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May 16, 2017

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: *The Nomination of Andrew S. Oldham to be United States Circuit Judge for the Fifth Circuit Court of Appeals*

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I write to oppose the confirmation of Andrew S. Oldham to be United States Circuit Court Judge for the Fifth Circuit Court of Appeals. Mr. Oldham's record of working to undermine the rights of vulnerable and marginalized communities in Texas — the very people who depend most on the courts to vindicate their rights — and his refusal to say *Brown v. Board of Education*[1] was rightly decided, demonstrates that he cannot uphold the rule of law and fairly and impartially provide equal treatment under the law. The Senate Judiciary Committee must reject his nomination.

Headquartered in New York City, LDF is the nation's oldest civil rights law organization. Since Thurgood Marshall founded it in 1940, LDF has pursued racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. LDF litigated and won the historic U.S. Supreme Court decision in *Brown v. Board of Education.* As part of its advocacy, LDF seeks to ensure that the federal judiciary reflects the nation's diversity and to protect the judiciary's role in enforcing civil rights laws and the Constitution's guarantee of equal protection.

Our concerns with this nomination begin with Mr. Oldham's record. During his legal career, Mr. Oldham has amassed a very troubling civil rights record as Texas Deputy Solicitor General. While representing Texas in civil rights cases with national impact, Mr. Oldham sought to undermine critical protections. Below we

[1] 347 U.S. 483 (1954).

briefly detail the aspects of his record which form the basis for our opposition, focusing on LDF's core areas of practice.

Employment Discrimination

Mr. Oldham represented Texas in its attempt to block the Equal Employment Opportunity Commission's (EEOC) efforts to combat racial discrimination in employment through guidance educating employers on how to consider criminal records properly. In recent decades, the number of Americans who have some sort of criminal record has increased significantly, with one-in-three Americans estimated to have a criminal record, creating barriers to opportunity, such as employment.[2] Since communities of color are disproportionately represented in our criminal justice system,[3] these impacts have important civil rights and racial justice implications. A 2004 study by Professor Devah Pager found that white job applicants with a criminal record were called back for interviews more often than equally-qualified black applicants who did not have a criminal record, attributing this to the effect of employers' consideration of both race and criminal background.[4] According to Professor Pager, the criminal justice system plays a central role in "sorting and stratifying labor market opportunities" for those with criminal records.[5] Employment policies and practices that apply a blanket exclusion of those with criminal records can lead directly to the disproportionate exclusion of African Americans and Latinos from the workforce. In response to this growing trend, the EEOC, in a bipartisan manner, issued enforcement guidance to educate employers on how to properly consider criminal records during the employment process and reduce the discriminatory impact of using these records.[6]

Despite this evidence of the discriminatory impact of blanket exclusions of people with criminal records, Mr. Oldham, on behalf of the State of Texas, brought a

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[2] Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out*, CENTER FOR AMERICAN PROGRESS 1(Dec. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf.
[3] Trends in U.S. Corrections, The Sentencing Project, http://sentencingproject.org/wp- ; *See* U.S. Census, Quick Facts, https://www.census.gov/quickfacts/table/PST045216/00.
[4] Devah Pager, *The Mark of a Criminal Record*, 108 AM. JOURNAL OF SOCIOLOGY 937, 957-60 (2003), http://www.irp.wisc.edu/publications/focus/pdfs/foc232i.pdf.
[5] *Id.*
[6] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq. (Apr. 25, 2012).

legal challenge against the EEOC guidance. In *Texas v. EEOC*, Mr. Oldham requested "[a] declaratory judgment that the State of Texas and its constituent agencies and its officials are entitled to maintain and enforce laws and policies that absolutely bar convicted felons, or a certain category of convicted felons, from government employment . . . ."[7] In the face of evidence of the racially discriminatory impact of these types of blanket exclusions, Mr. Oldham and Texas chose to double down on erecting barriers to employment for those with criminal records.

Voting Rights

During his confirmation hearing, Senator Harris asked Mr. Oldham if he agreed that voting discrimination still exists in this country. Mr. Oldham refused to answer the question or acknowledge that discrimination exists in voting. This is consistent with Mr. Oldham's voting rights legal advocacy. As a lawyer for Texas, he advocated for weakening the Voting Rights Act, arguing in an *amicus* brief for *Shelby v. Holder*[8] that the Supreme Court should roll back the Act's requirement under Section 5 that jurisdictions like Texas, with a history of discrimination in voting, seek approval of voting changes by either DOJ or a federal court. In the Texas *amicus* brief, Mr. Oldham argued that

> as the need for section 5's extraordinary measures has waned, the preclearance regime's burdens have increased. Texas's effort to gain preclearance for its recently enacted voter-identification law is a case in point. . . . [T]he Civil Rights Division of the Department of Justice has used every weapon in its arsenal to thwart the implementation of a law that this Court has recognized as a legitimate and constitutional fraud-prevention measure. Because of section 5, the State of Texas still is unable to implement its voter-identification law. . . .[9]

Unfortunately, the Supreme Court agreed and in the wake of its decision, the door was opened to attacks on voting rights, with numerous states and local jurisdictions, such as Texas, imposing new discriminatory voting restrictions, such as strict voter identification requirements. Since the decision, there have been at least ten federal court decisions finding or affirming that states or localities

