: “In this case, the majority mistakenly finds that the detective’s statement was coercive, and then compounds that mistake by erroneously concluding that the statement overbore the defendant’s will.”<sup>12</sup>

**Access to Courts:** In *Westin Operator v. Groh*,<sup>13</sup> the Colorado Supreme Court ruled that Jillian Groh – who suffered traumatic brain injuries in a car accident – could sue a hotel for negligence after the hotel evicted her and her friends for being too loud. Although the plaintiff and her friends told hotel security

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<sup>5</sup> <https://www.judiciary.senate.gov/imo/media/doc/Eid%20Responses%20to%20QFRs.pdf>.

<sup>6</sup> 242 P.3d 1092 (Colo. 2010).

<sup>7</sup> Id. at 1094.

<sup>8</sup> Id. at 1096.

<sup>9</sup> Id. at 1099 (Eid, J. concurring in the judgment in part and dissenting in part).

<sup>10</sup> 314 P.3d 836 (Colo. 2013).

<sup>11</sup> Id. at 838.

<sup>12</sup> Id. at 846 (Eid, J., dissenting).

<sup>13</sup> 347 P.3d 606 (Colo. 2015).

guards that they were too inebriated to drive, the guards evicted them from the hotel and into freezing cold weather. The court majority denied summary judgment for the hotel because many factual disputes existed in the case. As the majority stated: “For instance, the record does not contain determinative information on the adequacy of the Westin’s training on eviction procedures, the degree of Groh’s intoxication, the accessibility of alternative transportation, the parties’ knowledge as to the availability of alternative transportation, and the weather conditions at the time of eviction.”<sup>14</sup> Justice Eid dissented and would have dismissed the case in its entirety. Her dissent reflects judicial arrogance when it comes to applying longstanding precedent related to the summary judgment standard. Her responses to Senator Durbin’s probing questions about her dissent, both at her hearing and in response to written questions, failed to allay concerns about her bias against civil plaintiffs seeking redress in court.

Justice Eid also issued a troubling dissent in *City of Brighton v. Rodriguez*,<sup>15</sup> in which the plaintiff, Helen Rodriguez, fell down a flight of stairs at her workplace and suffered severe brain injuries. The employer attempted to deny compensation to Ms. Rodriguez because her fall was “unexplained.” But the Colorado Supreme Court rejected that argument and – following binding case law that requires appellate courts to defer to the evidentiary findings of administrative law judges – held that Ms. Rodriguez’s injury arose out of her employment and therefore that she was entitled to compensation under Colorado workers’ compensation law. Justice Eid did not follow binding precedent and would have dismissed the case.

Justice Eid again dissented in *Jackson v. Unocal Corp.*,<sup>16</sup> in which plaintiff landowners filed a class action alleging that the defendant oil company caused asbestos contamination as a result of its removal of an oil pipeline. Following established precedent, the Colorado Supreme Court deferred to the trial court conclusion that the plaintiffs had met the test – common issues of liability and damages predominated – to be certified as a class. Justice Eid, however, rejected that analysis and would have denied class certification. Class action lawsuits have historically been critical to the success of civil rights and consumer rights actions, which allow individuals to band together to fight for justice as a group. Class actions provide a mechanism for people to recover damages for smaller claims that otherwise would not be worth the legal expense if brought individually. They are a critical tool for discrimination victims and low-income people, but Justice Eid’s record does not show respect for such claims.

**Religious Discrimination:** In *Taxpayers for Public Education v. Douglas County School District*,<sup>17</sup> the Colorado Supreme Court struck down a Colorado educational program that awarded taxpayer-funded scholarships to students who could use their scholarships to attend religious schools, several of which had discriminatory practices. As a concurring justice noted: “At least eight [of 23 religious schools] discriminate in enrollment or admissions on the basis of religious beliefs or practices. In addition, the trial court found that the [Choice Scholarship Pilot Program] permits Private School Partners to discriminate against students with disabilities; that one school has an ‘AIDS policy’ under which it can refuse to admit, or expel, HIV-positive students; and that another participating school lists homosexuality as a ‘cause for termination’ in its teacher contract.”<sup>18</sup> Justice Eid again dissented from the majority and

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<sup>14</sup> Id. at 617.

