



May 20, 2020

VIA EMAIL

**Re: National Employment Lawyers Association (NELA) Opposes Nomination of
Justin Walker to the United States Court of Appeals for the DC Circuit**

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

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 Judge Justin Walker to the United States Court of Appeals for the DC 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 represent plaintiffs in employment cases in every circuit, including the DC Circuit to which Judge Walker has been nominated. Our members and the thousands of clients they represent afford NELA a unique perspective on how judicial decisions impact the daily lives and the rights of working people.

At the outset, we wish to register our dismay that at this time, the Senate is moving forward with consideration of Mr. Walker's nomination—or any judicial nomination, in view of the unprecedented crisis that our nation, and every worker in the nation, faces as the COVID-19 pandemic rages on. Over 35 million American workers are out of work and many of those returning to work are returning to dangerous conditions in the workplace. As of this writing over 92,000 Americans have died from COVID-19 with no end in sight. In the face of this public health crisis, it is indefensible to use precious time and resources to advance a nominee who is committed to dismantling the Affordable Care Act which provides access to health care for millions of Americans and their families. Further underscoring the partisan nature of this nomination, Mr. Walker was put forward for a D.C. Circuit judgeship that does not even become vacant until September.

NELA is committed to doing everything possible to ensure that lifetime appointments to the federal judiciary will be filled by individuals who adhere to the rule of law and who are deeply committed to protecting the rights of *all* working people, especially in matters of civil rights and the well-established doctrines protecting underrepresented communities in the workplace. NELA carefully considers each nominee, including his or her record, through this lens.

Judge Walker Is Not Qualified To Serve As Federal Judge

Justin Walker was nominated and confirmed to serve on the U.S. District Court for the Western District of Kentucky last year. After serving just a few months in that capacity, Judge Walker was nominated to the United States Circuit Court for the District of Columbia Circuit, a court that is often called the second highest court in the nation. Last year, Walker earned a rating of “Not Qualified” from the nonpartisan American Bar Association (ABA), which objectively evaluates candidates based on competence, among other criteria.

Judge Walker had been out of law school for just nine years when he was nominated to the U.S. District Court seat – substantially below the 12-year minimum years of practice that the ABA uses as the minimum experience necessary to be considered qualified for federal judicial service.

Mr. Walker acknowledged that he has never served as the sole or lead attorney trying a case to verdict or judgment and has only taken one deposition during his entire career. The ABA plainly stated that Walker’s “legal practice to date [did] not compensate for the short time the nominee has practiced law and/or his lack of substantial courtroom experience.” Walker was confirmed to a district court judgeship despite his lack of experience and “Not Qualified” rating. Three weeks after being sworn in as a district court judge, Walker was nominated to the U.S. Court of Appeals for the D.C. Circuit. None of the factors that raised concern last year have changed, including his lack of qualification for the judgeship for which he was nominated.

Judge Walker Opposes Access To Health Care

Judge Walker’s long record of zealous opposition to the Affordable Care Act (ACA) raises particular concerns amidst the worst public health emergency this nation has faced in over a century. Access to health care is an ongoing and increasingly difficult issue for working people. In a July 3, 2018 op-ed explaining why Judge Kavanaugh’s opinion in a D.C. Circuit case demonstrated skepticism of the ACA, Mr. Walker revealed his own intense opposition to this landmark health care law. Mr. Walker called the ACA an “indefensible decision” and asserted:

Kavanaugh’s thorough and principled takedown of the mandate was indeed a roadmap for the Supreme Court – the Supreme Court dissenters, justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, who explained that the mandate violated the Constitution. I am very familiar with that opinion, because I served as Kennedy’s law clerk that term. I can tell you with certainty that the only justices following a roadmap from Brett Kavanaugh were the ones who said Obamacare was unconstitutional. Kavanaugh was equally critical of the individual mandate under the weak Taxing Clause argument advanced by the government and catastrophically accepted by the Supreme Court.¹

Mr. Walker’s view that the Supreme Court’s decision to uphold the ACA decision was “indefensible” and “catastrophic” demonstrates that he would be incapable of fairly presiding over cases involving that critical federal law.

Judge Walker Supports Radical Steps To Diminish Federal Enforcement of Civil and Human Rights:

¹ <https://www.judiciary.senate.gov/imo/media/doc/Justin%20Walker%20SJQ%20-%20PUBLIC.pdf>.

Administrative law is the source of essential tools for enforcement of a wide array of workers' rights issues. Worker health and safety, many aspects of wage and hour law, anti-discrimination regulations promulgated by the Office of Federal Contract Compliance Programs, EEOC and other federal agencies are all critical tools in advancing and enforcing workers' rights. Judge Walker has advanced extreme views on administrative law, asserting that the Supreme Court should overturn longstanding precedents – specifically *Chevron* and *Humphrey's Executor* – that laid the legal groundwork permitting federal agencies to help protect civil rights, the environment, health care, labor, workplace safety, education, consumer protection, and more. For three and a half decades, since 1984, the Supreme Court has required judges to defer to administrative agencies' interpretations of federal law in most cases where the law is ambiguous and the agency's position is reasonable. The late Justice Scalia defended the *Chevron* doctrine as an important rule-of-law principle.²

Overturing the *Chevron* precedent, as Mr. Walker advocates, would return that ultimate decision-making authority to judges. *Humphrey's Executor*, a 1935 Supreme Court decision, safeguarded the creation of independent federal agencies that have substantial expertise in their subject area and protect the American people and are insulated from presidential interference.

Judicial Activism From The Bench

Mr. Walker's short tenure on the district court has already been punctuated by a decision in which he ruled on an issue not before the court but that aligned with his personal ideological agenda. In *On Fire Christian Center v. Fischer* Judge Walker issued a temporary restraining order on an issue not before the court, *and* without permitting the defendant an opportunity to present evidence.

Mr. Walker issued a temporary restraining order and a 20-page opinion allowing a Louisville church to have in-person attendance at an April 12, 2020 Easter service. He began his opinion: "On Holy Thursday, an American mayor criminalized the communal celebration of Easter." In fact, the mayor had not ordered, nor had he issued any law that would prohibit holding or attending an Easter Service. The mayor in question had simply urged people to practice social distancing and avoid services, in keeping with the recommendations of every public health expert in the nation. In response, Judge Walker used his role as a federal judge to address an issue in keeping with his personal values, but that didn't exist as a legal issue before him. Judge Walker's 20-page opinion on the matter demonstrates troubling judicial activism.

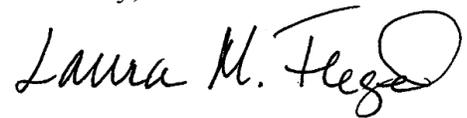
If confirmed, Judge Walker's extreme views will cause incalculable harm to civil and employee rights that have been part of the mainstream for decades. Our nation, and each one of us, functions on a daily basis thanks to the every-day working people who are NELA members' clients. As the COVID-19 crisis has revealed, our society's functioning is dependent upon healthcare workers, sanitation workers, grocery workers, and tens of millions of other essential working people. They, in turn, are dependent upon judges to uphold access to healthcare and the many health and safety regulations upon which their lives depend.

² <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj>

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. NELA strongly urges you to stand on behalf of working people across this country and vote against advancing the nomination of Justin Walker.

If you have questions or wish to discuss this letter, please contact Laura Flegel, Legislative & Public Policy Director at lflegel@nelahq.org. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Laura M. Flegel". The signature is written in a cursive style with a large, looping flourish at the end of the word "Flegel".

Laura M. Flegel