

AFJ NOMINEE REPORT

ANDREW OLDHAM



U.S. Court of Appeals for the Fifth Circuit

CONTENTS

INTRODUCTION, 1

BIOGRAPHY, 2

THE ENVIRONMENT, 2

WORKERS AND CONSUMERS, 4

DREAMERS AND THEIR PARENTS, 5

CIVIL RIGHTS, 6

Ban the Box, 6

Voting Rights, 6

Fair Housing Act, 6

Disability Rights, 7

REPRODUCTIVE RIGHTS, 7

GUN SAFETY, 7

HEALTH CARE, 8

ANTITRUST, 9

CONCLUSION, 9

INTRODUCTION

On February 15, 2018, President [Trump nominated](#) Andrew S. Oldham to the Fifth Circuit Court of Appeals for the seat then held by Judge Edward Prado. In [January 2018](#), Trump nominated [Prado](#) to be the U. S. Ambassador to Argentina; the Senate confirmed Prado on March 22, 2018. Prado was the [only remaining Latino](#) judge active on the Fifth Circuit. This is Trump's fifth nominee to the Fifth Circuit since taking office last year.

Significantly, Oldham's record paints a clear picture of an ideological warrior bent on curtailing critical rights and protections for everyday people. His nomination is entirely in keeping with the Trump Administration's stated goal of appointing judges who will assist in tearing down health, safety and consumer protections and the federal agencies that create and enforce them.

At 39, Oldham is also the youngest person Trump has nominated for a seat on the circuit courts of appeals, which means that if confirmed, he could wield influence on the Fifth Circuit for three to four decades or more. This, too, is in keeping with the administration's strategy of naming ever-younger individuals to the federal bench to cement in place a rightward tilt to our system of justice. Alliance for Justice strongly opposes Oldham's confirmation.

- » **The environment.** Oldham [repeatedly](#) helped Texas join then-Oklahoma Attorney General Scott Pruitt in suing the Environmental Protection Agency (EPA) and [undermining](#) efforts to address climate change. Oldham even questioned the legitimacy of the EPA, [saying](#): "One of the reasons why the administrative state is enraging, is not that you disagree with what the EPA

does, although, I do disagree with a lot of what it does. That's not the thing that makes it enraging. It's the [illegitimacy](#) of it,"¹ and "no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate."²

- » **Workers and consumers.** Oldham has questioned the legitimacy of safeguards protecting the public and consumers. [Oldham](#) was reportedly "[heavily involved](#)" in the "[Texas Plan](#)" to radically amend the U. S. Constitution and gut the enforcement of modern consumer, public health, and workplace protections: "What's driving it from our perspective, from the Governor's perspective and mine . . . is much deeper than that."³ "It's not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire [existence](#) of this edifice of administrative law is constitutionally suspect."⁴
- » **Dreamers and their parents.** Oldham was the [architect](#) of Texas's [strategy](#) to block the expansion of DACA to additional Dreamers and parents of U.S citizens or green card holders, across the country.
- » **Gun safety.** Oldham [represented](#) Texas in its fight against a California concealed carry law. He also [argued](#) that Texas concealed carry license holders should be [able](#) to carry firearms into some government buildings.
- » **Civil rights.** Oldham [helped](#) Texas sue to block the EEOC's efforts to "Ban the Box" in hiring. He [assisted](#) in gutting the Voting Rights Act in *Shelby County v. Holder* while advocating for Texas's controversial voter ID law, and also [fought](#) against fair housing protections for communities of color.
- » **Reproductive rights.** Oldham [defended](#) Texas's extreme anti-abortion law, HB2,

which the U.S. Supreme Court ultimately declared unconstitutional in *Whole Woman's Health v. Hellerstedt*.

- » **Health care.** Oldham [led](#) Texas's effort with 19 other states to strike down the Affordable Care Act.
- » **Antitrust.** Oldham [argued](#) that the modern day Sherman Act – a [foundation](#) of antitrust law and competition policy – is unconstitutional.

BIOGRAPHY

Oldham is currently general counsel to Texas Governor Greg Abbott. He has worked for Abbott since 2012, serving as deputy solicitor general, deputy general counsel, and acting general counsel.⁵ Abbott [described](#) Oldham's nomination as "an excellent choice of a strict construction constitutionalist. I think he's even better than Gorsuch." In Oldham's [notes](#) for an August 2016 speech, he wrote, "What truly made me passionate about public service can be summed up in two words: Greg Abbott."⁶ Oldham [argued two](#) cases before the U.S. Supreme Court on behalf of Texas.⁷

Previously, Oldham worked as an associate at Kellogg Hansen Todd Figel & Frederick PLLC. He also spent [several years](#) as an attorney adviser in the Department of Justice Office of Legal Counsel ([OLC](#)) during the George W. Bush Administration, serving under [Steven Bradbury](#) from 2006 to 2008. In his nomination paperwork, Oldham [indicated](#) that he "drafted legal briefs and argued before military commissions charged with conducting war-crimes trials."⁸

Oldham clerked for Justice Samuel Alito on the U.S. Supreme Court and Judge David Sentelle on the D.C. Circuit. He received his J.D. from [Harvard](#) Law School in 2005, an

MPhil from the University of Cambridge in 2002, and his B.A. from the University of [Virginia](#) in 2001.⁹ Oldham is 39 years old. He previously worked as a [speechwriter](#) on Capitol Hill. While in [college](#), Oldham helped found an organization designed to educate men about sexual assault.

Oldham joined the ultraconservative [Federalist Society](#) – an outside group to which Trump has [delegated](#) important aspects of the judicial nomination process – at age [24](#) and has been a member since then.¹⁰ Oldham is a frequent speaker at Federalist Society events.¹¹ Oldham has also [spoken](#) multiple times to the Blackstone Legal Fellowship of the Alliance Defending Freedom (ADF);¹² the Southern Poverty Law Center has designated ADF as a [hate group](#).

THE ENVIRONMENT

Through both his legal career and public comments, Oldham has advocated against efforts to protect the environment and prevent climate change. He has also questioned the legitimacy of the EPA. In a [recorded](#) May 2016 speech before the Federalist Society at the University of Chicago, Oldham said:

One of the reasons why the administrative state is enraging, is not that you disagree with what the EPA does, although, I do disagree with a lot of what it does. That's not the thing that makes it enraging. **It's the illegitimacy of it.**¹³ (emphasis added)

As discussed below, Oldham's [comments](#) reflect his view that "the entire existence of this edifice of administrative law is constitutionally suspect." Oldham's "[favorite example](#)" for criticism is the EPA's effort

to limit carbon emissions in order to fight climate change:

[The Clean Power Plan] is the ultimate example, I think, of rule by bureaucrat, right . . . And again, it's not about whether you think the Clean Power Plan is a good idea or a bad idea. What I want to challenge, and what this whole idea of why we need unique constitutional reform, is that it is a fundamentally illegitimate exercise of ways to come up to govern modern American life. . . .¹⁴

And you go down and you talk to the folks, and they just, like, everybody thinks about how they don't like the Clean Power Plan, [but] **no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate.**¹⁵(emphasis added)

Oldham also helped Texas sue to block the EPA from limiting pollution and enforcing the Clean Air Act. In [*Utility Air Regulatory Group v. EPA*](#), 134 S. Ct. 2427 (2014) (consolidated with *Texas v. EPA*, No. 12-1269), Oldham [submitted](#) a brief claiming that “the Clean Air Act cannot be construed to authorize EPA to regulate greenhouse-gas emissions” under the Clean Air Act’s permit scheme. Oldham, joined by then-Oklahoma Attorney General Scott Pruitt, criticized the “far-reaching and near-ridiculous regulatory burdens required by EPA’s decision to regulate greenhouse-gas emissions”¹⁶ in the case at hand, labeling the consequences “preposterous[.]”¹⁷ and the EPA’s arguments “nonsense.”¹⁸ Texas’s arguments even called into question the landmark environmental protection case [*Massachusetts v. EPA*](#), 549 U.S. 497 (2007), arguing:

If this Court concludes that *Massachusetts* compels EPA to regulate greenhouse-gas emissions under the [Clean Air Act’s permit scheme], then the State Petitioners respectfully request that this Court reconsider *Massachusetts*’s holding that CO₂ and other greenhouse gases unambiguously qualify as “air pollutant[s]” within the meaning of the Act.¹⁹

In the end, the Supreme Court substantially upheld the EPA’s authority to regulate greenhouse gases. In an opinion by Justice Scalia, the Court decided that the EPA reasonably interpreted the Clean Air Act to require large “stationary sources” of pollution (like power plants and factories) to meet certain agency permitting requirements for greenhouse gas pollution, while limiting EPA’s efforts to apply these rules to other sources of pollution. *Utility Air Regulatory Group*, 134 S. Ct. at 2449.

Oldham also challenged the EPA’s efforts to enforce the Clean Air Act in [*EPA v. EME Homer City Generation*](#), 134 S. Ct. 1584 (2014) (consolidated with *American Lung Association v. EME Homer City Generation*, No. 12-1183). In this case, Oldham again joined a [brief](#) for the state of Texas with Scott Pruitt, this time questioning the EPA’s efforts to reduce pollution across state lines. Oldham’s brief argued that the D.C. Circuit had correctly vacated the EPA’s “Transport Rule.” The EPA issued this rule under the Clean Air Act to address the obligations of states upwind from pollution to reduce emissions. Several states and private plaintiffs challenged the rule, arguing that the EPA’s method for computing obligations exceeded its statutory authority. The Supreme Court upheld the EPA’s authority to create and enforce a federal plan addressing upwind polluters.

