

December 11, 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 nearly 45 years, I write to urge you to oppose the nomination of Leonard Steven Grasz to the United States Court of Appeals for the Eighth Circuit.

Mr. Grasz is spectacularly unfit for the federal bench. Mr. Grasz has taken legal positions that will make it virtually impossible for many who come before him as litigants, especially women and LGBTQ individuals, to believe that he will give them a fair and impartial hearing.¹ In addition, his statements demonstrate that he lacks both the necessary respect for judicial precedent, as well as the requisite temperament to serve in a lifetime position on the federal bench. In fact, Mr. Grasz has been cited as being "gratuitously rude," as lacking "open-mindedness," and displaying "a certain amount of caginess" when discussing his views, a quality evident throughout his written responses to the Judiciary Committee's questions for the record.² All of this raises serious doubts about whether Mr. Grasz will treat all litigants coming before him with respect and impartiality.

As an initial matter, Mr. Grasz has shown that he lacks respect for Supreme Court precedent, especially with regard to a woman's constitutional right to abortion. For example, while in the Attorney General's office, Mr. Grasz wrote a law review article arguing that *Roe v. Wade* and *Planned Parenthood v. Casey* did not apply to a medically necessary abortion procedure – the same procedure Mr. Grasz would later argue should be banned in *Stenberg v. Carhart*.³ Instead, the article argued, under the precedent of *Standing Bear v. Crook*, which recognized the personhood of Native Americans, that fetuses should be considered "persons" once located

¹ Mr. Grasz has held multiple leadership positions in organizations that take ideological positions on divisive issues. For example, Mr. Grasz held leadership positions in organizations that advocate for reinstatement of the death penalty in Nebraska. See Don Walton, *Steve Grasz Nominated as U.S. Circuit Court Judge*, LINCOLN JOURNAL STAR (Aug. 4, 2017), http://journalstar.com/news/state-and-regional/federal-politics/steve-grasz-nominated-as-u-s-circuit-court-judge/article_4171ab55-18d3-53d7-b75a-41a4194acafb.html.

² Statement of Pamela Bresnahan on Behalf of the American Bar Association Standing Committee on the Federal Judiciary Concerning the Nomination of Leonard Steven Grasz to be a Judge of the United States Court of Appeals for the Eighth Circuit (Oct. 30, 2017), available at <https://www.americanbar.org/content/dam/aba/unacategorized/GAO/GraszStatement.authcheckdam.pdf>; NOMINATION OF STEVEN GRASZ TO THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT QUESTIONS FOR THE RECORD (Nov. 8, 2017), available at <https://www.judiciary.senate.gov/imo/media/doc/Grasz%20Responses%20to%20QFRs.pdf> (hereinafter Steven Grasz Questions for the Record).

³ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000); Steven Grasz, *If Standing Bear Could Talk. . . Why There is No Constitutional Right to Kill a Partially-Born Human Being*, 33 CREIGHTON L. REV. 23, 27 (1999).

outside the uterus.⁴ He then compared efforts to establish the personhood of fetuses to efforts to recognize citizenship rights for emancipated slaves.⁵ He also argued that the reasoning in *Roe* is consistent with the killing of newborn children.⁶ And he flatly stated that “[a]bortion jurisprudence is, to a significant extent, a word game.”⁷ Mr. Grasz’s article disregards clearly applicable precedent while stretching unrelated precedent beyond where it can be reasonably interpreted in order to support an ideological antiabortion result. Such disregard for precedent raises serious questions about whether he might do the same if confirmed to the federal bench, especially in light of Mr. Grasz’s indication that he continues to stand by the assertions in this article.⁸

Mr. Grasz has since attempted to deemphasize the legal positions he took in the article as being irrelevant and those of merely a commentator because he asserts he would, if confirmed, follow Supreme Court and Eighth Circuit precedent. However, Mr. Grasz’s strongly worded legal views are extremely relevant to any future role as a judge on a federal court of appeals, as precedent can be unclear or fail to fully address the facts or legal questions in a particular case.⁹

Extreme Hostility to the Constitutional Right to Abortion. As Deputy Attorney General in the Nebraska Attorney General’s office, Mr. Grasz used his position to further an antiabortion agenda for nearly a decade. In multiple briefs, opinions, and other materials, Mr. Grasz argued against the right to abortion, often deploying extreme antiabortion rhetoric.

In one case, Mr. Grasz co-authored an opinion defending the constitutionality of a type of state law that would ban a medically necessary abortion procedure.¹⁰ In the opinion, he at one point compared abortion with animal abuse, alleging that “human fetuses or unborn babies are literally afforded less legal protection against cruelty, including dismemberment and death, than stray cats or rodents. It would be a criminal offense to cut off the limbs of a cat or suck the brains of a living rat merely to kill it.”¹¹ After the Nebraska legislature passed this type of ban, it was challenged in court, where Mr. Grasz argued in defense of the abortion procedure ban before the U.S. District Court for the District of Nebraska and the U.S. Court of Appeals for the Eighth Circuit.¹² The District Court enjoined the law from being enforced,¹³ and the Eighth Circuit affirmed the lower court’s ruling, holding that the abortion ban imposed an undue burden on a woman’s right to decide to have an abortion.¹⁴ Despite having lost in both courts,

⁴ *Id.* at 27.

