

September 5, 2017

The Honorable Charles Grassley
Chairman
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: Opposition to the Nomination of Eric S. Dreiband

Dear Senators Grassley and Feinstein:

The National Women's Law Center (the Center), an organization that has advocated on behalf of women and girls for forty-five years, writes to express its strong opposition to the nomination of Eric S. Dreiband to be Assistant Attorney General of the Civil Rights Division at the U.S. Department of Justice.

As the leader of the Civil Rights Division, the Assistant Attorney General is one of the nation's most senior officials tasked with protecting civil and constitutional rights. The Assistant Attorney General directs the Civil Rights Division's interpretation and enforcement of a number of civil rights laws, including those vital to women's opportunity and right to be free from discrimination, among them Title VI and VII of the Civil Rights Act of 1964 (including the Pregnancy Discrimination Act), Title IX of the Education Amendments of 1972, the Freedom of Access to Clinic Entrances Act (FACE), and the Fair Housing Act of 1968. Mr. Dreiband's record demonstrates that he should not be confirmed to this important position. He repeatedly has advocated for positions that would limit equality and opportunity for women, people of color, LGBTQ people, and vulnerable and marginalized communities, specifically with regard to crucial protections enforced by the Civil Rights Division. Moreover, his consistent efforts to narrow the scope of anti-discrimination laws, and repeatedly expressed hostility to broad civil rights enforcement authority and important enforcement tools, render him unsuitable as a lead enforcer of civil rights laws.

Any Trump Administration nominee would be worrying enough, given the unprecedented assault against the civil rights of vulnerable communities. But Mr. Dreiband's nomination also comes at a time when the proposed budget for the Department of Justice would defund and deprioritize civil rights enforcement. Specifically, the proposed 2018 budget eliminates 121 positions, including 14 attorneys, and rolls back efforts to combat discrimination against

LGBTQ people and people with disabilities, and civil rights abuses by law enforcement.¹ The nomination of Mr. Dreiband further reinforces the message implicit in the 2018 budget proposal: the Civil Rights Division is no longer in the business of defending civil rights.

Mr. Dreiband has worked to narrow the scope of rights and remedies under crucial sex discrimination laws enforced by the Civil Rights Division, including those providing protection from pay discrimination, pregnancy discrimination, and gender identity discrimination.

Pay discrimination

In 2008, Mr. Dreiband testified in his personal capacity before the Senate² against legislation designed to help women challenge pay discrimination: the Fair Pay Restoration Act, subsequently enacted in 2009 as the Lilly Ledbetter Fair Pay Act.³ This bipartisan legislation restored protections against pay discrimination stripped away by the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*⁴ The 5-4 decision in *Ledbetter* held that Lilly Ledbetter lost her right to challenge the pay discrimination that led to her being paid less than her male coworkers, because she did not bring her lawsuit within 180 days after the initial decision to pay her less, even though she continued to experience discrimination in the form of a lower paycheck every pay period, for years thereafter. The Act clarified that an unlawful compensation practice occurs each time compensation is paid pursuant to a discriminatory compensation decision or other discriminatory practice, and thus a pay discrimination lawsuit is timely if it is brought within 180 days of receiving a discriminatory paycheck.

Mr. Dreiband testified that he “did not believe that the bill would advance the public interest.” He wrongly claimed that the *Ledbetter* decision was consistent with years of Supreme Court precedent. In fact, prior to *Ledbetter*, the Supreme Court and nine of the twelve federal courts of appeals to consider the issue applied the paycheck accrual rule, finding that each discriminatory paycheck constituted a separate employment practice in violation of Title VII, even if the discriminatory pay decision was made outside the limitations period.⁵

Mr. Dreiband also testified that the Act would impose significant costs on employers by requiring them to “preserve records in perpetuity,” and result in “limitless monetary penalties.” But passage of the Ledbetter Act has not led to significant new costs for

¹ See General Legal Activities, Civil Rights Division (CRT) *FY 2018 Budget At A Glance*, available at <https://www.justice.gov/jmd/page/file/968381/download>.

² Statement of Eric S. Dreiband, *Hearing About the Fair Pay Restoration Act*, United States Senate Committee on Health, Education, Labor and Pensions (Jan. 24, 2008), available at <https://www.help.senate.gov/imo/media/doc/dreiband.pdf>.