WORKERS AND CONSUMERS

In several recorded public appearances, Oldham has questioned the legitimacy of safeguards protecting the public and consumers. In a January 2017 speech before the Texas Public Policy Foundation, Oldham [argued](#):

Over 90% of the law that comes out of Washington, D.C., is in the Code of Federal Regulations . . . it's not in the United States Code . . . it is literally just the dictates of bureaucrats in Washington. And that is unacceptable. And so the Governor has proposed a plan . . . that would **make all of those administrative regulations completely inoperable as a matter of law**, unless and until they are voted on by elected members of Congress.²⁰ (emphasis added)

According to one of his former bosses in the Texas state government, Oldham was "[heavily involved](#)" in the formulation of Governor Greg Abbott's "[Texas Plan](#)" to radically amend the United States Constitution. Oldham then traveled around the country promoting the plan, including at a [recorded](#) University of Chicago talk in May 2016:

But really what I think is actually driving, what's driving it from our perspective, **from the Governor's perspective and mine**, is not so much, you know, we need to abolish the IRS or, you know, we need to have some fundamental reform in some other agency or institution. **It is much deeper than that**; it really goes to the rule of law. . . . I have particular things

that I think are illegitimate in the way that we conduct modern American law . . . but I'm just going to go through a few of mine just to give you a sense of kind of what I think is illegitimate about the way modern American law works. . . . **It's not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire existence of this edifice of administrative law is constitutionally suspect.**²¹ (emphasis added)

While Oldham questions the foundation of modern consumer, public health, and workplace protections, the Texas Plan would also dramatically curtail the modern-day Commerce Clause and require a seven-justice supermajority for the Supreme Court to hold a state or federal law unconstitutional.

When testifying before the Texas House in September 2016, Oldham [argued](#) that: "Our Supreme Court seems just as comfortable making up rights that have no bearing in the Constitution, as it is ignoring those that are expressly and explicitly guaranteed by the text of that document."²² In his January 2017 Texas Public Policy Foundation speech, he also [described](#) the Constitution as follows:

It's amended every June when the Supreme Court of the United States adjourns. They issue a bevy of opinions that effectively glom on all sorts of new rights and erase other rights that the Constitution is either supposed to protect or not supposed to protect and is **just the whim of five unelected lawyers who happen to wear black robes.**²³ (emphasis added)

DREAMERS AND THEIR PARENTS

Oldham was the [architect](#) of Texas's legal strategy to halt the [expansion](#) of the Deferred Action for Childhood Arrivals (DACA) program to additional Dreamers and to the parents of U.S. Citizens (Deferred Action for Parents of Americans and Lawful Permanent Residents – DAPA). He was credited with leading the effort by other personnel in Texas state government, who remarked “Deputy Solicitor General Andy Oldham is [lead counsel](#) for this matter and the drafter of the attached [white paper](#),”²⁴ and “[Andy](#) was the one who was working day and night for months starting this lawsuit.”²⁵

As Oldham described in the [complaint](#) he filed to [block](#) the expansion: “On November 20, 2014, the President announced that he would unilaterally create legal protections for approximately 4 million undocumented immigrants. Under the President’s plan, the undocumented parents of U.S. citizens and legal permanent residents would receive deferred action status, as well as work permits and tolling of their unlawful presence in the United States. The President also expanded DACA to hundreds of thousands of additional undocumented immigrants.”²⁶

Oldham [elaborated](#): “the President announced his unilateral creation of the DACA program on June 15, 2012. At the President’s direction, the DHS Secretary then suspended the Nation’s immigration laws for approximately 1.7 million undocumented immigrants. . . . The Defendants’ policies (including DACA and the policy described in *Nava-Martinez*) have had and continue to have dire consequences in the Plaintiff States.”²⁷

When discussing what Oldham would later [describe](#) as “a memo fired off by the Secretary of DHS,” Oldham’s complaint [alleges](#), “At the most basic level, the Directive is a promise to openly tolerate entire classes of undocumented immigrants. In addition, the Directive offers affirmative legal inducements to stay, such as work authorization and the tolling of unlawful presence.”²⁸

In addition to starting this lawsuit, as lead counsel Oldham [argued](#) the preliminary injunction motion that led to a nationwide injunction blocking the DAPA/DACA expansion. He also [compiled](#) the record²⁹ that supported Texas’s argument for emergency relief, [explaining](#): “It was a huge time crunch . . . so it was basically three weeks of 24 hour days.”³⁰ Upon moving with Greg Abbott to the Texas Governor’s Mansion, Oldham continued to help with the appeals in this case, [authoring](#) an amicus [brief](#) for Governor Abbott when the case reached the Supreme Court. The Supreme Court ultimately upheld the nationwide injunction blocking the DAPA/DACA expansion 4-4. [U.S. v. Texas](#), 136 S. Ct. 2271 (2016).

Texas Attorney General Ken Paxton later [notified](#) U.S. Attorney General Jeff Sessions that, if the U.S. didn’t end the Dreamers program, Texas intended to [modify](#) this same lawsuit to challenge the original DACA program (“[Texas](#), along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.”).³¹

The [Trump](#) Administration subsequently [ended](#) DACA, citing the same kinds of legal

arguments that Oldham advanced in the original DAPA/DACA expansion litigation (“The Attorney General [sent](#) a [letter](#) to the Department on September 4, 2017 . . . The letter further stated that because DACA ‘has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.’”) ³²

Although Oldham spoke frequently around the country about the DAPA/DACA expansion litigation, notes or recordings are not yet available for each of his public appearances.

CIVIL RIGHTS

Oldham frequently represented the state of Texas in its challenges to federal civil rights laws.

I. BAN THE BOX

When the Equal Employment Opportunity Commission (EEOC) issued [guidance](#) to employers to help those with criminal histories have a fair chance in hiring decisions, Oldham helped the state of Texas [sue](#) the EEOC in *Texas v. EEOC*. Oldham joined Texas’s amended [complaint](#) that argued “The State of Texas respectfully requests a declaration of its right to maintain and enforce its laws and policies that **absolutely bar** convicted felons (or certain categories of convicted felons) from serving as police officers, youth-correction officers, state-supported-living-center employees, GLO employees, lottery officials, game wardens, school teachers, and **any other job the State and its Legislature deem appropriate**” ³³ (emphasis added).

The Texas State Conference of the NAACP intervened, [noting](#) “[a]t a time when millions of people are still struggling to find work, the

Texas attorney general should not be working to erect barriers to employment, particularly when those barriers disproportionately and unfairly affect workers of color.” In [February](#) 2018, a U.S. District Court found for Texas in part and for the EEOC in part. See [Texas v. EEOC](#), 2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb. 1, 2018).

II. VOTING RIGHTS

When the Supreme Court was considering [Shelby County v. Holder](#), 570 U.S. 529 (2013), Oldham co-authored an amicus brief for the state of Texas in support of gutting the Voting Rights Act (VRA). In Oldham’s [brief](#), Texas argued that its difficulty obtaining preclearance for its extremely controversial voter ID law justified rolling back the Voting Rights Act, stating, “But as the need for section 5’s extraordinary measures has waned, the preclearance regime’s burdens have increased. Texas’s effort to gain preclearance for its recently enacted voter-identification law is a case in point,” ³⁴ and “Texas’s ongoing efforts to gain preclearance of its voter-identification law demonstrate that section 5 continues to impose ‘substantial federalism costs’ at a time when the need for a preclearance regime has receded.” ³⁵

While the Supreme Court struck down a key portion of the Voting Rights Act 5-4 in *Shelby County*, litigation about Texas’s extremely controversial voter ID law is [ongoing](#). A U.S. District Court [found](#) that Texas’s law both had a discriminatory effect and intentionally discriminated against Latinos and African-Americans. The case remains [pending](#) on appeal in the Fifth Circuit, which stayed the District Court’s order in September. See [Veasey v. Abbott](#), 870 F.3d 387 (5th Cir. 2017).

III. FAIR HOUSING ACT

Oldham fought to maintain policies that

perpetuated the segregation of communities of color, representing Texas in [Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.](#), 135 S. Ct. 2507 (2015). In this case, Texas attempted to challenge whether cases of housing discrimination could be brought based on disparate impact to communities of color. Oldham's [brief](#) for the state of Texas argued that the Fair Housing Act (FHA) does not allow these kinds of claims.

The Supreme Court, in a decision by Justice Anthony Kennedy, rejected Oldham's plea to turn back the clock on these civil rights protections, finding that: "The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.'"³⁶

IV. DISABILITY RIGHTS

Oldham gave an interview to the Dallas Morning News for an [article](#) entitled "Greg Abbott pushes to block disabled Texans' lawsuits against state." It was reported that: "Deputy Solicitor General Andy Oldham said there are good reasons why the state tries to block lawsuits from going to court, even when it has a strong case. Good lawyers use all the tools at their disposal, he said." The article continued:

Dennis Borel, executive director of the Coalition of Texans with Disabilities, said that advocates' frustration stems from Abbott's office consistently seeking immunity for Texas agencies, regardless of the claim. "When you invoke the sovereign immunity defense, you're not responding to the merits of the case," he said. "You're simply saying the state is immune for its violations of the ADA and therefore there's not even a point of having a day in court."

