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LEAGUE OF CONSERVATION VOTERS
NATURAL RESOURCES DEFENSE COUNCIL
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TEXAS PUBLIC INTEREST RESEARCH GROUP
VALLEY WATCH, INC. ♦ VIRGINIA FOREST WATCH
WATERKEEPERS NORTHERN CALIFORNIA
WISCONSIN FOREST CONSERVATION TASK FORCE

July 30, 2003

Re: Eleventh Circuit Lifetime Nomination of William H. Pryor

Dear Senator:

We are writing to express our strong opposition to the nomination of Alabama Attorney General William H. Pryor to a lifetime position on the U.S. Court of Appeals

for the Eleventh Circuit, which decides the fate of federal environmental and other safeguards in Alabama, Florida, and Georgia.

As detailed below, and more fully in a report by Community Rights Counsel (see www.communityrights.org/PDFs/PryorReport.pdf), Alabama Attorney General Pryor has been exceptionally aggressive in attacking the constitutionality of core national environmental safeguards. At the same time, Mr. Pryor has failed to take the enforcement action needed to bring Alabama's major corporate polluters into compliance with environmental laws. Moreover, in his oral and written responses to questions probing his environmental record, Mr. Pryor has been remarkably unresponsive. His evasive answers to questions about environmental issues heighten our concerns about his suitability for such an important court.

Mr. Pryor has been alone among the 50 state attorneys general in challenging the constitutionality of significant portions of the Clean Water Act and the Endangered Species Act. He testified before Congress that "EPA invaded the province of the States" by enforcing the Clean Air Act to prevent uncontrolled pollution increases at dirty coal-burning power plants and oil refineries (even though the pollution harms downwind States). He has also demonstrated hostility to claims of environmental injustice, stating unequivocally, "environmental racism claims should fail generally." Mr. Pryor's record indicates that, if confirmed to the circuit court of appeals, he would bring to the bench an activism on these issues that would seriously undermine decades of established federal environmental safeguards for clean water, clean air, endangered species, and environmental threats to the health of minority communities. Specifically, Mr. Pryor has:

- **Urged the Supreme Court to Strike Down Key Portions of the Endangered Species Act As Unconstitutional.** Mr. Pryor has been extremely aggressive in seeking out opportunities to advance an unjustifiably narrow view of the federal government's power to protect the environment. For example, alone among state attorneys general, Mr. Pryor urged the Supreme Court to review the Fourth Circuit's ruling in *Gibbs v. Babbitt* and declare unconstitutional federal efforts to protect wildlife on private lands under the Endangered Species Act. (The Supreme Court denied Mr. Pryor's request). The author of *Gibbs*, Chief Judge J. Harvie Wilkinson III, rejected the constitutional arguments that Mr. Pryor later advanced because they would "place in peril the entire federal regulatory scheme for wildlife and natural resource conservation" and "would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones." The other circuit courts that have considered this issue all have similarly rejected constitutional challenges to the ESA. *Rancho Viejo v. Norton* (D.C. Cir. 2003); and *GDF Realty v. Norton* (5th Cir. 2003).
- **Urged the Supreme Court to Strike Down Key Clean Water Act Safeguards as Unconstitutional.** Mr. Pryor also urged the Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. United States* to strike down federal efforts to protect waters and wetlands that provide habitat for migratory birds. Again, Mr. Pryor was the only state attorney general to file a brief arguing that the Constitution's Commerce Clause does not give Congress the authority to protect this nationally important habitat. In the same case, eight state attorneys

general filed a brief supporting federal power. The *SWANCC* Court decided the case on statutory grounds, choosing to avoid ruling on Mr. Pryor's constitutional argument.

