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LDF
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November 21, 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 Senator McConnell and Senator Schumer:

We write to oppose the nomination of Lawrence VanDyke to the Ninth Circuit Court of Appeals. Mr. VanDyke fails to meet the most basic qualifications for a lifetime appointment to the federal judiciary. He is the ninth judicial nominee from the Trump administration rated unqualified by the non-partisan American Bar Association. Furthermore, he has a deeply troubling record that suggests he cares more for the concerns of special interests than the merits of any argument before him. Additionally, Mr. VanDyke's nomination is strongly opposed by both the Senators from the Ninth Circuit state.

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.

As an organization, LDF has relied on a judicial system with fair, impartial and competent judges in order to fight for the dignity and humanity of African Americans and other minorities. The judicial system plays a critical role in enforcing the Constitution and other laws of this country. The nomination of Mr. VanDyke, in light of his extensive record of unprofessionalism and actions that suggest an inappropriate and ongoing allegiance to special interest groups, jeopardizes the integrity and functionality of the courts.

Lack of Judicial Temperament and Integrity

Mr. VanDyke has been rated unqualified by a substantial majority of the American Bar Association's (ABA) Standing Committee on the Federal Judiciary.[1] The ABA Standing Committee has conducted evaluations of federal judicial nominees since the Eisenhower administration.[2] 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. Additionally, to protect against any evaluator having an outsized role in a nominee's rating, the ABA's rating process includes *two* separate evaluations when a "Not Qualified" rating is reached.[3]

Over the years, the ABA rating process has elicited bipartisan support from members of the Judiciary Committee and Senate. In 2012, Senator and current Chairman of the Judiciary, Lindsey Graham praised the ABA's vetting of judicial nominees stating, "That service you provide the United States Senate is invaluable because in these politically charged times in which we live, you are a filter, sort of a wall, between people who are politically connected and somebody who should be on the bench."[4] Indeed, just last year, Senator Graham referenced the ABA rating as evidence of qualifications of a nominee.[5]

That ABA, whose evaluations of candidates are cited with approval by Republican Senators on the Judiciary Committee when it finds Trump nominees "Well Qualified" for judicial service, issued an extraordinary and alarming letter to the Senate Judiciary Committee, in which it offered a rare and unequivocally harsh critique of Mr. VanDyke's temperament and integrity. Summarizing its findings about nominee VanDyke, the

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[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 (Oct. 29, 2019) https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/10-29-2019-vandyke-rating.pdf?logActivity=true.

[2] American Bar Association, *Standing Committee on the Judiciary*, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf.

[3] *Id.,* at 7.

[4] Colin Levy, *Graham (Hearts) the ABA*, The Wall Street Journal (Aug. 8, 2012) https://www.wsj.com/articles/SB10000872396390444199504577575920062155512.

[5] 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.

Committee concluded that "Mr. VanDyke's accomplishments are offset by the assessments of interviewees that Mr. VanDyke is arrogant, lazy, an ideologue, and lacking in knowledge of the day-to-day practice including procedural rules." It found a consensus among the interviewees that Mr. VanDyke "lacks humility, has an 'entitlement' temperament, does not have an open mind, and does not always have a commitment to being candid and truthful."[6] This assessment by the ABA is simply disqualifying.

The ABA's assessment of Mr. VanDyke also noted "concerns about whether Mr. VanDyke would be fair to persons who are gay, lesbian, or otherwise part of the LGBTQ community."[7] Indeed, when asked in private interviews if he would be fair to LGBTQ litigants before the court, Mr. VanDyke refused to affirmatively respond. While Mr. VanDyke later declared his commitment to open-mindedness at his nomination hearing, we have no reason to believe the hesitancy he expressed in private was disingenuous. In fact, the reluctance Mr. VanDyke showed in private, when he was not subject to social norms or public shame, bears significantly more weight than the affirmation he gave at his nomination hearing.

