AFJ NOMINEE REPORT

MICHAEL PARK

U.S. Court of Appeals for the Second Circuit

CONTENTS

INTRODUCTION

On November 13, 2018, President Trump nominated Michael H. Park to the Second Circuit Court of Appeals seat previously held by Judge Gerard E. Lynch, who took senior status. The Senate did not act on Park's nomination before the end of the Congress, and on January 3, 2019, his nomination was returned to the President. On January 23, 2019, President Trump renominated Park.

AFJ strongly opposes Park's confirmation for a number of substantive and procedural reasons.

Park's nomination is being advanced over the objections of both of his home-state senators, Chuck Schumer and Kirsten Gillibrand. Consistent with Senate practice for nearly a century, the Judiciary Committee should not proceed with a hearing without positive blue slips from both senators. The Congressional Research Service has not found any known instance in which a nominee has ever been confirmed over the objections of both home-state senators. As Senator Orrin Hatch said in 2014, "[w]eakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's constitutional 'advice and consent' role knows how disastrous such a move would be."

It is clear, moreover, why Senators Schumer and Gillibrand object to Park's nomination. Park is a movement lawyer who has dedicated his career to advocating for ultraconservative causes. There is nothing in his record to suggest he will be a fair, unbiased jurist should he be confirmed. His career, thus far, has fulfilled a checklist of conservative causes – advocating against voting rights and affirmative action, women's reproductive rights, tribal rights, workers, health care, consumers, and clean water.

In the past, Senate Republicans have often claimed that nominees whose records are defined by strong ideologies should be disqualified. For example, Senate Majority Leader Mitch McConnell opposed an Obama nominee whose litigation record was, in McConnell's words, "marked by ideologically-driven positions." Senator Ted Cruz opposed a Trump nominee, Mark Bennett, because his record "represents an advocacy position that is extreme." Michael Park is such a nominee.

BIOGRAPHY

Park graduated from Princeton University and Yale Law School. He served as a law clerk to then-Judge Samuel Alito on the Third Circuit Court of Appeals and then again for Alito when he became a Supreme Court Justice.[1] Park worked as an attorney at the Department of Justice Office of Legal Counsel under the Bush Administration, from 2006-08, and also worked at Dechert LLP. At Dechert, he represented Deutsche Bank AG in a civil mortgage fraud lawsuit brought by the U.S. Attorney's Office in the Southern District of New York and defended Merrill Lynch and Credit Suisse First Boston in securities actions.[2]

Park, a longtime member of the Federalist Society,[3] became a partner in 2015 at Consovoy McCarthy Park, a boutique law firm that "has become the go-to legal shop for conservative ideologues looking to fight everything from voting rights to affirmative action to abortion." The firm led the effort to erode voting rights and equal representation in *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016). The firm's founder, William Consovoy, argued to cut the Voting Rights Act in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The firm also is currently representing President Trump in a lawsuit over allegations that Trump has violated the emoluments clause of the U.S. Constitution by maintaining business interests that profit from spending by foreign countries.

CIVIL RIGHTS

Park has spent his career working to undermine civil rights. As Jon Greenbaum, chief counsel at the Lawyers' Committee for Civil Rights Under Law, said, "Michael Park has a demonstrated record of hostility to civil rights, and it is hard to imagine he would change his views as a judge."

For example, Park, on behalf of the Project on Fair Representation, is defending the Trump Administration's effort to insert a citizenship question into the 2020 census. The insertion of the citizenship question would reverse 70 years of census practice and, as the Leadership Conference on Civil and Human Rights, the Leadership Conference Education Fund, Muslim Advocates, the National Association of Latino Elected and Appointed Officials Educational Fund, the National Coalition on Black Civic Participation, and 149 other organizations wrote, would "violate[] the Census Bureau's constitutional and statutory duties to conduct a full enumeration of the U.S.

