

November 29, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: 29 LGBT Groups Oppose Confirmation of Leonard Steven Grasz and Mark Norris

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 29 national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to urge you to oppose the nominations of Leonard Steven Grasz to the United States Court of Appeals for the Eighth Circuit and Mark S. Norris, Sr. to the United States District Court for the Western District of Tennessee. After a comprehensive review of their records, we have concluded that their views on civil rights issues are fundamentally at odds with the principles of equality, liberty, justice and dignity under the law, particularly with regard to LGBT Americans, and they will not be able to overcome their personal beliefs when asked to administer fair and impartial justice. We are convinced that Mr. Grasz and Mr. Norris are demonstrably unqualified for lifetime appointments to the federal bench. We strongly urge you to oppose their respective nominations.

Leonard Steven Grasz

As outlined below, we have grave concerns about Mr. Grasz's ability to serve as a fair and impartial judge due to his long history of targeting LGBT people. Although we will focus on the anti-LGBT aspects of Mr. Grasz's record, it is important to emphasize that these are not concerns unique to the communities that we serve. This Committee should heed the warning of the American Bar Association (ABA) that Mr. Grasz is not qualified for an appointment on the federal bench because he is unable to put the law ahead of his personal beliefs and to administer fair and impartial justice to all litigants who might come before him.¹ The ABA is non-partisan and non-ideological, so when the organization deems a judicial nominee 'Not Qualified' out of concerns about bias, it suggests that the nominee has failed to meet even basic requirements of fairness. The ABA's assessment of Mr. Grasz is

¹ American Bar Association, *Statement of Pamela A. Beshnahan on Behalf of the Standing Committee on the Federal Judiciary Concerning the Nomination of Leonard Steven Grasz*, (Oct. 30, 2017), available at <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/GraszStatement.authcheckdam.pdf>.

extraordinary. It has issued only four unanimously unqualified ratings since 1989, and two of those nominees were not confirmed, with the other two nominations (including Mr. Grasz) still pending.

As part of their routine evaluation process, the evaluators for the ABA Committee on the Federal Judiciary contacted more than 1,800 lawyers and judges concerning Mr. Grasz’s nomination, and received 183 responses. Many of those individuals were peers of Mr. Grasz who questioned whether he would be able to detach himself from his “deeply-held social agenda and political loyalty to be able to judge objectively, with compassion and without bias.”² Such responses are particularly troubling in light of Mr. Grasz’s deep and longstanding animus toward the LGBT community that he has demonstrated throughout his legal career. This demonstrated animus only exacerbates the severity of the concerns raised by the ABA in declaring Mr. Grasz unfit to serve in the federal judiciary.

This assessment from the ABA reaffirmed our own evaluation that Mr. Grasz is simply incapable of administering fair and impartial justice to those who do not fit within his particular worldview, including, in particular, LGBT people. Since 2015, Mr. Grasz has served as Board Director of the Nebraska Family Alliance (NFA), an organization affiliated with Focus on the Family, an organization that has worked extensively to undermine protections for LGBT people. Mr. Grasz’s connections to the NFA run deep. In fact, Mr. Grasz’s son, Nate Grasz, currently serves as Director of Policy for the organization and has opposed marriage equality, bans on conversion therapy, and anti-discrimination protections for LGBT people.

While Steven Grasz served as Director of the Board, the NFA took extreme positions that targeted members of the LGBT community—positions that he has never repudiated. During the confirmation process, Senator Hirono offered Mr. Grasz multiple opportunities to clarify and renounce some of these “deeply-held personal views” and the positions of the NFA.³ In each instance, Mr. Grasz refused. Specifically, Mr. Grasz was unwilling to say whether he supported prohibiting discrimination in employment based on sexual orientation and gender identity; refused to commit to recuse himself in cases involving questions of marriages, families and LGBT rights, and in cases involving whether religious liberty trumps anti-discrimination laws; and declined to say whether he shared the NFA’s view that same-sex couples and their families are “less optimal” than different-sex couples and their families.⁴

