



September 16, 2020

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## OPPOSE THE CONFIRMATION OF TOBY CROUSE TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 220 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 Toby Crouse to be a U.S. District Judge in the District of Kansas.

Mr. Crouse is a right-wing ideologue who, as solicitor general of Kansas for the past three years, has filed brief after brief attempting to undermine core civil and human rights. He has defended numerous laws and policies to restrict voting rights, LGBTQ equality, reproductive freedom, immigrant justice, and gun safety. He would be incapable of serving as a neutral arbiter, and the Senate must reject his nomination.

More broadly, rather than processing judicial nominees at this moment, the Senate should be focused on addressing the many urgent challenges that are gripping our nation – from the devastating health and economic impact of the COVID-19 crisis, to the racial reckoning over police brutality and violence, to the need to safeguard our democracy by helping fund the November election and U.S. Postal Service. The U.S. House of Representatives has passed legislation to tackle these problems, but the Senate, under Majority Leader McConnell's hyperpartisan and inept leadership, has failed to consider any of the life-saving measures passed by the House. Instead, the Majority Leader has devoted much of the Senate's time and attention to remaking the federal courts.

**Defended Discriminatory Proof-of-Citizenship Voting Law:** Mr. Crouse defended Kansas's discriminatory proof-of-citizenship law – championed by notorious vote suppression advocate and former Kansas Secretary of State Kris Kobach – that required individuals to provide documentary proof of U.S. citizenship when registering to vote. Between 2013 and 2016, the law blocked more than 35,000 Kansans from registering to vote. In 2018, a federal district judge struck down the law as a violation of the U.S. Constitution and the National Voter Registration Act, and the U.S. Court of Appeals for the Tenth Circuit affirmed that ruling earlier this year. Mr. Crouse conducted the oral argument in defense of this discriminatory law in the Tenth Circuit.<sup>1</sup>

**Sought to Restrict LGBTQ equality:** In a significant LGBTQ rights case that the Supreme Court is still deciding whether to take up, *Arlene's Flowers, Inc. v. State of Washington*, Mr.

<sup>1</sup> <https://apnews.com/543a1afac16945db82ebe04f3fb33de4>.

Crouse worked on an amicus brief on behalf of a florist that refused to sell flowers to a same-sex couple for their wedding. Mr. Crouse argued that the biased florist is an “artist” and therefore has a First Amendment right to discriminate. The notion of a First Amendment right to discriminate has been rejected by many courts for the reason the Supreme Court explained in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*: when a government entity regulates commercial conduct pursuant to a generally applicable regulation of conduct, irrespective of expression, there is no First Amendment right to exempt oneself from compliance. Moreover, Mr. Crouse’s brief made the absurd allegation that “the governmental entity here has pursued this case solely because it objects to Stutzman’s religious beliefs.”<sup>2</sup> The case had nothing to do with objecting to the florist’s religious beliefs. Rather, the state of Washington pursued the case to protect the rights of its LGBTQ residents in accordance with the state’s anti-discrimination law.

**Opposes Reproductive Freedom:** Time and again, Mr. Crouse has fought against access to contraception and abortion. He has put his far-right political agenda ahead of the right of people to make their own health care choices. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, he worked on an amicus brief on behalf of religious employers who refused to accept a carefully crafted accommodation that allowed employees access to contraception.<sup>3</sup> The position that Mr. Crouse advanced in this case – which was adopted by a sharply divided Supreme Court – resulted in approximately 126,000 people losing access to no-cost contraceptive services, which Congress had sought to provide when passing the Patient Protection and Affordable Care Act. As Justice Ginsburg noted in her dissenting opinion: “this Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer’s insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets.”<sup>4</sup>

In *Box v. Planned Parenthood of Indiana & Kentucky*, Mr. Crouse worked on an amicus brief that defended an Indiana law requiring the burial of post-abortion fetal remains and prohibiting the use of sex selection, race selection or genetic anomaly, which seeks to stigmatize those seeking abortions. Mr. Crouse’s brief included extreme and biased arguments, such as an allegation that the Indiana law “prohibits the elimination of classes of human beings through discriminatory abortion,” and that the law “requires providers to dispose respectfully of aborted unborn children, rather than dumping them as medical waste.”<sup>5</sup> The Supreme Court upheld the burial provision but rejected Mr. Crouse’s position on selective abortions.

In *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, Mr. Crouse represented Kansas in an effort to defund Planned Parenthood by terminating its Medicaid contracts, which allow Planned Parenthood clinics to provide contraception, cancer screenings, and other vital health care services to

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<sup>2</sup> [https://www.supremecourt.gov/DocketPDF/19/19-333/119021/20191015153207813\\_Arlenes%20Flowers%20v%20Washington%20Cert%20Amicus.pdf](https://www.supremecourt.gov/DocketPDF/19/19-333/119021/20191015153207813_Arlenes%20Flowers%20v%20Washington%20Cert%20Amicus.pdf).

