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The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I write to support the confirmation of my colleague Goodwin Liu to serve on the U.S. Court of Appeals for the Ninth Circuit. As leading scholars and lawyers across the political spectrum have observed, Liu is a person of outstanding intellect, unblemished character, and admirable judicial temperament. In this letter, I wish to underscore Liu's sterling qualifications and address concerns that have been raised about his writings. I do so on the basis of my close association with him over the past seven years and my unusual degree of familiarity with his record, as explained below.

The Committee is by now familiar with Liu's background as the son of immigrants, product of California public schools, Rhodes Scholar, graduate of Stanford, Oxford, and Yale Law School, and United States Supreme Court law clerk. The Committee is also aware of Liu's experience in government, law practice, and academia, and the honors and accolades he has won for his teaching and scholarship. The fact that Liu earned tenure, promotion to Associate Dean, and election to the American Law Institute—all after less than five years as a professor—speaks to the exceptionally high regard that his colleagues, both at Berkeley and the profession, have for his integrity, judgment, and legal acumen.

Liu has written extensively on constitutional law and education law and policy, and I understand that the Committee and the public will be examining his writings closely in the weeks ahead. I am concerned, however, that a small but vocal group has sought to depict Liu as a radical judicial activist by inaccurately describing his record. This caricature of Liu as someone outside the mainstream of American jurisprudence is both incorrect and unfair.

I believe I am especially qualified to offer this perspective, not only because I am one of Liu's colleagues at Boalt in the field of constitutional law, but also because I chaired his tenure committee two years ago. In that role, I undertook a detailed and comprehensive review of Liu's writings. I have spent a substantial amount of time examining his articles and book chapters, and I am very familiar with his record and with the rigorous peer evaluations of his work. This made evident to me and to my colleagues at Berkeley and beyond that Liu is a superb teacher and scholar with carefully considered and nuanced views. In addressing a wide range of issues, Liu demonstrates rigor, independence, fair-mindedness, and—most importantly for present purposes—sincere respect for the proper role of courts in a constitutional democracy.

I have been dismayed and disappointed that some commentators have portrayed Liu as a liberal extremist when his record is so plainly to the contrary. His writings indicate that he would be relatively moderate and pragmatic, and an especially fair jurist, one with a clear understanding of the limited role that courts should occupy. Indeed, when one looks across the entire body of his work in his principal area of expertise, education law and policy, it is telling that so much of it is directed at legislators and policymakers and not at courts—a reflection, I believe, of his appreciation for the appropriate limits of judicial authority. Some of the responses to Liu's nomination have misunderstood, either deliberately or otherwise, his writings. For example:

Welfare rights. Some commentators have said that Liu believes judges can and should invent constitutional rights to social welfare goods such as education, housing, subsistence, and health care. The claim is based on a 2009 law review article that Liu wrote just before earning tenure.[1]

In fact, the article makes precisely the opposite point. Liu's "conception of the judicial role does not license courts to declare rights to entirely new benefits or programs not yet in existence."[2] Welfare rights, Liu says, "cannot be reasoned into existence by courts on their own."[3] The main thrust of the article is to reject the view, advanced by legal scholars in the 1960s and 1970s, that courts can read into the Constitution a theory of distributive justice. Instead, Liu argues for "legislative supremacy" in defining welfare rights.[4] For example, he says, there is "no role for courts" to question Congress's decision in the 1996 welfare reform law to end the sixty-year-old entitlement of poor families to cash assistance.[5]

The judicial role that Liu describes in the article is a modest one. When equal protection or due process challenges have been brought to eligibility criteria or benefits restrictions in a given program, courts have ordinarily decided such cases applying rationality review. That is standard doctrine. Liu would not authorize courts to go further to declare substantive rights to programs or benefits that the legislature has not created, and he notes that "it is not the case that any legislation providing a needed welfare good instantly gives rise to a cognizable right."[6] Liu also makes clear that even when courts hear challenges to eligibility criteria or restrictions on benefits, the legislature ordinarily retains the final word.[7] As the article shows, judicial review of this sort is supported by Supreme Court precedent, and it has been embraced by Justices such as Lewis Powell, hardly a left-wing radical.[8]

Affirmative action. Other commentators have said that Liu believes racial quotas are permissible and even required under the Constitution and that judges should remedy societal discrimination regardless of the duration of the remedy or its effects on innocent people. These claims are simply untrue.

