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June 19, 2019

Clerk, Northern District of Texas
United States District Court
1100 Commerce Street, Room 1452
Dallas, Texas 75242

Re: Randy Ethan Halprin v. Lorie Davis, Director, Texas Department of Criminal Justice; Case No. 3:19-cv-1203; In the U.S. District Court for the Northern District of Texas

ADL (“Anti-Defamation League”), one of the nation’s leading anti-hate organizations, files this letter brief in support of Petitioner Randy Ethan Halprin’s habeas petition to:

- provide historical context for the blatantly anti-Semitic terms and phrases attributed to the presiding judge in Mr. Halprin’s criminal and capital trial, Judge Vickers Cunningham and,
- emphasize the substantial danger to our justice system of having racially or religiously biased judges presiding over criminal trials as appears to have happened in this death penalty case.

Before addressing these points, we provide the following background information about ADL and a brief history of anti-Semitism.

I. Statement of Interest

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, ADL’s timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, ADL continues to fight all forms of hate with the same vigor and passion. ADL is very often the first call when acts of anti-Semitism occur. A global leader in exposing extremism, delivering anti-bias education and fighting hate online, ADL’s ultimate goal is a world in which no group or individual suffers from bias, discrimination or hate.

II. History of Anti-Semitism

Anti-Semitism refers to prejudice and discrimination that is directed toward Jews. Anti-Semitism can be based on stereotypes or myths that target Jews as a people as well

as their religious practices and beliefs.¹ Historically, what began as ethnic prejudice and religious polemic evolved into a systematic policy of political, economic, and social isolation, exclusion, degradation, and attempted annihilation. This prejudice takes many forms and manifests itself, for example, as religious teachings that proclaim the inferiority of Jews or political efforts to isolate, oppress, or otherwise injure them.

The term “anti-Semitism” was coined in 1873 by Wilhelm Marr, a German political agitator, to designate the anti-Jewish campaigns underway and promote the exclusion of Jews from citizenship. Hostility toward Jews dates, however, to ancient times. It did not begin in the Nazi era, nor did it end with the close of World War II. Its persistence through the millennia speaks to the power of scapegoating a group that is defined as the “other.”

Since biblical times, manifestations of anti-Semitism have evolved and taken many forms. One of the oldest forms of bigotry in existence, anti-Semitism has persisted on account of religious intolerance, cultural misunderstanding, and centuries-old myths that have resulted in divisions among cultural and religious groups and, in the most extreme cases, the loss of lives, families, and communities.

At the time of ADL’s founding in 1913, the American Jewish community faced rampant anti-Semitism and overt discrimination. Books, plays, and, above all, newspapers depicted Jews with crude stereotypes. Against this backdrop of bigotry and intolerance, an attorney from Chicago, Sigmund Livingston, proposed an aspirational idea—to create an organization with a mission “to stop the defamation of the Jewish people, and to secure justice and fair treatment to all...” ADL was founded with the clear understanding that the fight against one form of prejudice could not succeed without battling prejudice in all forms. This understanding has compelled ADL to speak out against all forms of hate and to support legal, political and educational initiatives to counter prejudice.

It was an event in Georgia that served as confirmation of the need for an organization to combat anti-Semitism. In 1913, Leo Frank, a Jewish businessman who moved to Atlanta to manage his family's pencil factory, was convicted of the rape and murder of a 13-year-old female employee following a trial that was defined by anti-Semitism. Sensational newspaper editorials planted anti-Semitic tropes about the accused, claims were made that a key witness said, “the damn Jew, they ought to hang him,” and, before the trial began, a juror allegedly exclaimed, “I am glad they indicted the God damn Jew. They ought to take him out and lynch him, and if I get on that jury I’ll hang that Jew, sure.” The jury found Frank guilty in less than two hours. Georgia’s governor, recognizing

¹ ADL, *A Brief History of Anti-Semitism*, <https://www.adl.org/media/4585/download>, last reviewed June 13, 2019.

that the trial had been tainted, then reduced Frank's death sentence to life in prison despite intense public pressure, intimidation and threats.