⁵ *Id.* at 28.

⁶ *Id.* at 37.

⁷ *Id.* at 30.

⁸ See Statement of Pamela Bresnahan, *supra* note 2, at 5-6.

⁹ See, e.g., Steven Grasz Questions for the Record, *supra* note 2.

¹⁰ See *Constitutionality of a Statutory Ban on “Partial-Birth” Abortions in Nebraska*, Neb. Op. Att’y Gen. No. 96043, 1996 WL 281882 (May 29, 1996).

¹¹ *Id.*

¹² See, e.g., *Carhart v. Stenberg*, 11 F.Supp.2d 1099 (D.Neb. 1998); *Stenberg v. Carhart*, 192 F.3d 1142 (8th Cir. 1999).

¹³ See, e.g., *Carhart v. Stenberg*, 11 F.Supp.2d 1099 (D.Neb. 1998).

¹⁴ See, e.g., *Stenberg v. Carhart*, 192 F.3d 1142 (D.Neb. 1999).

the State of Nebraska nevertheless asked the Supreme Court to review the case.¹⁵ According to press reports at the time, “[t]he assertion that the Nebraska law [was] aimed not at abortion but at something else, something close to infanticide, permeate[d] the briefs on the state’s side.”¹⁶ Ultimately, the U.S. Supreme Court found Nebraska’s law to be unconstitutional.¹⁷

In another case, Mr. Grasz played a major role in Nebraska’s defense of a state regulation that restricted state funding for abortion only to circumstances when a woman’s life is in danger, rather than when a woman’s life is in danger and when she is a survivor of rape or incest as required under the federal Medicaid rules. When abortion providers sued to ensure that Nebraska women eligible for Medicaid received abortions in cases of rape, Nebraska’s defense of the regulation entailed challenging the federal requirement. Mr. Grasz wrote a brief asking the Eighth Circuit to overturn its own precedent, which the Eighth Circuit declined to do.¹⁸ Mr. Grasz was counsel of record for the subsequent petition asking the U.S. Supreme Court to review the case.¹⁹

Mr. Grasz also wrote opinions defending state laws prohibiting state grants from going to organizations that provide abortion-related services²⁰ and interpreting state law to extend a state prohibition on public funding for abortion to insurance coverage for selective reduction – which can be medically necessary for some women experiencing multi-fetal pregnancies.²¹

Finally, Mr. Grasz actively supports and has held a leadership role in organizations that take antiabortion positions. For example, Mr. Grasz was a member of the Board of Directors of the Nebraska Family Alliance, an organization that takes an extreme antiabortion stance until September 2017 when he was nominated for the judiciary. The Nebraska Family Alliance claims that “abortion harms women” – a claim that has been medically disproven.²² The group also asserts that emergency birth control pills are abortifacients, and declares that “evidence shows

¹⁵ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

¹⁶ Linda Greenhouse, *Narrow Abortion Case Before Court Leads to a Wider Debate*, N.Y. TIMES (Apr. 2000), <http://www.nytimes.com/2000/04/23/us/narrow-abortion-case-before-court-leads-to-a-wider-debate.html>.

¹⁷ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

¹⁸ See *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), available at https://scholar.google.com/scholar_case?case=4479707880851917265&q=60+F.3d+497&hl=en&as_sdt=20006. The state had urged the Eighth Circuit to overrule its prior precedents, which rejected the argument that the Hyde Amendment did not substantively amend the Medicaid statute and held that states were obligated to fund abortions for Medicaid-eligible women in cases of rape or incest. *Id.* The Eighth Circuit declined to revisit those prior cases and invalidated the regulation. *Id.*

¹⁹ *Id.*

²⁰ See *Constitutionality of Amendment Prohibiting Use of Public Trust Funds to Award Grants to Entities Providing Abortion-Related Services*, Neb. Op. Att’y Gen. No. 98021, 1998 WL 141371 (Mar. 30, 1998).

²¹ *Selective Reduction Abortion – Insurance Coverage*, Neb. Op. Att’y Gen. No. 99005, 1999 WL 91937 (Feb. 19, 1999).

²² See Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, GUTTMACHER INSTIT. (Aug. 1, 2006), <https://www.guttmacher.org/gpr/2006/08/abortion-and-mental-health-myths-and-realities>; Susan A. Cohen, *Still True: Abortion Does Not Increase Women’s Risk of Mental Health Problems*, GUTTMACHER INSTIT. (June 25, 2013), <https://www.guttmacher.org/gpr/2013/06/still-true-abortion-does-not-increase-womens-risk-mental-health-problems>.

that a growing preborn child possesses many of the physical and physiological characteristics that will be present at birth and into adulthood.”²³ Mr. Grasz’s decision to affiliate himself with an organization that has endorsed patently false statements to support its opposition to reproductive health care raises serious questions about whether he would be able to impartially decide cases involving reproductive rights. Further, Mr. Grasz’s blanket assertions that these affiliations are irrelevant, and that he would, if confirmed, follow Supreme Court and Eighth Circuit Precedent, provides little reassurance in light of Mr. Grasz’s enmeshment with these organizations.²⁴

