



June 21, 2018

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OPPOSE THE CONFIRMATION OF ANDREW BRASHER TO THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Andrew Brasher to be a U.S. District Judge for the Middle District of Alabama.

Mr. Brasher, 37, is the latest nominee who fits the profile of most Trump judicial nominees: young, white, male, and extreme. Mr. Brasher is a crusading ideologue and has devoted much of his career to attempting to restrict voting rights, LGBT equality, reproductive freedom, environmental protection, and other critical civil and human rights. He does not possess the neutrality and fair-mindedness necessary to serve in a lifetime position as a federal judge.

Worked to Restrict Voting Rights: The Senate Judiciary Committee is expected to vote on Mr. Brasher, the Solicitor General of Alabama, just a few days after the fifth anniversary of the Supreme Court's infamous *Shelby County v. Holder* decision, which gutted the Voting Rights Act. The Senate Judiciary Committee was primarily responsible for enactment and reauthorization of the Voting Rights Act and many of its current members worked extensively across the aisle to ensure its reauthorization in 2006. That meticulous congressional work was discarded by five justices on the Supreme Court when they struck down the critical preclearance provisions in the *Shelby County* decision. Mr. Brasher filed an amicus brief asking the Court to do just that. He argued that "Congress violated the Constitution" when it reauthorized the Voting Rights Act in 2006, and he asserted: "The Alabama of 2013 is not the Alabama of 1965 – or of 1970, 1975, or 1982."¹ In her *Shelby County* dissent, Justice Ginsburg refuted that argument. She wrote: "Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful §2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of §5, Alabama was found to have denied or abridged voting rights on account of race or color more frequently than nearly all other States in the Union."² Mr. Brasher's failure to acknowledge the reality of Alabama's history of voting rights violations and the protective role that the Voting Rights Act had played in places like Alabama is troubling and indicates he would not have an open mind in such critical civil rights cases.

¹ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_soa.authcheckdam.pdf.

² https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf. (internal quotations and citation omitted).

Mr. Brasher has attempted to restrict voting rights in other cases as well. In *Thompson v. Alabama*, he argued that the court should dismiss a class action suit by plaintiffs who were denied the right to vote even after completing their sentence. They were denied this right because they had committed a “felony involving moral turpitude” and could not afford to pay the fines and fees associated with their conviction. One study estimated that the law disenfranchised over 286,000 people, nearly 8 percent of Alabama’s voting age population.³ The district court judge denied Mr. Brasher’s motion (in part) and allowed the case to go forward.⁴

In *Arizona v. Inter Tribal Council of Arizona*, Mr. Brasher defended a restrictive Arizona voting rights law that required proof of citizenship when registering to vote. The Supreme Court rejected his arguments in a 7-2 decision written by Justice Scalia and struck down the Arizona law because it was preempted by the National Voter Registration Act, which only requires a registrant to assert he or she is a citizen under penalty of perjury.

In addition, Mr. Brasher has defended unconstitutional racial gerrymanders. In *Alabama Legislative Black Caucus v. Alabama*, he argued that Alabama’s consideration of race in redistricting was constitutional because it was not the predominating factor.⁵ The Supreme Court rejected this argument, stating that “there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26.”⁶ Mr. Brasher made similar arguments in *Wittman v. Personhuballah*,⁷ which the Supreme Court dismissed for lack of standing. He subsequently wrote a blog post that criticized the Supreme Court’s racial gerrymandering jurisprudence, complaining that the Supreme Court had created “a low bar for plaintiffs to show racial predominance.”⁸

Fought Against LGBT Equality: Mr. Brasher filed an amicus brief in the landmark case *Obergefell v. Hodges*, which recognized marriage equality in America. Mr. Brasher argued against the right to marriage equality, writing: “Sexual relationships between men and women – and only such relationships – have the ability to provide children with both their biological mother and their biological father in a stable family unit.”⁹ He also asserted: “Every child has an inborn nature that joins together the natures of two adults, and the child’s biological parents are uniquely positioned to show the child how to recognize and reconcile these qualities within herself.”¹⁰ The Supreme Court rejected these and other discriminatory arguments made by Mr. Brasher and conservative ideologues who sought to deny the right to marry for millions of LGBT couples.

Mr. Brasher also filed a Supreme Court amicus brief in *Elane Photography v. Willock* in which he sided with a photographer who refused to take pictures at a same-sex ceremony, in violation of a New Mexico public accommodations law. Mr. Brasher argued: “By compelling Elane Photography to photograph a same-sex commitment ceremony, New Mexico is unconstitutionally requiring the photographer to create expression with a particular viewpoint – approval, validation and celebration of the ceremony.”¹¹ The

³ https://www.al.com/news/index.ssf/2017/10/too_poor_to_vote_how_alabamas.html.

