



May 15, 2018

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 Andrew Oldham to serve as a judge for the U.S. Court of Appeals for the Fifth 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 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.

Mr. Oldham's demonstrated experience represents efforts to scale back and tear down protections for plaintiff-employees, consumers, and marginalized communities for the benefit of corporations, not every day working people, and in support of ideologically motivated attempts to reverse or slow progress on the civil rights of individuals who have faced harsh discrimination as they attempt to work and live their lives. Moreover, his independence is compromised by his alignment with hyper-partisan conservative organizations and institutions. His efforts to dismantle the federal administrative system stand at odds with the federal judiciary's charge to uphold the rule of law with independent and fair-minded judgment. At 39 years old, Mr. Oldham is one of the youngest people ever nominated for a federal circuit court judgeship. The significant damage he has already done to civil and human rights during his short career will only be magnified if he is confirmed for a lifetime position on the Fifth Circuit.

A. Oldham's Hostility Toward Civil and Political Rights

Mr. Oldham's legal experience is defined by a disregard for civil and political rights. He opposes bipartisan efforts to remove barriers to employment for people with arrest or conviction histories. In 2012, the Equal Employment Opportunity Commission ("EEOC") updated its guidance to advise employers that they could be in violation of Title VII if they inappropriately considered a person's arrest or conviction history in employment decisions. Mr. Oldham sued the EEOC and the Department of Justice on behalf of the state of Texas, asserting that states have the right to categorically ban hiring criminals: "The State of Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and neither the EEOC nor [Attorney General] Holder has authority to say otherwise."¹ The Texas State Conference of the NAACP intervened, noting "[a]t a time when millions of people are still struggling to find work, the Texas attorney general should not be working to erect barriers to employment, particularly when those barriers disproportionately and unfairly affect workers of color."² In February 2018, a federal court in Texas "decline[d] to declare that Texas has a right to maintain and enforce its laws and policies that absolutely bar convicted felons for certain categories of convicted felons) from serving in any job the State and its Legislature deems appropriate." *Texas v. EEOC*, No 5:13-CV-255-C, 2018 U.S. Dist. LEXIS 30558, at *5 (N.D. Tex. Feb. 1, 2018).

Mr. Oldham's disdain for anti-discrimination laws was categorically rejected by the Supreme Court. Mr. Oldham fought to maintain policies that perpetuated the segregation of communities of color, representing Texas' challenge to whether cases of housing discrimination on behalf of communities of color under the Fair Housing Act (FHA) could be based on a theory of disparate impact. Disparate impact claims are critical to the success of federal civil rights law enforcement because they recognize the reality of policies and practices that to some appear neutral but result in disproportionate discrimination against a protected group. In a decision by Justice Anthony Kennedy, the Supreme Court rejected Mr. Oldham's arguments, explaining that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose" and "it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988." *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519, 2547 (2015).

In addition to these litigation positions, Mr. Oldham refused to answer a question at his hearing as to whether *Brown vs. Board of Education* was correctly decided. Other judicial nominees across the ideological spectrum – including Chief Justice Roberts, Justices Kagan, Sotomayor, Alito, Kennedy, and Gorsuch – had no trouble praising the *Brown* decision. When Chief Justice Roberts was asked during his confirmation hearing whether he thought *Brown* was rightly

¹ First Amended Complaint for Declaratory and Injunctive Relief, at 2, *Texas v. Equal Empl. Opp. Comm'n*, No. 13-cv-00255-C (filed Mar. 18, 2014), available at <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-EEOC-13-cv-00255-NDTX-Texas-Amended-Complaint-Oldham.pdf>.

² Jeremy Heallen, NAACP Pans Texas Suit Over EEOC Background Check Policy, Law360.com (May 22, 2014), available at <https://www.law360.com/articles/540986/naacp-pans-texas-suit-over-eecoc-background-check-policy>.

decided, he unequivocally responded, “I do.” Justice Gorsuch described *Brown* as a “great and important decision.” Justice Kagan testified, “I hope and I know that the principles that *Brown v. Board of Education* set forth are still relevant today ... [T]he idea of equality under law is a fundamental American constitutional value.” Mr. Oldham’s failure to affirm *Brown* is a new low in judicial nominees’ unwillingness to publicly commit to support our nation’s civil rights laws and history of movement toward a more just and equitable society. This response, combined with the issues set out above, give rise to grave concerns about Mr. Oldham’s willingness or commitment to upholding the civil rights of people of color and other individuals who face systemic discrimination and bias.

B. *Oldham’s Alignment With Hyper-Partisan Conservative Organizations Compromises his Judicial Independence*

Though he has held a wide range of positions over his brief career, Mr. Oldham repeatedly allied himself with hyper-partisan conservative organizations and institutions. Recently Republican Senators have argued that these nominees took litigation positions that simply represented their clients’ views, which do not necessarily represent the views of the individual nominees. But credentialed lawyers like Mr. Oldham can pick and choose which clients to represent.

