

December 6, 2017

VIA EMAIL

The Honorable Charles Grassley
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

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

Dear Senators Grassley and Feinstein,

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 Mark S. Norris, Sr. to the United States District Court for the Western District of Tennessee.

As a Tennessee state legislator, Mark Norris has worked for the past 17 years to undermine the legal rights of women, LGBTQ individuals, Muslims, workers, and people of color. He has introduced blatantly unconstitutional legislation, taken questionable litigation positions, and made statements demonstrating animus and bias, all of which raise serious questions about his ability to serve as a fair and impartial jurist.

Women's Reproductive Rights and Health

During his time as a Tennessee state legislator, Mr. Norris has shown extreme hostility to the Constitutional right to decide whether to have an abortion. In 2007, following a Tennessee Supreme Court decision invalidating several abortion restrictions, Mr. Norris co-sponsored a resolution to begin the process of amending the Tennessee Constitution. The amendment—intended to make it easier for the state to pass abortion restrictions—stated “nothing in this Constitution secures or protects a right to abortion.”¹

In the Tennessee legislature, Mr. Norris voted in favor of bills purposely intended to test the constitutional right to abortion and make it more difficult – if not impossible – for women to access abortion. For example:

¹ S.J. Res. 127, 105th Gen. Assemb., Reg. Sess. (Tenn. 2007); see also *SJR 127, VOTE SMART*, <https://votesmart.org/bill/6120/16958/48790/abortion-not-protected-by-state-constitution#.WhJOuLbMyl6> (last visited Nov. 29, 2017). After the General Assembly approved the amendment, it was placed on the ballot as a referendum for consideration by Tennessee voters. In 2014, Amendment 1 was approved by 53% of the vote. The Amendment was subsequently challenged in court, and cases are on-going in state court and the Sixth Circuit Court of Appeals. Anita Wadhvani, *Fate of Tennessee abortion measure Amendment 1 now up to appeals court*, TENNESSEAN (Aug. 2, 2017), <http://www.tennessean.com/story/news/2017/08/02/fate-tennessee-abortion-measure-amendment-1-now-up-appeals-court/526383001/>.

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- In 2012, Mr. Norris voted for a bill that would establish legal rights for fertilized eggs in an attempt to undermine the constitutional right to abortion.²
- In 2012, Mr. Norris voted to require abortion providers to obtain medically unnecessary hospital admitting privileges,³ a law that eventually forced two clinics in the state to close.⁴ The Supreme Court later struck down this type of restriction as unconstitutional in *Whole Woman's Health v. Hellerstedt* and the Tennessee law Mr. Norris voted for has now been permanently enjoined.⁵
- In 2015, Mr. Norris voted in support of a bill requiring abortion clinics to meet the licensure requirements of ambulatory surgical centers.⁶ The Supreme Court also later struck down this type of restriction as unconstitutional, and the Tennessee law Mr. Norris voted for has now been permanently enjoined.⁷
- In 2015, Mr. Norris voted to impose a mandatory delay of 48 hours before a woman can get an abortion,⁸ and voted against amendments that would have added exceptions for women pregnant as a result of rape or incest.⁹ A legal challenge was brought by three abortion clinics and a provider challenging the constitutionality of the mandatory delay.

Were he to be confirmed, Mr. Norris' demonstrated record of hostility to a woman's right to decide whether to have an abortion calls into question his ability to apply settled

² H.B. 3517, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012). The bill would codify a definition of personhood in Tennessee criminal code that opponents of abortion have long attempted to enshrine into law in order to challenge *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the U.S. Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Those who want to see *Roe* overturned have long attempted to embed fetal personhood in law in order to challenge this holding.

³ H.B. 3808, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); see also *HB 3803*, VOTE SMART, <https://votesmart.org/bill/15938/41969/48790/requires-publication-of-abortion-statistics#.Wh7aNFwNfPg> (last visited Nov. 29, 2017).

⁴ Anita Wadhvani, *Tennessee agrees to stop enforcing two abortion measures*, TENNESSEAN (Apr. 13, 2017), <http://www.tennessean.com/story/news/2017/04/13/tennessee-agrees-stop-enforcing-two-abortion-measures/100437468/>.

⁵ See *Adams & Boyle v. Slatery*, No. 3:15-cv-00705, (M.D. Tenn. Aug. 14, 2017), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Docket-No-60.pdf>.

⁶ S.B. 1280, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); see also *SB 1280*, VOTE SMART, <https://votesmart.org/bill/19684/51879/48790/exempts-certain-abortion-facilities-from-being-licensed-as-surgical-centers#.Wh7dAlWnFpg> (last visited Nov. 29, 2017).

⁷ See *Adams & Boyle*, *supra* note 5.

