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The Leadership Conference

OPPOSE THE CONFIRMATION OF BRITT GRANT TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH 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 Britt Grant to the U.S. Court of Appeals for the Eleventh Circuit.

Britt Grant, 40, is a justice on the Supreme Court of Georgia. Although she has not had controversial cases during her first year on that court, in her previous job as Solicitor General of Georgia her work sought to diminish civil and human rights in America. Her extreme ideology earned her a place on President Trump's Supreme Court short list.[1] She graduated from law school just 11 years ago, which is less experience than the American Bar Association's ("ABA") minimum years of practice standard to be rated qualified to serve as a federal judge. The ABA rating for Ms. Grant has not yet been submitted to the Senate Judiciary Committee, but in his haste to rush President Trump's judicial nominees through the committee regardless of their qualifications, Chairman Grassley has scheduled Ms. Grant's hearing for May 23, 2018. The Senate must reject this nomination.

Hostile to Voting Rights: In the infamous *Shelby County v. Holder* case, Ms. Grant worked on an amicus brief filed by the state of Georgia in 2012 that sought to declare the heart of the historic Voting Rights Act unconstitutional. Ms. Grant's brief stated: "The Court should grant certiorari to Shelby County and declare Sections 4(b) and 5 of the Voting Rights Act unconstitutional."[2] Ms. Grant's position – affirmed by the Supreme Court in a controversial 5-4 decision – has led to the passage of widespread voter suppression laws, voter purges, and discriminatory polling place practices.

In the 2014 case *Kobach v. U.S. Election Assistance Commission*,[3] Ms. Grant worked on an amicus brief on behalf of Kansas and Arizona, which had sought to require proof of citizenship in order to register to vote in federal elections. The Tenth Circuit rejected Ms. Grant's argument in a unanimous opinion and said that her argument was "plainly in conflict with the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*,"[4] which held that the National Voter Registration Act precluded a state from requiring information for federal elections beyond what the federal voter registration form required.

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[1] https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-five-additions-supreme-court-list/.
[2] http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-96-Shelby-Co-AZ-Amicus-Brief.pdf.
[3] 772 F.3d 1183 (10th Cir. 2014).
[4] 133 S. Ct. 2247 (2013).

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After the Supreme Court denied certiorari in this case,[5] the Brennan Center for Justice stated: "This makes clear, once and for all, that Kansas and Arizona's attempt to make it harder to register using our national voter registration form violates federal law. It's time for Kansas and Arizona to stop trying to create hurdles in the voting process and to focus on keeping elections free, fair, and accessible to all."[6]

Attacked LGBT Equality: Ms. Grant worked on an amicus brief filed by Georgia and other states in the landmark case *Obergefell v. Hodges*,[7] which established marriage equality in America. Ms. Grant argued there was no constitutional right to marriage equality. Her 2015 brief stated:

> The Constitution takes no sides on same-sex marriage, and therefore leaves the issue up to the free deliberations of state citizens…. States may rationally structure marriage around the biological reality that the sexual union of a man and a woman – unique among human relationships – produces children…. A decision that the Fourteenth Amendment compels what those States [that adopted same-sex marriage through the political process] spent so much energy to accomplish would dissolve any democratic legitimacy they conferred on same-sex couples by granting them the status of marriage.[8]

The Supreme Court rejected these and other discriminatory arguments made by Ms. Grant and conservative ideologues who sought to deny the right to marry for millions of LGBT people.

In *Gloucester County School Board v. G.G.*, Ms. Grant argued against the right of transgender school children to use the restroom of their gender identity. Her 2016 brief attacked the decision by the U.S. Departments of Education and Justice to issue a guidance letter protecting transgender student rights, arguing that the decision violated federalism principles and states' rights. Ms. Grant went so far as asking the Supreme Court to overrule its past precedent that requires deference to legitimate decisions made by federal agencies. Her brief stated: "The time has come for this Court to revisit the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997) – a judge-made theory of deference that has been criticized by several Justices of this Court; that perpetually bedevils and divides the lower courts; and that improperly concentrates an extraordinary amount of power in federal agencies to the detriment of the States and the public."[9] The Supreme Court did not issue a decision in this case; it was remanded to the Fourth Circuit after the Trump administration rescinded the agencies' guidance letter.