Brian East, senior attorney for Texas Disability Rights, said the repeated efforts to raise sovereign immunity against the disabled cuts off the chance to fix problems. "I wouldn't say they were hostile," East said of the attorney general's legal team. "They are hostile to the notion that individual citizens might have redress against the state, in general. They are not targeting people with disabilities specifically, but doing what they can to limit the rights of individuals to use the courts in civil rights cases against the state."

REPRODUCTIVE RIGHTS

When Texas passed a series of provisions known as Targeted Regulation of Abortion Providers (TRAP) laws, Oldham was a lead attorney [defending](#) the Texas law. The Supreme Court later struck down Texas's House Bill 2 as unconstitutional in [Whole Woman's Health v. Hellerstedt](#), 136 S. Ct. 2292 (2016). The laws had imposed onerous burdens, including mandating hospital admitting privileges for abortion providers and requiring that clinics conform to the structural standards of ambulatory surgical centers.

Oldham defended Texas's TRAP laws in both [Planned Parenthood v. Abbott](#), 951 F.Supp.2d 891 (W.D. Tex. 2013) and *Whole Woman's Health*. In *Planned Parenthood v. Abbott*, Oldham gave Texas's [closing](#) argument at trial, defending Texas's provisions limiting medication abortions and requiring admitting privileges for providers. Oldham [also](#) helped represent Texas in the initial phases of *Whole Woman's Health*, which challenged the restrictive admitting privileges and the ambulatory-surgical center requirements.

In striking down these portions of House Bill 2, the Supreme Court held that “the challenged provisions of H. B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women’s health capable of withstanding any meaningful scrutiny.”³⁷

When discussing the case at a recorded September 2016 appearance, however, Oldham spoke [favorably](#) of Justice Alito’s dissent:

[Justice Alito] makes a lot of, I think, very powerful points in that dissent. But one of them is that the Supreme Court seems to have created an area of law that just applies to one particular constitutional right. Right? We don’t apply the normal neutral rules of normal federal litigation, like that would apply to every other case in this particular context. So, for example, we don’t apply the rule of res judicata, apparently. We don’t apply the rule that the relief that is granted to the plaintiffs is limited to the relief that the plaintiffs requested . . . the debates over abortion will continue to rage on, whether and to what extent they are protected by the Constitution. But I think that Justice Alito is quite right in raising a warning flag³⁸

Previously, Oldham also defended Texas’s controversial effort to bar reproductive health organizations from receiving funding through the Texas Women’s Health Program. See [Planned Parenthood Association of Hidalgo County Texas, Inc., v. Suehs](#), 692 F.3d 343 (5th Cir. 2012). In a brief that Oldham [joined](#), Texas argued that “by providing taxpayer funds for Planned Parenthood’s family-planning services, the State boosts the prestige of the Planned Parenthood trademark and gives the organization added stature as it seeks to persuade lawmakers

and the general public to embrace its controversial views on abortion.”³⁹

GUN SAFETY

Oldham worked on concealed carry issues for Governor Abbott and, in recent years, has spoken frequently about firearms law and policy. [Notes](#) or recordings are not available for [all](#) of Oldham’s [speeches](#) on gun safety issues. He is also a member of the National Rifle Association (NRA).⁴⁰

When the California Rifle and Pistol Association Foundation challenged San Diego County’s requirement that individuals show “good cause” in order to receive a permit to carry a concealed firearm in public, Oldham [filed](#) a brief for Texas and other states arguing for a weaker standard. Oldham diminished the [public safety concerns](#) behind these gun violence measures, arguing: “California bases its incapacious view of the right to bear arms on purported ‘public safety’ concerns.”⁴¹ Oldham continued:

California is wrong to suggest that its public safety concerns give the State a legal basis to impose special and **draconian burdens on Second Amendment rights**. . . . Not only are [Concealed Handgun License] CHL holders dramatically less likely to commit crimes themselves, they also incentivize others to commit less crime. Would-be criminals are less likely to break the law when they know that their victims may be carrying firearms. Decades of empirical research prove this. (emphasis added)⁴²

In 2015, [when](#) Texas adopted campus carry and open carry laws, Oldham wrote a [memo](#) for Governor Abbott that took an expansive view of where concealed carry license

holders could carry firearms – including into some government buildings. Oldham’s memo interpreting the new law generated [controversy](#) among local [officials](#). As one editorial [explained](#), “If the top legal experts in Gov. Greg Abbott’s office have their way, a lot of government buildings in Tarrant County will see sharp changes to their security precautions. Officials will have to back away from current gun restrictions — at least when the people carrying guns are licensed to do so. People with handgun licenses have the right to take their guns — concealed for now, but openly carried in a belt or shoulder holster after Jan. 1 — into most areas of those buildings, Abbott’s lawyers say.”

Oldham also gave [several public](#) speeches on firearms, including [speeches](#) on “Irrational Basis: The Scrutiny Applicable Only to Gun Law.”⁴³ In a recorded September 2016 appearance, Oldham [discussed](#) a [Highland Park](#), Illinois ban on AR-15 style weapons and his concerns about the rule of law implications for various lower-court rulings on gun violence issues. Oldham argued that the Supreme Court should have considered the Seventh Circuit ruling upholding Highland Park’s ban:

The AR-15 or modern sporting rifle is the most popular rifle in, in the United States, and you know, the ban in Highland Park is a categorical ban, I mean it is straight up, just like the California [sic] ban is, on that, on that category of weapons. So I agree with you that there should be Supreme Court, constitutional scrutiny on categorical bans on types of weapons, but it strikes me that that is equally true in both of those cases.⁴⁴

HEALTH CARE

Oldham was lead counsel in an effort with 20 states to strike down the Affordable Care

Act (ACA) as unconstitutional. In [Hotze v. Burwell](#), 784 F.3d 984 (5th Cir. 2015) Oldham filed an amicus brief arguing that the ACA violated the Origination Clause of the U.S. Constitution. Then-Chairman of the Senate Finance Committee Ron Wyden [filed](#) an amicus brief supporting the constitutionality of the law, which provides health care coverage to millions of Americans. The Fifth Circuit dismissed the challenge to the ACA on [standing](#) grounds, and the Supreme Court denied review in 2016.

In Oldham’s [brief](#) challenging the law, he argued that “In contravention of the Framers’ plan, public scrutiny and blame for that \$1 trillion tax bill fell on the Senate instead of the more politically-accountable House. And for their part, House members seemed all-too-glad to avoid the political heat.”⁴⁵

ANTITRUST

While an attorney adviser in the Department of Justice, Oldham [wrote](#) an article in his personal capacity that argued that the [foundational](#) antitrust law – the Sherman Act – is unconstitutional. According to [Oldham](#), “the federal antitrust regime is unconstitutional,” “the Sherman Act, as it is currently understood, is unconstitutional,” and “the modern-day scope of the Sherman Act is illegitimate.”⁴⁶

CONCLUSION

Throughout his career, Andrew Oldham has shown his dedication to dismantling health, safety and environmental protections. He has shown hostility to the rights of women, people of color, immigrants, and people with disabilities. He has opposed common-sense gun safety measures designed to enhance public safety. For these reasons, Alliance for Justice strongly opposes his confirmation to a lifetime seat on the federal bench.

ENDNOTES

- 1 Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 54:16, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).
- 2 *Id.* at 57:30
- 3 *Id.* at 6:10
- 4 *Id.* at 10:25
- 5 Sen. Comm. on the Judiciary, 115th Cong., Andrew Stephen Oldham Questionnaire for Judicial Nominees, 1-2, available at <https://afj.org/wp-content/uploads/2018/04/Andrew-S.-Oldham-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 6 Andrew Oldham, Speaker, “The Office of the Solicitor General: Advocacy for Protecting the People,” Blackstone Legal Fellowship, Washington D.C. (Aug. 2, 2016).
- 7 *Jennings v. Stephens*, 135 S. Ct. 793 (2015); *Trevino v. Thaler*, 569 U.S. 413 (2013).
- 8 Sen. Comm. on the Judiciary, 115th Cong., Andrew Stephen Oldham Questionnaire for Judicial Nominees, 28.
- 9 *Id.* at 1.
- 10 *Id.* at 5.
- 11 *Id.* at 7-11.
- 12 *Id.*
- 13 Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 54:16, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).
- 14 *Id.* at 13:16.
- 15 *Id.* at 57:30.
- 16 Brief for the State Petitioners at 2, *Utility Air Regulatory Group v. EPA*, No. 12-1146 (Dec. 9, 2013), available at <https://www.kattenlaw.com/files/upload/Broome/Merits-Brief-Texas-et-al.pdf>.
- 17 *Id.* at 4.
- 18 *Id.* at 10.
- 19 *Id.* at 24.
- 20 Andrew Oldham, Speaker, “Time for a Convention of States,” Texas Public Policy Foundation, Recording at 19:25, available at <https://www.youtube.com/watch?v=H4R-ErCNafC&feature=youtu.be> (Jan. 12, 2017).
- 21 Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 6:10, 10:25, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).
- 22 Andrew Oldham, Testimony, Hearing before the Texas House Select Committee on State & Federal Power & Responsibility, Recording at 2:10:29, available at http://tlchouse.granicus.com/MediaPlayer.php?view%20_id=3%207%20&clip%20id=%2012213 (Sept. 13, 2016).
- 23 Andrew Oldham, Speaker, “Time for a Convention of States,” Texas Public Policy Foundation, Recording at 21:40, available at <https://www.youtube.com/watch?v=H4R-ErCNafC&feature=youtu.be> (Jan. 12, 2017).
- 24 *William Groth v. Mike Pence*, No. 49A04-1605-PL-1116 at *7 (Ind. Ct. App. Jan. 9, 2017), available at <https://www.in.gov/judiciary/opinions/pdf/01091701ewn.pdf>.
- 25 Andrew Oldham, Speaker, “SCOTUS Roundup Panel,” Federalist Society, University of Texas Student Chapter, Recording at 53:00, available at <https://www.youtube.com/watch?v=lgOyrAF-XUE> (Sept. 8, 2016).
- 26 Complaint for Declaratory and Injunctive Relief at 18-19, *Texas, et al. v. U.S., et al.*, 1:14-cv-00254 (Dec. 3, 2014), available at <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-U.S.-14-cv-00254-SDTX-COMPLAINT.pdf>.
- 27 *Id.* at 9, 11.

