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May 20, 2019

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of our three million members and the 50 million students they serve, we strongly urge you to VOTE NO on Howard Nielson’s nomination to the United States District Court for the District of Utah. Votes associated with this issue may be included in NEA’s Report Card for the 116th Congress.

On May 17, 1954, a unanimous Supreme Court held in *Brown v. Board of Education of Topeka* that racial discrimination by the government violates the Constitution. The words of that decision, a watershed in our nation’s history, ring as true today as they did 65 years ago, when *Brown* was decided:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Before *Brown*, Jim Crow, *de jure* racial segregation, and racially segregated and unequal schools were the norm—and considered constitutional. The *Brown* decision helped our nation turn the corner on that shameful history. While much more must be done to fulfill the promise of *Brown*, the decision itself is fundamental to our nation’s progress.

During the confirmation process, Mr. Nielson was asked whether *Brown* is consistent with originalism, a theory of constitutional interpretation he strictly adheres to as a member of

the Federalist Society. “[P]ersuasive scholarly arguments have been made that *Brown* is deeply faithful to the core original meaning of the Fourteenth Amendment,” he said, “[but it is] not be appropriate for [me] to attempt to classify the court’s methodology in *Brown*.” This response alone is disqualifying.

Other recent nominees, including Supreme Court justices, praised the decision and did not believe it was inappropriate to do so:

- Asked during his confirmation hearing whether *Brown* was rightly decided, Chief Justice Roberts unequivocally responded, “I do.”
- Justice Thomas spoke of the awe of being appointed to the court that decided *Brown* and said it “changed my life and changed the South . . . certainly even before I knew all of the legal ramifications.”
- Justice Alito said “certainly” when asked whether he supported *Brown*.
- Justice Kagan testified, “I hope and I know that the principles of *Brown v. Board* are still relevant today. . . . The idea of equality under law is a fundamental American constitutional value.”
- Justice Gorsuch described *Brown* as a “great and important decision.”
- Justice Kavanaugh called *Brown* “inspirational” and “the single greatest moment in Supreme Court history.”
- Now-retired Justice Kennedy testified, “I think *Brown v. Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think *Plessy v. Ferguson* was wrong on the day it was decided.”

The four words engraved on the facade of the United States Supreme Court are the bedrock of our system: “Equal justice under law.” A nominee to the federal bench who does not pledge fidelity to those words cannot be confirmed.

Mr. Nielson’s record only deepens our concerns about his commitment to equality. Among other things, he advocated for a ban on affirmative action in higher education and, in his defense of Proposition 8, sought to recuse a judge because of his sexual orientation. Mr. Nielson has been a prominent opponent of the Affordable Care Act, even though the loss of its protections would harm millions of people with preexisting conditions and leave millions more without access to coverage. And, at a time when gun violence has reached epidemic levels in our schools, he regularly represents the NRA in opposing common-sense reforms like not allowing handguns to be sold to people under age 21.

On behalf of America’s students and educators, we strongly urge you to VOTE NO on Howard Nielson and all judicial nominees who will not publicly affirm the correctness of *Brown*.

Sincerely,



Marc Egan
Director of Government Relations
National Education Association