

March 7, 2024

VIA EMAIL

United States Senate
Washington, D.C.

Re: *Letter in Support of Ms. Nicole Berner for the U.S Court of Appeals for the Fourth Circuit*

Dear Senator,

We are writing on behalf of the National Women’s Law Center (the “Law Center”)¹ and the undersigned gender justice organizations to express our support for the confirmation of Ms. Nicole Berner to the United States Court of Appeals for the Fourth Circuit. Ms. Berner is a brilliant civil rights and labor litigator with a demonstrated commitment to equal justice for all who will be a tremendous addition to the federal bench. During Ms. Berner’s confirmation hearing, she displayed her superb legal acumen and an even temperament as she thoroughly responded to each question posed by the Senators about her record and how she’d approach cases as a judge. We urge the Senate to grant her respectful consideration and the swift confirmation she deserves.

Nicole Berner is a renowned attorney with a deep understanding of the impact of laws and the Constitution on the rights of women, girls, workers, people of color and LGBTQ people, and is incredibly qualified to serve on the Fourth Circuit. Since 2017, Ms. Berner has served as a Partner at James & Hoffman, P.C. on a full-time retainer as General Counsel for the Service Employees International Union (“SEIU”). Previously she served as associate general counsel and then deputy general counsel at SEIU. During her tenure at SEIU, she has overseen federal litigation on behalf of SEIU and its members representing workers’ rights to organize a union and collectively bargain, defend reproductive freedom,² protect access to healthcare,³ protect and advance LGBTQ rights,⁴ and safeguard the right to vote.⁵ Prior to joining SEIU, Ms. Berner served as a staff attorney at Planned Parenthood Federation of America, where she defended

¹ The Law Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Law Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm women and girls – especially those who face multiple forms of discrimination, including women of color, LGBTQ people, and low-income women and families. For over 50 years, the Law Center has been on the leading edge of every major legal and policy victory for women.

² “SEIU Files ‘Friend of the Court’ Brief to Help Protect Reproductive Healthcare in Missouri,” Feb. 25, 2020, <https://www.seiu.org/blog/2020/2/seiu-files-friend-of-the-court-brief-to-help-protect-reproductive-healthcare-in-missouri>.

³ See *California v. Texas*, 141 S. Ct. 2104 (2021); *King v. Burwell*, 576 U.S. 473 (2015); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

⁴ See *Bostock v. Clayton County*, 140 S. Ct. 1731(2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

⁵ See *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

reproductive freedom, including litigating to protect access to medication abortion.⁶ Her substantial litigation experience protecting and advancing the civil rights of all people and understanding of how the law shapes people's lives is much-needed on the federal bench.

In addition to Ms. Berner's experience fighting for the rights of workers, women, people of color, and the LGBTQ community at SEIU and Planned Parenthood, she has distinguished credentials and experience across the legal field. A high honors Phi Beta Kappa graduate of University of California, Berkeley and an Order of the Coif graduate of U.C. Berkeley School of Law earned concurrently with a Master of Public Policy, Ms. Berner began her legal career clerking for Judge Betty Fletcher on the U.S. Court of Appeals for the Ninth Circuit and Chief Judge Thelton Henderson on the U.S. District Court for the Northern District of California. Following Ms. Berner's clerkships, she began practicing as a visiting attorney at Yigal Arnon & Co. in Israel. She went on to serve as an associate at Jenner & Block LLP, where she was a member of the litigation team for the seminal *Lawrence v. Texas* case that paved the way for future LGBTQ protections.⁷ Throughout Ms. Berner's extensive career she has demonstrated an enduring commitment to excellence, social justice, and equal justice for all, which be a vital asset to the Fourth Circuit.

Ms. Berner would also bring much needed professional, gender, and LGBTQ diversity to the Fourth Circuit and federal appellate bench. Despite recent progress in confirming labor and civil rights lawyers to the federal bench,⁸ lawyers who've spent the bulk of their careers advocating for social justice like Ms. Berner remain underrepresented on the federal bench.⁹ If confirmed, Ms. Berner would be the first labor lawyer, the first lawyer with reproductive rights expertise, and the first openly LGBTQ person to ever serve on the Fourth Circuit. Additionally, she would be only the third openly LGBTQ woman to serve on the federal appellate bench and just the third woman from Maryland to serve on the Fourth Circuit. Both public trust and judicial decision-making are respectively improved when our courts reflect our country's rich diversity and include judges from underrepresented communities.¹⁰ Ms. Berner's lived and professional experience would greatly benefit the Fourth Circuit and all who come before the court.

Ms. Berner is one of the brightest legal minds in our nation and will make an excellent appellate judge. The Law Center and the undersigned gender justice organizations respectfully urge the Senate to swiftly confirm Nicole Berner to the U.S. Court of Appeals for the Fourth Circuit. Please feel free to contact Erinn Martin, Director of Nominations and Cross-Cutting Policies, at erinnmartin@nwlc.org should you have any questions.

⁶ See *Planned Parenthood Cincinnati Region, et al. v. Taft*, 439 F.3d 304 (6th Cir. 2006).

⁷ *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (June 26, 2003).

⁸ *End-Of-Year Report*, Alliance for Justice (2022), pg.15, https://www.afj.org/wp-content/uploads/2023/01/2022_AFJ_EOYReportFINAL.pdf.

⁹ Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, Cato Institute (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates#>.

¹⁰ Kate Berry, *Building a Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges*, Brennan Center for Justice at NYU School of Law and American Bar Association Judicial Division (2017), https://www.brennancenter.org/sites/default/files/publications/Building_A_Diverse_Bench_0726.pdf; Maya Sen, *Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, Over Time*, 2017 Wis. L. Rev. 367 (2017), <https://scholar.harvard.edu/files/msen/files/judicial-diversity.pdf>.

Sincerely,

The National Women's Law Center

A Woman's Choice Inc.
Advocates for Youth
Alliance for Justice
American Humanist Association
American Society for Reproductive Medicine
AVAC
Black Women's Health Imperative
Center for Biological Diversity
Center for Freethought Equality
Center for Popular Democracy
Clearinghouse on Women's Issues
Cobalt
Earthjustice
Equal Rights Advocates
Esperanza United
Feminist Majority Foundation
Girls for Gender Equity
If/When/How
Illinois NOW
Ipas
League of Conservation Voters
Lilith Fund
Midwest Access Coalition
MomsRising
Monroe County NOW
National Abortion Federation
National Asian Pacific American Women's Forum
National Association of Consumer Advocates
National Center for Lesbian Rights
National Council of Jewish Women
National Employment Law Project
National Health Law Program
National Partnership for Women & Families
Ohio National Organization for Women
PFLAG National
Planned Parenthood Federation of America
Pro-Choice North Carolina
Progress Florida
Religious Coalition for Reproductive Choice
Reproductive Freedom For All (formerly NARAL Pro-Choice America)
Texas Equal Access Fund
The Fund for Women and Girls

Victim Rights Law Center
Women's March