



December 3, 2019

Senator Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Senator Chuck Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer:

The NAACP Legal Defense & Educational Fund, Inc. (LDF) was founded in 1940 by Thurgood Marshall. It has been an entirely separate organization from the NAACP since 1957. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. For almost 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color.

We write to strongly oppose the nomination of Sarah Pitlyk to the federal district court for the Eastern District of Missouri. Ms. Pitlyk is the eighth judicial nominee advanced by President Trump who has been rated unqualified by the American Bar Association's (ABA) Standing Committee on the Federal Judiciary, and the fourth to be rated so by a unanimous vote. It is an essential and baseline requirement that judicial nominees, particularly those nominated to the district court, have significant litigation experience and a demonstrated understanding of trial procedures. Ms. Pitlyk fails to meet these qualifications.

Ms. Pitlyk's lack of experience belittles the importance and critical responsibility of a district court judge. Indeed, Ms. Pitlyk's nomination shows a disregard for all parties who would bring cases before her, as well as for the people of Missouri, whose rights would depend on her ability to succeed in this lifetime appointment. The nomination of Ms. Pitlyk, despite her extreme inexperience, jeopardizes the integrity and functionality of the courts. We strongly oppose her nomination.

ABA Unanimously Unqualified Rating

On September 24th, the ABA Standing Committee delivered a letter to the Senate Judiciary Committee, noting its assessment of Ms. Pitlyk as unanimously “Not Qualified.”¹ In addition to having less than 12 years’ experience practicing law, the ABA found that Ms. Pitlyk:

has never tried a case as lead or co-counsel, whether civil or criminal. She has never examined a witness. Though Ms. Pitlyk has argued one case in a court of appeals, she has not taken a deposition. She has not argued any motion in a state or federal trial court. She has never picked a jury. She has never participated in any stage of a criminal matter.²

The ABA determined that Ms. Pitlyk “does not meet the minimum professional competence standard necessary to perform the responsibilities required by the high office of a federal district judge.”³

The ABA Standing Committee has conducted evaluations of federal judicial nominees since the Eisenhower administration. It assesses a nominee’s competence, integrity and temperament in a thorough and comprehensive process that includes interviews with people familiar with the nominee and an analysis of the nominee’s legal writings. The process has elicited bipartisan support from members of the Judiciary Committee and Senate. Indeed, just last year, Senator Lindsey Graham, current chair of the Senate Judiciary Committee, referenced the ABA rating as evidence of a nominee’s qualification to serve on the federal bench.⁴

The ABA review and rating of judicial nominees serves as a nonpartisan check to balance and guard against political motivations which may infect the nomination

¹ Letter from William C. Hubbard, Chair, Am. Bar. Ass’n Standing Comm. on the Federal Judiciary, to Hon. Lindsey Graham, Chairman, & Hon. Dianne Feinstein, Ranking Member, United States Senate Comm. on the Judiciary (Sept. 24, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2019-09-24-re-nomination-of-sarah-pitlyk.pdf?logActivity=true.

² *Id.*

³ *Id.*

⁴ Steve Kiggins, *American Bar Association calls for FBI investigation into Kavanaugh allegations*, USA Today (Sep. 28, 2018) <https://www.cnbc.com/2018/09/28/american-bar-association-calls-for-fbi-investigation-into-kavanaugh-allegations.html>



process and interfere with the critical duty to build a fair-minded judiciary. It is rare for the ABA to find a nominee *unanimously* unqualified, and a shocking disregard of the duty to advise and consent to confirm such a nominee to a lifetime appointment on a federal court. It is, therefore, of the utmost concern that some Senators have ignored the assessment of the ABA and continue their aggressive push to confirm a nominee who has never tried a case as lead or co-counsel, to a lifetime position as a trial judge. Unfortunately, this reckless disregard for the lack of experience and demonstrated competence of judicial nominees has increasingly defined the recent confirmations of judicial nominees. With each lifetime appointment of a nominee that does not have the requisite experience, knowledge, or qualifications, irreparable damage is done to the credibility of our nation's judicial system and to the "advise and consent" role entrusted to the Senate.

This nomination, and the continued rubber stamping of inexperienced and unqualified judicial nominees, is of significant concern to LDF and the communities it serves. We litigate numerous cases in the federal district courts each year. The cases we litigate are, like most civil rights cases, complex. They involve significant discovery issues, questions of privilege, the manageability of class claims, and multiple contested motions prior to trial, including dispositive motions such as motions to dismiss and summary judgment. At trial these cases involve difficult evidentiary questions, the assessment of expert testimony and reports, jury instructions, rulings on the permissible scope of witness testimony, hearsay determinations, and rulings on motions that may dispose of multiple claims. These decisions must be made by the district court judge in real time during the course of trial and often in the presence of a jury.