- 28 *Id.* at 27-28.
- 29 Sen. Comm. on the Judiciary, 115th Cong., Andrew Stephen Oldham Questionnaire for Judicial Nominees, 19.
- 30 Andrew Oldham, Speaker, "SCOTUS Roundup Panel," Federalist Society, University of Texas Student Chapter, Recording at 54:00, available at <https://www.youtube.com/watch?v=lg0yrAF-XUE> (Sept. 8, 2016).
- 31 Memorandum on Rescission Of Deferred Action for Childhood Arrivals (DACA), DEP'T OF HOMELAND SEC. (Sept. 5, 2017), available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.
- 32 *Id.*
- 33 First Amended Complaint for Declaratory and Injunctive Relief at 14, *Texas v. EEOC*, No. 5:13-cv-00255 (N.D. Tex. Mar. 18, 2014), available at <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-EEOC-13-cv-00255-NDTX-Texas-Amended-Complaint-Oldham.pdf>.
- 34 Amici Curiae Brief at 1-2, *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013), No. 12-96, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_texas.authcheckdam.pdf.
- 35 *Id.* at 2.
- 36 *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).
- 37 *Whole Woman's Health*, 136 S. Ct. at 2319.
- 38 Andrew Oldham, Speaker, "Panel: SCOTUS Roundup," Federalist Society, University of Texas Student Chapter, Austin, Texas. Recording at 20:15 available at <https://www.youtube.com/watch?v=lg0yrAF-XUE> (Sept. 8, 2016).
- 39 Appellant's Brief at 53, *Planned Parenthood Association of Hidalgo County Texas, Incorporated v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (No. 12-50377) available at <https://afj.org/wp-content/uploads/2018/04/PP-of-Hidalgo-County-v.-Suehs-appellant-brief-5th-Circuit.pdf>.
- 40 Sen. Comm. on the Judiciary, 115th Cong., Andrew Stephen Oldham Questionnaire for Judicial Nominees, 5.
- 41 Amici Curiae Brief at 2, *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (No. 10-56971), available at http://michellawyers.com/wp-content/uploads/2010/11/Peruta_Amici-Curiae-Brief-for-the-Governors-of-Texas-Louisiana-Maine-Mississippi-Oklahoma-and-South-Dakota-in-Support-of-Plaintiffs-Appellants.pdf.
- 42 *Id.* at 9-10.
- 43 Andrew Oldham, Speaker, "Irrational Basis: The Scrutiny Only Applicable to Gun Law," Federalist Society, University of Chicago Student Chapter, Chicago, Illinois (Oct. 17, 2016); Andrew Oldham, Speaker, "Irrational Basis: The Scrutiny Only Applicable to Gun Law," Federalist Society, Fort Worth Lawyers Chapter, Fort Worth, Texas (Oct. 6, 2016).
- 44 Andrew Oldham, Speaker, "Panel: SCOTUS Roundup," Federalist Society, University of Texas Student Chapter, Austin, Texas, Recording at 50:20, available at <https://www.youtube.com/watch?v=lg0yrAF-XUE> (Sept. 8, 2016).
- 45 Brief of Texas, et al. at 26, *Hotze v. Sebelius*, No. 14-20039 (May 15, 2014), available at https://www.afj.org/wp-content/uploads/2018/04/14-20039_Amicus-Brief.pdf.
- 46 Andrew Oldham, *Sherman's March Into the Sea*, 74 TENN. L. REV. 319, 379, 325 (2007), available at <https://www.afj.org/wp-content/uploads/2018/04/Oldham-Shermans-March-Into-the-Sea.pdf>.



April 19, 2018

Dear Senator,

We write to express our strong opposition to Anderw Oldham, nominated to the U.S. Court of Appeals for the Fifth Circuit.

In order to be qualified for a lifetime position on the federal bench, a nominee must be fair-minded and committed to defending our core constitutional protections, including reproductive freedom. However, Oldham's record makes clear that he is not.

In fact, Oldham defended the notorious Texas Targeted Regulation of Abortion Providers (TRAP) law, H.B.2, which shut down women's health centers across the state. In one brief signed by Oldham, the state of Texas admitted that such laws "may reduce the number of providers that can meet the health and safety standards prescribed by the Legislature, or require women to travel greater distances to see a physician who meets those requirements," but argued that this did not present enough of a burden on women to render the law unconstitutional. However, the Supreme Court disagreed, striking down the law with their decision in *Whole Woman's Health v. Hellerstedt*.

In another attack on reproductive freedom, Oldham defended a Texas regulation that defunded Planned Parenthood by prohibiting organizations that provide abortion care from receiving funding through the Texas Women's Health Program (TWHP). In a brief Oldham signed, the state of Texas argued that by funding Planned Parenthood through the TWHP, "the State boosts the prestige of the Planned Parenthood trademark and gives the organization added stature as it seeks to persuade lawmakers and the general public to embrace its controversial views on abortion," and that said boost "works to undercut the reductions in elective abortions that the WHP will provide." Health experts have demonstrated that the consequent exclusion of Planned Parenthood health centers from the state's Medicaid program resulted in significantly reduced access to contraception.

Now, more than ever, women must be able to rely on the courts to protect their constitutional rights. Oldham's record shows that he will undermine, not protect, the freedoms that Americans depend on.

Thank you for your consideration and please feel free to contact Kate Ryan at 202.973.3059 or Nicole McFarland at 202.973.9012 with any questions about this nomination.

Sincerely,

NARAL Pro-Choice America



April 23, 2018

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of the hundreds of thousands of members of People For the American Way across the United States, we strongly oppose the confirmation of Andrew Oldham to replace Judge Edward Prado as a federal judge on the Fifth Circuit Court of Appeals. His extreme views of the law and of the role of judges are incompatible with a lifetime position on the bench.

To put this nomination in context, President Trump has made five nominations to the Fifth Circuit—nearly one third of its complement of active judges—after only 15 months in office. Yet despite the enormous Latino population within the Fifth Circuit, the president has not nominated even a single Latino to the court. By seeking to replace Prado with Oldham, President Trump has chosen to leave the court without any Latino active judges for the first time since 1991.

Oldham is not the person to fill this vacancy or any other within our federal court system.

Since 2012, he has occupied elite legal positions at the highest echelons of the Texas government, as deputy solicitor general, deputy general counsel to the governor, and now general counsel to the governor.

In the state's lawsuit to shut down President Obama's Deferred Action for Parental Accountability (DAPA) program, Oldham was part of a legal team that engaged in a disturbing political misuse of the judicial system: maneuvering to get the case before a judge who could not only be relied upon to employ a very conservative legal philosophy in deciding the case but also to inject his personal right-wing anti-immigration political ideology into his decisions. Specifically, Oldham and his team filed the lawsuit in the Brownsville division of the Southern District of Texas, where there were only two active judges, one of whom had (among other things) made profoundly inappropriate and political statements about immigration from the bench. That was Judge Andrew Hanen.

Therefore, although Judge Hanen's fitness for office is not before the Senate, his actions are relevant to assessing the nominee's fitness. After sentencing the defendant in a 2013 human trafficking prosecution, Hanen released a wholly unnecessary court opinion simply to issue a jeremiad against federal immigration laws and policies.ⁱ An undocumented immigrant had hired the defendant to smuggle her ten year-old daughter into the country, but he was caught before mother and daughter could be reunited. Pursuant to policy, the federal government did not keep the girl from her mother. They prosecuted the

smuggler, but did not press charges against the mother. Although this exercise of prosecutorial discretion was not before Hanen, he issued an order exploding with rage against it. As Hanen stated:

The DHS, instead of enforcing our border security laws, actually assisted the criminal conspiracy in achieving its illegal goals. ...

This is the fourth case with the same factual situation this Court has had in as many weeks. In all of the cases, human traffickers who smuggled minor children were apprehended short of delivering the children to their ultimate destination. In all cases, a parent, if not both parents, of the children was in this country illegally. That parent initiated the conspiracy to smuggle the minors into the country illegally. He or she also funded the conspiracy. In each case, the DHS completed the criminal conspiracy, instead of enforcing the laws of the United States, by delivering the minors to the custody of the parent illegally living in the United States. ... The DHS has simply chosen not to enforce the United States' border security laws.

...