⁸ S.B. 1222, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); see also *SB 1222*, Vote Smart, <https://votesmart.org/bill/19682/51876/48790/requires-a-48-hour-waiting-period-prior-to-an-abortion#.Wh7eX1WnFpg> (last visited Nov. 29, 2017).

⁹ Teddy Wilson, *Tennessee Legislature Cracks Down on Reproductive Rights*, REWIRE (Apr. 22, 2015), <https://rewire.news/article/2015/04/22/tennessee-legislature-cracks-reproductive-rights/>.

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precedent guaranteeing a woman's constitutional right to abortion. In his hearing, Mr. Norris asserted to the Senate Judiciary Committee that he would abide by relevant precedents like *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Woman's Health*, but given his record, it is difficult to take Mr. Norris's assertions seriously.

In addition, Mr. Norris voted in favor of a resolution urging Congress to repeal the Affordable Care Act's birth control benefit. The resolution called the legal requirement "a direct assault on people of faith and the very Constitution itself."¹⁰ Given that cases involving the birth control benefit continue to be considered in courts across the country, this vote raises serious questions about the ability of Mr. Norris to remain impartial.

LGBTQ Rights

Mr. Norris has endorsed legislation that demonstrates animus towards LGBTQ individuals and limits efforts to protect LGBTQ individuals from discrimination. In addition, he has taken litigation positions that directly contravene and attempt to circumvent Supreme Court precedent. For example:

- In 2016, he supported legislation that allows mental health counselors "with sincerely held principles" to refuse LGBTQ clients.¹¹
- In 2011, he supported state legislation that preempted (and thus nullified) city laws protecting LGBTQ individuals from discrimination, after the city of Nashville passed an ordinance prohibiting contractors from discriminating on the basis of sexual orientation or gender identity.¹²
- In 2017, he supported legislation prohibiting any government entity from taking action against companies based on their internal policies,¹³ which would prevent cities from refusing to contract with companies that discriminate against LGBTQ people, and would raise a host of broader concerns as well.
- In 2011, he also supported a bill that would have prohibited public school teachers from providing information about homosexuality to students – dubbed the "Don't Say Gay" bill.¹⁴

¹⁰ H.J. Res. 667, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

¹¹ S.B. 1556, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); *see also SB 1556*, LEGISCAN, <https://legiscan.com/TN/rollcall/SB1556/id/500053> (last visited Nov. 29, 2017).

¹² Lucas L. Johnson II, *Governor Signs Bill That Voids Nashville Law*, DESERET NEWS (May 24, 2011), <https://www.deseretnews.com/article/700138398/Governor-signs-bill-that-voids-Nashville-law.html>.

¹³ S.B. 127, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); *see also SB 127*, LEGISCAN, <https://legiscan.com/TN/rollcall/SB0127/id/601041> (last visited Nov. 29, 2017).

¹⁴ S.B. 49, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011). *See also SB 49*, OPEN STATES, <https://openstates.org/tn/votes/TNV00000507> (last visited Nov. 29, 2017); "Don't Say Gay" bill passes Tenn.

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- In 2004, he co-sponsored a joint resolution urging the U.S. Congress to enact the Federal Marriage Amendment, which would have defined marriage as “the union of a man and a woman.”¹⁵
- He later supported a resolution condemning the Supreme Court’s decision in *Obergefell v. Hodges*.¹⁶ He also supported legislation that would have required courts and government agencies to follow gendered statutory language, including where laws referred to “husbands and wives” rather than spouses.¹⁷

In addition, in 2016, Mr. Norris, along with 52 Republican legislators, tried to intervene in the divorce and child custody proceedings of a same-sex married couple to advance a gendered interpretation of the law in contravention of the *Obergefell* decision.¹⁸ The legislators’ brief also explicitly argued that *Obergefell* should not apply to custody issues in divorce proceedings.¹⁹ The trial judge noted that the legislators’ request to intervene “constitutes an attempt to bypass the separation of powers provided by the Tennessee constitution.”²⁰

It is difficult to overstate the degree of hostility that these actions manifest towards LGBTQ individuals. Litigants coming before Mr. Norris, if he were confirmed, could not expect impartial justice.

Anti-Muslim and Anti-Immigrant Bias

In 2016, Mr. Norris sponsored a resolution directing the Tennessee attorney general to challenge the resettlement of refugees in Tennessee.²¹ After the resolution passed, Mr.

Senate, NBC NEWS (May 20, 2011), http://www.nbcnews.com/id/43115864/ns/us_news-life/t/dont-say-gay-bill-passes-tenn-senate/.

¹⁵ S.J. Res. 27, 103d Gen. Assemb., Reg. Sess. (Tenn. 2004).

¹⁶ Statement of Intent or Position-Expresses disagreement with the U.S. supreme court’s decision in *Obergefell v. Hodges*, H.R.J. Res. 529, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); see also *HRJ 0529*, LEGISCAN, <https://legiscan.com/TN/rollcall/HJR0529/id/537864> (last visited Nov. 29, 2017).