population." Former Census Bureau directors, in an amicus brief, explained: "The Census Bureau's own experts have concluded that the addition of a citizenship question is likely to compromise data quality and census accuracy by depressing response rates and introducing a differential impact on specific populations and the geographies where those populations are most concentrated."[4]

Civil rights advocates emphasized that inserting this question into the census would lead to a drastic undercount of communities of color. In its amicus brief, the Leadership Conference argued that "including a citizenship question on the 2020 census will inflict grievous harm on poor people and communities of color, with no countervailing benefit."[5]

In a lengthy opinion, Judge Jesse Furman of the Southern District of New York rebuked the Commerce Department for breaking "a veritable smorgasbord" of federal rules when it ordered the citizenship question added.[6] Judge Furman said Secretary Wilbur Ross "cherry-picked" facts to support his argument, ignored contrary evidence and kept Census Bureau experts in the dark.[7] In addition, Furman discussed Ross's false or misleading statements under oath when he attempted to defend his pretextual justification.[8]

Moreover, Park is committed to dismantling equal opportunity programs. In 2012, he served as a key contributor in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), writing an amicus brief on behalf of petitioner Abigail Fisher in support of her argument that the university's use of race as one consideration among many in the admissions process was unconstitutional.

Park is also representing the plaintiff group, Students for Fair Admissions (SFFA), that has sued Harvard University for its race-conscious admissions process. The case is considered "one of the most high-profile and controversial lawsuits designed to end affirmative action in college admissions." Civil rights activists fear the Supreme Court's conservative majority could use the case to "end the consideration of race in admissions to all universities and colleges," and ultimately "shut out large numbers of minorities from top schools."

Previously, Park also challenged affirmative action policies at the University of North Carolina in *Students for Fair Admissions v. UNC*, 319 F.R.D. 490 (M.D.N.C. 2017).

WOMEN'S HEALTH CARE

Park has a strong record of taking cases that threaten women's rights. For example, Park represented the state of Kansas in *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), after it attempted to defund Planned Parenthood and banned it from participating in the state Medicaid program. After Planned Parenthood sued, a trial court issued an injunction prohibiting the state from cutting off funding, and the Tenth Circuit affirmed. As the court said, states may not cut off healthcare providers from Medicaid "for any reason they see fit, especially when that reason is unrelated to the provider's competence and the quality of the healthcare it provides."[9]

Park co-authored the state's petition for the Supreme Court to hear the case. In December 2018, the Supreme Court denied certiorari.

Park was also involved in defending the Trump Administration's attack on the right of a young immigrant woman in government custody, Jane Doe, to access abortion care, in *Garza v. Hargan*, 304 F. Supp. 3d 145 (D.D.C. 2018). Park represented Scott Lloyd, director of the Office of Refugee Resettlement, and Stephen Wagner, head of the Administration for Children and Families at the Department of Health and Human Services. As D.C. Circuit Court Judge Patricia Millett explained in her concurrence in *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (vacated as moot), allowing Doe to access her abortion care, Doe's "capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an abortion."[10] The young woman ultimately won the case and was able to access the health care that she needed.

TRIBAL RIGHTS

Park worked on two briefs in *Sturgeon v. Frost*, advocating for a position that could lead to the elimination of federal protection of subsistence fishing rights for Alaska Natives.[11] The largest nationwide tribal organization, the National Congress of American Indians, emphasized the danger this case poses to Alaska Natives. If Park's position is adopted, as Heather Kendall-Miller, an Alaska Native and attorney with the Native American

Rights Fund, said, it "would be a death knell to us in Alaska, absolutely."

The case "raises questions about who has the authority to regulate water in national parks" in Alaska – the federal government or the state. The case arose after John Sturgeon was riding a hovercraft on a river running through a national park, when National Park Service officials threatened him with a citation for violating federal law. He sued, arguing that the Park Service had no authority over the Nation River because the State of Alaska, not the federal government, owned it. Because Alaska's constitution prohibits the state from providing preferential fishing rights to certain communities, a victory for Sturgeon would negatively transform Alaska Natives' longstanding fishing activity on the river.