[T]his policy lowers the morale of those law enforcement agents on the front line here on the border. These men and women, with no small risk to their own safety, do their best to enforce our laws and protect the citizens of the United States. It seems shameful that some policymaker in their agency institutes a course of inaction that negates their efforts. It has to be frustrating to those that are actually doing the work of protecting Americans when those efforts are thwarted by a policy that supports the lawbreakers.

This Court is not unsympathetic to any individual or entity taking action that is in the best interests of a minor child; nor is it this Court's goal to divide or separate family members. But the decision to separate [the mother] from [her daughter] was made years ago, and it was made by [the mother]. She purposefully chose this course of action. Her decision to smuggle the child across the border, even if motivated by the best of motives, is not an excuse for the United States Government to further a criminal conspiracy, and by doing so, encourage others to break the law and endanger additional children.

While such a tirade against federal policy might be expected on the campaign trail or in a congressional floor speech, in no way could it be considered appropriate coming from a federal judge in an official court document. But for anti-immigrant advocates, it was an ideological signal they could not possibly have misread. So when Andrew Oldham and his team decided to challenge DAPA, they could be confident that Hanen would be hostile to federal immigration efforts and to immigrants. Their effort succeeded when the case was assigned to Judge Hanen, who in fact issued a nationwide injunction to prevent DAPA from going into effect.ⁱⁱ

By itself, forum shopping is not at all disqualifying for a lawyer who seeks the bench. Advocates often forum-shop as part of their zealous representation of their clients. Judges differ in temperament, in their approaches to legal questions, and in their ability to preside over a case efficiently and effectively. But

deliberately maneuvering to get their case before a judge who would engage in improper conduct is itself improper, and it strongly suggests that Oldham considers such judicial conduct acceptable.

Oldham's substantive legal views are equally disqualifying. For instance, he believes that activities and even the existence of many regulatory agencies are fundamentally illegitimate: He told law students at a Federalist Society event that "[t]he reason why the administrative state is enraging is not that we disagree with what the EPA does. It's the illegitimacy of it."ⁱⁱⁱ In a similar vein, he has stated that:

It's not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire existence of this edifice of administrative law is constitutionally suspect.^{iv}

But while conservative elites at the Federalist Society or in the corporate boardroom may wish otherwise, the system Oldham considers illegitimate has been upheld again and again by the United States Supreme Court and raise serious concerns about his ability or willingness to be a fair-minded judge.

Those views explain why he has accepted prestigious appointments in the Texas government positions where he could make such arguments on behalf of the state. It has given him the opportunity to shape the law to his liking through litigation in a number of areas, such as by:

- challenging California's right to apply its own gun safety laws to Texans in the state;
- challenging the EPA's general authority to issue regulations on greenhouse gas emissions from power plants;
- undermining federal efforts to protect formerly incarcerated people from discrimination; and
- attacking the widely accepted use of disparate impact analysis in discrimination cases brought under the Fair Housing Act.

Oldham was "heavily involved"^v with "The Texas Plan, a 92-page manifesto against "the administrative state" and proposals for constitutional amendments to destroy it:

The administrative state is the alphabet soup of agencies, bureaus, boards, and commissions—like the EPA, FTC, FHA, DOE, DOL, BATFE, HUD, EEOC, NLRB, HHS, IRS, SEC, FEMA, FAA, FDA, and myriad others—that makes the overwhelming majority of federal law. Sometimes that law takes the form of administrative rules and regulations; sometimes it takes the form of administrative adjudications; sometimes it takes the form of executive orders or executive actions. In all of its forms, however, the modern-day administrative state cannot be reconciled with the Constitution's lawmaking procedures, and its unchallenged control over the federal government constitutes a grave affront to the rule of law.^{vi}

The "administrative state" Oldham condemns is the system the American people, through our elected officials, created long ago and have consistently maintained to protect our health, safety, and rights in an increasingly complex world where the power of the individual vis-à-vis business was rapidly dissipating.

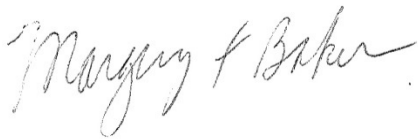
Those who President Theodore Roosevelt called “the malefactors of great wealth” opposed efforts to limit their power by the people acting through their government, and they oppose those efforts today. But the constitutional legitimacy of the American people’s choices has been ratified repeatedly by the Supreme Court. In fact, “The Texas Plan” acknowledges that reality and harshly condemns it as itself violating the Constitution:

[I]t bears emphasis at the outset that *the Constitution itself is not broken*. What is broken is our Nation’s willingness to obey the Constitution and to hold our leaders accountable to it. ... When measured by how far we have strayed from the Constitution we originally agreed to, the government’s flagrant and repeated violations of the rule of law amount to a wholesale abdication of the Constitution’s design.^{vii}

Andrew Oldham has a strong and deeply-felt ideological abhorrence of “the administrative state.” As a judge, he would be required to put that personal ideology aside and uphold the system he is so committed to destroying. It is a mystery why Oldham would want such a job. Unfortunately, nothing in his record suggests that he would be willing and able to put those views aside and operate under the constraints the position of a federal judge requires.

The Senate should reject this nomination.

Sincerely,



Marge Baker

Executive Vice President for Policy and Program

ⁱ *United States v. Nava-Martinez*, 2013 U.S. Dist. LEXIS 188285, 2013 WL 8844097.

ⁱⁱ "Nationwide Injunctions and the Lower Federal Courts," Andrew Kent, Lawfare Blog, <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts>.

ⁱⁱⁱ "'A friendly vote on the court': How Greg Abbott's former employees could help Texas from the federal bench," Emma Platoff, Texas Tribune, April 3, 2018, <https://www.texastribune.org/2018/04/03/greg-abbott-andrew-oldham-fifth-circuit-judicial-appointees>.

^{iv} Id.

^v Id.

^{vi} "The Texas Plan: Restoring the Rule of Law with States Leading the Way," Gov. Greg Abbott, page 23, https://gov.texas.gov/uploads/files/press/Restoring_The_Rule_Of_Law_01082016.pdf.

^{vii} Id. at 3.



EARTHJUSTICE

April 23, 2018

The Honorable Chuck Grassley
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Opposition to Nomination of Andrew S. Oldham to United States Court of Appeals for the Fifth Circuit

Dear Chairman Grassley and Ranking Member Feinstein:

Earthjustice opposes the confirmation of Andrew S. Oldham to a lifetime seat on the United States Court of Appeals for the Fifth Circuit. A federal appellate court judge serves as an arbiter of our federal laws on matters affecting the structure of our democracy and the rights and welfare of all Americans. Such a position requires a nominee who is fair-minded to all litigants, committed to the rule of law, and dedicated to implementing and defending our core constitutional and statutory protections. Mr. Oldham's record makes clear he does not meet these requirements. We urge the Senate Judiciary Committee to reject his nomination.

Andrew Oldham's record goes far beyond zealous advocacy for his clients and reflects a deep hostility towards, in his own words, the "entire existence of this edifice of administrative law,"¹ which he argues is "constitutionally suspect."² The "edifice" of administrative law to which he refers is in fact essential to implement the many statutory safeguards Congress has provided the American people across a range of critical issues, such as clean air and water, a healthy environment, worker and consumer protections, and many of our statutory civil rights. Mr. Oldham's view that the entire federal regulatory framework is "constitutionally suspect," calls into serious question his ability to fairly and impartially adjudicate the legality of administrative actions.

Mr. Oldham's public statements shed light on his extreme views. In a 2017 speech to the Texas Public Policy Foundation he stated that federal regulations are, "literally just the dictates of

¹ Oldham SJQ –Andrew Oldham, Speaker, "Article V and a Convention of States," Federalist Society, University of Chicago Student Chapter, Recording at 10:25, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).

² Id.

bureaucrats in Washington. And that is unacceptable.”³ Mr. Oldham’s view reflects a profound misstatement of how administrative law works. Federal officials can adopt rules only within the confines of statutory authority granted by Congress: And agency rules are subject to careful oversight by the federal courts, which can overturn rules found to be arbitrary or unlawful. Mr. Oldham’s notion that federal officials exercise rulemaking authority with unfettered discretion is therefore utterly false. Nor would it make any sense for Congress itself to write all the specific regulations needed to implement scientifically complex laws such as the Clean Air Act.

In the same 2017 speech, Mr. Oldham stated that the use of the Commerce Clause to support public regulatory protections is “egregious” and argued in support of the Texas governor’s proposal to “restore the Commerce Clause to its original meaning.”⁴ This critique of the Commerce Clause usage is a recurring theme in his public remarks. For example, in a speech he gave in May 2016 to the Federalist Society at the University of Chicago he said, “It’s not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire existence of this edifice of administrative law is constitutionally suspect.”⁵

It is clear to us Mr. Oldham believes that Congress has exceeded its powers under the Commerce Clause⁶ in enacting federal public protection laws and delegating implementation authority to federal agencies for more than eighty years. By extension, it is clear to us he also believes Supreme Court precedents upholding Congressional power to regulate were wrongly decided. This retrograde and cramped view of the Constitution would return our nation to a time when industries could pollute without limit or without fear of being held accountable for harm to public health and the environment. Mr. Oldham’s version of the Commerce Clause would also invalidate child labor laws, worker and consumer protections, to name a few, and undermine all of the federal agencies tasked with implementing and enforcing these laws.

