



October 16, 2019

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## OPPOSE THE CONFIRMATION OF HALIL OZERDEN 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 Halil Ozerden to the U.S. Court of Appeals for the Fifth Circuit.

Judge Ozerden, who serves as a district judge in the Southern District of Mississippi, has a track record of reflexively dismissing the claims of discrimination victims without letting them have their day in court. He has demonstrated insensitivity to racial justice and LGBTQ equality. Judge Ozerden is President Trump's sixth nominee to the Fifth Circuit, and he would tilt this court – already the most conservative federal appellate court in the country – even further to the right. The Senate must reject his nomination.

**Record of Troubling Decisions:** Judge Ozerden has dismissed multiple cases brought by civil rights plaintiffs at the summary judgment stage of litigation. Cases should only be dismissed on summary judgment if there exists “no genuine dispute as to any material fact,”<sup>1</sup> and under longstanding Supreme Court precedent, the facts of the case are to be viewed in the light most favorable to the nonmoving party.<sup>2</sup> Judge Ozerden, however, has routinely ignored these constraints and prevented discrimination victims from having their case go to trial and having their day in court.

Some of his rulings are so extreme that they have been reversed by the far-right Fifth Circuit. For example, in the 2016 case *Equal Employment Opportunity Commission (EEOC) v. Rite Way Service, Inc.*, the EEOC brought a Title VII retaliation lawsuit on behalf of a woman, Mekeva Tennort, who was fired after complaining that a female coworker was subjected to sexual harassment by their male supervisor. The male supervisor told the female coworker that her pants were tight and “I’m a man, I’m gonna look.”<sup>3</sup> On another occasion, the male supervisor pretended to strike the female coworker’s behind and exclaimed “ooh wee.”<sup>4</sup> Judge Ozerden concluded that Ms. Tennort could not have reasonably believed that the male supervisor’s conduct violated the law, and he granted summary judgment to defendant Rite

<sup>1</sup> Fed. R. Civ. P. 56(a).

<sup>2</sup> See, e.g., *Adickes v. Kress*, 398 U.S. 144, 157 (1970).

<sup>3</sup> *Equal Employment Opportunity Commission (EEOC) v. Rite Way Service, Inc.*, 819 F.3d 235, 238 (5<sup>th</sup> Cir. 2016).

<sup>4</sup> *Id.*

Way. The Fifth Circuit reversed Judge Ozerden's decision and held that the plaintiff was entitled to have a jury decide her case.<sup>5</sup>

The Fifth Circuit also reversed Judge Ozerden in a 2009 case, *Cromwell v. Driftwood Electrical Contractors, Inc.*<sup>6</sup> In that case, Judge Ozerden granted summary judgment for the company in a dispute involving two employees who brought a Fair Labor Standards Act (FLSA) action alleging they were not paid for overtime work they did to restore damaged telecommunications lines in the wake of Hurricane Katrina. Judge Ozerden ruled that the plaintiffs were independent contractors, not employees, and therefore exempt from overtime provisions of the FLSA. The Fifth Circuit rejected Judge Ozerden's reasoning and vacated his decision.

In addition, Judge Ozerden has issued rulings in hostile work environment cases that reflect a lack of understanding of Mississippi's shameful, racist history, and an ignorance about the use of racist symbols and epithets to terrorize and intimidate African-American residents. In a 2011 case, *Johnson v. Northrop Grumman Shipbuilding, Inc.*, African-American plaintiff Roger Johnson alleged that he encountered a racially discriminatory hostile work environment at his job. The evidence showed that the plaintiff "has been exposed to racially derogatory writings, depictions, and graffiti on numerous occasions during his tenure,"<sup>7</sup> including, on two separate occasions, witnessing the presence of a hangman's noose in the employer's shipyard and parking lot. Mr. Johnson also stated that the "N-word" was used in the workplace. Judge Ozerden concluded that the evidence was insufficient to establish a hostile work environment and granted summary judgment to the company, even though other judges have ruled in analogous cases that the plaintiff was entitled to go to trial.<sup>8</sup>