The effort by some Republican senators on the Judiciary Committee to discredit the ABA's process simply does not hold water. The ABA uses the same rigorous process for all nominees. The vast majority of nominees evaluated by the ABA—whether they are nominated by a Republican or Democratic President—are found to be minimally qualified for judicial service. The ABA letter about Mr. VanDyke's qualifications should be given extra weight precisely because it represents such an unusually devastating assessment of a judicial nominee.

Moreover, concerns regarding Mr. VanDyke's integrity, temperament and willingness to perform the duties of an impartial judge extend well beyond those noted in the ABA letter. Mr. VanDyke's career has long been plagued with complaints of unprofessional behavior and political motivations. Mr. VanDyke spent just over a year as Montana Solicitor General before resigning. Shortly after he resigned, one colleague stated: "Ever since he has arrived, Mr. VanDyke has been arrogant and disrespectful to others, both in and outside of this office. He avoids work. He does not have the skills to

[6] *Letter from William C. Hubbard.*
[7] *Id.*

perform, nor desire to learn how to perform, the work of a lawyer."[8] Additional reports demonstrate that this colleague's views were not an aberration. The Chief of Staff to the Montana Attorney General, Mark Mattioli, agreed with the characterization, responding "your frustration does not exceed ours."[9] Senior Assistant Attorney General, Michael Black also took issue with Mr. VanDyke's unprofessionalism, stating: "He's a charlatan as far as I'm concerned, and his use of this office in an attempt to bolster his qualifications is not appropriate."[10]

To confirm a nominee with such an extensive and alarming record of unprofessionalism and disregard for the practice of law to the federal Court of Appeals, denigrates the high honor of service on the federal appellate bench, and would be a disservice to the people of the Ninth Circuit.

Extensive record of Mr. VanDyke's Troubling Allegiance to Special Interest Groups

Mr. VanDyke is a member of the International Defensive Pistol Association, the Western Nevada Pistol League, and the National Rifle Association (NRA).[11] Throughout his career he has filed multiple briefs in accordance with the NRA's agenda to oppose gun safety laws or regulations. Indeed, in 2013, Mr. VanDyke advised the state of Montana to join a brief in *NRA v. Bureau of ATFE*, specifically to be on record allied with the NRA. He stated: "I'm not sure I agree with the strategy of bringing this case to the SCOTUS, but I think we want to be on the record as on the side of gun rights (and the NRA)."[12] Mr. VanDyke also recommended that the state of Montana sign on to a brief in *Nojay v. Cuomo*, a case concerning New York's ban on semiautomatic firearms. Again, he let his personal beliefs seep into his legal and professional responsibility, reasoning: "Plus—semi-auto firearms are fun to hunt elk with, as the attached picture attests. :) That's

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[8] Email from Michael Black to Scott Darkenwald, (Jan 28, 2014) at 665, https://s3.amazonaws.com/s3.documentcloud.org/documents/1284252/foi-request-re-montana-solicitor-sept-2014.pdf

[9] *Id*., at 664

[10] *Former colleague criticizes VanDyke's Qualifications for Montana Supreme Court*, Legal Monitor Worldwide (Oct. 16, 2019) https://afj.org/wp-content/uploads/2019/10/Former-colleague-criticizes-VanDyke_s-qualifications-fo.pdf.

[11] Senate Judiciary Questionnaire https://www.judiciary.senate.gov/imo/media/doc/Lawrence%20VanDyke%20SJQ%20-%20PUBLIC.pdf.