³ Pub. L. 111-2, 123 Stat. 5 (2009).

⁴ 550 U.S. 618 (2007).

⁵ *Bazemore v. Friday*, 478 U.S. 385 (1986).

employers; indeed the Ledbetter Act merely served to restore the status quo legal understanding that had existed prior to the Supreme Court's decision. The number of charges alleging violations of the Equal Pay Act⁶ and sex discrimination under Title VII⁷ has remained fairly constant since the passage of the Ledbetter Act. Nor did the Act alter the plaintiff's burden of proof or requirements for establishing a pay discrimination claim.

Mr. Dreiband's testimony suggests that as the leader of the Civil Rights Division, he would seek to limit the reach of crucial protections like the Ledbetter Act that help working people uncover and challenge pay discrimination, instead of vigorously enforcing and defending them.

Pregnancy discrimination and reproductive justice

Almost 40 years after the passage of the Pregnancy Discrimination Act, pregnant workers still face widespread discrimination and barriers to obtaining and keeping a job. Loss of income, diminished hours, a demotion or termination of employment, being denied an accommodation and being forced onto unpaid leave, and loss of health insurance and other workplace supports can have a devastating impact on pregnant workers and the families who rely on their income.

Accordingly, it is critical to ensure that the Civil Rights Division will be led by an individual with a strong commitment to the robust implementation and enforcement of laws prohibiting sex and pregnancy discrimination, including the right to receive pregnancy accommodations recognized by the Supreme Court in *Young v. UPS*.⁸ Mr. Dreiband is not that person. He has been a leading advocate on behalf of employers seeking to limit the ability of pregnant workers to challenge discrimination.⁹

Mr. Dreiband also has supported efforts to allow employers' religious beliefs to override women's right to insurance coverage of birth control, challenging the accommodation to the Affordable Care Act's birth control benefit. The accommodation allows certain non-profit employers with religious objections to birth control to opt out of the benefit while still guaranteeing employees receive birth control coverage through their regular insurance plan.

⁶ EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2016, EQUAL PAY ACT, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

⁷ EEOC, SEX-BASED CHARGES (CHARGES FILED WITH EEOC) FY 1997 - FY 2016, <https://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm>.

⁸ 135 S. Ct. 1338 (2015).

⁹ Mr. Dreiband successfully defended Bloomberg LP in a high-profile class action brought by the EEOC, in which it alleged that Bloomberg engaged in a pattern or practice of pregnancy discrimination and retaliation by, among other things, demoting and reducing the pay of female employees after they announced their pregnancies and after they took maternity leave. EEOC, Press Release, *Bloomberg LP Sued for Pregnancy Bias* (Sept. 27, 2007), available at <https://www.eeoc.gov/eeoc/newsroom/release/9-27-07.cfm>; Jones Day, *Bloomberg wins dismissal in well-publicized pregnancy discrimination case brought by EEOC* (July 2015), available at <http://www.jonesday.com/experiencepractices/ExperienceDetail.aspx?experienceid=24475>.

Mr. Dreiband represented¹⁰ religiously-affiliated employers and schools claiming the opt-out process violated the Religious Freedom Restoration Act (RFRA) -- a claim forcefully rejected in a unanimous decision the by the D.C. Circuit.¹¹

Gender identity discrimination

Mr. Dreiband defended the University of North Carolina when the state was sued by the Department of Justice for violating Title VII and Title IX¹² after it passed a law, HB2, requiring transgender individuals to use public restrooms and changing facilities corresponding to the gender listed on their birth certificate, and prohibiting cities and counties from enacting laws providing LGBTQ individuals with antidiscrimination protections. Mr. Dreiband's nomination is insulting not only to the LGBTQ community, but to the career employees of the Civil Rights Division who valiantly litigated that case for many months, until the Department of Justice under Attorney General Sessions abandoned the lawsuit following a modification of the law.¹³

The Civil Rights Division recently filed an amicus brief¹⁴ in a case pending before the Second Circuit Court of Appeals, arguing that Title VII's prohibition against sex discrimination does not include protection from sexual orientation discrimination -- a position in opposition to that of the EEOC in the same case.¹⁵ Given his record, Mr. Dreiband's confirmation as Assistant Attorney General raises the disturbing prospect that under his leadership, the Civil Rights Division is likely to continue to take an active role in seeking to challenge and weaken critical civil rights protections for LGBTQ individuals.