Mr. Oldham’s public views on the limits of the Commerce Clause make unsurprising – though no less alarming – his litigation record specifically advocating against environmental protections, including enforcement of bedrock environmental laws like the Clean Air Act.⁷

³ Andrew Oldham, Speaker, “Time for a Convention of States,” Texas Public Policy Foundation, Recording at 19:25, available at <https://www.youtube.com/watch?v=H4RErCNafC&feature=youtu.be> (Jan.12, 2017); see also similar speeches: Andrew Oldham, Speaker, “Article V and a Convention of States,” Convention of States Townhall, Fort Worth, Texas (Sept. 27, 2016) & similar Federalist Society speeches listed in his SJQ in Oklahoma, Maryland, Texas, and North Carolina..

⁴ Andrew Oldham, Speaker, “Time for a Convention of States,” Texas Public Policy Foundation, Recording at 20:40, available at <https://www.youtube.com/watch?v=H4RErCNafC&feature=youtu.be> (Jan.12, 2017); see also similar speeches: Andrew Oldham, Speaker, “Article V and a Convention of States,” Convention of States Townhall, Fort Worth, Texas (Sept. 27, 2016) & similar Federalist Society speeches listed in his SJQ in Oklahoma, Maryland, Texas, and North Carolina.

⁵ Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 10:25, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).

⁶ Id.

⁷ For a discussion of his litigation record, see Alliance for Justice report available at <https://www.afj.org/wp-content/uploads/2018/04/AFJ-Report-Andrew-Oldham.pdf> (pgs. 2-3).

Shockingly, Mr. Oldham has further questioned the constitutional legitimacy of the EPA, saying: “One of the reasons why the administrative state is enraging, is not that you disagree with what the EPA does, although, I do disagree with a lot of what it does. That’s not the thing that makes it enraging. It’s the illegitimacy of it,”⁸ and “no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate.”⁹ A nominee who questions the legitimacy of a significant portion of our nation’s system of laws and regulations cannot reasonably be expected to implement that system of laws and regulations in the fair and even-handed manner required of a federal judge.

For the foregoing reasons, we respectfully urge you and the entire Senate Judiciary Committee to reject Andrew Oldham’s nomination to the Fifth Circuit.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin Hayden", followed by a long horizontal line extending to the right.

Martin Hayden, Vice President
Policy & Legislation

⁸ Andrew Oldham, Speaker, “Article V and a Convention of States,” Federalist Society, University of Chicago Student Chapter, Recording at 54:16, available at <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law> (May 9, 2016).

⁹ Id at 57:30.



April 23, 2018

Officers

Chair

Judith L. Lichtman
National Partnership for
Women & Families

Vice Chairs

Jacqueline Pata
National Congress of American Indians
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Hillary Shelton

Secretary

Jo Ann Jenkins

Treasurer

Lee A. Saunders
American Federation of State,
County & Municipal Employees

Board of Directors

Helena Berger
American Association of
People with Disabilities
Kimberly Churches
AAUW
Kristen Clarke
Lawyers' Committee for
Civil Rights Under Law
Lily Eskelsen Garcia
National Education Association
Fatima Goss Graves
National Women's Law Center
Chad Griffin
Human Rights Campaign
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Derrick Johnson
NAACP
Michael B. Keegan
People for the American Way
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Marc Morial
National Urban League
Janet Murguía
UnidosUS
Debra L. Ness
National Partnership for
Women & Families
Rabbi Jonah Pesner
Religious Action Center
Of Reform Judaism
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Anisa Tootla
League of Women Voters of the
United States
Richard L. Trumka
AFL-CIO
Toni Van Pelt
National Organization for Women
Randi Weingarten
American Federation of Teachers
Dennis Williams
International Union, UAW
John C. Yang
Asian Americans Advancing Justice |
AAJC

Policy and Enforcement

Committee Chair

Michael Lieberman
Anti-Defamation League
President & CEO
Vanita Gupta

**OPPOSE THE CONFIRMATION OF ANDREW OLDHAM TO THE
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Andrew Oldham to the U.S. Court of Appeals for the Fifth Circuit.

At age 39, Mr. Oldham is one of the youngest people ever nominated for a federal circuit court judgeship. But despite being just 13 years out of law school and barely clearing the American Bar Association's minimum years of practice standard to be rated qualified, he has done significant damage to civil and human rights during his short career. He has worked to restrict voting rights and other critical civil rights including immigrant rights and women's health, as well as seeking to undermine environmental protection and gun safety. Mr. Oldham is a conservative ideologue who would not be a fair-minded jurist and should not be given a lifetime appointment on the federal judiciary – an appointment which, given his age, could span half a century.

Worked to Restrict Voting Rights: The right to vote is foundational to our democracy. Throughout our nation's history, African Americans and other marginalized communities have faced systemic barriers to accessing the ballot. One such barrier in recent years has been the passage of photo ID laws. As deputy solicitor general in Texas, Mr. Oldham defended the use of photo ID laws in a 2013 Supreme Court amicus brief he filed on behalf of Texas in the case *Shelby County v. Holder*.¹

In his brief, Mr. Oldham vigorously defended Texas's discriminatory photo ID law, SB 14. A federal district judge subsequently struck down this law, holding that "SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The Court further holds that SB 14 constitutes an unconstitutional poll tax."² The district court ruling was upheld by the conservative Fifth Circuit.³

Mr. Oldham's brief also savaged the U.S. Department of Justice's Civil Rights Division for declining to preclear the discriminatory Texas photo ID law under Section 5 of the Voting Rights Act. Mr. Oldham wrote that "for nearly two years, the Civil Rights Division of the Department of Justice has used every weapon in its arsenal to thwart the implementation of a

¹ 570 U.S. 529 (2013).

² <https://electionlawblog.org/wp-content/uploads/20141009-TXID-Opinion.pdf>.

³ <https://www.texastribune.org/2016/07/20/appeals-court-rules-texas-voter-id/>.



law that this Court has recognized as a legitimate and constitutional fraud-prevention measure.”⁴

Mr. Oldham not only defended the discriminatory Texas photo ID law, he also advanced the extreme argument that Section 5 of the Voting Rights Act – the heart of this historic federal civil rights law – should be invalidated. Mr. Oldham wrote: “The preclearance proceedings involving Texas’s voter-identification law illustrate the enormous burdens of the section 5 regime.... The only way for this Court to alleviate these unwarranted and burdensome federalism costs is to declare the reauthorization of section 5 unconstitutional.”⁵ Although Mr. Oldham’s defense of the Texas photo ID law was rejected by federal courts, his attack on the Voting Rights Act was upheld in the infamous 5-4 *Shelby County* ruling.

Fought Fair Chance Hiring: Mr. Oldham has been an opponent of bipartisan efforts to remove barriers to employment for people with arrest or conviction histories. In 2012, the Equal Employment Opportunity Commission (“EEOC”) updated its employer guidance on the use of background checks, advising employers that they could be in violation of Title VII if they inappropriately considered a person’s arrest or conviction history in employment decisions. The guidance advised employers to adopt fair chance hiring policies like “ban the box” and to delay inquiry into an applicant’s conviction history until later in the hiring process. In 2014, Mr. Oldham filed a complaint against the EEOC and the U.S. Department of Justice on behalf of Texas, arguing in sweeping terms that “The State of Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and neither the EEOC nor [Attorney General] Holder has authority to say otherwise.”⁶

The Texas NAACP moved to intervene to defend the EEOC guidance on behalf of victims of unreasonably rigid Texas hiring policies. One such victim, Beverly Harrison, a 58-year-old African-American grandmother who lives in Dallas, was denied a job as a school crossing guard due to a third-degree felony assault conviction that dated back to 1975 that was later dismissed.⁷ An NAACP official stated: “We are deeply troubled by Attorney General Abbott’s attempt to use this meritless lawsuit to not only attack the EEOC’s thoughtful and well-reasoned guidance, but also to try and undermine vital civil rights laws and protections. At a time when millions of people are still struggling to find work, the Texas attorney general should not be working to erect barriers to employment, particularly when those barriers disproportionately and unfairly affect workers of color.”⁸

Opposed Disparate Impact Claims Under Fair Housing Act: In 2014, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*,⁹ Mr. Oldham filed a brief on behalf of Texas, challenging the use of disparate impact claims to enforce the Fair Housing Act (“FHA”). Disparate impact claims are critical to the success of federal civil rights law enforcement because they recognize the reality of policies and practices that appear to be neutral but result in a disproportionate impact on a protected group. Such claims are consistent with congressional intent in passing anti-discrimination statutes. Yet Mr. Oldham argued: “The text of the Fair Housing Act unambiguously precludes the ‘disparate impact’ interpretation adopted by HUD and the court of appeals” and “HUD’s ‘disparate impact’ interpretation will give agencies undue powers over the administration of anti-

⁴ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_texas.authcheckdam.pdf.

⁵ Id.

⁶ <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-EEOC-13-cv-00255-NDTX-Texas-Amended-Complaint-Oldham.pdf>.

⁷ <https://www.afj.org/wp-content/uploads/2018/04/NAACP-Law360-Article.pdf>.

⁸ Id.

