March 11, 2019

VIA EMAIL
Re: National Employment Lawyers Association (NELA) Opposes Nomination of Michael Park to the U.S. Court of Appeals for the Second Circuit

Dear Senator:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong opposition to the confirmation of Michael Park to the United States Circuit Court for the Second Circuit. 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 daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground and an accurate understanding of the profound impact of the judiciary on the daily lives and the rights of working people.

Because of the profound effect of the federal judiciary on the lives of working people, NELA is invested in ensuring that lifetime appointments to the federal judiciary will adhere to the rule of law, especially in matters of civil rights and the well-established doctrines protecting underrepresented communities in the workplace. Mr. Park has no judicial experience, but his record as a lawyer reflects consistent advocacy seeking to diminish well-settled civil rights law.

Mr. Park's work as a lawyer demonstrates a deeply troubling hostility toward the rights of workers, and the day to day conditions faced by vulnerable working people, and, by extension, their families. His legal work demonstrates a clear ideology that is contrary to mainstream civil rights protections. If confirmed, Mr. Park will have the power to make decisions that will adversely impact laws and regulations that provide critical public protections to ensure that workplaces are free from discrimination and retaliation, and that safeguard workplace health and safety. There is no reason to believe that this perspective would not be evident in his judgements and role as a judge.

In a dispute between an employer and employee, the employer typically has the benefit of being the entity that has systems of records and far more financial resource than employees who find themselves in conflict with the employer. This asymmetry is a fact of life, and the inherent advantage of employers over employees in workplace disputes only further underscores the importance of impartiality on the part of the judge.

A judge, regardless of his or her personal and political views, *must* serve as a neutral check on the power and views of the Executive and Legislative branches of government, uphold the spirit of the U.S. Constitution, and protect the rights of the individuals who appear before

them. Impartiality is the central promise of the judiciary and is critical to the structure of our democracy. Many recent nominees have intoned Justice Roberts's words, articulated during his confirmation hearing, that a judge's function is merely to call "balls and strikes," and to articulate the difference between his or her past work as an advocate and present role as a judge. Mr. Park has a record which is consistently extreme and out of the mainstream, and his ideology is evident in his record. There is simply no basis whatsoever to suggest that he could or would serve as a neutral and impartial decision maker regarding civil and workers' rights plaintiffs.

The decision to confirm a nominee for this lifetime appointment requires more than merely evaluating a nominee's academic and legal qualifications. It demands more than having the nominee recite a general statement about future neutrality. Rather, every senator has an obligation to all of his or her constituents to carefully consider how a nominee's past advocacy and affiliations will affect the nominee's sensibilities as a judge. As Professor Ogletree remarked in the context of a different nomination, "[It is] obvious that people's life experiences will inform their judgments in life as lawyers and judges" because law is more than "a technical exercise," citing Justice Oliver Wendell Holmes Jr.'s famous aphorism: "The life of the law has not been logic; it has been experience." [1]

It is incumbent on you to examine Mr. Park's record as a litigator and legal activist. Mr. Park has been a law firm partner with great autonomy regarding what work he would and would not undertake. He was not a junior associate who was told what he could and could not do when he espoused his extreme positions. The overarching theme of his advocacy and experience has been to work *against* settled civil rights laws. Any attempt to explain Mr. Park's record of extreme positions by saying that as an advocate, a lawyer isn't representing his or her personal views, rings hollow.

1. Mr. Park's Record and Actions Demonstrate His Rejection of Mainstream Civil Rights Doctrine

Mr. Park's legal career has been marked by consistent efforts to use the courts to *limit*, rather than expand or even uphold, equal opportunity. There is every reason to believe, based on this record, that Mr. Park will apply his disregard for mainstream civil rights doctrine, equal opportunity and the rights of under-represented communities in his consideration of workplace disputes.

Anti-Immigrant Census Litigation In an amicus brief on behalf of an extremist organization, the so-called Project on Fair Representation, Mr. Park defended the Trump administration's disturbing decision to add a citizenship question to the 2020 census.[2] Mr.

