Lambda Legal
making the case for equality

December 6, 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: Lambda Legal Letter of Concern about the Nomination of James Ho

Dear Chairman Grassley and Ranking Member Feinstein:

Lambda Legal is writing to express serious concern about the nomination of James C. Ho to the U.S. Court of Appeals for the Fifth Circuit. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV, through impact litigation, policy advocacy, and public education.

We wish to call to your attention aspects of Mr. Ho's record that illustrate our concerns over his suitability for the bench and fear that he poses a threat to the communities that our organizations serve. Mr. Ho's record suggests that he would be a consistent vote against the civil and human rights of LGBT Americans should he be confirmed to the Fifth Circuit.

Mr. Ho is the third federal judicial nominee to be associated with the First Liberty Institute, an organization that has consistently opposed legal protections for LGBTQ people.[1] In addition, Mr. Ho has aggressively defended Texas's ban on marriage equality. While working in the solicitor general's office in 2010, Mr. Ho submitted a brief in support of a ban on same-sex marriage that trivialized the unions of same-sex couples. The case involved a same-sex couple who were married in Massachusetts sought a divorce in Texas. Mr. Ho argued that it is "neither complicated nor controversial" that "[t]he naturally procreative relationship between a man and a woman deserves special societal support and protection—both to encourage procreation (without which society cannot survive), and to increase the likelihood that children will be raised by both of their parents, within the context of stable, long-term relationships—interests that are uniquely served through governmental recognition and enforcement of the union of one man and one woman."[2] When Mr. Ho wrote the brief in 2010, many states had already legalized

[1] Mr. Ho recently co-wrote an article with the President of the First Liberty Institute. *See* Kelly Shackelford & James C. Ho. *US courts: Can't pray at work, can't pray at home*, THE HILL (Sept. 1, 2017), *available at* http://thehill.com/blogs/pundits-blog/civil-rights/348858-opinion-us-courts-cant-pray-at-work-cant-pray-at-home.
[2] *In the Matter of the Marriage of J.B. and H.B.*, Brief of the State of Texas, 2010 WL 1367402 (Tex.App.-Dallas), 18

marriage equality and there was ongoing litigation challenging the constitutionality of so-called Defense of Marriage Act ("DOMA") and the exclusion of same-sex couples from marriage.

Just three years later, the Supreme Court in *United States v. Windsor* struck down DOMA in part because it "humiliates tens of thousands of children" being raised by gay parents and impermissibly disparages those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." And two years after that, the Supreme Court in *Obergefell v. Hodges* recognized marriage equality as the law of the land based partly on the fact that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted" and that "[e]xcluding same-sex couples from marriage thus conflicts with a central premise of the right to marry." The Court was concerned that "without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser" and that "[t]hey also suffer the significant material costs of being raised by unmarried parents." Accordingly, the Court found that "[t]he marriage laws at issue here thus harm and humiliate the children of same-sex couples." Mr. Ho's brief made no mention of a fact that the Supreme Court considered crucial in both *Windsor* and *Obergefell*—that "many same-sex couples provide loving and nurturing homes to their children." Nor did Mr. Ho's brief acknowledge the material and dignitary harms that a ban on same-sex marriage would inflict on those couples and their children.

Mr. Ho has been an outspoken supporter of current nominee Jeff Mateer, who has described transgender children as part of "Satan's plan."[3] In 2016, the *San Antonio Express-News* issued an editorial opposing Mr. Mateer's nomination to a position in the Texas Attorney General's office based on Mr. Mateer's opposition to LGBT nondiscrimination protections and marriage equality. In response to the editorial, Mr. Ho wrote an op-ed asserting that Mr. Mateer "firmly believes in the profound and abiding importance of protecting and enforcing the legal rights and civil liberties of every Texan."[4] Mr. Ho authored the op-ed *after* Mr. Mateer's public comments denigrating transgender children and comparing marriage equality to "people marrying their pets." Apparently for Mr. Ho, "every Texan" does not include LGBT Texans. When asked by Senator Feinstein during the hearing whether he agreed with Mr. Mateer's views on transgender children, Mr. Ho declined to answer with a simple "yes" or "no."

In addition, we are deeply concerned about the memo authored by Mr. Ho laying out possible "interpretations" of the Geneva Convention when he worked in the Office of Legal Counsel during the Bush Administration that depart from the rule of law.[5] Mr. Ho's memo was cited in a series of infamous "torture memos" that were developed to provide legal cover to the torture of detainees being held by the

[3] *See* Lambda Legal, *Lambda Legal Leads 35 LGBT Groups Demanding President Trump Withdraw Jeff Mateer's Nomination to Federal Bench* (Oct. 16, 2017), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
[4] James C. Ho, *Mateer Appointment Worthy of Praise*, SAN ANTONIO EXPRESS-NEWS (April 13, 2016) *available at* http://www.mysanantonio.com/opinion/commentary/article/Mateer-appointment-worthy-of-praise-7246618.php.
[5] *See* U.S. Department of Justice Office of Legal Counsel Memorandum for Alberto R. Gonzales, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 15 n.8 (citing Memo for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Feb. 1, 2002)), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

U.S. Government. When asked whether he believes waterboarding is a form of torture, Mr. Ho avoided the question by citing that Congress enacted legislation expressing opposition. At a time when the Executive branch is proceeding to dismantle one democratic norm after another, we are seriously concerned about Mr. Ho's deference to presidential power. Mr. Ho has acknowledged taking legal positions regarding the rights of detainees that have repeatedly been struck down by the Supreme Court.[6]

Nominees to federal courts must be qualified and committed to respecting the rule of law and the Constitution. For the reasons stated above, we urge you to carefully consider Mr. Ho's record before deciding whether to confirm him to the U.S. Court of Appeals for the Fifth Circuit. Thank you for considering our views on this important issue. Please do not hesitate to contact Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org if we can provide additional information throughout the confirmation process.

Very truly yours,

Lambda Legal

cc: United States Senate Judiciary Committee Members

[6] See, *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting the position that the president can block terrorism detainees' right to challenge their imprisonment in federal court by holding them at Guantanamo); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (rejecting the position that he president can deem Americans captures abroad ads "enemy combatants" and indefinitely imprison them in military detention with no contact without judicial oversight); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (rejecting the position that the president can "disappear" an American citizen picked up anywhere within the United States).