The proper adjudication of these cases requires judges who are experienced in trial practice and procedure, and whose own litigation experience has prepared them to manage the exigencies of trial. The competence of trial judges is particularly important because the procedural decisions and findings of fact made by trial judges are rarely overturned. Appellate courts must defer to a trial court's factual findings unless they are "clearly erroneous,"⁵ and should not overturn most procedural rulings

⁵Fed. R. Civ. P. 52(a)(6)

unless they constitute an abuse of discretion.⁶ This means that the vast majority of decisions made by district court judges will remain undisturbed by appellate review.

The confirmation of a lawyer like Ms. Pitlyk, who lacks basic trial litigation experience, is particularly objectionable for a seat on the federal district bench. Her lack of knowledge and skill will jeopardize the right of all parties to be treated fairly and will be most acutely felt by litigants in complex cases who appear before her. The standard for a lifetime appointment to the federal bench must, at a minimum, require the basic competence needed to perform the duties of the office. Ms. Pitlyk lacks that competence. Her confirmation would mock any credible standard for litigation experience among district court nominees and threatens to irreparably damage the standing of this Committee.

Ms. Pitlyk has advanced racist conspiracy theories in pursuit of her anti-abortion agenda

In addition, Ms. Pitlyk has made a career trafficking in alarming and racist stereotypes about African American women and women of color, and lurid conspiracy theories in her efforts to undermine abortion access. Just last year, Ms. Pitlyk co-authored an amicus brief in *Box v. Planned Parenthood of Indiana and Kentucky*, in which she argued in favor of sex and race-selective abortion bans, which prohibit abortion providers from performing abortions if the reason for the abortion is the race or sex of the fetus.⁷ In the brief, Ms. Pitlyk asserted that women of color, particularly African American women, are being coerced into choosing to have abortions on the basis of the race of the fetus. Ms. Pitlyk argued that abortion providers like Planned Parenthood are “infected with racial bias,” that clinics “target[] ethnic minorities,” and pointed to higher rates of abortion among women of color for support.⁸ Indeed, she wrote, “[b]abies of minority mothers are aborted at a far higher rate than their

⁶ *Fenstermaker v. Halvorson*, 920 F.3d 536 (2019) <https://casetext.com/case/fenstermaker-v-halvorson-2>

⁷ Brief of the Restoration Project; Pastor Joseph Parker, Pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage in Texas; and the Thomas Moore Society as Amici Curiae, *Box v. Planned Parenthood of Indiana and Kentucky* 139 S.Ct. 1780 (2019). <https://www.thomasmoresociety.org/wp-content/uploads/2018/11/Indiana-Amicus-for-SCOTUS.pdf>

⁸ Brief of the Restoration Project at 3, 5, 16.

white counterparts—a disturbing trend that the abortion industry intentionally and unabashedly perpetuates.”⁹ Again, these claims are unfounded, and deeply offensive. Not only does Ms. Pitlyk’s brief ignore facts, it promotes racist stereotypes about African American women and abortion. Unsurprisingly, Ms. Pitlyk’s brief cited and relied on research from unsubstantiated and conspiracy-theory sources, such as “blackgenocide.org” “Racial Targeting and Population Control,” and “Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?”¹⁰

In the same brief, Ms. Pitlyk argued that Asian American and Pacific Islanders (AAPI) have a cultural preference for sons and therefore seek abortions based on the sex of the fetus.¹¹ This argument is based on offensive stories and xenophobic stereotypes which mischaracterize AAPI culture. Her argument is not only unfounded and derogatory, it is dangerous. Perpetuating such inflammatory stereotypes and misinformation could lead to racial profiling, discrimination and denial of care for AAPI women seeking abortions.

Ms. Pitlyk’s view are not just conservative or anti-abortion. They are bizarre, racist and disqualifying for a seat on the federal bench. Ms. Pitlyk has demonstrated a career-long commitment to undermining the agency, autonomy and civil rights guaranteed to African American women and all women. No litigant with a civil rights claim, especially in seeking access to abortion, could trust that Ms. Pitlik would fairly, impartially or properly provide equal justice under the law as a district court judge.