<sup>15</sup> 318 P.3d 496 (Colo. 2014).

<sup>16</sup> 262 P.3d 874 (Colo. 2011).

<sup>17</sup> 351 P.3d 461 (Colo. 2015).

<sup>18</sup> Id. at 479 (Marquez, J., concurring in the judgment).

even alleged that the constitutional provision at issue might be premised on “anti-Catholic bigotry.”<sup>19</sup> Justice Eid’s answers to questions about this case from Senator Whitehouse and Senator Coons did nothing to alleviate serious concerns raised by her dissenting opinion.

In *Catholic Health Initiatives Colorado v. City of Pueblo*,<sup>20</sup> the court majority ruled that a nursing home affiliated with the Catholic Church was not entitled to a tax exemption because it did not constitute a “charitable organization” under the city’s tax code and controlling case law. Justice Eid again dissented, accusing the majority of applying the tax code “in such a way that discriminates against religious organizations”<sup>21</sup> in violation of the First Amendment’s Free Exercise Clause.

**Public School Funding:** In *Lobato v. People*,<sup>22</sup> the Colorado Supreme Court ruled that the plaintiff school districts had standing to challenge the adequacy of the Colorado public school financing system under the Colorado Constitution. As evidence, the plaintiffs cited data “indicating that students of color, English language learner (‘ELL’) students, students with disabilities, and economically disadvantaged students failed to meet certain proficiency targets.”<sup>23</sup> Justice Eid joined the dissent, which would have dismissed the case based on the political question doctrine, which establishes that certain constitutional provisions may be interpreted and enforced only through the political process. The court majority rejected that analysis, stating: “A ruling that the plaintiffs’ claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a ‘thorough and uniform’ system of public education.”<sup>24</sup>

In another school funding case, *Mesa County Board of County Commissioners v. State*,<sup>25</sup> the Colorado Supreme Court ruled 6-1 that it was permissible for local school districts to increase property taxes to help fund public schools. In Colorado, public schools are funded by a combination of local property tax revenue and state funding in a formula set forth in the state’s School Finance Act. As the court majority explained: “The School Finance Act funding formula and the state’s contribution to it are intended to adjust for the disparities in property values throughout the state and to make per pupil expenditures more equitable.”<sup>26</sup> A state constitutional provision limits the amount of local tax revenue that can be collected unless voters waive the revenue limits, which they did in 174 of 178 Colorado school districts. The waivers allowed school districts to better fund their public schools. In a lone dissent, Justice Eid criticized the majority ruling as a “\$117 million tax increase on Colorado voters.”<sup>27</sup> Her sole dissent mirrored that of conservative activists and Republican politicians.<sup>28</sup>

**Property Rights:** Justice Eid has been a zealous defender of companies and property rights, dissenting in several eminent domain cases in which the government sought to condemn corporate and company lands

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<sup>19</sup> Id. at 479-480 (Eid, J., concurring in part and dissenting in part).

<sup>20</sup> 207 P.3d 812 (Colo. 2009).

<sup>21</sup> Id. at 826 (Eid, J., dissenting).

<sup>22</sup> 218 P.3d 358 (Colo. 2009).

<sup>23</sup> Id. at 364.

<sup>24</sup> Id. at 372.

<sup>25</sup> 203 P.3d 519 (Colo. 2009).

<sup>26</sup> Id. at 522.

<sup>27</sup> Id. at 538 (Eid, J., dissenting).

<sup>28</sup> <http://www.denverpost.com/2009/03/16/colorado-supreme-court-upholds-1-7b-school-tax/>.

for public benefit. On at least three occasions, she dissented in cases in which the Colorado Supreme Court ruled that the government could condemn private property or assess certain fees in order to create parks, improve highways, and maintain infrastructure.<sup>29</sup> However, in a case involving the question of whether condemnation authority could be granted to an oil company, Justice Eid said that condemnation authority was permissible.<sup>30</sup> Once again, she was a dissenting voice.