- **Opposed Federal Efforts to Reduce Air Pollution; Supported an Environmental “Race to the Bottom.”** Environmental laws are textbook examples of cooperative federalism, with the federal government and states joining together to achieve environmental progress. Mr. Pryor rejects this cooperative federalism in favor of what he calls “competitive federalism.” Under this approach, states can race to the environmental bottom, competing for industry and tax revenue by offering ever-laxer environmental protections. To advance this notion of “competitive federalism,” Mr. Pryor has argued that states should not be accountable in court for failing to enforce minimum federal mandates. Mr. Pryor has also testified before Congress in opposition to EPA's efforts to enforce the law that requires the owners of coal-fired power plants and oil refineries to adopt modern pollution controls when they overhaul their facilities. In this testimony, Mr. Pryor charged that “EPA invaded the province of the States” by using “the blunt tool of enforcement” to carry out the pollution control requirements of the Clean Air Act. *Joint Hearing Before the U.S. Senate Committee on Environment and Public Works and the U.S. Senate Committee on the Judiciary* (July 16, 2002).
- **Failed to Compel Alabama's Corporate Polluters to Comply With Environmental Laws.** While Mr. Pryor has adamantly opposed EPA's enforcement of federal environmental laws on federalism grounds, during his tenure Alabama has been remarkably lax in enforcing critical environmental safeguards. According to a recently leaked EPA report, the most recent data (FY 2001) show that 38 percent of all Alabama “major” dischargers of water pollutants were in “significant noncompliance.” Alabama had 73 major dischargers in significant noncompliance – making it one of the worst states in the nation on environmental compliance issues. In five criteria that EPA uses to measure enforcement efforts against these “SNC” facilities, Alabama is tied with six other states by coming up short in four of these five categories (only two states were worse). *A Pilot for Performance Analysis of Selected Components of the National Enforcement and Compliance Assurance Program* (Feb. 2003).
- **Demonstrated Hostility Towards Environmental Justice.** In a published article, Mr. Pryor identifies “[his] favorite victory of the 2000 Term” as the Supreme Court ruling in *Alexander v. Sandoval* denying individuals the ability to sue under Title VI of the Civil Rights Act for enforcement of regulations that form the primary source of rights to ensure environmental justice. In a speech, Mr. Pryor's stark conclusion that “environmental racism cases should fail generally” demonstrates insensitivity to the victims of environmental injustice.

Mr. Pryor's testimony at his Senate Judiciary Committee hearing and his responses to written questions from committee members did nothing to assuage these concerns. For example, in his briefs in *Gibbs* and *SWANCC*, and in several speeches, Mr. Pryor has argued that Congress does not have authority to regulate in areas of “state

environmental primacy.”¹ Although Mr. Pryor confirmed in response to a question by Senator Edwards that he views “land use regulation and conservation of wild animals” as areas of “state environmental primacy,” he did not answer Senator Edwards’ next question: “Do you believe that the federal government has the power under the Commerce Clause to regulate in these areas?” Instead, Mr. Pryor simply cited the 1942 case *Wickard v. Filburn* for the proposition that Congress has authority to regulate activities that are “economic in nature.” This begs the question, because Mr. Pryor would not state whether or not he believes that land use and endangered species conservation are economic in nature. Indeed in his *Gibbs* brief, he argued that endangered species conservation on private lands was not sufficiently economic to justify regulation under the Commerce Clause.

Similarly, Senator Biden asked Mr. Pryor: “Do you believe that Congress, through its Commerce Clause powers, may criminalize the killing of endangered species” that “never cross state lines?” Instead of answering the question as to what he believed, Mr. Pryor cited the fact that the Fourth Circuit in *Gibbs v. Babbitt* “has held that Congress has the power to prohibit the killing of an endangered species.” The *Gibbs* ruling, of course, is not controlling authority in the Eleventh Circuit, where Mr. Pryor would sit. More importantly, Mr. Pryor signed a brief that urged the Supreme Court to overturn *Gibbs* and rule against federal authority to regulate the killing of endangered species. Mr. Pryor plainly does not believe that *Gibbs* settled Senator Biden’s question, which is of critical importance to conservationists across the country.

Finally, Mr. Pryor stated that he does not have “a judgment” on several critical issues that he has raised in his own briefs. For example, the amicus brief Mr. Pryor signed in the *Gibbs* case argued that Supreme Court review of the case was necessary because otherwise “it is inevitable that some other endangered species will find its way onto private property and cause a criminal prosecution, the derailing of a hospital project, or other injury to State and local interest.” When asked about this statement by Senator Edwards, Mr. Pryor stated that he “[does] not have a judgment” on whether federal environmental protection efforts cause injury to state and local interests. Respectfully, Mr. Pryor should not have signed an amicus brief to the Supreme Court calling such injuries “inevitable” if he had no “judgment” on the truth of the matter asserted.

Grant Woods, former Attorney General of Arizona and a Republican colleague of Mr. Pryor’s, recently told National Public Radio that he believes President Bush should “rethink” his nomination of Mr. Pryor. Mr. Woods stated that Mr. Pryor was “probably the most doctrinaire and the most partisan of any attorney general I dealt with in eight years.” These statements exacerbate our concern, based on Mr. Pryor’s record and testimony, that, if confirmed, Mr. Pryor will be unwilling or unable to decide fairly and impartially the environmental cases that will come before his court.

For all these reasons, we strongly urge you to exercise your constitutional advise-and-consent duty to oppose Mr. Pryor’s nomination to a lifetime seat on the Eleventh Circuit Court of Appeals.

¹ William H. Pryor, *Competitive Federalism in Environmental Enforcement*, Speech to the Alabama State Bar Environmental Section, June 8, 2001, at 17 (arguing “in favor of limiting the reach of the federal government through the Commerce Clause into traditional areas of state environmental primacy”).

Sincerely,

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