Undermined Women's Access to Health Care: Ms. Grant worked on several briefs that sought to limit women's access to reproductive health care. In *Sebelius v. Hobby Lobby Stores, Inc.*, she worked on an amicus brief in 2014 and argued that corporations are "persons" with religious rights and should not have to abide by a federal requirement that health plans offered by employers provide contraception coverage to their female employees. Ms. Grant's brief articulated a sweeping license to discriminate in the name of religion, stating: "Courts should not become enmeshed in evaluating the interpretive merits or proper doctrinal weight of religious principles. Their religious propriety is not for the courts to second guess."[10] Ms. Grant made the same argument in an amicus brief filed in the case *Conestoga Wood Specialties Corp.*

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[5] 135 S. Ct. 2891 (2015).
[6] https://www.brennancenter.org/press-release/voting-rights-victory-supreme-court-declines-hear-voter-registration-case.
[7] 135 S. Ct. 2584 (2015).
[8] http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556562571574bsacLouisiana.pdf.
[9] http://www.scotusblog.com/wp-content/uploads/2016/10/16-273-certiorari-amicus-west-virginia-et-al.pdf.
[10] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_som.authcheckdam.pdf.

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v. Sebelius, which was later consolidated with *Hobby Lobby*. In a controversial 5-4 decision, the Supreme Court held that the contraception requirement violated the Religious Freedom Restoration Act.

Ms. Grant defended her state's so-called "fetal pain" law, passed in 2012, that banned abortions after 20 weeks of pregnancy and permitted doctors who were in violation to be charged with a felony punishable by up to 10 years in prison. This law, which did not contain an adequate exception to protect women's health or for cases in which the pregnancy was caused by rape or incest, was challenged in court and initially struck down by a trial judge. The law was upheld by the Georgia Supreme Court last year, which concluded that the sovereign immunity doctrine prevented the state from being sued. Ms. Grant recused herself from the case due to her previous involvement.[11]

In a 2013 amicus brief filed in the case *Secretary of the Indiana Family & Social Services Administration v. Planned Parenthood*, Ms. Grant supported an Indiana law that blocked Medicaid payments for any health care providers that provided abortions, in an effort to defund Planned Parenthood and other abortion providers.[12] The Supreme Court denied certiorari, leaving in place a Seventh Circuit ruling that invalidated the Indiana law.[13]

Ms. Grant's extreme anti-abortion record demonstrates why President Trump added her to his Supreme Court short list in November 2017. During the 2016 presidential campaign, Mr. Trump embraced unseemly litmus tests and expressly stated he would only appoint Supreme Court justices who opposed abortion rights. 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."[14] Ms. Grant would be such a justice.

Defended Jury Discrimination: Ms. Grant has defended discriminatory practices in jury selection. In *Foster v. Chatman*, she worked on a brief to the Supreme Court that defended a Georgia prosecutor's decision to strike Black jurors based on their race.[15] She argued that the prosecutor had used race-neutral reasons for striking several jurors, but a near-unanimous Supreme Court – with only Justice Thomas in dissent – rejected her argument. In an opinion written by Chief Justice Roberts, the Supreme Court noted that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury" and "a draft affidavit from the prosecution's investigator stated his view that '[i]f it comes down to *having to pick* one of the black jurors, [Marilyn] Garrett, might be okay.' (emphasis added)."[16] Chief Justice Roberts concluded: "Two peremptory strikes on the basis of race are two more than the Constitution allows."[17]

In another case, *Peña-Rodriguez v. Colorado*, Ms. Grant worked on a brief that defended a criminal conviction that had been tainted by racism in jury deliberations.[18] The defendant in this case, Miguel

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[11] https://www.courthousenews.com/doctors-seeks-to-clear-path-to-challenge-georgia-abortion-law/.
[12] https://www.afj.org/wp-content/uploads/2018/05/SECRETARY-OF-THE-INDIANA-FAMILY-_-SOC.-SERVS.-ADMIN.-v.-PLANNED-PARENTHOOD-OF-INDIANA_-INC._-2013-U.pdf.
[13] 699 F.3d 962 (7th Cir. 2012).
[14] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[15] http://www.scotusblog.com/wp-content/uploads/2015/08/foster-op-certiorari_20150807084105.pdf.
[16] 136 S. Ct. 1737, 1755 (2016).
[17] Id.
[18] https://www.ag.state.la.us/Files/Amicus/2016%20Amicus/Miguel%20Angel%20Pena-Rodriguez%20v.%20State%20of%20Colorado/Pena-Rodriguez%20v.%20State%20of%20Colorado.pdf.

Angel Peña–Rodriguez, sought to overturn his conviction and argued that anti-Hispanic statements made during jury deliberations violated his Sixth Amendment right to a fair trial. According to the Court, "The jurors reported that [juror] H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, 'I think he did it because he's Mexican and Mexican men take whatever they want.' Id., at 109. According to the jurors, H.C. further explained that, in his experience, 'nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.'"[19] The Supreme Court ruled for the defendant and against Ms. Grant.