In *Sturgeon v. Masica*, 2013 U.S. Dist. LEXIS 157078 (D. Ak. 2013) (subsequently named *Sturgeon v. Frost)*, the district judge held for the National Park Service. On appeal, the Ninth Circuit affirmed, 768 F.3d 1066 (9th Cir. 2014). The Supreme Court heard Sturgeon's case for the first time in 2016, holding that the Ninth Circuit misinterpreted the applicable federal statute. On remand, the Ninth Circuit held for the National Park Service on a different theory. The case is again pending at the Supreme Court, which heard oral arguments on November 5, 2018.

Environmental groups also have major concerns with Park's position in the case. As several groups wrote in an amicus brief, "[t]he authority of the Park Service over navigable waters within the parks is critical to the parks fulfilling the purposes for which they were established. . . If the Park Service did not have regulatory authority over navigable waters within the parks, [the] mandate to protect these areas would be impossible to fulfill."[12]

In another amicus brief submitted by a group of Alaska Native subsistence users, the native advocates argued,

> The importance of subsistence fishing to Alaska Native subsistence users cannot be overestimated. A ruling removing federal reserved waters from the definition of "public lands" would be a disaster for subsistence users considering "[a]pproximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent."[13]

Kendall-Miller emphasized in the *Anchorage Daily News* that if Park's position is successful, it "could abolish all Alaska Native subsistence fishing rights . . . so that one man can drive a hovercraft in a national park." She said that if the Court rules for Sturgeon,

"Alaska will be in a state of chaos when the fishing season begins. There will be lots of civil disobedience. It will be explosive." Fred John Jr., a tribal member from Mentasta, stated: "I think as soon as you back up the Sturgeon case, you're against the Native way of life. That's what the state wanted all these years, the power to take subsistence back, which is for everybody. Once they do that, we've lost everything."

IMMIGRATION

On January 25, 2017, President Trump issued an executive order titled "Enhancing Public Safety in the Interior of the United States." The order threatened to cut federal funding for local jurisdictions that Trump and then-Attorney General Jeff Sessions argued were so-called "sanctuary" jurisdictions. The city of Chicago sued, challenging the order, and the U.S. District Court for the Northern District of Illinois agreed, ruled the order unlawful, and enjoined the attorney general from enforcement. On appeal, Park filed an amicus brief on behalf of the National Sheriffs' Association, arguing the district court decisions should be reversed.

HEALTH CARE

President Trump has explicitly stated that he is looking for judicial nominees who are hostile to the Affordable Care Act (ACA). In fact, he said his "judicial appointments will do the right thing unlike Bush's appointee John Roberts on ObamaCare." Park meets Donald Trump's test in this regard, as he filed an amicus brief arguing the Affordable Care Act was unconstitutional.

Tragically, the stakes for the health and wellbeing of millions of people are all too real. Since the Republican Congress failed in its attempts to repeal the Affordable Care Act,[14] Trump is now trying to use the courts to do so. Trump's Justice Department has already attacked the law that ensures insurance companies cannot deny coverage or charge higher rates to people with preexisting conditions.[15] The legal attack Park supported would reportedly take health care away from 52 million Americans, including cancer survivors, people with diabetes, and pregnant women. As the American Medical Association and other physician groups made clear, it "would have a devastating impact on doctors, patients, and the American health care system as a whole."

WORKERS

After New York City issued an emergency order to improve work conditions for low-income nail salon workers, Park sued on behalf of salon owners, fighting efforts to protect workers.[16]

In May 2015, *The New York Times* published an exposé on the poor health, safety, and labor conditions for low-wage nail salon workers. The article detailed wage theft, physical abuse, and health consequences from toxic product exposure. Another study found that more than one-third of workers in beauty salons were paid less than minimum wage.[17]

Soon after the first *Times* article appeared, Gov. Andrew Cuomo announced a task force to inspect nail salons, and a state investigation resulted in the finding of 116 wage violations at 29 nail salons. Cuomo issued an emergency order in August of 2015 requiring salons to purchase a "wage bond," which would give workers recourse to collect funds if owners are found to pay their employees an illegally low wage. This was a requirement that "received universal support from worker advocates."