Among the most disturbing content in the NFA’s written materials are articles supporting the dangerous and inhumane practice of conversion therapy. Virtually every leading medical and therapeutic organization in the United States has rejected conversion therapy as unnecessary, ineffective, and dangerous. In 2009, the American Psychiatric Association issued a report concluding that the reported risks of conversion therapy include depression, guilt, helplessness, hopelessness, shame, social

² American Bar Association, *Supplemental Statement on Behalf on Pamela A. Breshnahan*, (Nov. 13, 2017), available at <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/GraszSupplementalStatement111317.authcheckdam.pdf>

³ Senate Judiciary Committee, *Nominations* (Nov. 1, 2017), available at <https://www.judiciary.senate.gov/meetings/11/01/2017/nominations>.

⁴ *Id.* See Brief for Amicus Curiae Organizations and Scholars of Gender-Diverse Parenting in Support of Respondents, *Obergefell v. Hodges*, 2015 U.S. S. Ct. Briefs LEXIS 1320 at *12–13 (Apr. 2, 2015), (NFA brief arguing that only the parenting of “a mother and a father[,]” rather than a same-sex couple, “provides children with the optimal environment for their cognitive, social, and emotional development from infancy through adolescence.”).

withdrawal, suicidality, substance abuse, stress, disappointment, self-blame and self-hatred, among others.⁵ When asked to simply clarify whether he thought that conversion therapy was good or bad, Mr. Grasz declined to respond.⁶ Mr. Grasz further refused to answer Senator Feinstein’s question about whether, as a Board Member of the NFA, he had ever expressed concern when the organization took its position to oppose bans on conversion therapy or whether he stood behind the organization’s position that the science behind these types of therapies is “far from settled” and that bans deny parents the right “to seek a counselor for their children that aligns with their family values.”⁷

It is clear that Mr. Grasz’s “deeply-held social agenda” would render him incapable of following established legal precedent in decisions that affect LGBT people. While working as the Chief Deputy Attorney General of Nebraska, Mr. Grasz opposed the legal recognition of same-sex marriages from other states. In one of Mr. Grasz’s legal opinions, he cautioned of “a grave danger that the Nebraska Supreme Court might well recognize same-sex marriages performed in Hawaii as being valid in Nebraska.”⁸ Mr. Grasz argued before the Nebraska Supreme Court that state law did not allow an unmarried lesbian couple to adopt a child and stated in an interview that, “[t]he state’s adoption law was not written with the intent to sanction gay adoption.”⁹ In addition, in 2015, while Mr. Grasz was Director of the Board, the NFA filed an amicus brief in *Obergefell v. Hodges*, arguing that only the parenting of “a mother and a father[,]” rather than a same-sex couple, “provides children with the optimal environment for their cognitive, social, and emotional development from infancy through adolescence.”¹⁰ After the *Obergefell* ruling, the NFA issued a statement stating that the Supreme Court’s marriage equality decision “redefines marriage to be a genderless relationship based upon the emotions of adults.”¹¹ During his Senate Judiciary Committee hearing, Mr. Grasz refused to answer whether he believed that same-sex parents had the same rights under the Constitution as different-sex parents, even though *Obergefell* clearly recognized that the benefits of marriage have to be extended on the same terms and conditions for all married couples. Through his record, statements and writings, Mr. Grasz has made clear that he would seek to defy precedent on these and other important questions affecting LGBT people and their families. On this basis alone, Mr. Grasz’s nomination should be rejected.

Mr. Grasz has channeled his biased views into building a career of hollowing out laws designed to protect LGBT people from discrimination. In 2013, during the City of Omaha’s convention, Mr.

