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November 8, 2017

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Grassley and Senator Feinstein:

I am writing to express my strong support for the nomination of Justice Don R. Willett to serve as a United States Circuit Judge on the Court of Appeals for the Fifth Circuit. I believe that Justice Willett possesses the intellectual gifts and the judicial temperament necessary for someone to be an outstanding Circuit Judge. His service on the Supreme Court of Texas has displayed these qualities of mind and character, and in addition he has shown a remarkable ability to write opinions that are clear, well-reasoned, and respectful of the judicial duty to decide cases according to law. I urge you to take the lead in ensuring that the Senate act promptly to give its advice and consent to Justice Willett's nomination.

Let me indicate the basis for my opinion about Justice Willett's qualifications to be a federal judge. I joined the Duke faculty in 1989, and both my teaching and my scholarship in the years since then have concentrated on federal constitutional law. I have been particularly interested in how we should understand the duty of intellectual integrity that I believe is central to the faithful performance of the office of the judge. I have also repeatedly taken leave from teaching to serve in government, as special counsel to the Attorney General of North Carolina in the early 1990s, as a deputy assistant attorney general in the Office of Legal Counsel under Presidents Clinton and Obama, and briefly as principal deputy solicitor general in 1996. My academic and my professional experience both underlie my conviction that our legal system depends on the conscientious discharge of their office by judges. I believe that Justice Willett is committed to that understanding of the judge's role.

Don Willett received his J.D., as well as a master's degree in political science, from Duke in 1992, but I did not have the pleasure of teaching him then. Three years ago, however, Don was a student in a class I taught on judicial history in Duke's Judicial Studies master's degree program. The course I teach in that program, made up entirely of sitting judges, is always a joy to teach, but even in the context of the 2014 class, a group all of whom I came to respect greatly, Don struck me as incredibly smart, willing to talk and also willing to listen, and a congenial person who can work well with other people while at times disagreeing with them sharply. I should add that the fact that Don went to the time and trouble to enroll in and complete (in 2016) this degree program illustrates the seriousness with which he takes the role of appellate judge.

Since that 2014 class I have followed Justice Willett's judicial work with admiration. Let me give three examples of opinions that I believe embody his approach to appellate decision-making.

The issue in *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76 (Tex. 2017), involved an insurance financing agreement that authorized the finance company to cancel the insurance policy for failure to make timely payments. The agreement further provided, however, that the power to cancel could only be exercised "after proper notice has been mailed as required by law," and the relevant statutory provision required the finance company to state a cancellation date at least ten days after the dispatch of the notice. In *BankDirect*, the cancellation notice stated a date only nine days after it was mailed, but the finance company argued that under the facts of the case, its exercise of its cancellation right could be deemed "substantial compliance" with the statute by treating the tenth day after mailing as the actual effective date of the cancellation.

Writing for the Texas Supreme Court, Justice Willett rejected the company's argument as inconsistent with an appropriately "text-centric" approach to statutory construction, and did so in an opinion that grounded that approach in fundamental constitutional principles while providing useful guidance to future courts that must deal with specific statutory language less clear-cut than the provision in *BankDirect*. His opinion wove together, in a remarkably clear and concise manner, the controlling weight of the provision's language (read by itself and also by comparison to other Texas statutes), the function of statutory deadlines, the proper use of the Texas Code Construction Act, and the significance for the issue in *BankDirect* of two recent Texas Supreme Court decisions. "Separation of powers demands that judge-interpreters be sticklers," he wrote towards the end of his opinion, sticklers "about not rewriting statutes under the guise of interpreting them." *Id.* at 86 (Willett, J.). Few would debate that statement in the abstract; Justice Willett's *BankDirect* reflects his agreement with the view of the late Justice Antonin Scalia that obedience-to-text in statutory interpretation is a constitutional obligation, but one which cannot be adequately discharged in a mechanical fashion. How exactly courts are to go about their task of construing statutes is controversial and debated, but the *BankDirect* opinion is an excellent application of the approach that Justice Scalia championed and that has arguably come to be the usual practice of the federal Supreme Court. Since (as Justice Willett observed in *BankDirect*) "[t]he lion's share of modern appellate judging is reading legislative language and decoding what it means," *id.* at 78 (Willett, J.), your Committee is necessarily concerned with how a judicial nominee will go about that task. Willett's sophisticated

understanding of statutory construction is strong evidence that he is well-qualified to be a federal appellate judge.