Park represented the nail salon owners in their lawsuit, which commenced in September 2015.[18] According to the court decision, the plaintiffs argued that the wage bond mandate unfairly singled out an Asian-dominated industry and was discriminatory. The *Times* reported that plaintiffs also argued that wage bonds were "not readily available" because "too few surety companies offer the wage bond and that those that do have such strict requirements — such as high personal credit scores — that the bond is out of reach for many owners."

In 2015, a court rejected this argument, finding the emergency regulation was facially neutral and bore a rational relationship to a legitimate state interest.[19] In dismissing the lawsuit, the court wrote that the state had "sufficiently demonstrated that nail salon workers are being deprived of legally due wages and that immediate adoption" of the regulation "was necessary for the preservation of the public health, safety or general welfare of nail salon workers."[20]

Also relevant are Park's efforts to make it more difficult for workers injured by asbestos to hold corporations accountable. In 2016, the New York Court of Appeals addressed the question of whether a manufacturer has a duty to warn about asbestos-containing parts

made by a third party but combined with its non-asbestos products. In this case, Crane Co. sold asbestos-laden products without providing warnings, despite its knowledge of the dangers of exposure to asbestos.[21] The plaintiffs, Ronald Dummitt, a Navy boiler technician, and Gerald Suttner, a pipe fitter at a GM plant, worked with Crane's asbestos-laden products. Both later died from mesothelioma.[22]

Park, arguing on behalf of the Chamber of Commerce on appeal, sought to reverse the juries' judgments for the plaintiffs.[23] He suggested that "is it not clear that a manufacturer is under no obligation, morally or legally, to warn of risks presented by products entirely designed, manufactured, distributed, and controlled by others [emphasis added]?"[24] He added that even if harms were foreseeable and manufacturers had an opportunity to warn, they should not have such a duty – a duty which "would not enhance scarce resources but rather would waste them."[25]

Park dismissed the legitimate concerns of Dummitt and Suttner – and numerous other Americans who have had health issues as a result of exposure to asbestos – as being pawns of trial lawyers: "[A]sbestos may be the product area where tort plaintiffs most need new industrial defendants to pay for their injuries."[26] In an endnote, he added, "Amicus does not mean to impugn Plaintiff's [sic] motives in this regard. Members of the plaintiff's bar owe a duty to pursue every plausible possibility on behalf of their clients. But in considering questions of social policy, this Court must keep its eyes open to the realities."[27]

As the New York State Trial Lawyers Association noted, "the inflexible rule" that Crane and Park "seek[] to have implemented in New York…would immunize even those manufacturers that knew of the dangers of its products and still failed to act."

On appeal, the New York Court of Appeals agreed with lower courts and found Crane liable for failing to warn customers about the danger of asbestos insulation. It articulated the following rule: "[T]he manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended."[28]

PUBLIC ZONING, HEALTH, AND SAFETY

Park has been a vigorous advocate of expanding current "takings" doctrine to second-guess local officials and to invalidate efforts by governments to address the needs and rights of its citizens. *See, e.g.* *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (rejecting Park's argument that restrictions preventing certain lots from development into building sites constituted a governmental taking without just compensation); *Leone v. Maui County*, 404 P.3d 1257 (2017) (reaffirming the right of counties to enforce regulation of coastal development against claims by one of the richest men in the county to build a single-family residence); *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal.App.5th 621 (2016) (denying review for Park's argument that provisions under the City of West Hollywood's affordable housing ordinance constitute a taking without just compensation). Park brought two of these cases pro bono.[29]

Most illustrative are Park's efforts to fight affordable housing in California. In 2010, in response to a local and regional affordable housing shortage, the City of San Jose passed a housing ordinance requiring that at least 15% of new residential development projects of 20 or more units be sold "at affordable prices."[30] The California Building Industry Association challenged the ordinance, claiming that it was an unconstitutional exaction under the Takings Clause of both the California and U.S. Constitutions.

