May 17, 2023

Submitted Via Electronic Mail

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard J. Durbin, Chairman
United States Senate Committee on the Judiciary
711 Hart Senate Building
Washington, D.C. 20510

The Honorable Lindsay Graham, Ranking Member
United States Senate Committee on the Judiciary
211 Russell Senate Office Building
Washington, DC 20510

Re: Nomination of Michael A. Delaney to the United States Courts of Appeals for the First Circuit

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

Our organizations write to collectively oppose the nomination of Michael A. Delaney to be a United States Circuit Judge for the U.S. Court of Appeals for the for the First Circuit.

Mr. Delaney's record in private practice, as Deputy Attorney General for the State of New Hampshire, and as a volunteer member of the New England Legal Foundation's (NELF) Board of Directors demonstrates a hostility to victims' rights, reproductive rights, employee rights, and government regulation that is unsuitable for the lifetime appointment for which he is being considered.

We live in a time of unprecedented economic concentration that has led to increased prices, lower quality products and services, underinvestment, restricted access to business ownership, and harm to workers. Administrative agencies at all levels of government face an uphill battle against these forces. NELF, whose stated mission is to "challenge[] actions by governments and private litigants which would unreasonably intrude on the economic freedoms of individuals and business enterprises in New England and the nation," plays an outsized role in this battle. It

regularly submits *amicus* briefs arguing for limited government. In *West Virginia v. EPA*, NELF "decr[ied] EPA's opportunistic discovery of agency power" before the U.S. Supreme Court. In *Loper Bright Enterprises v. U.S. Secretary of Commerce*, NELF again argued against the authority of administrative agencies, this time the National Marine Fisheries Service, to fulfill their statutory mandates. In *Liu v. Securities and Exchange Commission*, NELF argued that the SEC lacked authority to obtain disgorgement of ill-gotten funds acquired through securities violations. In *Brown v. Saint-Gobain Performance Plastics Corp.*, NELF defended a plastics company accused of exposing people to a toxic chemical. Finally, in *Archer v. Grubhub Holdings*, NELF allied with the Chamber of Commerce and successfully argued for a broad application of the Federal Arbitration Act to Grubhub delivery drivers seeking compensation for state wage act violations and retaliation.

Mr. Delaney was a member of the NELF committee that vetted these amicus briefs, and that work deserves heightened scrutiny. It is fundamentally different from his paid positions at private law firms and his political appointments in the New Hampshire Attorney General's Office. At NELF, Mr. Delaney was not a paid advocate taking positions on behalf of a client. He was volunteering his time to promote a specific cause. There is no better source for Mr. Delaney's views of the law and government than uncompensated advocacy. As federal agencies like the Federal Trade Commission and the Consumer Financial Protection Bureau face constitutional challenges to their very existence, it is not difficult to surmise how he would rule from the bench of the First Circuit.

Mr. Delaney's response to Senator Hawley's written questions about monopoly power also gives us pause. When asked what market share was necessary to sustain a claim under Section 2 of the Sherman Act, Mr. Delaney stated:

> Response: In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court stated that "Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2 of the Sherman Act." *Id.* (citations omitted).

This suggests that Mr. Delaney could set a threshold of 80% or more if seated on the First Circuit, a position that is inconsistent with federal jurisprudence where a threshold market share is not even a mandatory element of monopolization claims.[1]

[1] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) ("The existence of such power ordinarily may be inferred from the predominant share of the market."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir.

The fight for reproductive rights has also taken on new importance following the Supreme Court's reversal of *Roe v. Wade* in 2022.[2] Yet Mr. Delaney's role in another Supreme Court case threatening those rights has not been fully explored. As Deputy Attorney General under Kelly Ayotte, he appeared on Supreme Court briefs submitted on behalf of the State of New Hampshire in *Ayotte v. Planned Parenthood*.[3] In responses to written questions from the Judiciary Committee members, Mr. Delaney attempted to minimize his role, stating that he did not participate in the First Circuit appeal or district court litigation and that he did not personally write the Supreme Court petition for review or appellate briefs. But he did not clarify what his role was at the Supreme Court level beyond having "discussions" with Attorney General Ayotte. Yet of the eight briefs submitted to the Supreme Court during Mr. Delaney's tenure as Deputy Attorney General, this was the only brief which bore his name. In sum, Ms. Ayotte vigorously defended a draconian law mandating parental notification for all minors' abortions with no exception for medical emergencies, and Mr. Delaney participated in some capacity. Without understanding his role in this case, the implications of confirming Mr. Delaney could be ominous indeed.

President Biden's Executive Order on Promoting Competition in the American Economy, signed on July 21, 2021, reminds us that,

> over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.

Yet granting Mr. Delaney a seat on the First Circuit would be a gift to opponents of the so-called "administrative state" and a boon to corporate power. It would pose serious threats to the rights of some of the most disadvantaged members of our economy, from women who cannot obtain reproductive health services to underpaid and overworked laborers. His nomination for a lifetime appointment to a federal appellate court in an age where these groups are under sustained courtroom attacks does not meet the moment. We have a clear picture of how Mr. Delaney views the federal government and the laws designed to protect our economy and the people of

---

2002) (finding monopoly power based on 74-77% market share); *Hewlett-Packard Co. v. Bos. Sci. Corp.*, 77 F. Supp. 2d 189, 196 (D. Mass. 1999). (70% market share sufficient to infer market power); *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 U.S. Dist. LEXIS 140251, at *36 (E.D. Pa. Sep. 28, 2012) ("a small market share is not dispositive in the presence of other factors suggesting market power").

[2] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

[3] 546 U.S. 320 (2006).

the United States. We urge the Committee to take that picture seriously and reject his nomination to one of the most powerful seats in the United States judiciary.

Sincerely,

American Economic Liberties Project
Demand Progress
Freedom BLOC
Kent Street Coalition
National Employment Law Project
People's Parity Project
Revolving Door Project
Strong Economy For All Coalition