⁵ American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), available at <https://www.APA.org/pi/LGBT/Resources/Therapeutic-Response.pdf>

⁶ Senate Judiciary Committee, *Nomination of Leonard Steven Grasz to the U.S. Court of Appeals to the Eighth Circuit Hearing, Submitted November 8, 2017*, available at <https://www.judiciary.senate.gov/imo/media/doc/Grasz%20Responses%20to%20QFRs.pdf>.

⁷ *Id.* See also Zoe Tillman, *One of Trump’s Judicial Nominees Sits on the Board of a Group that Defends Conversion Therapy*, BuzzFeed, (Sept. 25, 2017), available at https://www.buzzfeed.com/zoetillman/one-of-trumps-judicial-nominees-sits-on-the-board-of-a?utm_term=.ulxKPaG86#.laaMdYxOQ.

⁸ *Same-Sex Marriage – Impact of Baehr v. Lewin and the Defense of Marriage Act on Nebraska Law*, Neb. Op. Att’y Gen, No. 96090, 1996 WL 739040 (Dec. 30, 1996). Emphasis added.

⁹ Robynn Tysver, *Court to Tackle Gay-Adoption Question*, Omaha World-Herald (Oct. 3, 2001).

¹⁰ See Brief for Amicus Curiae, *supra* note 4.

¹¹ WOWT, *The Heartland Responds to Gay Marriage*, WOWT.com, available at (June, 26, 2015) <http://www.wowt.com/home/headlines/The-Heartland-Responds-to-Gay-Marriage-Ruling-310083571.html>.

Grasz introduced a charter amendment to permit discrimination against LGBT people in employment and public accommodation under the guise of religious liberty. When asked by a fellow Convention member if this amendment would “create an exemption for business owners who don’t want to hire gays and lesbians to circumvent or do any end run around the city human rights ordinance,” Mr. Grasz replied “Yes.”¹² Likewise, the NFA advocates against legislation that would prohibit employment discrimination against people based on sexual orientation or gender identity.¹³

Mr. Grasz also appears to share the NFA’s distorted and dangerous views about transgender people. The organization essentially argues that transgender people do not exist by claiming that the “social construct of a gender spectrum, instead of the biological reality of male and female” is a “trend that should be rejected at every level.”¹⁴ The NFA has worked aggressively to defeat basic equal opportunity protections for transgender people. While Mr. Grasz served on its Board, the organization fought policies that protect the rights of transgender students based on “safety concerns”—a myth that relies on assumptions that transgender people are inherently dangerous. When Ms. Pamela Bresnahan, an ABA representative, was recently questioned under oath during a Senate Judiciary Committee hearing about the “Not Qualified” rating that the ABA Committee on the Federal Judiciary gave to Mr. Grasz. Ms. Bresnahan was pressed to articulate exactly which issues led Mr. Grasz’s peers to conclude that he could not separate the law from his personal beliefs. Ms. Bresnahan identified Mr. Grasz’s personal beliefs about transgender rights as one of the issues.

Mr. Grasz’s relentless efforts to target the rights of vulnerable groups are particularly troubling for a nominee to the federal judiciary because, if confirmed, he would be expected to administer justice equally to litigants of various racial backgrounds, and all genders and sexual orientations. As his ABA rating suggests and as we have found, Mr. Grasz will not be able to move from an advocate targeting LGBT people to the role of an impartial interpreter of the law. In other words, Mr. Grasz is not fit for the job.

Mark Norris

While Mr. Norris’s broader anti-civil rights record is so voluminous that it took the Alliance for Justice nearly 20 pages to summarize,¹⁵ this letter underscores the lengths to which Mr. Norris has gone to oppose the basic civil rights of LGBT people. Unlike attorneys who seek to claim that they were merely advancing the views of their client, Mr. Norris has expended significant personal effort to advance legislation that would privilege and protect those who seek to discrimination against LGBT people.

¹² See Proposed Amendment to Omaha Charter Section 8, 8.02A: *Religious Freedom and Rights of Conscience* (2013); See also City of Omaha Charter Study Review Convention, Testimony, 147–48 (Dec. 3, 2013).