Extreme Hostility to LGBTQ Rights. While serving in the Nebraska Attorney General’s office, Mr. Grasz signed a 1996 opinion finding that Nebraska did not recognize same-sex marriages and encouraging Nebraska to pass legislation “expressly refusing to recognize same-sex marriages” in order to avoid the “grave danger” of the Nebraska Supreme Court recognizing the validity of such marriages validly entered into in other states.²⁵ In addition, Mr. Grasz represented Nebraska in an amicus brief urging the Vermont Supreme Court to use the traditional definition of marriage in *Baker v. Vermont*,²⁶ and argued in *In re Adoption of Luke* that state law did not allow an unmarried lesbian couple to adopt a child.²⁷

Furthermore, during the City of Omaha Charter Review Convention, Grasz served on a committee and promoted an amendment to the charter of the city of Omaha that would have created an exemption for employers to discriminate against LGBTQ individuals under the guise of religious liberty.²⁸ This raises particular concerns about whether or not he would give religious preferences precedence over civil and other legal rights, especially those with which he personally disagrees.

In addition, Mr. Grasz supports organizations that take harmful positions for LGBTQ individuals. For example, as previously noted, Mr. Grasz was a board member of the Nebraska Family Alliance, which has vigorously supported “conversion therapy” for young LGBTQ persons and has argued that state bans on conversion therapy are “a stunning attack on parental rights and

²³ *Id.*

²⁴ See, e.g., Steven Grasz Questions for the Record, *supra* note 2.

²⁵ *Validity in Nebraska of Same-Sex Marriages Contracted in Another State*, Neb. Op. Att’y Gen. No. 96025, 1996 WL 132907 (Mar. 25, 1996).

²⁶ See ALLIANCE FOR JUSTICE, REPORT ON LEONARD STEVEN GRASZ 8, available at <https://www.afj.org/wp-content/uploads/2017/10/AFJ-Grasz-Report.pdf>.

²⁷ See *In re Adoption of Luke*, 640 N.W.2d 374 (2002), available at https://scholar.google.com/scholar_case?case=7313418488474416371&q=640+N.W.2d+374+&hl=en&as_sdt=2006. In this case, the state argued that the intent of the law was to allow only married couples to adopt. The Nebraska Supreme Court agreed, and since same-sex couples were not allowed to marry in Nebraska at that time, the couple was not allowed to adopt. See *id.*

²⁸ See ALLIANCE FOR JUSTICE, *supra* note 26, at 6-7 & nn. 46-47 (citing Proposed Amendment to Omaha Charter Section 8, 8.02A: Religious Freedom and Rights of Conscience (2013); City of Omaha Charter Study Review Convention, Testimony, 147-48 (Dec. 3, 2013)).

religious freedom.”²⁹ The organization also opposed state legislation to prohibit discrimination in the workplace on the grounds of sexual orientation and gender identity,³⁰ and has expressed hostility to the right of transgender students.³¹ Mr. Grasz’s strong affiliation with this organization again raises serious questions about whether he would treat LGBTQ litigants fairly, and whether he could impartially decide cases in which discrimination or the equal rights of LGBTQ individuals were at issue.

In sum, Leonard Grasz is not fit for a lifetime position on the federal bench, where his rulings will affect the lives of women and LGBTQ individuals for generations. Mr. Grasz’s record on abortion rights and LGBTQ rights demonstrates troubling legal views, and would reasonably give pause to any litigant seeking to vindicate those rights before him, were he to be confirmed to the Eighth Circuit. For all the reasons described above, the Center urges you to reject his nomination. Please feel free to contact me, or Gretchen Borchelt, Vice President of Reproductive Rights and Health 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 written in a cursive, flowing style.

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

²⁹ See Paul Weber, *How Jayson Found Help for Unwanted Same-Sex Attraction*, Nebraska Family Alliance (Aug. 4, 2017), <https://nebraskafamilyalliance.org/jayson-counseling-same-sex-attraction/>; see also Nate Grasz, *Legislation Criminalizing Conversion Therapy Sweeping the Nation*, Nebraska Family Alliance (July 21, 2017), <https://nebraskafamilyalliance.org/legislation-criminalizing-conversion-therapy-sweeping-nation/>.

³⁰ *12 People Bullied by the Government Under Nondiscrimination Laws*, Nebraska Family Alliance (Mar. 1, 2017), <https://nebraskafamilyalliance.org/people-bullied-nondiscrimination-laws/>.

³¹ See Jake Bliss, *Sexual Orientation, Gender Identity, and Race: Are They Three of a Kind?*, Nebraska Family Alliance (Apr. 7, 2017), <https://nebraskafamilyalliance.org/sexual-orientation-gender-identity-race-three-kind/>; *School Defends Controversial “Transition Ceremony” in Kindergarten Classroom*, Nebraska Family Alliance (Aug. 29, 2017), <https://nebraskafamilyalliance.org/school-defends-controversial-transition-ceremony-kindergarten-classroom/>.