⁴ https://www.afj.org/wp-content/uploads/2018/05/Thompson-v.-Alabama_-2017-U.S.-Dist.-LEXIS-211512-1.pdf.

⁵ <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/05/13-1138-Joint-Motion-to-Affirm-ADC-final.pdf>.

⁶ https://www.supremecourt.gov/opinions/14pdf/13-895_o7jq.pdf.

⁷ <http://www.scotusblog.com/wp-content/uploads/2016/01/14-1504-tsac-Alabama.pdf>.

⁸ <http://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/>.

⁹ http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556_State_of_Alabama.pdf.

¹⁰ *Id.* (internal quotations and citation omitted).

¹¹ <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusStates.pdf>.



Court did not grant certiorari in *Elane Photography* but recently rejected such sweeping First Amendment arguments in its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

Mr. Brasher also wrote a blog post arguing against marriage equality, and he asserted that marriage was an area in which “state policymakers deserve the freedom to respectfully disagree and where societal consensus should be achieved through the ballot box instead of the courtroom.”¹²

Mr. Brasher’s hostility to LGBT equality was also demonstrated by his maximum financial contribution in 2014 to a Montana Supreme Court candidate, Lawrence VanDyke, who expressed support for LGBT conversion therapy and wrote that “homosexuals can leave the homosexual lifestyle.”¹³

Unwilling to Say *Brown v. Board of Education* Was Correctly Decided: At his nomination hearing, Mr. Brasher was asked by Senator Blumenthal if *Brown v. Board of Education* was correctly decided. Although many of President Trump’s judicial nominees have had no trouble saying that *Brown* was correctly decided, others, including Mr. Brasher, have been unwilling to do so. The refusal of nominees like Mr. Brasher to say that *Brown v. Board of Education* – perhaps the most landmark civil rights case in American history – was correctly decided, is another telltale sign of Mr. Brasher’s hostility to civil and human rights.

Attempted to Restrict Health Care Access for Women: Mr. Brasher has worked on several cases in which he sought to limit women’s access to health care and reproductive freedom. In *Eternal World Television Network v. Burwell*, he challenged the contraception coverage accommodation of the Affordable Care Act. Mr. Brasher argued that the accommodation – which permitted religious nonprofits to opt out of the contraception insurance coverage requirement by signing a short form objecting to the requirement and sending it to a third-party provider – violated the Religious Freedom Restoration Act.¹⁴ The court rejected his argument, and the Eleventh Circuit agreed that Mr. Brasher’s argument was wrong. The court stated: “We reject the plaintiffs’ claims because we conclude that the regulations do not substantially burden their religious exercise and, alternatively, because (1) the government has compelling interests to justify the accommodation, and (2) the accommodation is the least restrictive means of furthering those interests.”¹⁵

Mr. Brasher has also defended numerous state anti-abortion restrictions. In *Reproductive Health Services v. Bailey*, he defended a draconian state law that allowed minors to receive a judicial bypass for parental consent but that also allowed the judge to appoint a guardian ad litem to represent the fetus and required that the local district attorney be allowed to appear at the bypass hearing to argue against the bypass.¹⁶ A federal judge struck down the law and wrote that “the judicial bypass option is rendered meaningless if, as in Alabama’s bypass statute — which has no counterpart in any other state bypass law — parents or legal guardians can participate as parties under some circumstances, and if there are insufficient safeguards to protect the anonymity of the minor petitioner.”¹⁷

¹² <http://www.scotusblog.com/2015/01/symposium-good-faith-and-caution-not-irrationality-or-malice/>.

¹³ <http://www.rightwingwatch.org/post/right-quietly-pours-money-into-montana-hoping-to-flip-pivotal-state-supreme-court/>.

¹⁴ 26 F.Supp.3d 1228 (S.D. Ala. 2014).

¹⁵ 818 F.3d 1122, 1129 (11th Cir. 2016).

¹⁶ <https://www.afj.org/wp-content/uploads/2018/05/Brasher-brief-RHS.pdf>.

¹⁷ 268 F.Supp.3d 1261 (M.D. Ala. 2017).

In *Planned Parenthood Southeast v. Strange*, Mr. Brasher defended Alabama's Targeted Regulation of Abortion Providers (TRAP) law that required doctors performing abortion services to have admitting privileges at local hospitals. The law was struck down.¹⁸ In this case, Mr. Brasher defended a discredited so-called expert witness, Vincent Rue, who has argued that abortion leads to mental illness.¹⁹ The federal district judge was highly critical of the state's use of expert witnesses in this case,²⁰ which raises serious questions about Mr. Brasher's ability to assess issues of witness credibility, a key component of the judicial role.