Hostile to Dreamers and Immigrant Rights: Ms. Grant was involved in a challenge to 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. She worked on a brief in *United States v. Texas* asking the Supreme Court to leave in place a lower court decision that halted the DAPA/DACA program, which her brief called a "sweeping and unprecedented assertion of Executive authority" with "no statutory or constitutional authority."[20] After the Supreme Court granted certiorari, Ms. Grant worked on another brief that attacked the DAPA/DACA program. Her brief argued that "DAPA will impose significant education, healthcare, and law-enforcement costs on plaintiffs because it will cause additional aliens to remain in the country and consume these costly services."[21] Because the Supreme Court was unable to resolve the dispute in *United States v. Texas* due to the lack of a ninth justice, the lower court decision halting the program served as the controlling decision.

Fought to Weaken Unions: Ms. Grant worked on an amicus brief that attacked "fair share" union fees in order to undermine the health of public sector unions in America, in the case *Friedrichs v. California Teachers Association.*[22] Ms. Grant's brief argued: "The State coerces political speech when it requires government employees to pay for public-sector bargaining,"[23] and it called for the Supreme Court to reverse a decades-old precedent: "This Court should grant the petition, overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and hold that compulsory agency fees to public-sector unions, including for activities related to the union's role as exclusive bargaining representative, violate the First Amendment."[24] Because the Supreme Court was unable to resolve this dispute in *Friedrichs* due to the lack of a ninth justice, the issue has continued to be the subject of litigation, and it is currently before the Supreme Court again in the case *Janus v. AFSCME*.

Challenged Environmental Protections: In two cases involving the Endangered Species Act, Ms. Grant worked on briefs asking the Supreme Court to overturn lower court decisions that had designated critical habitats for green sturgeon (*Building Industry Association of the Bay Area v. U.S. Department of Commerce*)[25] and polar bears (*Alaska Oil & Gas Association v. Jewell*).[26] The Supreme Court denied certiorari in both cases, rejecting Ms. Grant's requests.

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[19] 137 S. Ct. 855, 862 (2017).
[20] http://www.scotusblog.com/wp-content/uploads/2016/01/15-674_bio_State_of_Texas_et_al.2.pdf.
[21] http://www.scotusblog.com/wp-content/uploads/2016/03/15-674_ts_Texas.pdf.
[22] 136 S. Ct. 1083 (2016).
[23] https://www.cir-usa.org/legal_docs/friedrichs_certiorari_amicus_states.pdf.
[24] Id.
[25] https://www.ag.state.la.us/Files/AmicusBriefs/BuildingAssociation_Vs_Commerce_15-1350.pdf.
[26] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2016/20161207_docket-16-596_amicus-brief-2.pdf.

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Ms. Grant attacked another environmental law – the Clean Water Act – in a case, *Georgia v. McCarthy*,[27] in which Georgia challenged a Clean Water Act rule defining the "Waters of the United States" promulgated in 2015 by the Environmental Protection Agency and U.S. Army Corps of Engineers. The rule provided protections from pollution for small streams and wetlands, but the Trump administration took efforts to suspend and ultimately repeal this rule.

Opposed Gun Safety: Ms. Grant worked on a brief in the case *Friedman v. City of Highland Park, Illinois*,[28] in which she challenged a local 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. The Seventh Circuit upheld the ban, and Ms. Grant asked the Supreme Court to overturn that decision because the state of Georgia believes that nearly any restriction on gun possession is a violation of the Second Amendment. The Supreme Court rejected her argument.

Ideological Jobs and Affiliations: Ms. Grant's extreme ideology can be seen not only in the positions she has advanced, but also in the career she has chosen. Prior to her appointment to the Georgia Supreme Court last year by conservative Republican Governor Nathan Deal, for whom she had worked between college and law school, Ms. Grant worked for four years for another conservative Georgia politician – Attorney General Samuel Olens. She served as his Counsel for Legal Policy and then as Solicitor General. Before that, she worked at a conservative Washington, D.C. law firm, Kirkland & Ellis LLP, where she represented corporate clients accused of price-fixing and other anti-consumer activities. Her first job out of law school was serving as a judicial law clerk to D.C. Circuit Judge Brett Kavanaugh, one of the nation's most conservative judges and a fellow member of President Trump's Supreme Court short list. In addition, Ms. Grant is a long-time member of the Federalist Society, joining this group in 2004 during her first year of law school and serving as her law school chapter president and later as a member of the Atlanta Chapter Advisory Board and Executive Board. 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 nominees, have been Federalist Society members.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Britt Grant to the U.S. Court of Appeals for the Eleventh 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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[27] https://www.judiciary.senate.gov/imo/media/doc/Grant%20SJQ.pdf.
[28] http://www.scotusblog.com/wp-content/uploads/2015/10/Friedman-v.-Highland-Park-certiorari.-amicus-brief-15-133-filing-M0103529xC...-c1.pdf.