

December 11, 2023



**SUPPORT THE CONFIRMATION OF NICOLE BERNER  
TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 240 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we write to express our strong support for the confirmation of Nicole Berner to the U.S. Court of Appeals for the Fourth Circuit. The Leadership Conference intends to include your position on the confirmation of Ms. Berner in our voting record for the 118th Congress.

Ms. Berner's impressive legal career, which includes a steadfast commitment to protecting civil rights, makes her extremely qualified to serve on the Fourth Circuit. Currently, she is a partner at James & Hoffman, P.C., where she is on full-time retainer as the general counsel of Service Employees International Union (SEIU). Prior to this, she worked as associate general counsel and deputy general counsel at SEIU. Additionally, Ms. Berner served as a staff attorney with Planned Parenthood Federation of America. She also worked as a contract legal researcher at Eli Schulman Law Offices, a visiting attorney at Yigal Arnon & Co., and as an associate with Jenner & Block LLP. Ms. Berner has worked to train future lawyers as an adjunct professor at Vanderbilt Law School. A graduate of the University of California, Berkeley, Goldman School of Public Policy at University of California, Berkeley, and Berkeley Law School, she clerked for Judge Betty Binns Fletcher for the U.S. Court of Appeals for the Ninth Circuit and Judge Thelton Henderson for the U.S. District Court for the Northern District of California. Ms. Berner's background as an exceptional lawyer with experience on a wide variety of complex legal matters makes her a perfect choice for this position.

Ms. Berner has spent much of her career defending and protecting the civil and human rights of all people. For example, Ms. Berner was a staff attorney for Planned Parenthood Federation of America, protecting the rights of those seeking access to safe reproductive health care. She also has worked for SEIU since 2006, where she currently serves as general counsel. In this role, Ms. Berner is tasked with supervising all legal activities of the union, which includes advising on the large number of cases brought by SEIU and their local affiliates on behalf of union members and overseeing the work of SEIU attorneys, as well as the more than 200 outside counsels who assist with SEIU's substantial caseload. Ms. Berner has worked on issues like collective bargaining and treating unfair labor practices, and she has litigated numerous complex cases herself on behalf of SEIU at both the state and federal levels, as well as in front of administrative courts and the National Labor Relations Board, with many cases moving through multiple enforcement bodies. She has protected the rights of workers on many issues, including the right to engage in protected union activity without fear of retaliation. For example, she successfully represented janitorial workers who had been discharged by their employer for picketing against low wages and unsafe

working conditions.<sup>1</sup> In addition to the substantial litigation responsibilities Ms. Berner is tasked with, she has also drafted or supervised numerous amicus briefs filed on behalf of SEIU in many important cases that intersect with workers' rights, including on issues like education,<sup>2</sup> health care,<sup>3</sup> immigration,<sup>4</sup> and voting rights.<sup>5</sup> Ms. Berner's experience representing working people is incredibly rare in our federal judiciary, especially on our appellate courts, which are entrusted with interpreting laws and issuing decisions that deeply impact the lives of all people — including working people. It is important that our courts have more judges who possess the kind of experience that Ms. Berner will bring to the Fourth Circuit.

Ms. Berner has also defended the rights of LGBTQ people, starting with her own family. When Ms. Berner and her then-wife, Ruti Kadish, moved to Israel from California with their son in 1998, Ms. Berner fought to have her adoption of their son acknowledged by the Israeli government.<sup>6</sup> The two women took their case to the Supreme Court of Israel and achieved a historic win, making their son the first child in Israel to have two legally recognized mothers.<sup>7</sup> Ms. Berner and Ms. Kadish's pursuit of justice for their family paved the way for the protections that all families deserve but have long been denied to LGBTQ people. Additionally, during her time as an associate with Jenner & Block, she was part of the litigation team for the landmark case *Lawrence v. Texas*.<sup>8</sup> The Supreme Court held that a Texas law prohibiting same-sex couples from engaging in certain consensual, adult sexual activities was unconstitutional — a huge victory for the LGBTQ community that paved the way for future LGBTQ protections as well as for other civil rights issues related to the right to privacy. Additionally, while at SEIU, Ms. Berner has either authored or overseen the writing of amicus briefs for every major LGBTQ rights case that the Supreme Court heard during that period, often using real world examples of the hardships experienced by LGBTQ people as a result of discriminatory laws.<sup>9</sup> Ms. Berner's personal and professional experience pursuing equality for LGBTQ people is crucial experience that is also needed on our federal courts.

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<sup>1</sup> *Service Employees International Union Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021).

<sup>2</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

<sup>3</sup> See *California v. Texas*, 141 S. Ct. 2104 (2021); *King v. Burwell*, 576 U.S. 473 (2015); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

<sup>4</sup> See *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021); *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Trump v. International Refugee Assistance Project*, 138 S. Ct. 353 (2017).

<sup>5</sup> See *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

<sup>6</sup> Deborah Sontag, [Matan Has Two Mommies, and Israel Is Talking](#), THE NEW YORK TIMES (June 4, 2000).

<sup>7</sup> Aleza Goldsmith, [Top court in Israel rules ex-Berkeley lesbians are moms](#), THE JEWISH NEWS OF NORTHERN CALIFORNIA (June 2, 2000).

<sup>8</sup> *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (June 26, 2003).

<sup>9</sup> These cases include: *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

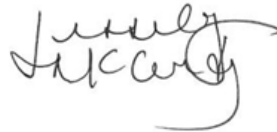
The confirmation of Ms. Berner would also mark a significant and much overdue milestone for this court. If confirmed, she would be the first openly LGBTQ judge to ever serve on the Fourth Circuit.<sup>10</sup> There are more than 14 million adults in the United States who identify as LGBTQ,<sup>11</sup> yet there have only ever been five openly LGBTQ federal appellate judges.<sup>12</sup> Further, until the 2021 confirmation of Judge Beth Robinson, no openly LGBTQ woman had ever served on our federal circuit courts.<sup>13</sup> The importance of a judiciary that reflects the community it serves cannot be overstated. Public trust in the judiciary is bolstered when our courts reflect the rich diversity of our country.<sup>14</sup> Different lived experiences, especially from underrepresented communities, bring varied perspectives to our federal courts that are crucial to improving judicial decision-making.<sup>15</sup> Ms. Berner's important lived and professional experiences would be an asset to the Fourth Circuit.

Ms. Berner is an excellent choice for this position, and we strongly urge the Senate to confirm her to the U.S. Court of Appeals for the Fourth Circuit. If you would like to discuss this matter further, please contact Lena Zwarenstejn, senior director of the fair courts program, at (202) 466-3311. Thank you for your consideration.

Sincerely,



Maya Wiley  
President & CEO



Jesselyn McCurdy  
Executive Vice President of Government Affairs

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<sup>10</sup> Rachel Weiner, [Biden nominates labor lawyer Nicole Berner to 4th Circuit](#), THE WASHINGTON POST (November 15, 2023).

<sup>11</sup> See Andrew R. Flores & Kerith J. Conron, [Adult LGBT Population in the United States](#), THE WILLIAMS INSTITUTE (November 2023).

<sup>12</sup> [Our Federal Courts Need More Openly LGBTQ Judges](#), THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (October 24, 2023).

<sup>13</sup> [Beth Robinson becomes first female LGBTQ+ appeals judge](#), WASHINGTON BLADE (November 1, 2021).

<sup>14</sup> Kate Berry, [Building a Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges](#), BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND AMERICAN BAR ASSOCIATION JUDICIAL DIVISION (2017).

<sup>15</sup> Maya Sen, [Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, Over Time](#), 2017 WIS. L. REV. 367 (2017).