[12] E-mail from Lawrence VanDyke to Tim Fox & Mark Mattioli (Aug 28, 2013) https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p81.pdf.

a SCAR 17—the same gun used by the Navy Seals (but mine's only semi-auto, unfortunately)."[13] In *Ambraski v. United States,* Mr. VanDyke again abdicated his duties to analyze a case and legal argument writing, "I haven't really given the case much thought. Since it involves guns, I would think there is a good chance we might join it if someone writes a brief."[14] Should he be confirmed, Mr. VanDyke has stated he will terminate his NRA membership, but has refused to recuse himself from cases in which they are a party.[15]

In addition to being influenced by his relationship with the NRA, Mr. VanDyke has relied on advice from the Federalist Society when making professional and legal decisions. In 2013, Mr. VanDyke emailed Dean Reuter, the General Counsel of the Federalist Society, from his official government account. In discussing the case *Montana v. Holder,* Mr. VanDyke admitted to Mr. Reuter that he was having "trouble coming up with any plausible (much less good) arguments of how to get around [existing Supreme Court precedent in] *Raich*."[16] Mr. VanDyke wrote that he would "like to make some sort of cooperative federalism argument" but expressed concern that his legal reasoning would not "pass[] the straight-face test."[17] He then asked for "any other ideas for good (or at least plausible) arguments [he] could make to get around *Raich, Wickard*, etc."[18] In response, Mr. Reuter provided the contact information of an academic he described as another "long-time Federalist Society sympathizer," adding "there is a good reason for the two of you to be in touch."[19]

Mr. VanDyke's correspondence demonstrates that he has relinquished his official governmental work to the interests of radically partisan organizations. Mr. VanDyke has declined to terminate his Federalist Society membership, should he be confirmed. Indeed,

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[13] E-mail from Lawrence VanDyke to Andrew Brasher, (Apr. 30, 2019) p. 3 https://s3.amazonaws.com/s3.documentcloud.org/documents/1284252/foi-request-re-montana-solicitor-sept-2014.pdf.

[14] E-mail from Lawrence VanDyke to Elbert Lin (Oct. 18, 2013) https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p109.pdf.

[15] VanDyke Questions for the Record, Senator Durbin https://www.judiciary.senate.gov/imo/media/doc/VanDyke%20Responses%20to%20QFRs.pdf.

[16] E-mail from Lawrence VanDyke to Dean Reuter (Oct. 22, 2013) https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p319-20.pdf.

[17] *Id.*

[18] *Id.*

[19] *Id.*

in Questions for the Record, he stated he plans to maintain an active membership and attend events as a judge.[20]

Additionally, Mr. VanDyke's correspondence also provides an example of a troubling incident of unprofessionalism in which he is alleged to have signed his name, and the state of Montana, to a brief without first reading it.[21]

Alarming Civil Rights Record

Mr. VanDyke's record indicates a hostility to the rights of the LGBTQ community that can be traced as far back as his college years. In a college article, Mr. VanDyke warned that "the trend of intolerance towards religion as homosexual 'rights' become legally entrenched is not merely an overseas phenomenon." [22] In the same article he argued that "homosexuals can leave the homosexual lifestyle," and that conversion therapy had been "substantiated," despite the overwhelming evidence that such practices are dangerous and, fundamentally, cannot work.[23] He further suggested that there is "ample reason for concern that same-sex marriage will hurt families, and consequentially children and society."[24]

During his nomination hearing, Mr. VanDyke failed to unequivocally state that he no longer believes same-sex marriage harms children. Rather, he evaded the question by insisting that his personal views would play no role in his decision making as a judge.[25] However, there is extensive evidence in Mr. VanDyke's record to believe otherwise. Given Mr. VanDyke's history of injecting his personal beliefs into his legal reasoning, we have

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[20] VanDyke Questions for the Record, Senator Whitehouse https://www.judiciary.senate.gov/imo/media/doc/VanDyke%20Responses%20to%20QFRs.pdf.

[21] E-mail from Lawrence VanDyke to Adam Aston (Mar. 24, 2014) https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p185.pdf.

[22] Lawrence VanDyke, *One Student's Response to 'A Response to Glendon'*, The Harvard Law Record (Mar. 11, 2004), https://web.archive.org/web/20180402060657/http:/hlrecord.org/2004/03/one-students-response-to-a-response-to-glendon/.