⁹ 135 S. Ct. 2507 (2015).

discrimination laws.”¹⁰ The Supreme Court rejected Mr. Oldham’s arguments, explaining that “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose” and “it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988.”¹¹

Undermined Disability Rights: When he worked in the Texas attorney general’s office, Mr. Oldham and his office aggressively sought to limit the ability of people with disabilities from using federal courts to vindicate their rights. Mr. Oldham was interviewed for a 2014 *Dallas News* article entitled “Greg Abbott pushes to block disabled Texans’ lawsuits against states.” The article stated: “Deputy Solicitor General Andy Oldham said there are good reasons why the state tries to block lawsuits from going to court, even when it has a strong case. Good lawyers use all the tools at their disposal, he said.”¹² But good lawyers must recognize binding case law, and Mr. Oldham’s abuse of the sovereign immunity doctrine suggests an unwillingness to do so. The article noted: “In at least nine ADA cases identified by *The News*, the state has claimed sovereign immunity in federal court and lost” and “Advocates for the disabled say Abbott’s office has worked to deny ADA protections by repeatedly and falsely claiming that impaired Texans don’t have the right to sue the state for discrimination.”¹³

Hostile to Immigrant Rights: As deputy solicitor general of Texas, Mr. Oldham led the charge to challenge the constitutionality of the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program and an expansion of the Deferred Action for Childhood Arrivals (“DACA”) program, to provide relief to additional Dreamers and the undocumented parents of U.S. citizens or lawful permanent residents. In a memo he authored on behalf of the Texas attorney general, Mr. Oldham wrote in regard to DAPA and DACA that “the President’s unprecedented, unilateral actions undermine the rule of law and should be reviewed by the courts” and “[i]f unchallenged, the President’s actions threaten to forever change the Nation’s constitutional foundation.”¹⁴ He then filed a lawsuit on behalf of Texas and 13 other states challenging the constitutionality of DAPA. In the complaint, Mr. Oldham alleged that “DACA led directly to a flood of immigration across the Texas-Mexico border and a ‘humanitarian crisis’ in Texas.... The DHS Directive [DAPA and DACA+] is a much larger step than DACA, and it will trigger a larger response. The DHS Directive will increase human trafficking in the Plaintiff States.” These allegations are baseless. As lead counsel, Mr. Oldham argued the preliminary injunction motion that led to a nationwide blockage of DAPA.¹⁵ The injunction was ultimately upheld by a deadlocked Supreme Court in 2016¹⁶ because the Senate refused to allow a vote on the pending Supreme Court nominee.

Sought to Restrict Women’s Health: Mr. Oldham has worked to restrict reproductive freedom for women in Texas by defending Targeted Regulation of Abortion Providers (“TRAP”) laws. He helped defend a draconian Texas law, HB 2, that would have required any physician performing an abortion to

¹⁰ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_pet.authcheckdam.pdf.

¹¹ https://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf.

¹² <https://www.dallasnews.com/news/local-politics/2014/02/15/greg-abbott-pushes-to-block-disabled-texans-lawsuits-against-state>.

¹³ Id.

¹⁴ <https://rewire.news/wp-content/uploads/2017/03/Rewire-Responsive.pdf>.

¹⁵ <https://www.afj.org/wp-content/uploads/2018/04/Texas-v.-U.S.-14-cv-00254-SDTX-PI-HEARING-TRANSCRIPT.pdf>.

¹⁶ *United States v. Texas*, 136 S. Ct. 2271 (2016).



have admitting privileges at a hospital within 30 miles of where the abortion was performed, and also would have required that all abortion clinics comply with standards for ambulatory surgical centers.¹⁷ This TRAP law was struck down by the Supreme Court in 2016 in *Whole Women's Health v. Hellerstedt*.¹⁸ In addition, Mr. Oldham defended a Texas regulation that defunded Planned Parenthood by banning organizations that provided abortion services from receiving funds through Texas's Women's Health Program.¹⁹ A study was conducted on the impact of this regulation, and the authors concluded that it affected not only access to abortions but also access to contraception: "The exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception."²⁰ Mr. Oldham also filed an amicus brief in a case that challenged the constitutionality of the Patient Protection and Affordable Care Act.²¹ He was unsuccessful.

Opposed to Gun Safety: Mr. Oldham has defended Texas laws that provide expansive rights for gun owners, and he has opposed laws in other states that have sought to implement common-sense gun safety measures. He wrote a memo in 2015 that took an expansive view of the Texas concealed handgun law and concluded that such handguns could lawfully be brought into certain government buildings.²² Mr. Oldham's interpretation was criticized by local public officials who expressed concern that weapons could be brought into government offices such as those of the district attorney and tax assessor.²³

In a 2015 case involving a San Diego, California law that required people to show "good cause" to carry a concealed firearm in public, Mr. Oldham filed an amicus brief with the Ninth Circuit arguing that the law violated the Second Amendment.²⁴ He wrote that "the whole point of the Constitution's text is to protect certain *unpopular* rights from the zeal of a government bent on squelching them."²⁵

And in a 2016 speech, Mr. Oldham criticized a Highland Park, Illinois ban on AR-15 assault weapons – the type of weapon that has been used in several school shootings in recent years, including Parkland, Florida in which 17 people were killed. Mr. Oldham stated: "The AR-15 or modern sporting rifle is the most popular rifle in the United States, and you know, the ban in Highland Park is a categorical ban. I mean, it is straight up, just like the California ban is on that category of weapons. So I agree with you that there should be Supreme Court constitutional scrutiny on categorical bans on types of weapons."²⁶

Challenged Environmental Protections: Mr. Oldham has not only challenged the Environmental Protection Agency's enforcement power under the Clean Air Act and Clean Power Plan, he has called into question the very existence of the EPA. In a 2016 speech to the Federalist Society, Mr. Oldham used anti-government rhetoric of the far right. He said: "One of the reasons why the administrative state is enraging is not that you disagree with what the EPA does, although I do disagree with a lot of what it

¹⁷ <https://www.statesman.com/news/trial-abortion-law-ends-decision-pending/a5E5y6lGOiKzdeUSpKhL6L/>.

¹⁸ 136 S. Ct. 2292 (2016).

¹⁹ <https://afj.org/wp-content/uploads/2018/04/PP-of-Hidalgo-County-v.-Suehs-appellant-brief-5th-Circuit.pdf>.

²⁰ <http://www.nejm.org/doi/full/10.1056/NEJMsa1511902>.

²¹ https://www.afj.org/wp-content/uploads/2018/04/14-20039_Amicus-Brief.pdf.

²² http://www.texaspolicechiefs.org/sites/default/files/2015_12GovMemo.pdf.

²³ <https://www.houstonchronicle.com/neighborhood/woodlands/news/article/Montgomery-County-officials-voice-worries-over-6701402.php>.

²⁴ http://michellawyers.com/wp-content/uploads/2010/11/Peruta_Amici-Curiae-Brief-for-the-Governors-of-Texas-Louisiana-Maine-Mississippi-Oklahoma-and-South-Dakota-in-Support-of-Plaintiffs-Appellants.pdf.

²⁵ Id.

²⁶ <https://www.youtube.com/watch?v=lg0yrAF-XUE>.

does. That's not the thing that makes it enraging. It's the illegitimacy of it."²⁷ In his speech, Mr. Oldham criticized the EPA's Clean Power Plan, designed by the Obama administration to limit carbon dioxide emissions and combat climate change. He called the Clean Power Plan "the ultimate example, I think, of rule by bureaucrat" and "no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate."²⁸

In at least two cases, Mr. Oldham challenged the efforts of the EPA to enforce the Clean Air Act. In a brief he filed (and joined by then-Oklahoma Attorney General Scott Pruitt) in *Utility Air Regulatory Group v. EPA*,²⁹ Mr. Oldham referred to the "far-reaching and near-ridiculous regulatory burdens required by EPA's decision to regulate greenhouse-gas emissions" and wrote that "[t]he Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions."³⁰ And in *EPA v. EME Homer City Generation*,³¹ Mr. Oldham wrote another brief joined by Pruitt that challenged the EPA's Transport Rule, which was issued under the Clean Air Act to address air pollution emitted in one state that causes harm in another.³² The Supreme Court ruled against Mr. Oldham in both cases.

Ideological Jobs and Affiliations: Conservative apologists for President Trump's extreme judicial nominees argue that these nominees were simply representing clients, whose views don't necessarily represent the nominees' views. But credentialed lawyers like Mr. Oldham can pick and choose which clients to represent. For the past six years, he has worked for right-wing Texas politician Gregory Abbott. In addition to the litigation positions discussed in this letter that Mr. Oldham pursued on behalf of Abbott, Mr. Oldham was involved in conceptualizing the radical legal theories behind them. According to a recent article:

Oldham was working for Abbott when he launched a long-shot idea: a second convention of the states, the first since 1787, to consider new amendments to the U.S. Constitution. The amendments Abbott proposed would, he said, "restore the rule of law" by reining in federal power and save the country from overreaching federal institutions, most notably the U.S. Supreme Court and the "alphabet soup" of federal agencies governing everything from environmental protection to education. Oldham was "heavily involved," [Texas Supreme Court Justice Jimmy] Blacklock said, with crafting the plan. And Oldham was also sent out across the state and the country to promote it at law schools and chapters of the conservative legal group the Federalist Society.³³

Earlier in his career, Mr. Oldham served as a law clerk for two of the nation's most conservative judges: Supreme Court Justice Samuel Alito and D.C. Circuit Judge David Sentelle. In between clerkships, Mr. Oldham served for two years in the Bush Justice Department's Office of Legal Counsel, which was notorious for authorizing the use of torture. In addition, Mr. Oldham is a long-time member of the Federalist Society, joining this group in 2002 during his first year of law school. This out-of-the-mainstream legal organization represents a sliver of America's legal profession – just four percent – yet over 80 percent of Trump's circuit court nominees, and a significant number of his district court

²⁷ <https://www.law.uchicago.edu/recordings/andy-oldham-texas-plan-amending-constitution-and-restoring-rule-law>.