¹³ Fred Knapp, *Property taxes, LGBT rights, teachers’ religious clothing discussed in Capitol*, NET News, (Feb. 21, 2017) available at <http://netnebraska.org/article/news/1064309/property-taxes-lgbt-rights-teachers-religious-clothing-discussed-capitol>.

¹⁴ School Defends Controversial “Transition Ceremony” in Kindergarten Classroom, Nebraska Family Alliance (Aug. 29, 2017), available at <https://www.nebraskafamilyalliance.org/>

¹⁵ Alliance for Justice, *AFJ Nominee Report: Mark Norris: U.S. District Court for the Western District of Tennessee* (Oct. 2017), available at <https://www.afj.org/wp-content/uploads/2017/10/AFJ-Norris-Report.pdf>.

For example, in 2011, after Nashville enacted an ordinance prohibiting city contractors from discriminating on the basis of sexual orientation or gender identity, Mr. Norris supported preemption legislation that prohibits cities from passing non-discrimination protections for LGBT people. When asked about why he supported the ordinance, Mr. Norris responded that the law was “intended to balance the right of local governments and businesses to adopt anti-discrimination policies with the proper level of state oversight.”¹⁶ As commentators noted at the time, however, the legislation effectively eliminated the possibility of ever establishing local protections against discrimination based on sexual orientation or gender identity.¹⁷ Because Tennessee’s anti-discrimination laws did not include any protections on the basis of sexual orientation or gender identity, the legislation clearly and swiftly rendered Nashville’s ordinance discrimination invalid and unenforceable, leaving LGBT workers vulnerable to discrimination on the basis of sexual orientation and gender identity. The legislation has been used as a model for other preemptive state legislation.

In 2016, Mr. Norris supported legislation¹⁸ which allows mental health counselors to discriminate against LGBT clients—what American Counseling Association (ACA) dubbed the “Hate Bill 1840.”¹⁹ The ACA’s CEO said that “of all of the state legislation I have seen passed in my 30 years with ACA, the new Tennessee law based on Senate Bill 1556/House Bill 1840 is by far the worst.”²⁰ When asked about why he supported the legislation, Mr. Norris responded that the law was “intended to protect the religious liberty of professional counselors,”²¹ without so much as acknowledging, let alone giving consideration to, the rights and well-being of LGBT clients.

In 2017, Mr. Norris supported legislation that prohibits any government from taking “discriminatory action” against a business based on its internal policies, including personnel and employee benefit policies.²² Also this year, Mr. Norris endorsed legislation, which became known as the “LGBTQ Erasure Bill,” that “attempt[ed] to undermine the impact of the Supreme Court’s marriage equality ruling by requiring courts and federal agencies to apply a plain meaning interpretation of gendered statutory language, including those involving the rights of husbands and wives.”²³

Mr. Norris has taken special steps to diminish the rights and safety of LGBTQ youth. In 2011, Mr. Norris supported legislation dubbed the “Don’t Say Gay Bill.”²⁴ The bill, which passed the State

¹⁶ Mark Norris, *News from Nashville* (May 23, 2016), available at <http://www.marknorris.org/blog1/2016/05/23/news-from-nashville-may-23-2016/>.

¹⁷ Leslie Fenton, *The anti-gay Tennessee bill no one’s talking about*, Salon (May 26, 2011), available at http://www.salon.com/2011/05/26/tennessee_antigay_bill_open2011/.

¹⁸ SB 1556, 2015-2016, 109th General Assembly, <https://legiscan.com/TN/rollcall/SB1556/id/500053>.

¹⁹ Andy Sher, *Tennessee experiences backlash from new LGBT counseling law*, Times Free Press (May 11, 2016), available at <http://www.timesfreepress.com/news/politics/state/story/2016/may/11/tennessee-sees-repercussions-new-lgbt-counsel/364900/>.