And in a similar 2011 case, *Rudolph v. Huntington Ingalls, Inc.*,<sup>9</sup> Judge Ozerden again granted summary judgment to the company in a Title VII racially hostile work environment case. The African-American plaintiff in that case, Larry Rudolph, also worked in a shipyard and was exposed to racial epithets, graffiti, and nooses in the workplace. He saw hangman's nooses on three separate occasions and heard white supervisors and coworkers use the N-word. Mr. Rudolph described an incident in which a supervisor told an African-American colleague, who was complaining about how he was treated, that "if I take a rope and put around [sic] your neck, you would complain about that."<sup>10</sup> He also reported that he saw racist graffiti in company bathrooms, including one message that read: "You don't have to use a rope to kill a [N-word]. There's a truck and a chain."<sup>11</sup> He also witnessed an incident in which a coworker placed two signs under a double water fountain, one of which had the names of white employees and the other stating "others." Despite these outrageous examples of a racially hostile work environment, Judge Ozerden dismissed the case, asserting that "simple teasing, offhand comments, and isolated incidents,

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<sup>5</sup> *Id.*

<sup>6</sup> 348 F.App'x 57 (2009).

<sup>7</sup> *Johnson v. Northrop Grumman Shipbuilding, Inc.*, Civil No. 1:06cv797, 2011 WL 1045444, at \*6 (S.D. Miss. Mar. 17, 2011).

<sup>8</sup> <https://employmentdiscrimination.foxrothschild.com/2014/06/articles/harassment-1/juries-dont-like-nooses-or-the-n-word-neither-do-appellate-courts/>.

<sup>9</sup> Civil No. 1:06CV7820, 2011 WL 4350941 (S.D. Miss. Sept. 15, 2011).

<sup>10</sup> *Id.* at \*11.

<sup>11</sup> *Id.* at \*12.

unless extremely serious, will not amount to discriminatory charges that can survive summary judgment” and “even assuming all of these incidents occurred within the relevant time period, the Court cannot say that there existed a regular pattern of frequent verbal ridicule or insults directed towards Rudolph.”<sup>12</sup>

**Insensitivity to LGBTQ Equality:** Judge Ozerden has demonstrated a lack of respect for the dignity of LGBTQ individuals. Senator Booker has asked the following question of 29 Trump judicial nominees: “Would you honor the request of a plaintiff, defendant, or witness in your courtroom who is transgender to be referred to in accordance with that person’s gender identity?” Twenty-three of the 29 nominees have answered this question in the affirmative, most simply responding: “Yes.”<sup>13</sup> Judge Ozerden was one of the six outliers. He supplied the following response: “Appellate courts generally review the record from district courts and the briefs of the parties without the occasion to address parties or witnesses by name in open court. If there is a need to use a pronoun to refer to a plaintiff, defendant, or witness in a written opinion, I would review the record and the parties’ briefing to assess the appropriate pronoun.”<sup>14</sup> This answer is disappointing and shows a lack of basic respect for transgender individuals.

Judge Ozerden’s answer is troubling for another reason: it was copied. His answer to Senator Booker’s question is identical to the answer of a previous nominee, Peter Phipps,<sup>15</sup> and submitted without attribution. Judge Ozerden’s unattributed replication of Judge Phipps’ answer to this question demonstrates a lack of judgment, and disregard for the confirmation process.

**Ideological and Partisan Affiliations:** Judge Ozerden was a partisan Republican operative before becoming a judge. As detailed in his Senate questionnaire, he served on the board of the Harrison County, Mississippi Republican Club and was a fundraiser for eight different far-right political candidates. One of those candidates, former Senator Trent Lott, made deeply offensive remarks in 2002, when he asserted: “When Strom Thurmond ran for president, we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either.”<sup>16</sup> Lott’s comment was widely viewed as an endorsement of segregation because when Thurmond ran for president in 1948, he ran on a platform in which he opposed “social intermingling of the races.”<sup>17</sup> Lott’s racist remark was so controversial and condemned that it cost him his position as Senate majority leader.<sup>18</sup> Yet in 2006, just a few years later, Mr. Ozerden served as a fundraiser for Senator Lott in his re-election campaign,<sup>19</sup> which indicates he either agreed with Senator Lott’s racist remark or wasn’t bothered by it. Either alternative is disconcerting.