Two years after his conviction, a hate-filled mob—which included many influential community leaders—dragged Frank from his prison cell and lynched him. The trial and lynching demonstrated that America was not immune from many of the historic stereotypes and conspiracy theories about Jews that had characterized European life for centuries.²

After the Holocaust when the world witnessed the atrocities of Nazi Europe and the resulting death of six million Jews, anti-Semitism became far less accepted publicly. Seeing what anti-Semitism could cause made peoples and nations ashamed of openly expressing anti-Semitism. As the decades have passed, memories have faded, and many of these inhibitions have weakened.

In recent years, there has been a disquieting upsurge of anti-Semitism around the world, including in the United States. From bigoted jokes and slurs uttered in school halls to physical assaults and the desecration of Jewish synagogues and cemeteries, anti-Semitism still manifests in many forms and instills fear in any community. One of the most disturbing recent examples of anti-Semitism in this country was the alt right “Unite the Right” rally in Charlottesville, Virginia, in August 2017, where hundreds of marchers threw Nazi salutes, waved swastika flags and shouted, “Jews will not replace us,” and “Sieg Heil,” a German phrase that translates to “Hail Victory.”

The Frank affair still resonates. Unfortunately, as we have seen in the recent tragic shootings in Pittsburgh, PA and Poway, CA, anti-Semitism is still disturbingly pervasive and age-old charges, stereotypes and biases are still alive. Indeed, ADL's most recent audit of anti-Semitic incidents recorded 1,879 incidents in the United States, the third highest number in the past four decades.

III. Judge Cunningham's statements reflect classic and deeply-ingrained Anti-Semitism.

ADL has reviewed the Petition for Writ of Habeas Corpus and supporting exhibits in this proceeding. (D.E. 58, D.E. 58-1.) Among these exhibits are declarations signed by Tammy McKinney (D.E. 58-1, Ex. 9) and Amanda Tackett (D.E. 58-1, Ex. 17) testifying as to Judge Vickers Cunningham's repeated use of terms such as “fuckin' Jew” and “goddamn kike” (D.E. 58-1, p. 33, Ex. 9, ¶¶ 13, 16.) Judge Cunningham reportedly also claims that Jews “needed to be shut down because they controlled all the money and all the power” (D.E. 58-1, p. 71, Ex. 17, ¶ 9.) He also repeatedly refers to individuals simply as a/the “Jew,” such as when he referred to Mr. Halprin as “the Jew” (D.E. 58-1, p. 72, Ex.

² It was not until decades later, at ADL's urging, that the State of Georgia issued Frank a posthumous pardon.

17, ¶ 15) or when he said he received a check from a “Jew” (D.E. 58-1, p. 72, Ex. 17, ¶ 16.). These statements reflect classic anti-Semitism.

Use of the term “kike” as a pejorative for Jew is documented at least as early as 1919 in journalist and linguist H.L. Mencken’s multi-volume work on spoken American English.³ The term’s continued usage is reflected in the decision of the editors of the Oxford English Dictionary to include the term in its 1961 supplement.⁴ Today the term “kike” continues to exist alongside other anti-Jewish pejoratives, such as “hymie,” “heeb,” and “Shylock.” Like many other ethnic or religious epithets, the term “kike” has no singular definition but, rather, encapsulates and invokes the full range of anti-Semitic stereotypes, including beliefs that Jews are cheap, untrustworthy, conniving, powerful, rich, grasping, and malevolent toward non-Jews.

