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

1101 15th Street, NW ♦ Suite 600 ♦ Washington, DC 20005
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

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.

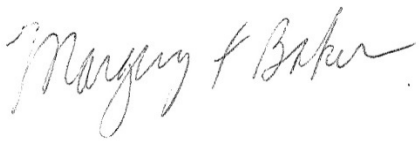
Those who President Theodore Roosevelt called "the malefactors of great wealth" opposed efforts to limit their power by the people acting through their government, and they oppose those efforts today. But the constitutional legitimacy of the American people's choices has been ratified repeatedly by the 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.