November 6, 2018

***Submitted Via Email*:**
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The Honorable Chuck Grassley, Chair
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 Chair 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 Chad Readler to serve as a judge on the U.S. Court of Appeals for the Sixth 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.

NELA, our members, and their clients take the role of the judiciary very seriously, and accordingly, the process by which federal judicial nominees are considered, and ultimately confirmed or not. Upholding established processes and traditions to ensure fairness and protect against partisanship in judicial confirmations is a cornerstone of a fair, impartial, and independent judiciary. The Senate should not confirm Mr. Readler to a lifetime judicial appointment without the support of *both* home-state senators. One of Mr. Readler's home state senators, Senator Sherrod Brown (D-OH), signaled his opposition to the nomination by withholding his blue slip and voicing his concerns regarding Mr. Readler's nomination, and with good reason.

Mr. Readler's record reflects a profound disregard for anti-discrimination protections, workers' rights, civil rights, and minority communities.

A. *Home-State Senator Opposes Readler's Nomination*

President Trump nominated Mr. Readler to the U.S. Court of Appeals for the Sixth Circuit, for a seat based in Ohio. Ohio Senator Sherrod Brown spoke out against the nomination of Mr. Readler and indicated that he would not return the blue slip to advance Mr. Readler's nomination, saying: "I cannot support nominees who have actively worked to strip Ohioans of their rights. Special interests already have armies of lobbyists and lawyers on their side, they don't need judges in their pockets."[1] Even after meeting with Mr. Readler, Senator Brown commented that the meeting did not "convince me that [Readler] will put the people of Ohio ahead of the special interests [he has] spent [his] career defending."[2] Despite a long-standing Senate tradition respecting the blue slip, Chair Grassley (R-IA) continues to demonstrate partisan disregard for an important Senate tradition by advancing this nominee.

In the 115th Congress, Chair Grassley has made the historic and troubling decision to schedule hearings on five federal circuit court nominees who lacked the support of at least one home-state senator: David Stras (Eighth Circuit), Michael Brennan (Seventh Circuit), Ryan Bounds (Ninth Circuit), Eric Murphy (Sixth Circuit) and Chad Readler (Sixth Circuit). The hearing on Mr. Bounds' nomination notably marked the first time that we know of in the 101-year history of the blue slip tradition in which a judicial nominee was advanced over the objection of *both* home-state senators.[3] Lacking bipartisan support because of prolific writings while attending Stanford University that reflected extensive racial bias and other biases, Mr. Bounds' nomination was withdrawn when it was clear he did not have the votes needed for confirmation, but the objections of both Oregon Senators were treated as irrelevant in the decisions by Leadership about proceeding with Mr. Bounds' confirmation.

The Senate is entrusted with the responsibility of ensuring that the core democratic principles of fairness and bipartisanship are upheld in the process of judicial confirmations. Discarding the processes and traditions that allow each home-state senator a voice in judicial nominations in his or her state diminishes the power of every senator, as well as that of his or her constituents. The blue slip tradition is critical to ensuring that the federal judiciary remains an independent branch of government. It minimizes partisanship in the federal judiciary by ensuring that only well-qualified, consensus nominees are confirmed to these lifetime appointments. Senator Brown's decision not to return a blue-slip on Mr. Readler's nomination should signal the end of his consideration for the federal judiciary. The Senate Judiciary Committee should respect its established traditions and processes.

B. *Readler's Record Demonstrates Disregard For Workers' and Civil Rights*

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[1] Jordain Carney, *Dem Senator Won't Return 'Blue Slip' For Two Trump Court Picks*, TheHill.com June 8, 2018, *available at* http://thehill.com/blogs/floor-action/senate/391382-dem-senator-wont-return-blue-slip-for-two-trump-court-picks.

[2] Eric Heisig, *Abortions, The Muslim Ban and Other Controversial Cases of Trump's Ohio Nominees For a Federal Appeals Court*, Cleveland.com (June 18, 2018), *available at* https://www.cleveland.com/expo/news/erry-2018/06/7003c9e82e5691/abortions_the_muslim_ban_and_o.html.

[3] *See* Barry J. McMillion, The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions, at 8 (Congressional Research Service Oct. 2, 2017), available at https://fas.org/sgp/crs/misc/R44975.pdf.