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[7] First Amended Complaint for Declaratory and Injunctive Relief, *Texas v. EEOC*, Case No. 5:13-cv-00255-C (N.D. Tex. 2014) at 18.
[8] 570 U.S. 529 (2013).
[9] Brief of the State of Texas as Amicus Curiae in Support of Petitioner, *Shelby v. Holder*, 570 U.S. 529 (2013) at 1-2.

intentionally discriminated against African Americans and other voters of color. In particular, the U.S. District Court for the Southern District of Texas held that the Texas photo identification scheme — the very measure Mr. Oldham complained in *Shelby* could not be implemented because of Section 5 — "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose."[10]

Housing Discrimination

In *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[11] representing the State of Texas, Mr. Oldham challenged whether housing discrimination cases could be brought under the Fair Housing Act based on whether the challenged practice had a disparate impact on communities of color, attempting to undermine a critical civil rights enforcement tool and turn back the clock on civil rights law enforcement. Fortunately, in a decision written by Justice Kennedy, the Supreme Court rejected this argument, holding

> Much progress remains to be made in our Nation's continuing struggle against racial isolation. . . . But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1.[12]

The Court determined that disparate-impact claims being used to challenge the Texas housing practices at issue were consistent with the Fair Housing Act's purpose and that "unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability."[13]

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[10] Veasey v. Perry, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014).
[11] 135 S. Ct. 2507 (2015).
[12] *Id.* at 2525.
[13] *Id.* at 2321-2522.

Brown v. Board of Education

Mr. Oldham's record alone should be disqualifying. However, during his confirmation hearing, he also refused to say that *Brown v. Board of Education* was correctly decided. In response to a question from Senator Blumenthal concerning whether *Brown* was correctly decided, Mr. Oldham insisted that the canons of conduct prevented him from discussing the merits of *Brown*.

Senator Blumenthal was justifiably incredulous in response. Until Mr. Oldham's confirmation hearing and that of Wendy Vitter, nominee to be a District Court Judge for the Eastern District of Louisiana who also refused to say that *Brown* was rightly decided, the *Brown* decision was part of the canon of universally accepted legal truths. *Brown* has long been recognized across the political and ideological spectrum as the foundational statement on equality in America. Each sitting U.S. Supreme Court justice said *Brown* was rightly decided at their confirmation hearings, with Justice Samuel Alito calling it "one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done." Circuit Court judges nominated by George W. Bush, dating at least back to 2003, all endorsed *Brown* at their confirmation hearings.

The *Brown* decision is a bedrock of this nation's legal canon that must be accepted and embraced by anyone seeking a lifetime appointment to the federal bench. *Brown* is on par with *Marbury v. Madison*[14] in terms of its vitality to the American legal system. No one would or should accept a nominee to the federal bench who refused to acknowledge that *Marbury* was rightly decided.

Brown not only banned segregation in our schools, but also redefined equality under the law. Its legacy reaches almost every aspect of public life and undergirds our nation's legal norms about equality and race. The ruling is not simply the Court's most important civil rights decision; it is the Court's most important decision dedicated to the rule of law. Mr. Oldham's answer to Senator Blumenthal therefore reflects both a rejection of the rule of law and the principles of equality enshrined in *Brown*. Mr. Oldham's views are a threat to the judicial norms that are critical to ensuring equal rights and the stability of our democracy. Rejecting *Brown* is a dangerous departure from these well-established norms that must not be tolerated.

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[14] 5 U.S. (1 Cranch) 137 (1803).

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In many ways, Mr. Oldham is only one of this administration's judicial nominees who demonstrate hostility not only to civil and human rights and principles of equality but also to well-established judicial norms and standards. However, the refusal to acknowledge that *Brown* was rightly decided is a new and much more serious flouting of democratic norms. Indeed, as a nominee to a federal circuit court that covers some of the states with the most troubling historical and contemporary records on civil rights, Mr. Oldham's answer is a judicial dog whistle, signaling that *Brown*, its legacy, and all the progress flowing from it are potentially up for renegotiation.

If confirmed, Mr. Oldham will be entrusted with enforcing the rule of law, the legacy of *Brown*, and this nation's civil rights laws. Federal judges must be prepared to recognize the core canon of equality *Brown* represents and should have demonstrated throughout their careers that they stand behind and support racial equality and justice. It would be dangerous and destabilizing to our democracy to normalize Mr. Oldham's deviation from judicial norms by confirming him. His refusal to acknowledge that *Brown* was rightly decided is unacceptable and aligns with a legal career devoted to attacking the civil and human rights of Texas' communities of color. No litigant with a civil rights claim before Mr. Oldham could trust he would fairly and impartially provide equal justice under the law. With civil rights under attack in this country, the Senate must use its "advice and consent" power to ensure our nation is served by judges who will uphold the rule of law and equal rights for all American and reject nominees like Mr. Oldham whose views and careers reflect opposition to these core principles.

We oppose Mr. Oldham's confirmation for the reasons set forth above and appreciate your consideration of our views. If you have any questions, please contact Director of Policy Todd A. Cox at 202-682-1300.

Sincerely,

Sherrilyn A. Ifill

Sherrilyn A. Ifill
President & Director Counsel

CC: Members of the Senate Judiciary Committee