²⁸ Id.

²⁹ 134 S. Ct. 2427 (2014).

³⁰ <https://www.kattenlaw.com/files/upload/Broome/Merits-Brief-Texas-et-al.pdf>.

³¹ 134 S. Ct. 1584 (2014).

³² https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-118212-1183_resp_sl.authcheckdam.pdf.

³³ <https://www.texastribune.org/2018/04/03/greg-abbott-andrew-oldham-fifth-circuit-judicial-appointees/>.



nominees, have been Federalist Society members. Mr. Oldham is also a member of the National Rifle Association. In light of Mr. Oldham's own comments, his ideologically conservative affiliations, and his brief legal career, he has shown that he shares the views of the clients and employers he has represented. He would not serve as a neutral and fair-minded jurist.

Lack of Diversity: In addition, the nomination of Mr. Oldham is a continuation of the troubling Trump administration record of diminished diversity on the federal bench. Judicial diversity is critical to instilling confidence in the justice system, and a diversity of judicial perspectives helps ensure that the Constitution works for everyone. President Trump has nominated the least diverse group of judicial nominees in decades. Over 90 percent of his nominees are White, and nearly 80 percent are men.³⁴ He has made 103 Article III judicial nominations,³⁵ and only one is African-American. By comparison, during the Obama administration, 38 percent of judicial nominees were persons of color and 43 percent were women. Mr. Oldham has been nominated to replace the only Hispanic on the 17-member Fifth Circuit, Judge Edward Prado. This is of particular concern because Texas – the largest state in the Fifth Circuit and the location of the vacancy to which Mr. Oldham has been nominated – has the second highest number of Hispanics of all 50 states both as a percentage of population (39 percent) and in raw numbers (10.4 million).³⁶

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Andrew Oldham to the U.S. Court of Appeals for the Fifth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

³⁴ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.

³⁵ https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump.

³⁶ <http://www.pewhispanic.org/2016/09/08/4-ranking-the-latino-population-in-the-states/>.



LEGISLATIVE ALERT

April 24, 2018

The Honorable Senator Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Senator Diane Feinstein
Ranking Member
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The AFL-CIO urges you to oppose the nomination of Andrew Oldham to serve on the United States Court of Appeals for the Fifth Circuit when the Senate Judiciary Committee considers his nomination.

Oldham has articulated absolutist legal theories that appear to reflect his inability to balance competing legal considerations—the core responsibility of a judge—and that favor corporate interests over those of working families.

In particular, Oldham has said that the Sherman Act is unconstitutional, embracing corporate mergers, whether or not they are anti-competitive or adverse to workers' and consumers' interests. He also has declared the "entire existence" of federal agencies "constitutionally suspect," positing that federal regulations are "illegitimate."

Oldham has advocated for the "restoration" of the Commerce Clause to "its original meaning." Such an interpretation would turn the clock back to enable corporations to fire employees because of union activity, to intimidate workers from joining unions, and to discriminate against workers because of their race.

Oldham has attacked the very legitimacy of the U.S. Supreme Court—the opinions of which, if confirmed as a federal appeals judge, he would be obligated to uphold and apply. Oldham diminished Supreme Court decisions as "just the whim of five unelected lawyers who happen to wear black robes."

Oldham also has worked to eviscerate the Voting Rights Act, suppress voting rights, bar those with criminal histories from being hired in Texas for “any . . . job the State and its Legislature deem appropriate,” restrict programs for DREAMERs and parents of U.S. Citizens, and challenge the constitutionality of the Affordable Care Act.

Our nation deserves judges who treat all Americans fairly, who do not promote corporate interests over those of working families, and who have respect for the rule of law and the U.S. Supreme Court. Oldham’s record does not meet that test. We urge you to oppose his nomination to the Fifth Circuit.

Sincerely,

A handwritten signature in black ink, appearing to read "William Samuel".

William Samuel, Director
Government Affairs Department

American Federation of Labor and Congress of Industrial Organizations

815 16th St., N.W. • Washington, D.C. 20006 • 202-637-5000 • www.aflcio.org

RICHARD L. TRUMKA
PRESIDENT

ELIZABETH H. SHULER
SECRETARY-TREASURER

TEFERE GEBRE
EXECUTIVE VICE PRESIDENT



April 24, 2018

Dear Senator:

The National Center for Transgender Equality (NCTE) writes to strongly oppose the nomination of Andrew Oldham to the U.S. Court of Appeals for the Fifth Circuit.

Every person—including the more than 10 million people in the United States who are lesbian, gay, bisexual, or transgender—deserves to be heard in our courts and have confidence that matters will be decided in a fair and impartial manner. Mr. Oldham’s prominent role in shaping some of the most high-profile attacks on civil rights, his persistent advocacy to delegitimize the power of the executive branch to enforce federal laws, and his disregard for established law all raise grave concerns about his ability to meet that standard.

Time and again, Mr. Oldham has chosen—and often deliberately sought out—to play a pivotal role in some of the most high-profile attempts to undermine civil rights. Mr. Oldham has amassed a record of numerous cases where he advanced discriminatory and unconstitutional policies, often relying on baseless claims and extreme arguments. For example, in an amicus filed in *Shelby County v. Holder*, Mr. Oldham aggressively defended a Texas law restricting voting rights. A federal court later struck down that law as unconstitutional, finding that it impermissibly discriminated on the basis of race, a decision that was upheld by the Fifth Circuit. Mr. Oldham also defended Texas’ draconian House Bill 2, a law that the Supreme Court ultimately struck down in *Whole Women’s Health v. Hellerstedt* as unconstitutional. He has been a leading opponent of bipartisan efforts to give people with arrest and conviction histories a fair chance at employment, going so far as to claim that states have the “right to impose categorical bans” on hiring people with arrest or conviction records—regardless of the unconstitutional and discriminatory impact of such categorical bans. Mr. Oldham also aggressively tried to limit the ability of people with disabilities to enforce their rights under the Americans with Disabilities Act by invoking sovereign immunity—a claim that courts have repeatedly rejected—and justified this blatant disregard of well-settled case law by reportedly stating that “[g]ood lawyers use all the tools at their disposal.” Further, Mr. Oldham was the architect of Texas’ efforts to block the expansion of Deferred Action for Childhood Arrivals (DACA) to additional Dreamers and to parents of U.S. citizens or green card holders, relying in his brief on baseless allegations that protecting residents from living in constant fear of deportation was causing a “humanitarian crisis” in Texas.

Mr. Oldham has not stopped at simply trying to defend discrimination or undo legal protections. He has also made it his mission to unravel the very infrastructure of enforcement of federal laws, including federal civil rights laws. For example, while advocating for a plan that would radically amend the U.S. Constitution and gut the enforcement of modern consumer, public health, and workplace protections, Oldham stated, “It’s not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire existence of this edifice of administrative law is constitutionally suspect.” In the same speech, Oldham emphasized, using the example of the Clean Power Plan, that regardless of the validity of a regulation, the ideology he embraces fundamentally rejects the promulgation of implementing regulations in general: “One of the reasons why the administrative state

is enraging, is not that you disagree with what the EPA does.... It's the legitimacy of it," he said, adding that "no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate."

Mr. Oldham's statements suggest that, if an action of the executive branch comes before him as a Fifth Circuit judge—no matter how crucial or well-supported it may be—the American people cannot trust that he will assess it on its merits or based on a careful or unbiased legal opinion. Rather, every sign suggests that Mr. Oldham will make decisions based on a reflexive and ideological opposition to the government's role in enforcing federal law. Mr. Oldham's efforts to put the government out of the business of enforcing federal law is dangerous for all Americans who rely on the executive branch to enforce laws that protect their health, safety, and basic rights to equal treatment—including lesbian, gay, bisexual, and transgender individuals, many of whom rely on the federal government to enforce their legal right to live free from discrimination. Confirming Mr. Oldham to the Fifth Circuit would place in his hands an immense power to block the enactment or the enforcement federal laws based simply on his ideological animosity towards the executive branch's role—with dangerous results not only for the Fifth Circuit but for the entire nation.

Mr. Oldham's vehement attempts to undermine civil rights, his indifference to upholding well-established law, and his extreme and zealous views on the legitimacy of enforcement mechanisms for federal law all raise grave concerns regarding his fitness for an appointment to the Fifth Circuit. Mr. Oldham has not shown that he is willing or able to put aside his long-held ideologies to deliver fair and impartial justice. Nominees for lifetime appointments to appellate courts should meet the highest standards of professionalism and impartiality, and Mr. Oldham's nomination does that meet that standard. We urge you to reject his nomination.

Thank you for consideration our views on this important nomination. You may reach the National Center for Transgender Equality through Ma'ayan Anafi at (202) 804-6050 or manafi@transequality.org with any questions you may have throughout the nominations process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mara Keisling', with a stylized, sweeping flourish extending to the right.

Mara Keisling
Executive Director