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May 4, 2020

The Honorable Lindsey Graham
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of our national network of more than 300,000 supporters, Americans United writes to voice our opposition to the confirmation of Justin Walker to the United States Court of Appeals for the District of Columbia Circuit.

When Judge Justin Walker was nominated to serve as a District Court judge, less than one year ago, the American Bar Association (ABA) deemed him unqualified due to his lack of experience: "Mr. Walker does not presently have the requisite trial or litigation experience or its equivalent."[1] The ABA noted that "Mr. Walker's experience to date has a very substantial gap, namely the absence of any significant trial experience. Mr. Walker has never tried a case as lead or co-counsel, whether civil or criminal."[2] Yet, after a mere six months as a district court judge, President Trump is already seeking to elevate him the to the D.C. Circuit, which many consider to be the second most powerful court in the nation.[3]

In the few short months Judge Walker has been on the district court, he has not had time to gain sufficient experience to qualify him for his current position, let alone enough experience to earn a promotion to the D.C. Circuit. He has not even presided over a trial that has gone to verdict or judgment. He has managed, however, to attract significant negative attention from legal experts, on both the right and left, for his opinion in *On Fire Christian Center v. Fischer*[4]—a case in which he granted a temporary restraining order to ensure that a church could hold drive-in church services during the global COVID-19 pandemic. Judge Walker's handling of this case reveals that he lacks the experience and judicial temperament necessary to serve on the D.C. Circuit and holds a troubling view of religious freedom.

As explained by Josh Blackman, Cato Scholar and Associate Professor of Law at the South Texas College of Law Houston, Judge Walker "made numerous, unforced errors" in his ruling on a

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[1] Letter from Paul T. Moxley, Standing Comm. on the Fed. Judiciary, Am. Bar Assoc., to Senate Judiciary Comm. (July 30, 2019). *available at* https://bit.ly/2VVf5aw.

[2] *Id.*

[3] *See, e.g.,* John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376 (2006).

[4] *On Fire Christian Ctr. v. Fischer,* No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) (granting temporary restraining order).

motion for a temporary restraining order in *On Fire Christian Center*.[5] Judge Walker, so eager to issue an opinion, wrote a discursive 20-page decision with 86 footnotes in just short of 24 hours. Yet he failed to find time to give the Defendants, Louisville Mayor Greg Fischer and the City of Louisville, the opportunity to respond to the allegations in the complaint before accepting what the plaintiffs said and using it as a platform to write an unnecessary and often ideological opinion delving into unrelated topics. Had he paused to even just hold a brief status conference by telephone before issuing his order and opinion, he likely would have learned that although the City of Louisville urged the religious community not to hold drive-in church services, it did not threaten any enforcement action against those who held such services, nor did issue an order banning such services.[6] There was no real case or controversy: Judge Walker issued an advisory opinion that barred the City from taking an action it had no intention of taking. In doing so, he grossly exceeded the powers of the federal courts under Article III of the Constitution. The *On Fire* opinion demonstrates his lack of experience or understanding of a judge's role.[7]

Indeed, Judge Walker began his the opinion with the jarring claim that, "on Holy Thursday, an American mayor criminalized the communal celebration of Easter."[8] This was factually incorrect. At the time of the opinion, the Commonwealth of Kentucky, like nearly two-thirds of the states, had temporarily suspended all mass gatherings—including those at houses of worship—to prevent the spread of COVID-19.[9] And most denominations and faiths across the country have been urging their congregations to hold online services and their congregants to stay home in order to save lives. Louisville attempted to dissuade—but did not prohibit—drive-in gatherings, because evidence showed that previous On Fire Christian Center drive-in services did not comply with social distancing rules: Instead of staying in their cars with the windows no more than half

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[5] Josh Blackman, *Courts Should Not Decide Issues that Are Not There,* Volokh Conspiracy (Apr. 12, 2020), https://bit.ly/2YAL4P1.

[6] Def.'s Mot. to Dissolve TRO at 2, 9-10, *On Fire Christian Ctr. v. Fischer,* No. 3:20-CV-264-JRW (W.D. Ky. Apr. 13, 2020), *available at* https://bit.ly/2WfWG6Z.

[7] A footnote at the end of the opinion appears to be the initials of Judge Walker and his law clerks. Attributing the opinion to his clerks, who surely assist him in researching and drafting the opinion but who are not Senate-confirmed and invested with Article III power, may demonstrate Judge Walker's lack of understanding about his role as an Article III judge. It also undermines the role of Article III judges, suggesting that their power can be simply delegated to law clerks. The footnote follows a statement about On Fire's beliefs regarding Easter, which does not actually use language or descriptions from the Plaintiff's pleadings. Using his own language, it reads as a deeply personal statement of beliefs, even using a first-person plural pronoun. Placed where it is in the opinion, the footnote could be read to associate the judge and his clerks with the statement of beliefs about Easter.

[8] *See* Walter Kim & Timothy Dalrymple, To Cancel or Not to Cancel: That is the Question, Christianity Today, Mar. 23, 2020, https://bit.ly/3f7qhIp ("canceling in-person worship services is not the same as canceling worship."); Auburn Seminary, Petition: We Commit to #FaithfulDistance! https://bit.ly/2SrE9n6 ("We now have an obligation to act to mitigate the worst impacts of the global COVID-19 pandemic. This obligation includes canceling large group gatherings and encouraging community members to stop unnecessary travel and stay at home."); Br. of Kan. Interfaith Action as Amicus Curiae in Support of Def., *First Baptist Church v. Kelly*, Case 6:20-cv-01102-JWB-GEB (D. Kan. Apr. 21, 2020), *available at* https://bit.ly/2Sssl4a ("no one's right to worship is being limited; only their ability to gather physically is affected. The pandemic is an extenuating circumstance that calls on people of faith to accept temporary limitations on public worship that would be unacceptable in normal circumstances. But these are not normal circumstances, and we are willing to accept a temporary inconvenience for a greater good—the life and health of our congregants and our communities.").