It is also troubling that Mr. Ozerden was raising money for Senator Lott at the time that Senator Lott recommended him for a judgeship in 2006, suggestive of an unseemly quid pro quo. He was nominated to the U.S. District Court for the Southern District of Mississippi on September 5, 2006 – two months

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<sup>12</sup> *Id.*

<sup>13</sup> <https://docs.google.com/document/d/1TPVwzsY4e6PciexUsFpptfunXRf17Z5PBhLUNmiNZs/edit?ts=5d276b37>.

<sup>14</sup> <https://www.judiciary.senate.gov/imo/media/doc/Ozerden%20Responses%20to%20QFRs.pdf>.

<sup>15</sup> <https://www.judiciary.senate.gov/imo/media/doc/Phipps%20Responses%20to%20QFRs1.pdf>.

<sup>16</sup> <https://www.nytimes.com/2002/12/10/us/under-fire-lott-apologizes-for-his-comments-at-thurmond-s-party.html>.

<sup>17</sup> *Id.*

<sup>18</sup> <https://www.npr.org/news/specials/trentlott/>.

<sup>19</sup> <https://www.judiciary.senate.gov/imo/media/doc/Ozerden%20SJQ%20-%20PUBLIC.pdf>.

before Senator Lott's election. Moreover, Judge Ozerden's fundraising may have constituted a violation of the Code of Conduct for United States Judges, which advises that a judge or judicial nominee should not "solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate."<sup>20</sup>

Judge Ozerden is a member of the far-right Federalist Society.<sup>21</sup> A recent news article explained: "Because membership in the Federalist Society has long been seen as a demonstration of ideological bona fides and a subscription to a package of ideas, prospective federal judges can use the group's events to signal their fealty to the movement's legal policy goals. Indeed, there is evidence that judges who are Federalist Society members are significantly more conservative on the bench than unaffiliated nominees."<sup>22</sup> 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 half of his district court nominees are Federalist Society members.

**Stacking the Fifth Circuit:** In 1981, journalist Jack Bass wrote a book entitled "Unlikely Heroes," which chronicled the courage of Fifth Circuit judges in vigorously implementing *Brown v. Board of Education* in the South despite public resistance to judicial rulings. But over the years, the Fifth Circuit has become the country's most conservative circuit court,<sup>23</sup> and President Trump – having already installed five extreme ideologues on that court: Don Willett, James Ho, Stuart Duncan, Kurt Engelhardt, and Andrew Oldham – has tipped it even further to the right. Judge Ozerden's nomination is a continuation of the relentless effort by the Trump administration to pack the Fifth Circuit with judges who possess a demonstrated hostility to civil and human rights. This will jeopardize the Fifth Circuit's historically significant role in vindicating the civil rights of its diverse population.

**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.<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.

The Fifth Circuit is the most racially diverse of all the circuits: two of its three states – Mississippi and Louisiana – have the largest percentage of African Americans in the country, 38 percent and 32 percent, respectively.<sup>25</sup> The third state, Texas, is a majority minority state and has the second largest percentage of

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<sup>20</sup> <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

<sup>21</sup> <https://www.judiciary.senate.gov/imo/media/doc/Ozerden%20SJQ%20-%20PUBLIC.pdf>.

<sup>22</sup> <https://www.politico.com/magazine/story/2019/08/31/federalist-society-advocacy-group-227991>.

<sup>23</sup> <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>.

<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/>.

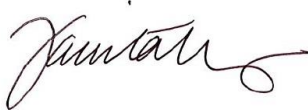
<sup>25</sup> <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.



Hispanics in the country (40 percent).<sup>26</sup> Yet the judges serving on the Fifth Circuit are racially monolithic: none are Hispanic and only two are African-American. If Judge Ozerden were confirmed to the Fifth Circuit, 14 of its 17 active judges would be white and 13 of the 17 would be male.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Halil Ozerden 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, at (202) 466-3311.

Sincerely,



Vanita Gupta  
President & CEO

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<sup>26</sup> *Id.*