Liu's writings consistently affirm the Supreme Court doctrine that racial classifications for whatever purpose are highly suspect under the Equal Protection Clause.[9] His writings on affirmative action focus on university admissions, and his views are largely consistent with existing precedent. In particular, Liu's writings affirm the unconstitutionality of racial quotas, the need for individualized review of every applicant, and the requirement that affirmative action have a termination point.[10]

Liu has disagreed with current doctrine insofar as he believes that affirmative action may be used to remedy societal discrimination.[11] But that view is hardly radical, putting Liu in the company of people like Richard Nixon, Gerald Ford, and Colin Powell. Moreover, I have no doubt that Liu, if confirmed, would set aside his own view and follow Supreme Court precedent on this as well as any other issue.

Liu has written that "affirmative action is not unqualifiedly good, nor is it unqualifiedly bad."[12] Even as he has lauded the increasing diversity of our top universities, he has recognized the risk that affirmative action may improperly stereotype minority and non-minority persons.[13] He has repeatedly affirmed that affirmative action must not unduly burden innocent individuals, exactly as current law instructs.[14] And he has called attention to the fact that affirmative action is not a policy that does much to help low-income students of all races.[15] These views do not put Liu outside the mainstream.

Capital punishment. Some commentators have said that Liu is hostile to the death penalty. But nowhere in Liu's record has he ever questioned the morality or constitutionality of the death penalty. The claim is apparently based on a 2005 paper by Liu and a co-author that raised concerns about then-Judge Samuel Alito's opinions on the Third Circuit rejecting claims of legal error in four capital cases.[16] In one, Judge Alito's view was reversed by the Supreme Court.[17] In another, his view was reversed by his own court.[18] In a third, Judge Alito's dissenting position was rejected by a panel majority of two judges, both former federal prosecutors appointed to the bench by President Reagan.[19] In only one of the four cases did Judge Alito's view prevail.[20] Because Liu's concerns in each case were shared by many other judges, both Republican and Democratic appointees, it is clear that Liu's 2005 paper does not make him an outlier on this issue.

School desegregation. Some commentators have said that Liu supports racial quotas in the assignment of students to public schools. The claim is based on a 2005 article in which Liu and his co-author urge school choice, including vouchers, to foster racial diversity in public schools.[21]

I am unable to find any language in this article—or any other article he has written—indicating that Liu supports racial quotas. The 2005 article proposes federal and state funding incentives to reward charter schools that "reflect the racial and socioeconomic diversity of the metropolitan area ... where they are located."[22] In this regard, Liu's views are similar to those of Justice Kennedy, whose opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) said that "having classrooms that reflect the racial makeup of the surrounding community" is one of "our highest aspirations" and that "achiev[ing] a diverse student population" in K-12 schools is a compelling interest under the Equal Protection Clause.[23] Further, Liu's 2005 article makes clear that metropolitan demographics do not define rigid quotas for school enrollments; they are instead flexible goals that permit variation.[24] In the higher education context, the Supreme Court has held that such flexibility is a key factor that distinguishes a permissible admissions policy from an impermissible quota.[25] In short, Liu's proposal, whatever its merits, is certainly not radical or extreme.

Constitutional interpretation. Other commentators have expressed concern that Liu believes that judges should look to "evolving norms and social understandings" in interpreting the Constitution. In the book, *Keeping Faith with the Constitution*, Liu and his co-

authors write that "fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society."[26]

Of course, there is no true "answer" to whether this view is correct. But one thing is clear: Liu's interpretive approach is part of mainstream legal thought, at least as much as originalism is. Disagreements over how the Constitution should be interpreted are familiar and unlikely ever to be resolved; the debate itself is part of our legal tradition. Though not without the inherent limits of any method of constitutional interpretation, Liu's position reflects the statements and practices of many of our most eminent jurists, including Louis Brandeis, Benjamin Cardozo, Oliver Wendell Holmes, and John Marshall.[27] And it echoes the language of key Supreme Court precedents ending racial segregation, establishing constitutional protections against gender discrimination, and authorizing Congress to regulate the national economy.[28] These points are discussed with care and clarity in his book.

