



May 5, 2020

The Honorable Lindsey Graham
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington D.C. 20510

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

RE: Lambda Legal Opposes the Confirmation of Justin Walker for United States Court of Appeals for the D.C. Circuit.

Dear Chairman Graham and Ranking Member Feinstein:

Lambda Legal urges you to postpone or cancel the hearing on, and to oppose the nomination of Justin Walker to the United States Court of Appeals for the D.C. Circuit. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and everyone living with HIV, through impact litigation, policy advocacy, and public education.

It is important to address the backdrop of this nomination hearing before discussing the nominee’s record. Senate Majority Leader Mitch McConnell’s decision to disregard the advice of the Attending Physician of the U.S. Congress and bring the Senate back into session for the purpose of pushing through more judicial nominations recklessly endangers the health and well-being of Senators, their staff and all of the supporting security and medical personnel, as well as their families and communities.¹ Leader McConnell has made no secret of the fact that his goal for the year is to “leave no vacancy behind” and has callously declared that the “pandemic will not get in the way of achieving that goal.”² With over one million confirmed COVID-19 cases across the country and over 65,000 dead from the virus,³ the decision of the Senate Judiciary Committee to move forward with hearings on judicial nominees is, in a word, indefensible. We respectfully submit that this decision, if held to, is likely to be difficult to explain to the American public.⁴

¹ Emily Cochrane and Nicholas Fandos, *Under Pressure, House Leaders Scrap Plan for Speedy Return to the Capitol*, NEW YORK TIMES (Apr. 28, 2020), available at <https://www.nytimes.com/2020/04/28/us/politics/house-return-coronavirus.html>

² Hugh Hewitt, *Senate Majority Leader Mitch McConnell on What Comes Next* (Apr. 22, 2020) available at <https://www.hughhewitt.com/senate-majority-leader-mitch-mcconnell-on-what-comes-next/>.

³ Centers for Disease Control and Prevention Coronavirus Disease, Cases in the U.S., available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed on May 3, 2020).

⁴ Rather than focusing on judicial nominations, the Senate Judiciary Committee should be prioritizing issues within its jurisdiction directly related to the global pandemic. For example, we would urge the committee to focus on the urgency of the crisis resulting from COVID-19 sweeping through our federal prisons. See, e.g., Walter Pavlo, *Bureau Of Prisons Had A Response Plan For A Pandemic But Delayed Action*, FORBES (Apr. 23, 2020) available at

The Committee’s decision to jeopardize public health in order to move forward immediately now with a hearing for a nomination to the U.S. Court of Appeals for the D.C. Circuit is particularly peculiar, as that position will not even be vacant until September 1, 2020, upon the retirement of Judge Griffith. Moreover, the Committee’s decision to schedule a needlessly premature hearing to consider the nomination of Judge Justin Walker is even more bizarre and inexcusable given Judge Walker’s glaring lack of legal experience, which resulted in him receiving a “Not Qualified” rating from the American Bar Association for the district court position to which he was confirmed a mere six months ago.⁵ Specifically, Judge Walker, who is only 38 years old, had never served as lead counsel in any case tried to verdict, had never filed a motion to dismiss in federal court, had never filed a motion for summary judgment in federal court, and had never even taken a deposition in a federal case.⁶

Judge Walker’s primary qualifications for this position appear to be his decades-long relationship with Senator McConnell,⁷ his public support for now-Justice Kavanaugh, and his strong affiliation with the Federalist Society.⁸ In addition, Judge Walker’s conduct since taking the bench has heightened rather than dissipated doubts about his ability to perform the duties of his current position of public trust in a fair and impartial manner, let alone whether he is an appropriate choice for elevation.⁹

Judge Walker’s own public statements reinforce the concern that he is an acknowledged, loyal partisan, not an impartial arbiter of justice. Less than two months ago, Judge Walker proclaimed during his investiture speech that, “*we are winning, but we have not won.*” He added that, “*although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call*

<https://www.forbes.com/sites/walterpavlo/2020/04/23/bureau-of-prisons-had-a-response-plan-for-a-pandemic-but-delayed-action/#6db2fbf3d974>.

⁵ American Bar Association Standing Committee on the Judiciary Ratings of Article III and Article IV Judicial Nominees, 116th Congress, *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf?logActivity=true (last accessed May 5, 2020).

⁶ Nomination of Justin Reed Walker to the United States District Court for the Western District of Kentucky Questions for the Record (Submitted August 7, 2019), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Walker%20Responses%20to%20QFRs.pdf>.