[9] *See e.g.* Ala. Amended Order of the State Health Officer (Apr. 3, 2020); Ga. Exec. Order 04.02.20.01 (Mar. 23, 2020); Idaho Dep't of Health and Welfare Order of the Director (Apr. 15, 2020); Ind. Exec. Order 20-18 (Apr. 6, 2020); Iowa Proclamation of Disaster Emergency (Apr. 6, 2020); La. Proclamation No. 41 JBE 2020 (Apr. 2, 2020); Mo. Dep't of Health and Senior Servs. Order (Apr. 3, 2020); Neb. Directed Health Measure Order 2020-10 (Apr. 10, 2020); N.C. Exec. Order No. 121 (Mar. 27, 2020); Okla. Exec. Order 2020-13 (Apr. 8, 2020); S.C. Exec. Order 2020-13 (Mar. 22, 2020); Tenn. Exec. Order 17 (Mar. 22, 2020).

open, their drive-in services[10] included "gathering within six feet of each other, elbow bumping, dangerously hanging out of car windows, and passing the collection basket."[11]

In addition, the *On Fire* opinion reflects Judge Walker's troubling view of religious freedom. He veers far from the claims made by On Fire Christian Center in order to express his views on a wide variety of religious freedom cases, and in so doing prejudged issues that would likely come before him on the D.C. Circuit. Despite their irrelevance to the legal question presented in the case before him, Judge Walker begins the opinion by reciting incidents of religious persecution, starting in 64 CE. Then he appears to suggest that plaintiffs in recent cases—such as businesses that claim they are entitled to religious exemptions from nondiscrimination laws that protect LGBTQ people and the Plaintiff in this case—are suffering akin to Christians who were persecuted under Nero, to African-American slaves who were flogged for attending Christian services, and to the Latter Day Saints driven into Utah by "[m]urderous mobs."[12]

He goes on to describe recent cases in an overwrought—and inaccurate—way:

- He describes the birth control benefit in the Affordable Care Act, which ensures that most health insurance plans cover all FDA-approved methods of contraception with no co-pay, as "forc[ing] religious business owners to *buy* pharmaceuticals they consider abortion inducing";[13]
- He depicts the Department of Justice's argument that the First Amendment did not preclude the application of the Americans with Disabilities Act to a woman who taught secular subjects at a religious school, as "prohibit[ing] a church from choosing its own ministers";[14]
- He characterizes the regulation that exempts religious entities from providing insurance coverage for contraception to their employees after simply filling out a form to request the exemption, as "conscript[ing] nuns to provide birth control";[15] and
- He portrays the enforcement of a state law that prohibits businesses from discriminating against LGBTQ customers as "discrimination toward people of faith."[16]

The First Amendment includes two complementary protections: free exercise of religion and the separation of church and state. Throughout the opinion, Judge Walker demonstrates that he views the Free Exercise Clause as predominant[17] and does not account for the limitations imposed by the Establishment Clause. Separation of church and state is the linchpin of religious freedom and one of the hallmarks of American democracy. It ensures that each person has the right to choose whether to be religious or nonreligious without pressure from the government. It

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[10] *On Fire*, 2020 WL 1820249 at *6.
[11] Def.'s Mot. to Dissolve TRO at *2, *On Fire* (W.D. Ky. Apr. 13, 2020).
[12] *On Fire*, 2020 WL 1820249, at *3-*4.
[13] *Id.* at *3 (emphasis added).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Notably, he appears to describe *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) as Free Exercise Clause cases rather than cases that were decided under the Religious Freedom Restoration Act. *On Fire,* 2020 WL 1820249, at *3. This could suggest that he would disagree with Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause does not require strict scrutiny so long as the law is neutral and generally applicable. Or, it could suggest that he would take a different, yet also extraordinary position, and argue that the laws in *Hobby Lobby* and *Zubik* were not neutral and generally applicable.

safeguards houses of worship from intrusion by the government and prevents religious institutions from using the mechanisms of government to impose their religion on others. It guarantees that parents can send their children to public schools without fear that they will be coerced into participating in prayer or religious activities. It protects taxpayers from being forced to fund the religious activities and education of others. It ensures that everyone can practice their religion, so long as it doesn't harm others. And, it makes certain that all Americans feel welcome and treated equally under the law regardless of their religion.

Confirming a judge who fails to recognize the protections afforded by the separation of church and state could have real and troubling consequences for people who most need the safeguards guaranteed by the First Amendment. Judge Walker will bring his problematic views of the scope of the First Amendment to any religious freedom cases that come before the D.C. Circuit. It is also concerning that he could come to new cases without an open mind, appearing already committed to ruling according to his views that laws guaranteeing access to healthcare and nondiscrimination burden religious exercise. His hasty ruling in *On Fire* already shows a proclivity to rule based on preexisting views rather than on the facts of the case before him.

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We all deserve qualified appellate court judges who treat all the parties fairly under the law, only issue rulings on real cases and controversies, and do not prejudge or impose their own ideological views onto the case. In Judge Walker's very short six-month tenure, he has proven he is not ready to do that.

For these reasons, Americans United opposes the confirmation of Justin Walker to the United States Court of Appeals for the District of Columbia Circuit.

Sincerely,

Maggie Garrett
Vice President of Public Policy