For the past six years, Mr. Oldham worked for right-wing Texas Governor Gregory Abbott and advocated for positions that would eviscerate protections for individuals, restrict federal power, and expand states’ rights. Mr. Oldham defended Texas’s controversial effort to bar reproductive health organizations from receiving state funding. *See Planned Parenthood Ass’n of Hidalgo Cty., Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012). He is a frequent advocate of concealed carry gun law and policy: When the California Rifle and Pistol Association Foundation challenged San Diego County’s requirement that individuals show “good cause” in order to receive a permit to carry a concealed firearm in public, Mr. Oldham filed a brief for Texas and other states arguing for a weaker standard. His brief diminished the public safety concerns behind these anti-gun violence measures, arguing: “California bases its incapacious view of the right to bear arms on purported ‘public safety’ concerns.”³ When the Supreme Court considered *Shelby County v. Holder* in 2013, Mr. Oldham co-authored an amicus brief for the state of Texas in support of gutting the Voting Rights Act (VRA) by arguing that Texas’ difficulty obtaining clearance for its controversial voter ID law justified rolling back the VRA.⁴ Mr. Oldham’s defense of the Texas photo ID law was rejected by federal courts, at least one of which found that the law both had a discriminatory effect and intentionally discriminated against Latinos and African Americans. *See Veasey v. Perry*, 71 F. Supp. 3d 327 (S.D. Tex. 2014).

³ Amici Curiae Brief at 2, *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (No. 10-56971), available at http://michellawyers.com/wp-content/uploads/2010/11/Peruta_Amici-Curiae-Brief-for-the-Governors-of-Texas-Louisiana-Maine-Mississippi-Oklahoma-and-South-Dakota-in-Support-of-Plaintiffs-Appellants.pdf.

⁴ Amici Curiae Brief at 1-2, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013), No. 12-96, available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v/12-96_pet_amcu_texas.authcheckdam.pdf.

In addition to these litigation positions, Mr. Oldham was involved in conceptualizing the radical legal theories behind them, including the “Texas Plan.” According to Texas Supreme Court Justice Jimmy Blacklock, Mr. Oldham was “heavily involved . . . with crafting the plan” to consider new amendments to the U.S. Constitution that would gut enforcement of modern consumer, public health, and workplace protections.⁵ Mr. Oldham was sent across the country to promote the Plan at law schools and chapters of the conservative legal group the Federalist Society, which he has been a member of since his first year of law school in 2002.⁶ The Texas Plan aligns with Mr. Oldham’s legal philosophy, which argues that federal administrative authority is “illegitimate.” In public appearances, Mr. Oldham has questioned the legitimacy of federal administrative safeguards. In a January 2017 speech before the Texas Public Policy Foundation, Mr. Oldham argued: “Over 90% of the law that comes out of Washington, D.C., is in the Code of Federal Regulations . . . it’s not in the United States Code . . . it is literally just the dictates of bureaucrats in Washington. And that is unacceptable.”⁷ He has called federal agencies like the Environmental Protection Agency and the Internal Revenue Service illegitimate and constitutionally suspect, respectively.⁸

According to experts, attorneys may use Mr. Oldham’s nomination for “test cases and trials”⁹ in the Fifth Circuit to challenge federal power in favor of conservative-leaning policies. Mr. Oldham’s ideological positions compromise his ability to make fair-minded decisions based upon legal precedent and statutory authority.

Working people deserve the important protections of regulations addressing wage and hour law, worker safety, enforcement of anti-discrimination laws so that employees can work each day in an environment free of harassment and intimidation, and they deserve a full and fair opportunity to prove their claims in our federal courts. Mr. Oldham’s work experience and legal philosophy demonstrates an intention to undermine workers’ ability to vindicate their rights and undercut the promise of a safe and fair workplace both of which are embodied in the protections enacted by Congress. Mr. Oldham’s efforts to raze civil and human rights protections and his active position

⁵ Emma Platoff, “A friendly vote on the court”: How Greg Abbott’s former employees could help Texas from the federal bench, *The Texas Tribune* (Apr. 3, 2018), *available at* <https://www.texastribune.org/2018/04/03/greg-abbott-andrew-oldham-fifth-circuit-judicial-appointees/>.

⁶ The Federalist Society is an out-of-the-mainstream legal organization that represents only 4% of America’s legal profession, yet accounts for over 80% of Trump’s circuit court nominees, and a significant number of his district court nominees.

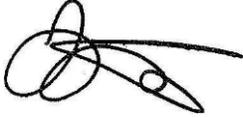
⁷ Andrew Oldham, Speaker, “Time for a Convention of States,” Texas Public Policy Foundation, Recording at 19:25 (Jan. 12, 2017), *available at* <https://www.texaspolicy.com/multimedia/video/time-for-a-convention-of-the-states-po2017>.

⁸ Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 54:16 (May 9, 2016), *available at* <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law>.

⁹ *Supra* note 5.

opposing administrative safeguards for consumers and workers, as well as his opposition to safeguards that help to ensure public health, is an ideological perspective which will result in harm to workers and protection of employers who would allow mistreatment of or dangerous conditions for their employees. As such, NELA respectfully urges you to oppose the nomination of Andrew Oldham to the U.S. Circuit Court for the Fifth Circuit. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'James H. Kaster', with a stylized flourish at the end.

James H. Kaster
NELA President

A handwritten signature in black ink, appearing to read 'Terry O'Neill', with a stylized flourish at the end.

Terry O'Neill
Executive Director