



September 16, 2019

United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way opposes the nomination of Lee Rudofsky to be a U.S. district court judge for the Eastern District of Arkansas. His defiance of the Supreme Court's *Obergefell* ruling while he was Arkansas's solicitor general indicates a willingness to subvert the rule of law and a bias against LGBTQ equality. Additionally, his use in court of doctored videos as evidence against Planned Parenthood constituted a fraud upon the court and, were he to be confirmed, would make it impossible to erase the appearance of bias against Planned Parenthood and other supporters of abortion rights and contraception access.

Rudofsky's committee questionnaire lists *Pavan v. Smith* among his ten most significant litigated matters that he personally handled.<sup>i</sup> It is, in fact, quite significant, because it shows his willingness to defy the rule of law in pursuit of a political agenda that harms same-sex couples.

After the Supreme Court unambiguously held in *Obergefell v. Hodges* that states cannot constitutionally withhold the "right, benefits, and responsibilities" of marriage—explicitly including in the issuance of birth certificates—from same-sex couples, Arkansas officials defied the ruling. Specifically, the Department of Health denied same-sex spouses the right to have both their names on their children's birth certificates in the same manner as opposite-sex married couples. When three married couples challenged their discriminatory treatment in court, Rudofsky opposed them as solicitor general. But when the state trial court predictably and correctly ruled in their favor, citing *Obergefell*, Rudofsky did not let the matter drop. Instead, he appealed to the Arkansas Supreme Court, and a majority agreed to reverse the lower court.

The state supreme court's ruling against the married couples constituted such blatant defiance of *Obergefell* that the U.S. Supreme Court reversed it summarily. In its *per curiam* opinion in *Pavan v. Smith*,<sup>ii</sup> the Court rejected Rudofsky's assertion that "*Obergefell* did not concern birth certificates, but [simply] a same-sex couple's right to marry."<sup>iii</sup>

At his confirmation hearing, Rudofsky asserted that as solicitor general, he generally litigated as the state attorney general ordered him to. But even if that was the case in *Pavan*, a principled attorney who respects our judicial system would not have followed that order.

Rudofsky used the confirmation hearing to make clear that he believes *Obergefell* was wrongly decided. This came up because he had signed on to two *amicus* briefs of "supporters of traditional conservative values" arguing that the Fourteenth Amendment requires states to

recognize the marriages of same-sex couples, one in the Proposition 8 case and the other in *Obergefell* itself.<sup>iv</sup> He told committee members:

Those were not when I was solicitor general. I did not sign those as a lawyer. Those were signed in my personal capacity. When I signed those briefs, senator, or I should say when I joined those *amicus* briefs, I was not an expert in 14<sup>th</sup> Amendment jurisprudence. Since then, as solicitor general, I've become much more familiar with that area of law, and I have to say, if I had to do it over again, as a *legal* matter, I would not have signed those briefs.<sup>v</sup>

Rudofsky's turnabout suggests that despite the broad freedoms protected by the 14<sup>th</sup> Amendment and numerous Supreme Court precedents recognizing the substantial breadth of those freedoms, he nevertheless interprets the Constitution to allow states to target LGBTQ people for disfavored treatment. That is incompatible with judicial service.

Rudofsky's explanation also raises other concerns. Jurisprudence around the Due Process and Equal Protection Clauses was doubtless the subject of extensive study and debate in his classes at Harvard Law School, from which he graduated just three years before Proposition 8 was adopted. These are among the most contentious and high-profile matters studied in law schools across the nation, yet he provides no explanation as to what he purportedly learned about the 14<sup>th</sup> Amendment as Arkansas's solicitor general that he had not considered at Harvard Law or during his career up to 2013. At the very least, he has created the appearance of shifting his stated beliefs in order to curry favor with a committee majority that wants judges who will advance their agenda from the bench.

Rudofsky's role in Arkansas Republicans' war against Planned Parenthood raises additional concerns. As the solicitor general, he defended the state's efforts to defund the organization in another of what he characterizes as among his ten most significant litigations.<sup>vi</sup> Using demonstrably doctored and discredited videos as justification, Gov. Asa Hutchison directed that Planned Parenthood of the Heartland (PPH) be barred from participating in the state's Medicaid services, a decision Rudofsky was tasked to defend.

But he crossed the line from zealous representation to defrauding the court by presenting the videos as even potentially reliable evidence for the state to rely on as justification for its decision. At a hearing in federal district court, he told the judge that "all [you] need do is watch the Planned Parenthood videos," which he described as "very clearly" presenting evidence of unlawful conduct that Arkansas could lawfully base its decision on.<sup>vii</sup> But the only reason any of the notorious videos showed anything "clearly" was because they had been deceptively edited to tell a false narrative, as was publicly known before the hearing.<sup>viii</sup>

Attorneys have an ethical obligation not to commit a fraud upon the court. Indeed, were outright deception of a judge with knowingly false evidence to be allowed, the "justice" in our justice system would disappear. A lawyer who engages in such an action has no place on the federal bench.

We urge all senators to oppose the nomination.

Sincerely,



Marge Baker  
Executive Vice President for Policy and Program

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<sup>i</sup> Senate Judiciary Committee questionnaire for Lee Philip Rudofsky, nominee to be U.S. District Judge for the Eastern District of Arkansas, <https://www.judiciary.senate.gov/download/lee-rudofsky-sjq>, pp. 42-43.

<sup>ii</sup> *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam), [https://www.supremecourt.gov/opinions/16pdf/16-992\\_868c.pdf](https://www.supremecourt.gov/opinions/16pdf/16-992_868c.pdf).

<sup>iii</sup> Brief for the Respondent in Opposition to Petition of Certiorari, *Pavan v. Smith*, April 14, 2017, available at <https://www.scotusblog.com/wp-content/uploads/2017/04/16-992-BIO.pdf>.

<sup>iv</sup> Brief *amici curiae* of Kenneth B. Mehlman, et al., supporting Respondents in *Hollingsworth v. Perry*, available at <https://www.scribd.com/document/127834199/Perry-Amicus-Brief-of-Mehlman-et-al>; Brief *amici curiae* of Kenneth B. Mehlman, et al., supporting Petitioners in *Obergefell v. Hodges*, available at [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556\\_Kenneth\\_B\\_Mehlman-3.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556_Kenneth_B_Mehlman-3.pdf).

<sup>v</sup> Nominations hearing, Senate Judiciary Committee, July 31, 2019, <https://www.judiciary.senate.gov/meetings/07/31/2019/nominations>.

<sup>vi</sup> Committee questionnaire at 43-45.

<sup>vii</sup> Transcript of Hearing on Motion for Temporary Restraining Order, *Planned Parenthood of Arkansas and Eastern Oklahoma v. Selig*, U.S. District Court for the Eastern District of Arkansas, September 17, 2015, p. 24.

<sup>viii</sup> E.g., “The Campaign of Deception Against Planned Parenthood,” New York Times, July 22, 2015, <https://www.nytimes.com/2015/07/22/opinion/the-campaign-of-deception-against-planned-parenthood.html>.