Mr. Readler's public writings and legal positions demonstrate hostility to protections for workers generally, including specific animus toward people of color, LGBTQ Americans, and minority communities. Mr. Readler rejects the remedial purpose of anti-discrimination law and believes they should be construed as narrowly as possible – to the extent he believes anti-discrimination laws should exist at all. In a 1998 article for the University of Michigan Law Review, Mr. Readler opposed local laws that prohibit discrimination based on sexual orientation (along with other protected statuses, such as marital status and income level) arguing that such laws have "little impact on employment discrimination."[4] Only the federal government should enact anti-discrimination protections, if at all:

> A final alternative that may be preferable to state regulation, and even federal regulation, is leaving private companies free to choose their own employment policies . . . The free market often is far more innovative than government . . . Private employers are 'regulated' by consumers who can punish them for adopting unpopular employment practices by choosing not to be employees or purchase products and services. The private sector is more effective and efficient in crafting employment policies than local, state, and federal governments.[5]

Mr. Readler's disdain toward anti-discrimination protections has been evident throughout his career. Recently, in his role at the Department of Justice, Mr. Readler authored an *amicus* brief in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), arguing that Title VII of the Civil Rights Act of 1964 does not protect workers from discrimination on the basis of sexual orientation.[6] Under Mr. Readler's leadership, the Justice Department took the rare step of reversing its own prior position and also taking a position contrary to that of the U.S. Equal Employment Opportunity Commission. Mr. Readler's opposition to anti-discrimination protections makes him unfit for a lifetime judicial appointment.

Mr. Readler's contempt for workers' rights extends to the right to a fair, living wage. The Obama Administration had issued a rule requiring employers to pay overtime salaried workers earning less than $47,476 (up from $23,660), with some exceptions, making an additional four million workers eligible for overtime pay. After a judge in the Eastern District of Texas enjoined the rule, Mr. Readler, as U.S. Acting Assistant Attorney General, refused to defend it in a brief before the Fifth Circuit.[7] In the brief, Mr. Readler took the position, "The Department has decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be." Rather than defend the rule, Mr. Readler dropped the defense, leaving millions of low wage workers without the overtime pay to which they should be entitled.

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[4] *Chad Readler, Local Government Anti-Discrimination Laws: Do They Make a Difference?, 31 U. Mich. J.L. Ref 777 (Spring 1998).*

[5] *Id. at 811-12.*

[6] *Josh Gerstein, Justice Department Says No LGBT Protection in Federal Sex-Discrimination Law, Political.com, July 27, 2017, available at https://www.politico.com/story/2017/07/27/lgbt-protection-sex-discrimination-law-241039.*

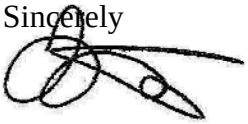
[7] *See* Reply Brief of Appellants, *Nevada et al. v. U.S. Dep't of Labor*, No. 16-41606 (filed June 30, 2017), *available at* https://www.afj.org/wp-content/uploads/2018/06/CA5-16-41606-DOL-Reply-Brief-on-Overtime.pdf.

Mr. Readler's record demonstrates his preference for special interest groups and corporations at the expense of everyday Americans, and he takes extreme positions in litigation that are far outside the mainstream. At the Department of Justice, Mr. Readler filed a brief to strike down the ACA, including its protections for people with preexisting conditions, with arguments that Republican Senator Lamar Alexander (Chair of the Senate Health, Education, Labor, and Pensions) called "as far-fetched as any I've ever heard."[8] An ideologically diverse group of legal scholars said in an amicus brief that Readler's arguments "violate[d] basic blackletter principles" of law.[9]

Working people and indeed all of us, deserve the consideration of a judge who will fairly and independently resolve disputes concerning wage and hour law, worker safety, anti-discrimination protections, and whistleblower rights. Mr. Readler's record strongly indicates that that he would not meet such a standard.

For these reasons, NELA respectfully urges the Senate Judiciary Committee to oppose the nomination of Chad Readler to the U.S. Court of Appeals for the Sixth Circuit. Thank you for your consideration.

Sincerely



James H. Kaster
NELA President

Terry O'Neill
Executive Director

[8] Jessie Helman, *GOP Senator: DOJ's ObamaCare Argument 'As Far-Fetched As Any I've Ever Heard,'* TheHill.com (June 12, 2018), https://thehill.com/policy/healthcare/391975-gop-senator-dojs-obamacare-argument-as-far-fetched-as-any-ive-ever-heard.

[9] *See* Brief of Amicus Curiae, *Texas et al. v. United States*, No. 18-cv-00167, at 4 (June 14, 2018), *available at* https://theincidentaleconomist.com/wordpress/wp-content/uploads/2018/06/Texas-v.-US-Law-Profs-Amicus-Br.pdf.