<sup>3</sup> [https://www.supremecourt.gov/DocketPDF/19/19-431/121409/20191105124734569\\_19-431%20and%2019-454%20tsac%20States%20of%20Texas%20et%20al%20-%20refile.pdf](https://www.supremecourt.gov/DocketPDF/19/19-431/121409/20191105124734569_19-431%20and%2019-454%20tsac%20States%20of%20Texas%20et%20al%20-%20refile.pdf).

<sup>4</sup> [https://www.supremecourt.gov/opinions/19pdf/19-431\\_5i36.pdf](https://www.supremecourt.gov/opinions/19pdf/19-431_5i36.pdf).

<sup>5</sup> [https://www.supremecourt.gov/DocketPDF/18/18-483/72184/20181115122354603\\_18-483%20Brief%20of%20States%20of%20Wisconsin%20et%20al%20Supporting%20Petitioners.pdf](https://www.supremecourt.gov/DocketPDF/18/18-483/72184/20181115122354603_18-483%20Brief%20of%20States%20of%20Wisconsin%20et%20al%20Supporting%20Petitioners.pdf).

nearly 200,000 Kansas residents who receive insurance through Medicaid.<sup>6</sup> The Tenth Circuit rejected Kansas's arguments in February 2018, and Mr. Crouse then filed a certiorari petition with the Supreme Court,<sup>7</sup> which denied it.

And in another unsuccessful attempt to undermine abortion providers, *Yost v. Planned Parenthood Southwest Ohio Region*, Mr. Crouse worked on an amicus brief urging the Supreme Court to bar attorney fee awards to abortion clinics that prevailed in court at the preliminary injunction stage of litigation – but where there was no final judgment because the enjoined Ohio law was effectively overridden by an FDA determination. Mr. Crouse's attorney fee position was rejected by the U.S. Court of Appeals for the Sixth Circuit and by the Supreme Court, which denied certiorari in the case.

Mr. Crouse's position in *Yost* is troubling not only because it would limit the ability of plaintiffs to challenge unlawful abortion restrictions, but unlawful voting rights restrictions as well. Mr. Crouse's brief criticized a case, *Common Cause/Georgia v. Billups*, in which plaintiffs were awarded attorney fees when they received a preliminary injunction against a Georgia photo ID law that was halted because a federal district judge ruled it would likely unduly burden the right to vote and constitute a type of poll tax. Mr. Crouse argued that the plaintiffs in the Georgia case should not have been entitled to attorney fees because there was no final judgment, even though Georgia changed its photo ID law in response to the district court ruling declaring it unconstitutional.

As one legal commentator noted: "The [*Yost*] dispute has attracted widespread attention from Republican-led states that want to limit legal-fee awards in voting rights cases and other matters beyond abortion rights cases. The abortion fee fight is unfolding at the Supreme Court as many Republican-led states move to restrict abortion rights amid the coronavirus pandemic."<sup>8</sup> It is deeply disturbing that Mr. Crouse has been in the middle of such efforts.

**Anti-Immigrant Efforts:** Mr. Crouse has backed the Trump administration and sought to undermine immigrant rights in several of the most infamous cases of our time. In *Department of Commerce v. U.S. District Court for the Southern District of New York*, Mr. Crouse worked on a brief in support of the shameful effort by the Trump administration to place a question on the 2020 Census form that sought citizenship status information.<sup>9</sup> Mr. Crouse's brief advanced the discredited argument that the question was needed to enforce the Voting Rights Act of 1965. The Trump administration's effort was struck down in 2019 by the Supreme Court, which ruled that the citizenship question had been added on a pretextual basis in violation of the Administrative Procedure Act.

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<sup>6</sup> <https://www.plannedparenthood.org/about-us/newsroom/press-releases/supreme-court-denial-is-a-victory-for-planned-parenthood-patients>.

<sup>7</sup> [https://www.supremecourt.gov/DocketPDF/17/17-1340/39617/20180321141128195\\_Andersen%20v.%20Planned%20Parenthood%20of%20Kansas%20et%20al.\\_Petition.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1340/39617/20180321141128195_Andersen%20v.%20Planned%20Parenthood%20of%20Kansas%20et%20al._Petition.pdf).

<sup>8</sup> <https://www.law.com/nationallawjournal/2020/03/26/ohio-wants-us-supreme-court-to-reverse-legal-fee-award-in-abortion-rights-case/>.