²⁰ *Id.*

²¹ Mark Norris, *News from Nashville* (May 23, 2016), available at <http://www.marknorris.org/blog1/2016/05/23/news-from-nashville-may-23-2016/>.

²² SB 0127, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0127>.

²³ Human Rights Campaign, *Anti-LGBTQ Bills in Tennessee Attempt to Undermine Supreme Court’s Marriage Equality Ruling*, HRC Blog (Apr. 26, 2017), available at <http://www.hrc.org/blog/anti-lgbtq-bills-in-tennessee-attempt-to-undermine-supreme-courts-marriage>.

²⁴ SB 49, <https://openstates.org/tn/votes/TNV00000507/>.

Senate, sought to prohibit teachers from providing any information about homosexuality to public school students. Human Rights Watch has found that laws like the “Don’t Say Gay Bill” discourage school personnel from intervening to stop bullying and harassment, deter teachers from providing basic information, and limit students’ ability to form and organize LGBT groups.²⁵ When asked whether he had taken these documented harms on LGBTQ youth into account when supporting the bill, Mr. Norris dismissed the question as “political” and declined to respond.²⁶

Federal judges are required to identify and balance different interests when applying legal tests, like whether religious accommodations place “significant burdens” on third parties. Yet, Mr. Norris’s positions and responses suggest that he may be incapable of even recognizing, let alone balancing, the rights and interests of vulnerable minorities. Indeed, nowhere does Mr. Norris acknowledge how laws that he has repeatedly supported harm members of the LGBT community. As numerous constitutional precedents make clear, by bestowing legal privileges on those who would discriminate against members of the targeted groups, these laws “stigmatiz[e] members of the[se] disfavored group[s] as ‘innately inferior’ and therefore as less worthy participants in the political community.”²⁷ And they also make it “more difficult for” particular “group[s] of citizens than for all others to seek aid from the government.”²⁸

Along with Mr. Norris’s ability to apply legal tests in an even-handed manner, his willingness to follow legal precedent with which he personally disagrees is also in question. Mr. Norris opposed the Obama Administration’s 2016 guidelines intended to assist schools in protecting transgender students from discrimination and complying with their obligations under Title IX, and even encouraged Tennessee to sue the Obama Administration, which he said was taking a “reckless post-constitutional approach to our government.”²⁹ At a time when transgender students are less likely to graduate and more likely to suffer violence and severe physical and emotional injuries, Mr. Norris declared his commitment to “mak[ing] sure that nothing will be done to give this ‘guidance’ any effect.”³⁰ When asked about why he opposed the guidelines, Mr. Norris responded that it was out of concern that the guidelines “represented an improper attempt to rewrite Title IX without Congressional approval,”³¹ even though courts have repeatedly ruled that transgender people are protected from discrimination under civil rights statutes, including Title IX, and specifically established that schools must treat students

²⁵ Human Rights Watch, “*Like Walking Through a Hailstorm*”: *Discrimination Against LGBT Youth in US Schools* (Dec. 7, 2016), available at <https://www.hrw.org/report/2016/12/07/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools>.

²⁶ Senate Judiciary Committee, *Nomination of Mark Norris to the U.S. District Court for the Western District of Tennessee, Questions for the Record, Submitted October 24, 2017*, available at <https://www.judiciary.senate.gov/imo/media/doc/Norris%20Responses%20to%20QFRs.pdf>.

²⁷ *Heckler v. Mathews*, 465 U.S. 728, 739 (1984).

²⁸ *Romer v. Evans*, 517 U.S. at 633.

²⁹ Joel Ebert, *26 Tennessee senators call on Haslam to join North Carolina lawsuit over transgender bathrooms*, Knoxville News Sentinel (May 16, 2016), <http://archive.knoxnews.com/news/politics/twenty-six-senators-call-on-haslam-to-join-nc-lawsuit-over-transgender-bathrooms-32fa0930-3f68-1c72--379709801.html/>.

