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Submitted Via Email:

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The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, I write to express our strong opposition to advancing the nomination of David Porter to the U.S. Court of Appeals for the Third Circuit. Mr. Porter has been rejected for a lifetime judiciary appointment before. He is opposed by his home-state senator, Robert Casey (D-PA). He cannot be relied upon to bring a fair and impartial perspective to the federal bench. We therefore urge you not to advance the nomination of this unqualified individual.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate on behalf of employees in every circuit, affording NELA a unique perspective on how employment cases, courts, and the judges who are entrusted with decision-making affect the lives of thousands of working people.

Numerous federal statutes exist to protect employees from discrimination, harassment, wage theft, and other unfair treatment in the workplace. Congress passed such laws to address injustices in the workplace faced by hundreds of thousands of working people. To effectuate the intent of Congress, these guarantees should be interpreted expansively. Too often, however, litigation tactics, especially dismissal and summary judgment motions that effectively shift fact-finding responsibility from juries to judges, undercut the purpose and intent of our nation's federal workers' rights laws. The importance of rigor, thoughtfulness, impartiality, and independence in a federal circuit court judge cannot be overstated. All of these qualities are essential to guard against mistakes and abuses by the lower courts, and to ensure justice for

individuals—especially individual working people. Mr. Porter’s record and his strong, outspoken, far-right ideology give rise to grave concerns about his dedication to adherence to the law, Constitution, and commitment to carry out that mandate.

A. Porter Was Previously Rejected For A District Court Judgeship

In 2014, Mr. Porter was a potential candidate for a District Court seat for the Western District of Pennsylvania. Upon close examination, however, he was found to be unfit for a district court appointment. President Obama accordingly did not nominate him. He is now being proposed to wield significantly more power on the Court of Appeals. But his unfitness to serve as a District Court judge should also disqualify him from consideration for an even more impactful lifetime appointment on the Court of Appeals for the Third Circuit.

B. Advancing Porter’s Nomination Undermines The Blue Slip Tradition And Bipartisan Cooperation In Pennsylvania

Senator Casey has been very outspoken in his concerns about Mr. Porter’s nomination. “I have worked in a bipartisan way with Senator Pat Toomey to recommend and move forward candidates for the federal judiciary in Pennsylvania, even when I have had concerns about the candidates’ judicial philosophies,” said Casey. “It is unfortunate that this Administration has decided to nominate, over my objections, an individual who is far outside the mainstream to a lifetime appointment to one of the most important courts in the nation: the Third Circuit Court of Appeals.” Senators Casey and Toomey have worked cooperatively in the past and continue to work cooperatively to fill district court positions. That important working relationship and the bipartisan cooperation it represents is extremely beneficial to the people of Pennsylvania who have differing views on important issues. It should not be ignored.

Two years ago Rebecca Haywood was nominated by President Obama and if confirmed would have been the first African American woman to serve on the same court. The nomination did not proceed because Chair Grassley invoked the Senate’s longstanding blue slip tradition and refused to schedule a hearing due to Senator Pat Toomey’s opposition. At that time he stated that it was essential to have the support *of both home state senators*. Chair Grassley should not abandon the tradition he recently embraced when the tradition favored the preferences of his party’s members of the Senate Judiciary Committee.

C. Porter Cannot Provide a Fair and Impartial Perspective as Judge

Mr. Porter has no judicial experience other than two years as a judicial law clerk in the early 1990s. Much of Mr. Porter’s experience is in private practice where he engages in general business litigation, primarily defending corporations and universities. Mr. Porter has notably represented parties suing to enforce restrictive covenants. He also represented Penn State Coach Maureen Portland in a lawsuit by basketball player Jennifer Harris alleging race and sexual orientation discrimination.¹

Mr. Porter’s activism outside the courtroom sheds light on his right-wing ideology. He is a movement conservative who proudly wears his extremist politics on his sleeve. He has been an active member of the Federalist Society since he was in law school, and currently serves as the

¹ M.D. Pa. Docket No. 1:05-cv-02648

President of its Pittsburgh Lawyers Chapter. In that capacity, he hosted Roger Clegg of the Center for Equal Opportunity (CEO), a group that espouses a strong anti-affirmative action position.²

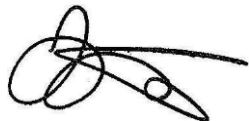
In addition, Mr. Porter is a member of the Pennsylvania Judicial Crisis network which opposed the confirmation of Justice Sotomayor specifically because, as a member of the Second Circuit panel in *Ricci v. DeStefano*, she suggested that a city fire department should be allowed to reformulate its promotions test if it believes, after only African American applicants failed, the test might be discriminatory.³

Mr. Porter has made some of his political views publicly known, having published numerous highly partisan articles, including one arguing that the Affordable Care Act was unconstitutional.⁴ Even after the Supreme Court upheld the law (which has resulted in tens of millions of Americans having health insurance for the first time), Mr. Porter continued to deride it as a “huge tax.” All of these factors lead to the inevitable conclusion that Mr. Porter lacks the impartiality that should be evident in order to be named for a lifetime appointment to the federal bench.

Mr. Porter has repeatedly and clearly indicated his disdain for the rights of individuals under our existing laws, especially the rights of those who have been historically marginalized in our society. Thus he cannot be thought to have the impartiality that is necessary for a lifetime appointment to the federal bench. Bias, and even the appearance of bias undermines the establishment of a fair judiciary before which every individual can have confidence in a just and impartial judicial system.

Mr. Porter’s ideological perspective stacks the deck against working people while protecting employers who allow mistreatment of or dangerous conditions for their employees. As such, NELA respectfully urges you to oppose the nomination of David Porter to the U.S. Circuit Court for the Third Circuit. Thank you for your consideration.

Sincerely,



James H. Kaster
NELA President



Terry O’Neill
Executive Director

² <https://fedsoc.org/events/affirmative-action-admissions-at-the-supreme-court-the-mulligan>

³ *Ricci v. DeStefano*, 557 U.S. 557

⁴ <https://www.visionandvalues.org/2012/03/is-the-health-care-law-constitutional/>
<http://www.post-gazette.com/Op-Ed/2012/07/04/Supreme-Court-to-America-Surprise/stories/201207040120>