June 13, 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, we write to oppose the nomination of Britt Cagle Grant of Georgia to be a circuit judge on the Eleventh Circuit Court of Appeals. Despite her youth and relatively short time practicing law, she has been added to President Trump's list of potential Supreme Court nominees.[i] During her confirmation hearing, she failed to assuage our deep concerns about her record, her approach to interpreting the law, and her willingness and ability to prevent her personal ideological views from affecting her judicial decisions. Indeed, her responses to committee members' questions have raised new concerns.

As a threshold matter, Grant's presence on Trump's Supreme Court list raises concerns about her qualifications, since the president promised to apply a litmus test to any high court nominee: opposition to *Roe v. Wade* and the constitutional right to abortion.[ii] The hearing did not reveal how it is the White House is confident that she passes this test, nor was there any reliable indication that she doesn't oppose *Roe v. Wade*.

Our nation's courts exist to protect our legal rights, and they are perhaps never more important than when a government seeks to curtail a core constitutional right. Those to whom we entrust the solemn responsibility of a lifetime judicial position must recognize that the liberty protected by the Fifth and Fourteenth Amendments is expansive—and that it includes the right of women to make their own reproductive choices.

Grant also failed to inform senators how she would approach a variety of other important legal issues. Like so many others of President Trump's judicial nominees, she testified that she would follow precedent—that she would apply the law to the facts. But if the process were that mechanical, all appellate cases would be decided unanimously. Clearly, that is not the case. Unfortunately, Grant did not elaborate in any meaningful way on *how* she would approach the task of applying precedent to fact, which is the essence of judging at the appellate level.

She has not demonstrated that she will be independent of partisan interests and that she will not use the bench to advance her clear ideological agenda. Grant has spent a significant portion of her career using her legal training and abilities to further a sharply conservative legal agenda. She spent several years with the Georgia attorney general's office, first as counsel for legal policy and then as solicitor general.[iii] Through that office, she helped the state, either through litigation or amicus briefs:

- support industry's efforts to weaken the Endangered Species Act;[iv]

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- defend a state law prohibiting abortion after 20 weeks;[v]
- argue that same-sex couples' right to marry is not protected by the U.S. Constitution;[vi]
- argue that Title IX permits schools to discriminate against transgender children;[vii]
- attack the legality of President Obama's Deferred Action for Parents of Americans (DAPA) program;[viii]
- claim that the coverage formula for preclearance under the Voting Rights Act violated the Constitution;[ix] and
- support Arizona's discriminatory proof of citizenship requirement for voter registration.[x]

Her inaccurate or evasive responses to senators' questions about the amicus brief Georgia filed in the *Shelby County v. Holder* case deepen our concern. At the hearing,[xi] she assured Sen. Klobuchar that the brief did not seek to have Section 5's preclearance provision struck down, but only its application via the Section 4 coverage formula:

> [Georgia's position was that] the law in place needed to reflect current conditions and current evidence rather than past evidence. And that's what the State of Georgia argued. That's what the other states argued and eventually the United States Supreme Court agreed. Not that there couldn't be a Section 5. Obviously, racial discrimination voting is completely inappropriate in any instance.
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> So, not that there couldn't a Section 5, but that [the law] needed to reflect current times and current statistics rather those from decades ago.

However, the brief supporting Shelby County contradicts that statement:

> The Court should overturn Sections 4(b) **and 5** of the VRA because those sections of the law unjustifiably intrude on the Covered States' sovereignty and impose significant and unwarranted burdens on Covered Jurisdictions.[xii] [emphasis added]

Attorneys submitting briefs to the United States Supreme Court are very careful in how they write and in what they ask the Court to do. The inclusion of Section 5 as a provision to be declared unconstitutional was not a typo that somehow got past Grant and every other official in the amicus states who drafted and reviewed the document. Any doubt is removed elsewhere in the brief:

> The amici States urge this Court to overturn the coverage formula of Section 4(b) **and the preclearance obligation of Section 5** because **those provisions** are no longer congruent and proportional to the current state of voter rights nationwide, yet impose costly and time-consuming burdens on an arbitrary group of states and localities without any reference to current conditions in those jurisdictions.[xiii] [emphasis added]

Georgia urged the Court to strike down the Section 5 preclearance part of the statute altogether at the certiorari stage, as well:

> The Court should grant certiorari to Shelby County and declare Sections 4(b) **and 5** of the Voting Rights Act unconstitutional.[xiv] [emphasis added]

In fact, anyone editing or simply reading that same brief would know that this was not a new position for Georgia:

> In [the 2009 Voting Rights case] *Northwest Austin*, the only State that filed an amicus brief arguing that Section 5 should be declared unconstitutional was Georgia.

The inconsistency between the briefs and Grant's testimony increases rather than assuages our concerns about this nomination.

Also, this nomination must be considered in its greater context. We are at a pivotal point in American history, when the courts may be called upon like never before to provide constitutional checks on dangerous presidential overreach.[xv] In this environment, it is especially important to select and confirm fair-minded judicial nominees, and they must demonstrate an ability to exercise independence from the executive.

President Trump showed his disdain for an independent, non-ideological judiciary even before he was elected. Now he has nominated Grant for a lifetime judgeship on the Eleventh Circuit, potentially as a stepping stone to the Supreme Court. We oppose her confirmation.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

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[i] "President Donald J. Trump's Supreme Court List," White House, Nov. 17, 2017, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list.
[ii] "Trump promises to appoint anti-abortion Supreme Court justices," The Hill, May 11, 2016, http://thehill.com/policy/healthcare/279535-trump-on-justices-they-will-be-pro-life.
[iii] Britt Grant Questionnaire for Judicial Nominees, Senate Judiciary Committee, https://www.judiciary.senate.gov/download/grant-sjq.
[iv] Id. at 43, citing Building Industry Association of the Bay Area v. Department of Commerce, 792 F.3d 1027 (9th Cir. 2015) and Alaska Oil & Gas Association v. Jewell, 815 F.3d 544 (9th Cir. 2016).
[v] "Judge rejects challenge to state's 'fetal pain' abortion law," Atlanta Journal-Courier, Aug. 13, 2016, https://www.ajc.com/news/local/judge-rejects-challenge-state-fetal-pain-abortion-law/rOWQw1E7Wb50EGPIrMNWMJ.
[vi] Questionnaire at 42, citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[vii] Id. at 43, citing Gloucester County School Board v. G.G., certiorari denied 137 S. Ct. 1239 (2017).
[viii] Id. at 42, citing United States v. Texas, 136 S. Ct. 2271 (2016).
[ix] Id. at 41, citing Shelby County v. Holder, 570 U.S. 529 (2013).
[x] Id., citing Kobach v. U.S. Election Assistance Commission, 772 F.3d 1183 (10th Cir. 2014).
[xi] https://www.judiciary.senate.gov/meetings/05/23/2018/nominations.

[xii] Shelby County v. Holder, Brief of Arizona, Georgia, South Carolina, and South Dakota as Amicus Curiae in Support of Petitioner, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_arz-etal.pdf at 5.
[xiii] Id. at 3.
[xiv] Shelby County v. Holder, Brief of Arizona, Alabama, Georgia, South Carolina, South Dakota, and Texas as Amicus Curiae in Support of Petitioner (certiorari stage), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-96-Shelby-Co-AZ-Amicus-Brief.pdf at 28.
[xv] See, e.g., "Trump and His Lawyers Embrace a Vision of Vast Executive Power," *New York Times*, June 4, 2018, https://www.nytimes.com/2018/06/04/us/politics/trump-executive-power-russia-investigation.html.