³⁰ Mark Norris, *News from Nashville* (May 23, 2016), available at <http://www.marknorris.org/blog1/2016/05/23/news-from-nashville-may-23-2016/>.

³¹ Senate Judiciary Committee, *Nomination of Mark Norris to the U.S. District Court for the Western District of Tennessee, Questions for the Record, Submitted October 24, 2017*, available at <https://www.judiciary.senate.gov/imo/media/doc/Norris%20Responses%20to%20QFRs.pdf>.

consistent with their gender identity and cannot deny transgender students access to bathrooms and other single-sex facilities that correspond with their gender identity.³² Mr. Norris’s response appears to ignore Title IX law at best and to call the law into question at worst, and in either case raises serious doubts that he would faithfully and accurately interpret Title IX case law when the issues at stake conflict with his personal beliefs.

Mr. Norris’s record suggests that he would not respect the Supreme Court’s precedent concerning marriage equality. In 2004, Mr. Norris was a leading sponsor of SJR 0027, calling upon Congress to pass a Federal Marriage Amendment defining marriage in a way that would have denied the freedom to marry to same-sex couples, and permitting states to give no legal effect or recognition to same-sex marriages performed in other states. That same year, he supported SB 2661, which prohibited Tennessee from recognizing any same-sex civil union or domestic partnership, even if valid in another state. Speaking about that bill, Mr. Norris said that unless Tennessee refused to recognize same-sex civil unions, “marriage may fall by the wayside in favor of civil unions,” and “if marriage falls by the wayside, so does our society.”³³ After the Supreme Court’s 2015 decision in *Obergefell v. Hodges* recognized marriage equality as the law of the land, Mr. Norris supported a resolution of the Tennessee General Assembly “express[ing] its disagreement with the constitutional analysis in *Obergefell v. Hodges* and the judicial imposition of a marriage license law that is contrary to the express will of this body and the vote of the people of Tennessee.”³⁴ Mr. Norris’s decade of anti-marriage-equality advocacy and publicly avowed “disagreement with the constitutional analysis in *Obergefell v. Hodges*” is fundamentally at odds with his duty to faithfully apply *Obergefell* if he becomes a federal judge. Through his words and actions, Mr. Norris has left no doubt that he would seek to restrict and roll back *Obergefell* and other constitutional precedents protecting the liberty, equality, and dignity of LGBT people.

* * * * *

The records of Mr. Grasz and Mr. Norris demonstrate that their appointments to the bench would cause grave harm to the LGBT community, as well as many other communities who rely on the federal judiciary to administer fair and impartial justice. These are not the kinds of judges that this country wants, needs or deserves. We urge you to reject their respective nominations.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org.

³² See, e.g., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d1039 (7th Cir. 2017).

³³ Mark Norris, *Defense of Marriage in Tennessee*, The Covington Leader (Feb. 18, 2004), page A11.

³⁴ HRJ 0529 General Assembly, *Statement of Intent or Position-Expresses disagreement with the U.S. supreme court’s decision in Obergefell v. Hodges* (Apr. 28, 2016). See also HRJ 0529 2015-2016, 109th General Assembly, <https://legiscan.com/TN/rollcall/HJR0529/id/537864>.



Very truly yours,

Lambda Legal
Advocates for Youth
CenterLink: The Community of LGBT Centers
Equality Alabama
Equality California
Equality Utah
Family Equality Council
FORGE, Inc.
FreeState Justice
Gender Spectrum
GLAAD
GLBTQ Legal Advocates & Defenders (GLAD)
GLMA: Health Professionals Advancing LGBT Equality
Los Angeles LGBT Center
Mazzoni Center
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for LGBT Health
National LGBT Bar Association
National LGBTQ Task Force Action Fund
OutServe-SLDN
Pride at Work
Sexuality Information and Education Council of the U.S. (SIECUS)
The Trevor Project
Transcend Legal
Transgender Law Center
Transgender Legal Defense & Education Fund
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members