<sup>9</sup> [https://www.supremecourt.gov/DocketPDF/18/18-557/77318/20181221123421996\\_Amicus%20Brief%20of%20Oklahoma%20et%20al.pdf](https://www.supremecourt.gov/DocketPDF/18/18-557/77318/20181221123421996_Amicus%20Brief%20of%20Oklahoma%20et%20al.pdf).

In *Department of Homeland Security v. Regents of University of California*, Mr. Crouse defended the cruel, discriminatory efforts of the Trump administration to rescind the Deferred Action for Childhood Arrivals (“DACA”) program.<sup>10</sup> Ending DACA could result in the deportation of 700,000 Dreamers, who were brought to the United States as children. The Supreme Court rejected the arguments of Mr. Crouse and the Trump administration and held that the decision to rescind DACA violated the Administrative Procedure Act.

And in *Trump v. Hawaii*, Mr. Crouse worked on an amicus brief for Kansas in support of the Trump administration’s xenophobic, nativist Muslim ban, which restricted entry into the United States to individuals residing in certain predominantly Muslim countries.<sup>11</sup> Five Justices on the Supreme Court upheld the ban, but only after it had been struck down repeatedly by lower courts and modified as a result.

**Opposes Common Sense Gun Safety Laws:** Mr. Crouse has also sought to undermine common sense gun safety laws, making extreme and irresponsible arguments about the scope of the Second Amendment. In *Kettler v. United States*, he authored a Supreme Court amicus brief arguing that silencers should have Second Amendment protection. According to the Giffords Law Center to Prevent Gun Violence: “Silencers are inherently dangerous devices that shooters can use to suppress the sound of gunfire and mask muzzle flash. These deadly accessories have been regulated effectively since the 1930s, yet the gun lobby has made concerted efforts to make it easier to buy and sell silencers. Silencers put law enforcement and the public at grave risk by making it more difficult to identify nearby gunshots and locate an active shooter, and they should not be widely available to civilians.”<sup>12</sup> The Supreme Court declined to take the *Kettler* case, leaving in place a Tenth Circuit ruling that laws requiring gun silencers to be registered do not violate the Second Amendment.

In *Pena v. Horan*, Mr. Crouse worked on a Supreme Court amicus brief challenging the constitutionality of California’s microstamping law, which requires firearms to include serial numbers on each cartridge. Microstamping permits law enforcement to match a cartridge case found at a crime scene to the purchaser of the gun, so it is a valuable crime-fighting tool. The Supreme Court declined to grant certiorari, leaving in place a Ninth Circuit ruling that affirmed the legality of the California law. Mr. Crouse’s brief also lodged a general grievance that federal courts were permitting too many restrictions on gun ownership, asserting: “In short, the Second Amendment has become the ‘Rodney Dangerfield of the Bill of Rights’—getting no respect.”<sup>13</sup> Mr. Crouse would bring a bias to the bench on gun safety issues and would not be capable of issuing impartial rulings.

**Disturbing Lack of Diversity:** Mr. Crouse possesses the three most common traits of President Trump’s judicial nominees: he is white, male, and a member of the far-right Federalist Society. President Trump’s lack of commitment to diversifying the federal judiciary continues to be deeply disturbing – he has

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<sup>10</sup> [https://www.supremecourt.gov/DocketPDF/18/18-587/113728/20190827105029429\\_Brief.pdf](https://www.supremecourt.gov/DocketPDF/18/18-587/113728/20190827105029429_Brief.pdf).

<sup>11</sup> [https://www.supremecourt.gov/DocketPDF/17/17-965/36980/20180228115013613\\_17-965%20TSAC%20Brief%20State%20of%20Texas.pdf](https://www.supremecourt.gov/DocketPDF/17/17-965/36980/20180228115013613_17-965%20TSAC%20Brief%20State%20of%20Texas.pdf).

<sup>12</sup> <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/silencers/>.

<sup>13</sup> [https://www.supremecourt.gov/DocketPDF/18/18-843/86904/20190204140832682\\_18-843%20tsac%20States%20of%20Texas%20et%20al.pdf](https://www.supremecourt.gov/DocketPDF/18/18-843/86904/20190204140832682_18-843%20tsac%20States%20of%20Texas%20et%20al.pdf) (internal citation omitted).



appointed the least diverse group of nominees in decades. Of his 56 appellate nominees, not a single one is Black, only one is Latino, and only 11 are women. His district court nominees are similarly homogenous. Our nation's great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the ultimate guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Toby Crouse to be a U.S. District Judge in the District of Kansas. 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, or Lena Zwarenstejn, Fair Courts Campaign Director, at (202) 466-3311.

Sincerely,



Vanita Gupta  
President & CEO