In 2014, Mr. Brasher spoke at an anti-abortion rally in front of the Alabama State House. Mr. Brasher boasted that he had spent the last eight months defending Alabama anti-abortion laws against legal challenges, and he told the crowd: "The ACLU and Planned Parenthood want a fight and we will give them one."²¹ Mr. Brasher's comments make clear that he will not be impartial if he is confirmed.

Challenged Environmental Protections: Mr. Brasher has worked to undermine important federal environmental laws. In *Georgia v. McCarthy*,²² he challenged a Clean Water Act rule defining the "Waters of the United States" promulgated in 2015 by the Environmental Protection Agency and U.S. Army Corps of Engineers. The rule provided protections from pollution for small streams and wetlands, and Mr. Brasher opposed it. The Trump administration ultimately repealed the rule.

Mr. Brasher also sought to weaken the effectiveness of the Endangered Species Act ("ESA"). In *Alaska Oil & Gas v. Jewell*, he filed an amicus brief asking the Supreme Court to reverse a Ninth Circuit decision that created a critical habitat under the ESA to protect endangered polar bears in Alaska. Mr. Brasher wrote: "Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity."²³ The Court denied Mr. Brasher's request and did not grant certiorari. In *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, Mr. Brasher made similar arguments to the Court against ESA protections for an endangered species of frog.²⁴ The Court recently granted certiorari in the case but has not yet scheduled an oral argument.

Involved in Alabama Challenge to Census Counting of Non-Citizens: Alabama recently filed a lawsuit arguing it is unconstitutional for the Census Bureau to count non-citizens as part of the decennial census.²⁵ Although Mr. Brasher is not listed on the complaint, it was signed by a member of the state solicitor general's office, which Mr. Brasher supervises, and in response to a written question from Ranking Member Feinstein, he admitted: "I have discussed the case with employees of the Alabama Attorney General's Office. I was also in a meeting in which the litigation was discussed with the Congressman who is a co-plaintiff in the lawsuit." Mr. Brasher's involvement in this ideological lawsuit, which is in sync with the Trump administration's shameful attempt to intimidate immigrants from participating in the census process, is highly disturbing.

Ideological and Partisan Affiliations: Mr. Brasher began his legal career as a law clerk to conservative Eleventh Circuit Judge William Pryor, and he has spent most of his career working in the aggressively

¹⁸ https://www.prochoiceamerica.org/wp-content/uploads/2018/05/Andrew-Brasher_NARAL.pdf.

¹⁹ https://en.wikipedia.org/wiki/Vincent_Rue.

²⁰ 33 F.Supp.3d 1381 (M.D. Ala. 2014).

²¹ <https://www.afj.org/wp-content/uploads/2018/05/Brasher-Pro-Life-Rally.pdf>.

²² 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015).

²³ <http://www.scotusblog.com/wp-content/uploads/2016/12/16-596-cert-amicus-alabama.pdf>.

²⁴ <http://www.scotusblog.com/wp-content/uploads/2018/01/17-71-17-74-cert-tsac-alabama.pdf>.

²⁵ https://www.al.com/news/index.ssf/2018/06/alabama_lawsuit_tip_of_the_spe.html.



ideological Alabama Attorney General's office. Mr. Brasher is also a Trump administration loyalist, having served on the Trump Transition Team at the U.S. Department of Justice in 2016.²⁶

Mr. Brasher has been a member of the Federalist Society since 2003, when he joined as a first-year law student. Since 2013, he has served as the vice president of the Federalist Society's Montgomery, Alabama chapter. He has given speeches at Federalist Society events throughout the country on 16 occasions, according to his Senate questionnaire.²⁷ This out-of-the-mainstream legal organization represents a sliver of America's legal profession – just four percent – yet over 80 percent of President Trump's circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members.

Mr. Brasher has also spoken three times before the Rule of Law Defense Fund, a conservative coalition formerly chaired by Scott Pruitt that has opposed EPA regulations and Dodd-Frank. The group frequently receives donations from the Koch brothers and there have been reports that the organization received nearly \$1 million from conservative dark money groups to fight environmental regulations.²⁸ Mr. Brasher simply lacks the independence and fair-mindedness necessary to serve in a lifetime appointment as a federal judge.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Andrew Brasher to be a U.S. District Judge for the Middle District of Alabama. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

²⁶ <https://www.judiciary.senate.gov/imo/media/doc/Brasher%20SJQ.pdf>.

²⁷ *Id.*

²⁸ <https://maplight.org/story/conservative-group-led-by-epa-chief-pruitt-received-dark-money-to-battle-environmental-regulations/>.