**Judicial Independence:** President Trump’s ad hominem attacks on federal judges who have ruled against him are beyond the pale and have been roundly rejected by commentators across the political spectrum. Even Justice Gorsuch called the President’s remarks “disheartening and demoralizing.”<sup>31</sup> It is therefore disappointing that Justice Eid refused to express any concern whatsoever of President Trump’s attacks on judicial independence. Senator Hirono asked her the following question in writing: “The person who nominated you does not have much respect for judges or courts. As a candidate for President and even now while in office, President Trump has belittled and berated judges who do not rubberstamp his views. He attacked Judge Curiel, his family’s heritage and his fairness while he was presiding over the Trump University fraud case. He sought to bully Judge Robart, who decided the first case challenging the constitutionality of his anti-Muslim travel ban. He sought to intimidate the Ninth Circuit, and more recently has belittled Judge Watson in Hawaii for ruling in the second round of travel ban cases. His pardon of Joe Arpaio shows he has little regard for the rule of law or the role of courts as a co-equal and independent branch. What is your view of President Trump’s comments on judges?” Justice Eid responded: “Federal judges are afforded life tenure in part to insulate them from popular sentiment. I have no opinion with respect [sic] President Trump’s comments.”<sup>32</sup> It is difficult to fathom anyone serving on a state supreme court who would not honestly have an opinion on such attacks on judicial independence.

Justice Eid’s extreme ideology earned her 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.”<sup>33</sup> 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.”<sup>34</sup> Justice Eid – who has been a member of the Federalist Society since 1988,<sup>35</sup> and who served as a faculty

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<sup>29</sup> *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (Eid, J., dissenting); *Department of Transportation v. Gypsum Ranch Co.*, 244 P.3d 127 (Colo. 2010) (Eid, J., dissenting); *Wolf Ranch v. City of Colorado Springs*, 220 P.3d 559 (Colo. 2009) (Eid, J., dissenting).

<sup>30</sup> *Larson v. Sinclair Transportation*, 284 P.3d 42 (Colo. 2012) (Eid, J., dissenting).

<sup>31</sup> <http://thehill.com/blogs/blog-briefing-room/news/318573-trump-scotus-pick-called-the-presidents-attack-on-judiciary>.

<sup>32</sup> <https://www.judiciary.senate.gov/imo/media/doc/Eid%20Responses%20to%20QFRs.pdf>.

<sup>33</sup> <http://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

<sup>34</sup> *Id.*

<sup>35</sup> <https://www.judiciary.senate.gov/imo/media/doc/Eid%20SJO.pdf>.



advisor to the University of Colorado law school Federalist Society chapter<sup>36</sup> – must have passed these litmus tests.

A final reason we oppose the Eid nomination is that the judicial vacancy to which she has been nominated does not need to be filled. The Judicial Conference of the United States – which is led by Chief Justice John Roberts – made recommendations to Congress in March 2017 for the creation of additional federal judgeships and the elimination of unnecessary judgeships. After outlining the recommendation to create 57 new judgeships, the Judicial Conference stated: “In addition, the Judicial Conference also agreed to recommend to Congress and the President that they not fill the next judgeship vacancy on the U.S. Court of Appeals for the Tenth Circuit and in the District of Wyoming, based on consistently low filings in both courts.”<sup>37</sup> If the federal courts themselves do not believe the Tenth Circuit seat should be filled, it would be an utter waste of taxpayer dollars to confirm Justice Eid to this vacancy.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Allison Eid to the U.S. Court of Appeals for the Tenth 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

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<sup>36</sup> <http://www.denverpost.com/2017/06/07/donald-trump-allison-eid-nomination-10th-circuit-court-of-appeals/>.

<sup>37</sup> <http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships>.