Yale Law School

DENNIS E. CURTIS · *Clinical Professor of Law*

March 26, 2018

State Senator Len Fasano
Legislative Office Building
Room 3400
Hartford, CT 06106

Dear Senator Fasano:

I am writing to you as a concerned observer of the debate over the confirmation of Justice Andrew McDonald to become Chief Justice of the Connecticut Supreme Court.

I am a Professor of Clinical Law Emeritus at Yale Law School, where I co-founded its clinical program in 1970. I have studied and taught the ethics of lawyers and judges for many years, and I have long been concerned about the manner in which we appoint and select our judges and the effect that the process has on the public's respect for the judiciary.

The conflict over Justice McDonald's nomination brings these concerns to the fore. But one aspect of the public dispute in particular has prompted me to reach out to you. In comments attributed to you in the New Haven Register (March 6, 2018), you raised concerns about Justice McDonald's conduct in citing to and discussing a study by Professor John J. Donohue III. The citation came in the concurring opinion that Justice McDonald and Justice Norcott co-authored in *State v. Santiago*, 318 Conn.

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1, 140 (2015). At least as quoted in the newspaper, your comments suggested that it was improper for Justice McDonald to refer to the study. Apparently, the concern is that because a Connecticut trial court had rejected the habeas petitioners' claims of racial disparity in the administration of the death penalty and that Professor Donohue had testified about his study at the trial, an appellate court ought not to reference the study. However, as Justices McDonald and Norcott's opinion noted, by the time they referenced the research by Professor Donohue, that study had been published in a peer-reviewed journal.

A review of Justice McDonald and Justice Norcott's concurrence in *Santiago* demonstrates (1) that the Donohue study was cited as only one of several pieces of information concerning possible racial disparity in the Connecticut death penalty system, 318 Conn. at 142-57; (2) that Justices McDonald and Norcott explained that the outcome of the habeas action (which while technically on appeal) was mooted by the majority opinion in *Santiago, id.* at 143-44; (3) that Justices McDonald and Norcott noted that the Donohue study had been published in a respected peer-reviewed journal and thus had been found methodologically credible by independent academic reviewers, *id.* at 158-59; and (4) that Justices McDonald and Norcott were not asserting a final determination that there was, in fact, racial disparity in Connecticut's death penalty system, but rather that there was a basis for legitimate concern. *Id.* at 172.

Although I understand you have not publicly stated your final position on Justice McDonald's pending nomination, I write in the hopes that the reference to the Donohue study will not be used in any way as a reason for hesitation about the nomination. There was nothing improper about this careful use of the Donohue study in a concurring opinion. Indeed, the Donohue study was cited and discussed by United States Supreme Court Justice Breyer in *Glossip v. Gross*, 135 S. Ct. 2726, 2760-61 (2015) (Breyer, J., dissenting), a capital case decided by the United States Supreme Court in June 2015 – two months before the McDonald-Norcott concurrence in *Santiago*. Justice Breyer's discussion of the study is further evidence that justices

appropriately read and engage with published scholarship on issues relevant to the case that they are deciding.

Given the time constraints, I have sent a preliminary email. This letter provides a fuller account, now scanned by email and faxed to you as well. I hope that you and those cc'd will share this letter with other Senators who may have concerns about this matter. I would be happy to discuss the issue with you if that would be useful. Thank you for your consideration.

Sincerely,

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cc: Senator Martin Looney