[1] Charlie Savage, "A Judge's View of Judging is on the Record," *The New York Times* (May 14, 2009). Professor Ogletree's comment was occasioned by concerns raised during hearings on then-Judge Sotomayor's nomination to the U.S. Supreme Court, when much was made over her statement about being a "wise Latina woman" of a certain socioeconomic background. Unlike Mr. Duncan's situation, however, Justice Sotomayor's nomination, supported by her extensive record of more than 150 opinions she authored as both a District Court and Second Circuit judge, as well as by statements by her colleagues on the Second Circuit and other prominent law professors, made clear that she was not ideological, that she would call cases as she saw them, and that she was outstandingly prepared and qualified. See generally, White House Press Release, May 27, 2009 (collecting and annotating sources).

[2] https://www.brennancenter.org/sites/default/files/legal-work/New-York_v_Dept-of-Commerce_Motion-for-Leave-to-File-Amicus-Brief_Project-on-Fair-Representation.pdf

Park's arguments, if accepted, would reverse 70 years of consistent census practice. The proposed question would undoubtedly undermine the integrity of the count that the constitutionally-mandated census seeks to obtain. The addition of the question that has been litigated would damage communities across the country, especially communities of color and immigrants and would violate the Census Bureau's constitutional and statutory duties to conduct a full enumeration of the U.S. population. These extremist arguments were rejected in a recent court ruling, from United States District Court Judge Jesse Furman.[3]

Mr. Park's arguments were undermined by evidence showing that the decision to add the citizenship question was not driven by claimed Voting Rights Act enforcement, at the urging of the Department of Justice, but rather by nativist advocates Stephen Bannon and Kris Kobach, who wanted to prevent non-citizens from being counted for congressional apportionment purposes. The Voting Rights Act had nothing to do with Mr. Park's arguments.[4] Far from being a strict constitutionalist, Mr. Park has taken a position that can only be characterized as that of a far-right activist.

The Second Circuit is home to a remarkably diverse population, including substantial immigrant communities. NELA is troubled that a nominee for the prestigious Second Circuit would advance arguments so evidently specious and pretextual, at the bidding of anti-immigrant activists.

Anti-Equal Opportunity Admissions Litigation. Mr. Park has been at the center of recent efforts to dismantle equal opportunity admissions programs in America's universities. Such programs are critical for advancing educational diversity, which, as the Supreme Court has noted, "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand different races.[5]" Significant for NELA's representation of employees and their interests, the Supreme Court noted that "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.[6]"

Contrary to this Supreme Court doctrine, Mr. Park is attacking equal opportunity programs and challenging their constitutionality, in lawsuits against Harvard University, the University of North Carolina, and the University of Texas.

In the Harvard case, Mr. Park is one of the lead counsels for an anti-civil rights organization, "Students for Fair Admissions," with the goal of dismantling Harvard's equal opportunity program. This is "one of the most high-profile and controversial lawsuits ever designed to end affirmative action in college admissions;" if plaintiffs are successful, "it could ultimately end the consideration of race in admissions to all universities and colleges and shut out large numbers of minorities from top schools."[7] The Harvard case is pending decision.

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[3] https://www.brennancenter.org/sites/default/files/legal-work/Final%20Judgment_%202019-01-15.pdf
[4] https://slate.com/news-and-politics/2018/10/ross-bannon-kobach-collaborated-on-census-citizenship-question.html
[5] *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198, 2210 (2016).
[6] Id.
[7] https://www.motherjones.com/politics/2018/10/trump-appeals-court-nominee-is-working-to-end-affirmative-action-at-harvard/

In addition to the Harvard case, Mr. Park presently represents the same extremist plaintiff in a similar lawsuit against the University of North Carolina. In a recently filed brief, Mr. Park attacked the university's equal opportunity program as "a massive racial preference" that "cynically focuses on diversity at the most superficial level."[8]

Mr. Park's litigation campaign against affirmative action goes back to at least 2012, when he filed a brief with the Supreme Court in *Fisher v. University of Texas at Austin*, arguing that the affirmative action program at the University of Texas' flagship campus was racially discriminatory and should be struck down. Mr. Park argued explicitly against the value of campus diversity – suggesting that the internet was a good pedagogical substitute for actual classroom diversity.[9] The Supreme Court rejected his misguided and ideological arguments.[10]