The longstanding opprobrium that Jews faced throughout history caused the term “Jew” itself to accrue some anti-Semitic connotations in the early 20th century when records indicate that some Jews preferred to be referred to as Hebrews.⁵ Although the term “Jew” has lost some of those negative connotations, to this day, many individual Jews are uncomfortable being referred to as “a Jew” and prefer the use of the term as an adjective (as in “a Jewish person”).⁶ To be sure, this is a matter of taste, but there can be no doubt that Judge Cunningham’s use of the term “Jew,” as described in the exhibits, indicates that he uses the term in its old, unreconstructed sense. Indeed, the fact that he sometimes attaches an overt negative qualifier to the term “Jew” (as in his repeated use of the term “fuckin’ Jew”) underscores the fact that the animus that he expresses toward the individual person whom he is addressing at the moment is deeply enmeshed with the negative attitude he already feels toward the group as a whole.

Judge Cunningham’s claim that Jews “needed to be shut down because they controlled all the money and all the power” (Ex. 17, ¶ 9) is a simplified version of two classic conspiratorial anti-Semitic beliefs. “All the money” sums up the belief, which has existed since the Middle Ages when Christianity forbade the lending of money, that Jews control the organs of international finance, including banks, and that they make loans and manipulate monetary policy to advance an agenda that advances an alleged Jewish plot to undermine Western nations and enrich and empower themselves. In the case of the United States, this belief frequently includes the allegation that Jews control the Federal Reserve.

³ H.L. Mencken, *The American language; an inquiry into the development of English in the United States* (New York: Knopf, 1919), p. 333.

⁴ Leo Rostein, *The Joys of Yiddish* (New York: McGraw Hill, 1968), p 179.

⁵ Mencken, 131.

⁶ Mark Oppenheimer, “Reclaiming ‘Jew’”, New York Times, April 23, 2017, p SR11.

Judge Cunningham's reference to Jews controlling "all the power" may be an extension of his belief about Jewish control of finance but also may incorporate anti-Semitic beliefs about Jewish control of other industries and entities of influence, including Hollywood, publishing and the news media, academia, and even governments. Again, allegations of Jewish control of these industries and entities are intended to support the conspiratorial, anti-Semitic contention that Jews are attempting to enrich and empower themselves and manipulate non-Jews to render the non-Jewish population submissive and powerless to stop a poorly-defined Jewish agenda.

It would be fair to question Judge Cunningham's objectivity about Jews if he made even one of the statements about them attributed to him by the Exhibits. Taken as a whole, his repeated references to "fuckin' Jews" and "kikes," his use of the term "Jew" as a pejorative, and his apparent belief in the anti-Semitic conspiracy theory that Jews control money and power make it impossible to avoid the conclusion that he is an anti-Semite. The fact that he called Mr. Halprin a "goddamn kike" and a "fuckin' Jew" after the trial ended (Ex. 9, ¶ 13) reinforces this conclusion.

IV. Biased judges corrode our criminal justice system and undermine public confidence in it.

Notwithstanding his clear animus toward Jewish people, Judge Cunningham presided over the criminal trial and sentencing of a Jewish defendant in a death penalty case. The judge's prejudice precluded him from being the impartial judge that the Due Process Clause requires. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

As the Supreme Court of the United States has explained, a "basic premise of our criminal justice system" is that the "law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). That premise is called into question every time a racist judge presides over the trial of an African-American defendant or an anti-Semitic judge presides over the trial of a Jewish defendant.

Not only is having a fair and unbiased judge critical to the protection of a defendant's fundamental constitutional rights, it is essential to maintaining public confidence in the criminal justice system as a whole. One of the chief goals of the criminal justice system is to "impress upon the criminal defendant and the community that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Public confidence in the integrity of the system is essential for maintaining community peace, see *Georgia v. McCollum*, 505 U.S. 42, 49 (1992), and for conferring legitimacy upon the system's outcomes. *Jerrico, Inc.*, 446 U.S. at 242 (noting the importance of both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done." (internal

citation omitted). These concerns are even stronger and more compelling in a death penalty case.

In summary, ADL fully endorses Petitioner's argument that "a judge's religious and racial prejudices are uniquely offensive to the Constitution and the legitimacy of the criminal justice system" (D.E. 58 at p. 25) and urges the Court to rule clearly and unmistakably that such prejudices have no place in our courtrooms.

Sincerely,

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