¹⁷ H.B. 1111, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); see also *HB 1111*, LEGISCAN, <https://legiscan.com/TN/rollcall/HB1111/id/633764> (last visited Nov. 29, 2017).

¹⁸ Tom Humphrey, *53 GOP lawmakers seek to intervene in Tennessee gay couple’s divorce*, TENNESSEAN (Sept. 12, 2016), <http://www.tennessean.com/story/news/politics/2016/09/12/53-gop-lawmakers-seek-intervene-knoxville-womens-divorce/90274248/>.

¹⁹ *Id.*

²⁰ Jamie Satterfield, *Knox County Judge grants woman rights of ‘husband’ in Tennessee’s first same-sex divorce case*, KNOXVILLE NEWS SENTINEL (May 10, 2017), <http://www.knoxnews.com/story/news/local/2017/05/10/knox-county-judge-grants-woman-rights-husband-tennessee-first-same-sex-divorce/314540001/>.

²¹ S.J. Res. 467, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); see also *SJR 467*, LEGISCAN, <https://legiscan.com/TN/bill/SJR0467/2015> (last visited Nov. 29, 2017).

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Norris set up an online campaign encouraging the attorney general to sue the federal government, consisting of an online petition and a website. The website stated, “Keep potential terrorists out of Tennessee,” and posed the rhetorical question, “Refugees or terrorists?” while juxtaposing images of refugees and ISIS fighters.²² Given this hateful, anti-Muslim rhetoric, it is difficult to imagine that litigants would be able to expect Mr. Norris to act as an open-minded and impartial jurist.

Mr. Norris’ legislative record also contains anti-immigrant positions. In 2017, he sponsored legislation that would have made the fact that a criminal defendant had undocumented immigration status a reason to “enhance,” or increase the severity of, their sentence in felony cases.²³ As the National Immigration Law Center has observed, this kind of legislation is likely unconstitutional and preempted by federal law.²⁴ In addition, he strongly opposed legislation that would have permitted undocumented students enrolled in the Deferred Action for Childhood Arrivals (DACA) program to pay in-state college tuition. He was quoted in the press as saying, “[i]t doesn’t make sense to have that many illegals in the state of Tennessee.”²⁵

These positions and statements raise serious concerns about the animus that Mr. Norris has demonstrated to refugees generally and Muslim refugees more specifically, as well as towards undocumented immigrants. In addition, they raise concerns about whether Mr. Norris would interpret federal immigration law without bias.

Worker Protections

Of additional concern is the fact that Mr. Norris has also supported legislation that preempted local governments from requiring employers to provide more generous health insurance benefits, leave policies, or wages than state or federal laws require.²⁶ The law also prohibited local governments from requiring construction contractors to pay more than state minimum wage, and from passing laws to address wage theft. This legislation, once enacted, preempted (and thus nullified) living wage laws and fair wage

²² See KEEP TN SAFE (2016), <https://web.archive.org/web/20161115143806/http://keeptnsafe.com/>.

²³ S.B. 1260, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); see also SB 1260, LEGISCAN, <https://legiscan.com/TN/bill/SB1260/2017> (last visited Nov. 29, 2017).

²⁴ Jake Lowary, *Bill gives judges in Tennessee power to use immigration status as felony sentencing enhancement*, USA TODAY (May 12, 2017), <http://www.tennessean.com/story/news/politics/2017/05/12/bill-gives-judges-tennessee-power-use-immigration-status-felony-sentencing-enhancement/318877001/>.

²⁵ Sam Stockard, *Tearful End for Non-Citizen Tuition Relief Bill*, MEMPHIS DAILY NEWS (Apr. 20, 2017), <https://www.memphisdailynews.com/news/2017/apr/20/tearful-end-for-non-citizen-tuition-relief-bill>.

²⁶ H.B. 501, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); see also HB 501, LEGISCAN, <https://legiscan.com/TN/rollcall/HB0501/id/255811> (last visited Nov. 29, 2017).

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laws that had been enacted by cities and counties in the state.²⁷ Higher minimum wages are especially important for women and the families they support, as women comprise the majority of people paid minimum wage (or close to it) in Tennessee and across the country. Mr. Norris' support of this preemption legislation raises concerns about his ability to treat the economic concerns of working people with the same seriousness he grants to those of corporations and employers.

For all of the foregoing reasons, the National Women's Law Center urges you to reject the nomination of Mark S. Norris, Sr. to a lifetime position on the U.S. District Court for the Western District of Tennessee. 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 letters of each name being capitalized and prominent.

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

cc.: Judiciary Committee

²⁷ Alliance for Justice, *Report on Mark Norris 15* (2017), available at <https://www.afj.org/wp-content/uploads/2017/10/AFJ-Norris-Report.pdf>.

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