Ms. Pitlyk’s has engaged in untoward efforts to ban affirmative action

Ms. Pitlyk wrote an amicus brief on behalf of the American Civil Rights Union supporting a 2006 Michigan ballot initiative that led to a state constitutional ban on race-conscious college admissions policies.¹² In advancing her argument that the ballot initiative was constitutional, Ms. Pitlyk disparaged and challenged what the

⁹ *Id.* at 3.

¹⁰ See Brief of the Restoration Project.

¹¹ *Id.* at 27.

¹² Brief for the American Civil Rights Union and the American Civil Rights Institute as Amici Curiae in Support of Petitioners, *Schuetz v. Coalition to Defend Affirmative Action*, 2014 U.S. S. Ct. Briefs <https://www.theacru.org/wp-content/uploads/Schuetz-v-BAMN-ACRU-Amicus.pdf>

United States Supreme Court has long held: that race can be used as a factor in college admissions when it is narrowly tailored and used as a part of a holistic review of an applicant.

Ms. Pitlyk asserted that considering race in education—as well as in employment, and contracting—only serves to “entrench racial prejudices.”¹³ Indeed, Ms. Pitlyk claimed that “state-imposed racial classifications pose a basic affront to the dignity of the persons classified”¹⁴ and that “[m]embers of preferred groups suffer from the unjust stigma that they are inherently incapable of competing on an even footing.”¹⁵ Affirmative action has proven to be one of the most effective tools for expanding opportunity and promoting diversity for students of color, helping to remedy inequality created by centuries of government-sponsored exclusion and discrimination. Affirmative action does not further perpetuate racial stereotyping—rather it represents a commitment to opening spaces once solely reserved for whites.

Finally, Ms. Pitlyk argued that race-conscious admissions programs “actually harm their intended beneficiaries by systematically mismatching minority students with programs where their risk of underperformance is heightened,”¹⁶ a theory that has been disproven by multiple scholarly studies.¹⁷ When, at her confirmation hearing, Senator Booker asked Ms. Pitlyk to elaborate upon her argument, she declined to provide “context beyond the text of the argument itself” asserting that the brief in question was “filed more than six years ago on a subject [she has] not [had] occasion to revisit since.”¹⁸ Ms. Pitlyk’s refusal to offer a substantive response to Senator Booker’s question hinders the Senate’s duty to investigate and understand

¹³ *Id* at 17.

¹⁴ *Id* at 11.

¹⁵ *Id* at 4.

¹⁶ *Id* at 5.

¹⁷ Brief of Empirical Scholars as Amici Curiae in Support of Respondents, *Fisher v. University of Texas at Austin*, 579 US _ (2016) <https://www.scotusblog.com/wp-content/uploads/2015/11/LCCR-and-Mintz-Fisher-Amicus-Empirical-Scholars.pdf>; Brief Amicus Curiae for Richard Lempert in Support of Respondents, *Fisher v. University of Texas at Austin*, 579 US _ (2016) [scotusblog.com/wp-content/uploads/2015/11/Lempert-Amicus-in-Fisher-v.-U.-Texas-No.-14-981-Filed-Copy.pdf](https://www.scotusblog.com/wp-content/uploads/2015/11/Lempert-Amicus-in-Fisher-v.-U.-Texas-No.-14-981-Filed-Copy.pdf)

¹⁸ Questions for the Record, Sarah Elizabeth Pitlyk at 125-6

<https://www.judiciary.senate.gov/imo/media/doc/Pitlyk%20Responses%20to%20QFRs.pdf>



the soundness of the legal reasoning processes of judicial nominees when performing its constitutional “advise and consent” duty.

Conclusion

Federal district courts play a critical role in enforcing the Constitution and other laws of this country. Confirming Sarah Pitlyk to the Eastern District of Missouri despite her extreme lack of experience, and despite a “Not Qualified” rating from the ABA, will put the legitimacy of the courts the rights of litigants, and the credibility of the Senate in danger. Furthermore, Ms. Pitlyk’s record on affirmative action and reproductive rights – including her embrace of racist stereotypes and conspiracy theories – are simply disqualifying for appointment to a lifetime seat on the federal bench. Nothing in her record suggests that she can serve as a fair-minded, impartial jurist. We strongly urge the Senate to oppose the nomination of Sarah Pitlyk to the U.S. District Court for the Eastern District of Missouri.

Sincerely,

Sherrilyn Ifill
President-Director Counsel
NAACP Legal Defense & Educational Fund
40 Rector Street
5th Floor
New York, NY 10006
sifill@naacpldf.org