[23] *Id.*

[24] *Id.*

[25] Senate Judiciary Committee Hearing (Oct. 30, 2019): Sen. Leahy, "it worried me when Sen. Cortez-Masto asked you whether your opinion had changed, your response was sort of a flippant, 'well you haven't seen up-to-date research on this issue'…do you still stand by your previous view that same-sex marriage harms children?" Mr. VanDyke, "…as far as my personal views, it is important to recognize, they would play no role in how I would judge." https://www.judiciary.senate.gov/meetings/10/30/2019/nominations.

serious concerns about his ability to fairly consider cases involving the LGBTQ community.

Moreover, in 2013, Mr. VanDyke recommended that the state of Montana file a brief in *Elane Photography v. Willock*, a case involving a wedding photographer who refused to provide services to a same-sex couple.[26] In recommending the state sign on, Mr. VanDyke wrote: "This is an important case because there is a fairly obvious collision course between religious freedom and gay rights, and this case (because it is an extreme case) could be very important in establishing that gay rights cannot always trump religious liberty."[27] Additionally, in 2005, Mr. VanDyke wrote a law review note questioning the constitutionality of nondiscrimination policies. He argued that public universities should not be allowed to require religious student groups comply with nondiscrimination policies, as such a requirement privileges the "viewpoint of inclusion and tolerance over the organization's viewpoint of exclusivity and moral disapproval." [28] Indeed, his law review note concluded "that religion and sexual orientation antidiscrimination requirements are unconstitutional as applied to religious student groups."[29] Mr. VanDyke's inflammatory remarks cannot be dismissed as unfounded college musings as many of the same arguments can be found his later work, most notably in amicus briefs submitted in *Elane Photography*[30] and *Christian Legal Society v. Martinez*.[31]

Lack of support from home state Senators

For 100 years, the Senate Judiciary Committee would not consider a judicial nominee who did not have blue slip support from both his or her home state Senators.[32]

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[26] E-mail from Lawrence VanDyke to Tim Fox & Mark Mattioli (Dec. 5, 2013), https://afj.org/wp-content/uploads/2019/10/VanDyke-FOIA-p196.pdf.

[27] *Id.*

[28] Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 Harvard Law Review 2882 (2005) https://www.jstor.org/stable/4093439,

[29] *Id.*

[30] Brief of Alabama, Arizona, Kansas, Michigan, Montana, Oklahoma, South Carolina, and Virginia as Amici Curiae Supporting Petitioner, *Elane Photography v. Willock* (Dec. 13, 2013) http://www.adfmedia.org/files/ElaneAmicusStates.pdf.

[31] Brief of Gays and Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 530513.

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

Indeed, before this administration, the last time the Senate confirmed a judge with only one blue slip was 1989.[33] The blue slip process was critical to ensuring the Senate's constitutional "advice and consent" duty was exercised to the fullest. It allowed Senators to consult with the President to find judges that would faithfully serve their constituents and helped to preserve the autonomy of courts from the political will of the executive office. The blue slip process was used by administrations and Senates of both political parties. Indeed, when Republicans controlled the Senate from 2009-2016, no nomination hearing or vote was held for a judicial nominee that did not have the blue slip support of both home state Senators.[34]

As former Senator Hatch remarked in 2014: "Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."[35] Today, however, Senate Republicans and the Trump administration have abandoned this century-old precedent in order to more easily nominate and confirm their controversial and radical judicial nominees. Since 2016, 16 circuit court nominees who did not have the support of one or both home state Senators have received a nomination hearing before the Senate Judiciary Committee.[36] Mr. VanDyke is the 17th such nominee.