¹⁰ *Priests for Life, et al. v. Dep't of Health and Human Serv.*, No. 13-5368 (D.C. Cir. Nov. 14, 2014), available at <http://www.scotusblog.com/wp-content/uploads/2015/10/13-5368-1522271.pdf>.

¹¹ *Id.* That case was consolidated with several others before the Supreme Court, which subsequently vacated and remanded the cases for reconsideration, and ordered the government and the objecting employers to attempt to fashion a mutually satisfactory accommodation. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

¹² Zack Ford, *Department of Justice Sues North Carolina Over Its Anti-Transgender Law*, THINKPROGRESS, May 9, 2016, available at <https://thinkprogress.org/department-of-justice-sues-north-carolina-over-its-anti-transgender-law-229e81f39e09/>; *Complaint*, *United States v. State of North Carolina*, Case No. 1:16-cv-00425 (M.D.N.C. May 9, 2016), available at <http://files.eqcf.org/cases/116-cv-00425-1/>.

¹³ Mary Emily O'Hara, *Justice Department Withdraws Lawsuit over HB2 "Bathroom Bill,"* NBC NEWS, Apr. 14, 2017, available at <https://www.nbcnews.com/feature/nbc-out/justice-department-withdraws-lawsuit-over-hb2-bathroom-bill-n746551>.

¹⁴ *Brief for the United States as Amicus Curiae*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), available at <https://www.washingtonblade.com/content/files/2017/07/Zarda-DOJ-brief.pdf>.

¹⁵ *En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. June 23, 2017), available at <https://www.documentcloud.org/documents/3900222-Zarda-v-Altitude-Express-EEOC-Amicus-2nd.html>

Mr. Dreiband has advanced positions that substantially limit the ability of older workers to challenge employment discrimination.

Recent studies demonstrate that older women are significantly more likely than their male counterparts to experience hiring discrimination based on their age.¹⁶ Fewer employment opportunities, combined with other factors including significant lifetime earning losses due to the gender wage gap,¹⁷ threaten women's economic security as they approach retirement. Mr. Dreiband has advanced narrow interpretations of the Age Discrimination in Employment Act of 1967 (ADEA) that make it more difficult for job applicants and employees over 40 years of age to challenge age discrimination. In 2010, Mr. Dreiband testified before a Senate committee¹⁸ against the Protecting Older Workers Against Discrimination Act (POWADA). This legislation would reverse the Supreme Court's 5-4 decision in *Gross v. FBL Financial Serv.*, which held that plaintiffs alleging age discrimination under the ADEA must show that "but for" age discrimination, they would not have suffered the adverse employment action – a higher standard than the proof of mixed motive sufficient in Title VII cases. Moreover, in a recent case, Mr. Dreiband successfully argued on behalf of an employer that only employees, not job applicants, may bring disparate impact claims pursuant to the ADEA, thereby denying a class of job seekers protection from age discrimination.¹⁹

Mr. Dreiband has worked to undermine broad civil rights enforcement authority and important civil rights enforcement tools vital to uncovering and combatting systemic discrimination.

Like the Civil Rights Division, the EEOC plays a critical role in addressing patterns of systemic discrimination. But in litigation, testimony, and public statements, Mr. Dreiband has repeatedly advocated for expanding judicial review of the EEOC's investigation and conciliation efforts, which would provide employers with new tools to avoid and delay judicial review of discrimination charges brought against them. He has also sought to limit the EEOC's ability to challenge discrimination through litigation, particularly systemic discrimination. For instance, Mr. Dreiband co-authored publications in which he criticized the EEOC's practice of seeking relief for victims of discrimination that it became aware of

¹⁶ See David Neumark, et al, NBER Working Paper Series, No. 21669, *Is it Harder for Older Workers to Find Jobs?*, NAT'L BUREAU OF ECONOMIC RESEARCH (Oct. 2015), available at https://www.banque-france.fr/sites/default/files/13_neumark.pdf.

¹⁷ See NAT'L WOMEN'S LAW CTR., *WOMEN AND THE LIFETIME WAGE GAP: HOW MANY WOMAN YEARS DOES IT TAKE TO EQUAL 40 MAN YEARS?* (Mar. 2017), available at <https://nwlc.org/resources/women-and-the-lifetime-wage-gap-how-many-woman-years-does-it-take-to-equal-40-man-years/>.

¹⁸ Prepared Statement of Eric S. Dreiband, *Ensuring Fairness For Older Workers*, United States Senate Committee on Health, Education, Labor and Pensions (May 6, 2010), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56416/pdf/CHRG-111shrg56416.pdf>.

¹⁹ *Villareal v. RJ Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016), cert. denied, 137 S. Ct. 2292 (2017).

through discovery – a strategy he disingenuously characterized as “sue first, ask questions later.”²⁰ In 2014, at an EEOC oversight hearing before the House Education and Workforce Committee, Mr. Dreiband testified²¹ in support of two bills designed to constrain the EEOC’s ability to initiate litigation, particularly group actions or cases involving systemic discrimination or pattern or practice claims, and to permit judicial review of the sufficiency of the agency’s conciliation efforts.

In 2014, Mr. Dreiband filed an amicus brief in the Supreme Court on behalf of the U.S. Chamber of Commerce and other business associations in *Mach Mining, LLC v. EEOC*.²² The brief urged the Court to find that the EEOC’s duty to conciliate is subject to judicial review, thereby enabling employers to delay resolution of discrimination claims by asking judges to insert themselves into the conciliation process after the fact. The Court agreed, holding that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit, although the scope of that review is narrow because the EEOC has discretion to determine what kind and amount of communication with an employer is appropriate in a case.²³

Mr. Dreiband’s statements and litigation positions seeking to undermine the EEOC’s authority and ability to investigate and litigate systemic discrimination cases indicate he should not lead a vital civil rights enforcement agency like the Civil Rights Division.

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In conclusion, Mr. Dreiband’s record is inconsistent with the Assistant Attorney General’s duty to protect civil and constitutional rights. His record demonstrates that we can expect him to undermine antidiscrimination laws and enforcement efforts that are critical to equality and

²⁰ Eric S. Dreiband and Sharron McClain, *The EEOC Strategy of Sue First, Ask Questions Later*, LAW360, Mar. 8, 2012, available at <https://www.law360.com/articles/314725/the-eeoc-strategy-of-sue-first-ask-questions-later>; Eric S. Dreiband and Joanne Alnajjar, *Systemic Discrimination: Responding to EEOC Investigations and Litigation*, PRACTICAL LAW: THE JOURNAL (Feb. 2013), available at <http://www.jonesday.com/files/Publication/f79e77b1-bec8-472f-84c5-511c3a513fc6/Presentation/PublicationAttachment/be46f37e-8817-4f52-aacf-7e6cc7534e65/eReadAttachment.pdf>.

²¹ Testimony of Eric S. Dreiband, *Hearing on H.R. 4959, “EEOC Transparency and Accountability Act,” H.R. 5422 “Litigation Oversight Act of 2014,” and H.R. 5423, “Certainty in Enforcement Act of 2014,”* United States House of Representatives Subcommittee on Workforce Protections of the Education and the Workforce Committee (Sept. 17, 2014), available at https://edworkforce.house.gov/uploadedfiles/dreiband_testimony.pdf.

²² *Brief of Amici Curiae Retail Litigation Center, Inc., et al. In Support of Petitioner, Mach Mining, LLC v. EEOC*, No. 13-1019 (S. Ct. Sept. 2014), available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1019_pet_amcu_cocus-et-al.authcheckdam.pdf

²³ 135 S. Ct. 1645 (2015).

opportunity for women, people of color, LGBTQ people, and vulnerable and marginalized communities. Accordingly, the Center strongly opposes the confirmation of Mr. Dreiband as Assistant Attorney General of the Civil Rights Division and urges the Committee to reject his nomination.

Sincerely,

A handwritten signature in blue ink that reads "Fatima Goss Graves". The signature is written in a cursive style with a blue color.

Fatima Goss Graves
President and CEO