2. Mr. Park Fought Against Protections For Low-Wage Workers Widely Known To Have Suffered Rampant Wage Theft & Other Mistreatment

Mr. Park represented a group of New York nail salon owners who sought to strike down a regulation that was promulgated to protect a large group of nail salon employees. The nail salon owners challenged a New York state regulation that was put into place after the revelation of rampant, illegal and frequently abusive treatment of nail salon workers by the salon owners. Wage theft was routine. The regulation was promulgated simply to ensure that low wage nail salon workers would not have their wages stolen, by requiring salons to purchase a "wage bond" that would give workers recourse to collect wages they had earned in cases of wage theft. Worker advocates universally supported the wage bonds. The salon owners did not. Mr. Park again took an anti-civil rights position, claiming that the wage bond mandate unfairly singled out this Asian-dominated industry. The court rejected this, concluding that the New York regulation "was necessary for the preservation of the public health, safety or general welfare of nail salon workers.[11]

3. Mr. Park's Nomination Should Not Be Advanced over the Objection of His Two Home-State Senators

Due to his extreme record, Mr. Park's confirmation is opposed by Senators Schumer and Gillibrand, his home-state senators. Nominating someone over the objection of their home-state senators departs from past Senate tradition and subverts the Constitution's advice and consent process. Prior to the confirmation of Eric Miller on February 28 to the U.S. Court of Appeals for the Ninth Circuit, The Congressional Research Service cannot identify any instance throughout the 102-year history of the blue slip — in which a judicial nominee was confirmed over the objections of both home-state senators. [12] Ignoring the objections of either, and in this case both, home state senators is a deliberate attempt to pack the court with judges who would not otherwise be confirmed and to evade the democratic principles that have surrounded the confirmation process throughout U.S. history.

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[8] https://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/158-SFFA-Brief-ISO-MSJ.pdf
[9] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_petitioneramcucurrentandfmrcivilrightsofficials.authcheckdam.pdf
[10] *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198, 2210 (2016).
[11] https://law.justia.com/cases/new-york/other-courts/2015/2015-ny-slip-op-25412.html
[12] https://fas.org/sgp/crs/misc/R44975.pdf

In light of the opposition of both home-state senators, Mr. Park should not be confirmed, and in fact, his nomination should not be granted a vote. During the last two years of the Obama presidency, as chair of the Senate Judiciary Committee, ***Senator Grassley (R-IA) did not grant a hearing or vote to a single nominee without the support of both home-state senators.*** During the Trump presidency, Senator Grassley and now Chair Graham (R-SC) have not seen fit to play by a single set of rules. They have abandoned this longstanding tradition, and indeed have abandoned the rule Senator Grassley eagerly enforced against Democratic leadership in the Senate. In the first two years of the Trump administration, Senator Grassley held hearings on eight circuit court nominees who lacked the support of at least one home-state senator.[13] The number of "blue slipped" circuit court nominees now stands at ten – with the additions of Mr. Park and fellow Second Circuit nominee Joseph Bianco. It is troubling that Senator Graham has adopted Senator Grassley's double standard on blue slips.

Conclusion

If confirmed, Mr. Park's extreme views will cause incalculable harm to civil and employee rights doctrines that have been part of the mainstream for decades. It will serve as a serious blow to our judicial system.

Our nation, and each one of us, functions on a daily basis thanks to the every-day working people who are NELA members' clients. Servers in restaurants, parking attendants, teachers, nurses, and millions of other working people keep our society intact. The working people of our nation and their families who depend on them deserve federal judges who clearly demonstrate that they respect both the rule of law and the intent of Congress in passing our civil and workplace rights laws. Loyalty to our Constitution and civil rights laws is a baseline qualification for a federal judge. Michael Park's record is inconsistent with these most basic expectations. NELA strongly urges you to stand on behalf of working people across this country and to oppose the confirmation of Michael Park. Thank you for your consideration.

Sincerely,

James H. Kaster
NELA President

Terry O'Neill
NELA Executive Director

[13] David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, and Paul Matey.