While Mr. VanDyke is nominated to one of two Nevada seats on the Ninth Circuit, he does not currently live in Nevada, and did not grow up in Nevada.[37] He does not own property in the state and does not have family connections with the state.[38] Mr. VanDyke is currently a resident of Manassas, Virginia, a suburb of Washington, D.C.[39] He was born

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[33] *Id*, at footnote 47.
[34] *Id*, at 2.
[35] Orin Hatch, *Protect the Senate's important 'advice and consent' role*, The Hill (Apr. 11, 2014) https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role.
[36] The 16 Circuit Court nominees who received a hearing before the Senate Judiciary Committee despite not having the support of one or both home state Senators are: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, Joseph Bianco, Kenneth Lee, Daniel Collins, Daniel Bress, Peter Phipps, Steven Menashi and Patrick Bumatay.
[37] Jacky Rosen, *Speech to the United States Senate* https://www.rosen.senate.gov/sites/default/files/2019-10/20191031170636272.pdf.
[38] *Cortez Masto Delivers Floor Remarks Opposing Appeals Court Nominee* (Oct. 31, 2019) https://www.cortezmasto.senate.gov/news/press-releases/cortez-masto-delivers-floor-remarks-opposing-appeals-court-nominee.
[39] Senate Judiciary Questionnaire, https://www.judiciary.senate.gov/imo/media/doc/Lawrence%20VanDyke%20SJQ%20-%20PUBLIC.pdf.

in Texas and attended high school and college in Montana and Oklahoma. After graduating from Harvard Law School in 2005, Mr. VanDyke spent the next decade of his career between Washington, D.C., Texas, and Montana. Only in 2015, after an unsuccessful candidacy for the Montana Supreme Court, did Mr. VanDyke take a job in Nevada. As Solicitor General of Nevada, Mr. VanDyke was given special permission—a temporary limited practice status—to practice law in the state, after failing to take the State Bar within his first two years in office.[40] Mr. VanDyke spent only four years in Nevada before moving to the D.C. area to work for the Environment and Natural Resources Division at the Department of Justice

Mr. VanDyke's nomination is strongly opposed by Nevada Senators Catherine Cortez Masto and Jacky Rosen.[41] The administration's failure to meaningfully consult with home state Senators and to entirely abandon the blue slip process is of grave concern to LDF.

Conclusion

Mr. VanDyke is unqualified to serve on the Ninth Circuit Court of Appeals. The record set forth above is conclusive and unequivocal. Throughout the course of his career, Mr. VanDyke has prioritized the concerns of special interest groups and partisan organizations over his ethical responsibility to consider the merits of a case before him. Both his record and the assessments from those who have worked with him suggest that Mr. VanDyke has prioritized his political agenda and personally held beliefs before the fair application of the law. Indeed, Mr. VanDyke has been rated unqualified by the ABA expressly because of his poor temperament and capricious commitment to open-mindedness and truthfulness. His nomination, opposed by both Nevada Senators, breaks with centuries old precedent specifically intended to guard against the confirmation of politically motivated candidates with no ties to the constituency they are meant to serve. Confirming such an unqualified nominee as Mr. VanDyke, to a lifetime judicial seat will fundamentally undermine the rule of law.

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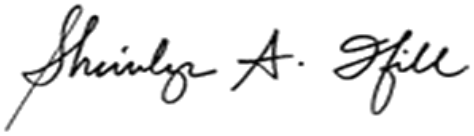
[40] Jon Ralston, *Nevada Solicitor General's Ability to Practice Law in Doubt*, The Nevada Independent (Jan 28, 2017), https://thenevadaindependent.com/article/nevada-solicitor-generals-ability-practice-law-doubt.

[41] *Rosen, Cortez Masto Statement on White House Announcement of Ninth Circuit Nomination* (Sep. 20, 2019) https://www.rosen.senate.gov/rosen-cortez-masto-statement-white-house-announcement-ninth-circuit-nomination.

For the foregoing reasons, we strongly encourage the Committee to vote against confirmation of Lawrence VanDyke for a seat on the Ninth Circuit Court of Appeals.

Sincerely,



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