Most of the work of a state supreme court is concerned with statutory and common law questions peculiar to that state, but as an intellectual matter American law is not divided into fifty-one plus airtight boxes, and Justice Willett's concurrence in *Patel v. Texas Dept. of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), has attracted national attention from constitutional lawyers and others concerned with the role courts should play in protecting economic liberty. The issue in *Patel* concerned the constitutionality, under the Texas Constitution's Due Course of Law Clause, of the state's statutory and administrative regulations of individuals and salons engaged in commercial eyebrow threading. A divided Texas high Court invalidated the regulatory scheme in part. Justice Willett wrote an ambitious concurrence that grounded the Court's decision in a broader account of Texas constitutional principles and statutory practice, and also located the decision in the debate over the sharp reduction in federal constitutional law protection for economic liberty that is associated with Justice Oliver Wendell Holmes, Jr., and with the New Deal.

In my judgment, the *Patel* concurrence is a significant judicial contribution to two important and long-standing constitutional issues – the place of economic freedom in the American constitutional system and the nature and even workability of distinctive bodies of state constitutional law. I regard Justice Willett's argument that state courts should not thoughtlessly “cut-and-paste federal ... jurisprudence” in answering issues of state constitutional law, *id.* at 98 (Willett, J.), as exactly right. I also appreciate the power of Justice Willett's substantive argument about the level of protection he believes the Texas Constitution should be read to afford economic liberty. This is *not* to say that I necessarily would have joined his opinion were I on his court, *nor* that I agree with Justice Willett's critique of current federal doctrine. What is significant for the Committee's purposes, I believe, is that his opinion in *Patel* is a responsible and intellectually serious discussion of the issues it addresses, and that it presents a complex line of thought in an engaging manner that never lapses into the ponderous and impersonal prose that afflicts many judicial opinions. Perhaps I should add that there is nothing in the opinion that suggests any hesitation on Justice Willett's part to recognize that all American courts, state or federal, must follow the precedents of the Supreme Court of the United States on issues of federal law.

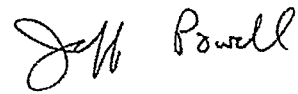
Finally, let me briefly mention Justice Willett's opinion dissenting from the Texas Supreme Court's refusal to review the lower court decision in *Serv. Employees Int'l Union Local 5 v. Prof. Janitorial Serv. of Houston, Inc.*, 481 S.W.3d 210 (Tex. 2014). The case involved the interpretation of a Texas statute giving a litigant that belongs to the “electronic or print media” the right to bring an interlocutory appeal from “orders that burden their free-speech or free-press rights.” *Id.* at 211 (Willett, J.). The lower state courts are split on how broadly to construe the statutory provision, which is of great and growing importance in the Internet era. Justice Willett presented the issue, its importance, and the consequences of his colleagues' unwillingness to address it, quickly but effectively. “We should not countenance vague and varying approaches that invite inconsistency and thus unpredictability—not when free-speech and free-press rights are implicated.” *Id.* at 213 (Willett, J.). Justice Willett is clearly alert to the challenges that social and technological change pose to the law, a quality that I believe a great virtue in this era.

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As I suggested with respect to the *Patel* case, Justice Willett and I no doubt disagree on various legal issues, including (I suspect) some of great significance. I do not support his nomination because of my agreements with him – except in the broad sense that all responsible American lawyers hold many legal positions in common even though our immediate conflicts sometimes obscure that fact. I support this nomination because I believe that Justice Willett would bring to the Fifth Circuit the intellectual integrity, and the same lively mind and pen, that his service on the Supreme Court of Texas has shown. I hope that you, and your colleagues, will come to the same conclusion, and vote to give the Senate's advice and consent to the appointment of Don Willett to be a United States Circuit Judge.

Respectfully yours,

A handwritten signature in black ink, reading "H. Jefferson Powell". The signature is written in a cursive, flowing style.

H. Jefferson Powell
Professor of Law
Duke University

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