* * *

Having read Liu's writings, I do not necessarily agree with every element of his views on these issues or others. However, when evaluated against the range of ideas in contemporary Supreme Court jurisprudence, Liu's perspectives—whether one agrees with them or not—are well within the legal mainstream. Moreover, no matter what views he has taken as a scholar, I am confident that, if confirmed to the Ninth Circuit, he will not seek to enforce his views as law. Rather, to the extent that any person can predict the future, I feel assured that he will faithfully discharge his obligation to follow Supreme Court and circuit precedent. In this regard, Liu will follow in a fine tradition of many legal scholars who have served with distinction on the federal bench.

In sum, Goodwin Liu is a judicial nominee with outstanding qualifications, an inspiring life story, and deep respect for the judiciary's limited but important role in our constitutional democracy. I urge his speedy confirmation.

Sincerely,

Jesse H. Choper

Notes

[1] Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008).

[2] *Id.* at 252.

[3] *Id.* at 247.

[4] *Id.* at 265

[5] *Id.* at 264 n.324.

[6] *Id.* at 245.

[7] *Id.* at 265 (urging "ultimate deference to legislative supremacy"); *id.* at 266 ("courts must defer to legislative judgments").

[8] *See id.* at 255-66 & n.297.

[9] *See* Goodwin Liu, Seattle *and* Louisville, 95 Cal. L. Rev. 277, 280-81 (2007) ("[R]ace-conscious school assignment is not immune to the risk of racial stereotyping and other harms associated with government decision-making based on race. Strict scrutiny ensures that those harms are minimized or avoided."); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 383 (1998).

[10] *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1102 (2002); Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. 705, 761, 762 (2004).

[11] *See* Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. at 759-63.

[12] Liu, *Causation Fallacy*, 100 Mich. L. Rev. at 1102.

[13] *See id.* at 1097-98, 1099 ("an admissions process that uses racial preferences as a means of enhancing educational diversity runs the risk of stereotyping white applicants," and "the risk of improper stereotyping ... raises valid constitutional concerns that have been recognized by the Supreme Court"); *id.* at 1100 ("in my view the assumption of inferiority [of minority applicants] fostered by racial preferences may well be the most powerful objection to affirmative action"); Liu, Seattle *and* Louisville, 95 Cal. L. Rev. at 280-81 (endorsing strict scrutiny of racial classifications because of "the risk of racial stereotyping").

[14] *See* Liu, *Causation Fallacy*, 100 Mich. L. Rev. at 1097-99; Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. at 762 (race-conscious admissions policies designed to remedy societal discrimination " 'must not unduly burden individuals who are not members of the favored racial and ethnic groups' " (citing *Grutter v. Bollinger*, 123 S. Ct. 2325, 2345 (2003))).

[15] *See* Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 Notre Dame L. Rev. 289 (2004).

[16] Goodwin Liu and Lynsay Skiba, Judge Alito and the Death Penalty (Dec. 2005), available at http://www.acslaw.org/pdf/Alito_Death_Penalty.pdf.

[17] *See id.* at 8-10 (discussing Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd*, Rompilla v. Beard, 545 U.S. 374 (2005)).

[18] *See id.* at 6-8 (discussing Riley v. Taylor, 237 F.3d 300 (3d Cir.), *vacated*, 277 F.3d 261 (3d Cir. 2001) (en banc)).

[19] *See id.* at 3-6 (discussing Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) (opinion by Cowen, J., joined by Mansmann, J.)).

[20] *See id.* at 10-12 (discussing Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc) (consolidated with *Bailey v. Snyder*)). Judge Alito's view prevailed over a dissent by four judges, including two Republican-appointed former federal prosecutors.

[21] Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791 (2005).

[22] *Id.* at 808.

[23] Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782, 797-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[24] *See* Liu & Taylor, *School Choice*, 74 Fordham L. Rev. at 809.

[25] *See* Grutter v. Bollinger, 539 U.S. 306, 335-36 (2003).

[26] Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, Keeping Faith with the Constitution 25 (2009).

[27] *See id.* at 26-28 (quoting Justice Brandeis), 71-72 & n.31 (quoting Justice Cardozo), 1 (quote Justice Holmes), 3 (quoting Chief Justice Marshall).

[28] *See id.* at 47-72.