The California Supreme Court unanimously upheld the regulation in *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974 (Cal. 2015). The court emphasized that such a restriction "is an example of a municipality's permissible regulation of the use of land under its broad police power."[31] The court noted that the purpose was to combat the overall lack of affordable housing and "to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low and moderate income households."[32] The court explained that, with rare exception, "[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property

owner's future use of his or her property."[33]

Park, pro bono, on behalf of the Cato Institute, filed a brief in support of the Building Association on appeal to the U.S. Supreme Court. He argued that "[h]owever laudable it is to construct affordable housing, the city is essentially appropriating part of the developers' property for its own uses or conditioning the issuance of permits on paying out large amounts of money" and that the "government imposes onerous conditions before allowing them to use their land."[34] The Supreme Court denied review.

Then-California Attorney General Kamala Harris made clear that the argument Park advocated would cause great harm. As she wrote:

> The rule of law at the center of this case . . . implicates the ability of state and local governments to regulate land use to balance California's continued growth with environmental and social needs. The State and local governments routinely exercise their police power by enacting legislation that addresses environmental, public health, safety and social concerns. . . The rule [the Building Association] advocates could call into question actions under all of these routine but vitally important government programs.[35]

CONSUMERS

On behalf of the Chamber of Commerce, Park fought FTC enforcement action against LabMD, a medical-testing laboratory, after the company's inadequate data security practices allowed sensitive private medical and financial data for 9,300 patients to be exposed to millions of internet users and downloaded. According to the FTC, the company had "amassed a vast store of medical and other sensitive personal information for more than 750,000 patients on its computer system." But "it systematically failed to use basic security measures to secure the data from unauthorized access." Park argued that the FTC lacked the authority to regulate cybersecurity generally or to bring actions against companies that fail to prevent sensitive information from being released in data breaches.

ENVIRONMENT

Park took an active role in challenging the Clean Water Rule, which expanded protection for two million miles of streams and 20 million acres of wetlands. The rule would have

helped ensure access to clean water for all Americans.

Park represented the U.S. Chamber of Commerce in a lawsuit against the EPA and U.S. Army Corps of Engineers seeking to overturn the Clean Water Rule. In *Nat'l Ass'n of Manufacturers v. U.S. Dep't of Def.*, 138 S. Ct. 617 (2018), he again represented the Chamber of Commerce, supporting trial court jurisdiction to hear challenges to the Clean Water Rule. Park also hosted a Federalist Society teleforum to discuss the litigation.

CONCLUSION

Throughout his career, Michael Park has worked to undermine civil rights. He has fought to include a citizenship question in the 2020 census and challenged equal opportunity programs at multiple universities. He has also worked to subvert the longstanding fishing rights of Alaska Natives, reduce access to abortion care, and protect the wealthy and powerful at the expense of workers. For these reasons, Alliance for Justice strongly opposes his confirmation to a lifetime seat on the federal bench.

ENDNOTES

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2 *Id.* at 20, 23-24.
3 *Id.* at 5.
4 Amici Curiae Brief in Support of Plaintiffs' Trial Position, Case No. 1:18-cv-2921 (Oct. 2018), at 2, available at https://www.brennancenter.org/sites/default/files/legal-work/FormerCensusDirectors_AmicusBrief_10-29.pdf.
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15 *See* Federal Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction in *Texas v. US*, available at https://www.afj.org/wp-content/uploads/2018/06/Texas-v-USA-CA.pdf.
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25 *Id.* at 17.
26 *Id.* at 9.
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32 *Id.* at 986.
33 *Id.* at 991.
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