⁷ Senator McConnell was heavily criticized for recessing the Senate in order to travel back to Kentucky to join Judge Walker for his investiture ceremony on March 13, 2020, delaying the advancement of the first Coronavirus legislation. *See*, Brendan Cole, *Mitch McConnell ‘Wasted’ Time on Coronavirus Bill By Sending Senate Home, Says Ohio Senator: ‘We Should be Working on This’*, NEWSWEEK (Mar. 17, 2020) *available at* <https://www.newsweek.com/mitch-mcconnell-sherrod-brown-coronavirus-relief-bill-senate-1492660..>

⁸ Judge Walker devoted much of his short career to earning thousands of dollars for speaking appearances organized by the Federalist Society in support of Justice Kavanaugh’s nomination, while at the same time conducting over one hundred media appearances with the same objective. *See*

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

⁹ One commentary on Judge Walker’s recent handling of a request to enjoin a municipal public health social distancing order (issued in response to the COVID-19 pandemic) noted “[h]ad the District Court held a 15 minute telephonic status conference, any doubts about the proposed enforcement [of the challenged order] could have been resolved. * * * But the District Court skipped that route. Instead, it spent nearly 24 hours writing a twenty-page published decision, with 86 footnotes.” Josh Blackman, *Courts should not decide issues that are not there*, THE VOLOKH CONSPIRACY, April 12, 2020, *available at* <https://reason.com/2020/04/12/courts-should-not-decide-issues-that-are-not-there/>

us ‘terrifying’ and who describe *us* as ‘deplorable’” and that “...in Kavanaugh’s America, *we* will not surrender while *you* wage war on *our* work, or *our* cause, or *our* hope, or *our* dream.”¹⁰

Impartiality – in both fact and public perception – is an essential ingredient of our legal system. But when Judge Walker referred to “our” work and “our” cause” and “our” courts in a speech about his new role as a federal judge, he dropped even the pretense of impartiality and reveled in the partisan ideology he intends to deploy on the federal bench. His honest but outrageous remarks already have added to the dangerous politicization of the judiciary that much of the American public rightly deplores. Nominating, or elevating, this sort of aggressively, publicly ideological nominee undermines the public’s confidence in the integrity and impartiality of the courts in precisely the ways about which Chief Justice Roberts has expressed grave concern.

As another example, Judge Walker has expressed similarly partisan views about the Affordable Care Act (ACA), the legislation responsible for millions of Americans having health insurance during the current pandemic. For example, in 2018, he wrote an article lambasting the idea that a dissent from then-Judge Kavanaugh could possibly be a defense of the ACA (in a decision dismissing a challenge to the ACA).¹¹ Defending the dissent against criticism from the right, Judge Walker argued that it actually provided a road map for the U.S. Supreme Court to hold the ACA unconstitutional. After the Supreme Court eventually upheld the ACA, Judge Walker characterized that decision as “indefensible.”¹² When confronted about these remarks during his confirmation process, Judge Walker professed that he understands “the role of a “citizen engaged in the political process” to be different from the role of a judicial nominee.¹³ Months later however, Judge Walker used his investiture speech, of all places, to renew his strident criticism of the Supreme Court’s decision to uphold the ACA.¹⁴ Despite his reassurances, Walker clearly does not understand or is indifferent to the difference between his role as citizen engaged in the political process and his role as a judge.

Make no mistake, access to healthcare has never been more critical to the well-being of our country. With millions of people unemployed and many sick and suffering, the ACA’s complementary support of private insurance markets is critical for public health and probably also for the survival of that sector of our economy. Judge Walker’s consistent derision for the ACA demonstrates a refusal to respect a duly-enacted statute, a lack of judicial temperament, and alarming naivety about the consequences of official actions. Sadly, it is beyond obvious that he is unable at this time to serve as a thoughtful, neutral arbiter of justice.

The U.S. Court of Appeals for the D.C. Circuit is widely viewed as influential because it has jurisdiction over issues concerning the U.S. Congress and many government agencies. It is charged with interpreting

¹⁰ Walker Investiture, *Judge Justin Walker Investiture Part Four – Judge Walker Speech*, YOUTUBE (Mar. 13, 2020), available at <https://www.youtube.com/watch?v=k5iUfudxuM8>.

¹¹ Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), available at <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/> (discussing then-Judge Kavanaugh’s dissent in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012)).”

¹² Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), available at <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.

¹³ See *Supra* Note 6.

¹⁴ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012) (holding the individual mandate was a “tax” that was within Congress’s taxing powers).



and enforcing public protections in a wide array of contexts, including health care. Judge Walker’s legal experience is still limited and undistinguished; however, his record to date shows extreme partisan ideology that is inseparable from his judicial philosophy. At this point, it is beyond serious dispute that, were he elevated, he would remain unable to set aside his ardent partisan agenda. Instead, Judge Walker’s confirmation to the D.C. Circuit would jeopardize even more people (or entities) whom Judge Walker views as a “them” rather than an “us.”

Thank you for considering our views on this important matter. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sasha Buchert, Senior Attorney, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal