

December 13, 2017

VIA EMAIL

Dear Senator,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for 45 years, I write to urge you to oppose the nomination of Don R. Willett to the United States Court of Appeals for the Fifth Circuit.

He currently serves as a justice on the Texas Supreme Court. Review of Justice Willett's record both on the bench and off raises serious concerns on a broad range of issues of importance to women.

First, Justice Willett's nomination is particularly problematic coming as it does at a moment of appropriately heightened concern regarding the prevalence of sexual harassment in the workplace and its impact on women's equality at work. While a policy advisor to then-Texas governor George W. Bush, Justice Willett wrote a memo expressing discomfort with a gubernatorial proclamation honoring the Texas Federation of Business and Professional Women. Specifically, he said,

I resist the proclamation's talk of "glass ceilings," pay equity (an allegation that some studies debunk), the need to place kids in the care of rented strangers, sexual discrimination/harassment, and the need generally for better "working conditions" for women (read: more government). Issue-wise, they support the ERA, affirmative action, abortion rights, legislation adding teeth to the Equal Pay Act, etc. and they regularly line up with the AFL-CIO and similar groups. . . . The group is quite active politically . . . and publishes research papers on issues like pay equity, abortion rights, etc. The proclamation can perhaps be re-worded to omit these ideological hot buttons while still respecting the contributions of talented women professionals. But I strongly resist anything that shows we believe the hype.<sup>1</sup>

This memo speaks dismissively of pay discrimination, sexual harassment, and other forms of sex discrimination that women face in the workplace as "allegation[s]" and "hype" that Justice Willett "strongly resist[s]" and does not "believe."

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<sup>1</sup> Ken Herman, *Bush Adviser's Memo Critical of Women's Issues*, Austin-American Statesman (July 15, 2000), available at <http://www.statesman.com/news/local/bush-adviser-memo-critical-women-issues/0qZW8b3DV3fAj4WU1PKqTK/>.

Justice Willett’s skepticism of the existence of sex discrimination in the workplace and his hostility to legal protections against that discrimination should disqualify him from the bench. Litigants coming before Justice Willett, if he were confirmed to the Fifth Circuit, would have reason to question whether their claims of discrimination, including sexual harassment and pay discrimination, would be fairly and impartially heard or, instead, treated as “hype” to “debunk.” And while Justice Willett pointed to his community service efforts with women’s organizations, his experience being raised by a single mother, and his personal treatment of his female employees to “rebut” the assertion that he does not recognize gender-based barriers in the workplace,<sup>2</sup> his personal relationships and service on nonprofit boards do not negate the fact that he spoke so dismissively of workplace protections that are more necessary than ever.

In line with these statements, Justice Willett has also narrowed the protections for individuals bringing sex harassment claims as a Texas Supreme Court Justice. In *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), he wrote an opinion limiting the legal and monetary remedies available to women facing sexual assault by ruling against the availability of common law protections for assaults that might be sexually motivated, on the grounds that Texas civil rights laws “implied” that those protections were an exclusive remedy.

Second, Justice Willett’s off-hand criticism of improving workplace conditions for women as “more government” and his opinions on related topics reflect an ideological hostility to government regulation that is apparent in other aspects of Justice Willett’s record. For example, Justice Willett criticized the Affordable Care Act as the beginning of a slippery slope. If upheld by the Supreme Court, he argued, “Government will have carte blanche to control every sphere of your everyday life.”

Justice Willett’s record on the Texas Supreme Court also includes two cases espousing the view that courts should be more aggressive in limiting certain legislative actions. In *Robinson v. Crown Cork & Seal*, 225 S.W.3d 126 (Tex. 2010), he wrote in a concurrence that courts “must remain vigilant, lest we permit boundless police power.” 335 S.W.3d at 164. In contrast, the Supreme Court has noted that states have traditionally had great latitude to legislate to promote and protect public health and public safety. *See, e.g., Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985). In *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (2015), he wrote a separate concurrence to assert that “when it comes to judicial review of laws burdening economic freedoms, courts should . . . not put a heavy, pro-government thumb on the scale.” 469 S.W.3d at 96. The concurrence went on to endorse greater scrutiny of economic regulations, hearkening back to the

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<sup>2</sup> Nomination of Don Willett to the U.S. Court of Appeals for the Fifth Circuit, Questions for the Record (Nov. 22, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Willett%20Responses%20to%20QFRs.pdf>.

*Lochner* era – a view that was sharply criticized by one of Willett’s conservative colleagues on the Texas Supreme Court, Chief Justice Nathan Hecht. *See id.* at 138.

These decisions suggest that, if confirmed, Justice Willett would approach governmental actions – many of which protect the health, safety, and rights of women and families – with overt hostility and a predetermined commitment to undermine and overturn them.

Third, Justice Willett also has demonstrated hostility to civil rights more generally in both the age discrimination context and in cases concerning the rights of LGBTQ individuals. In *Mission Independent School Dist. v. Garcia*, 372 S.W.3d 629 (Tex 2012), he dismissed an age discrimination case brought by a teacher against her school district, conflating the evidence necessary for a presumption of liability with the facts necessary to bring a case forward at all, requiring that the employee effectively prove her case at its start, just to establish jurisdiction.

And he has voted to limit same-sex couples’ rights under *Obergefell v. Hodges*. For example, in *Pidgeon v. Turner*, No. 15-0688 (Tex. 2017), he joined a majority opinion holding that city employees who were married in other states were not automatically entitled to spousal benefits, despite the Supreme Court’s decision in *Obergefell*.<sup>3</sup> In addition, he authored flippant tweets that were dismissive, if not disparaging, of marriage equality<sup>4</sup> and the rights of transgender students.<sup>5</sup>

These decisions and statements demonstrate a cramped approach to interpreting federal civil rights laws and precedents. LGBTQ litigants coming before him, were he to be confirmed, would also have reason to doubt that they would receive a fair and impartial hearing.

Justice Willett has characterized his own record as a jurist in ideological terms: “I’ve built a record that is widely described – well, universally described – as the most conservative of anybody on the [Texas] Supreme Court. . . . I’m universally regarded to be the most conservative member of the court, which is a label that I accept with, frankly, gladness and gusto.”<sup>6</sup> In addition, Justice Willett was one of the individuals on

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<sup>3</sup> *See also* In re State, 489 S.W.3d 454 (Tex. 2016) (Willett, J., concurring) (arguing that trial court should have given state attorney general 45 days’ notice of challenge of Texas constitution and Texas Family Code, rather than dismiss a petition of mandamus as moot following the Supreme Court’s decision in *Obergefell*).

<sup>4</sup> *See* Trudy Ring, *Trump’s LGBT-Unfriendly Supreme Court Picks*, THE ADVOCATE (Mar. 18, 2017) (citing Willett’s tweet, in 2015, that “I could support recognizing a constitutional right to marry bacon.”), available at <https://www.advocate.com/election/2016/5/18/trumps-lgbt-unfriendly-supreme-court-picks>).

<sup>5</sup> *See id.* (citing Willett’s tweet, “Go away, A-Rod,” regarding California transgender teen playing on high school girls’ softball team).

<sup>6</sup> Interview, Arlington Voice (2012), available at <https://www.youtube.com/watch?v=ImznoCBCmE>.

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then-candidate Trump's list of potential Supreme Court. President Trump made repeated and unprecedented commitments as to the kind of individual he would nominate as a Supreme Court Justice. First, President Trump guaranteed that his Supreme Court nominees would vote to overturn *Roe v. Wade*.<sup>7</sup> Second, he said that he would nominate a Justice "in the mold" of the late Justice Scalia, who, in addition to consistently voting to overturn *Roe v. Wade*, voted to strip a broad range of legal and constitutional antidiscrimination protections from women and girls. We take President Trump at his word, and presume that Justice Willett was placed on that list because he meets those criteria, just as we take Justice Willett's words to mean that he would gladly be viewed as the most conservative judge on the Fifth Circuit, if he were confirmed.

For all of the foregoing reasons, the National Women's Law Center urges you to reject the nomination of Don R. Willett to a lifetime position on the U.S. Court of Appeals for the Fifth Circuit. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Fatima Goss Graves". The signature is fluid and cursive, with the first name "Fatima" being the most prominent.

Fatima Goss Graves  
President and CEO  
National Women's Law Center

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<sup>7</sup> Emily Crockett, *Trump on 60 Minutes: If Roe v. Wade is Overturned, Women Will "Have to Go to Another State,"* Vox (Nov. 14, 2016), <http://www.vox.com/policy-and-politics/2016/11/13/13618556/trump-60-minutes-roe-v-wade-abortion>.

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