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The Leadership Conference

OPPOSE THE CONFIRMATION OF ANDREW BRASHER TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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 the U.S. Court of Appeals for the Eleventh Circuit.

Mr. Brasher, 38, is an ideologically extreme district court judge who was narrowly confirmed by the Senate to that position just months ago. His record was so controversial that he could not earn the support of a single Democratic senator. Time and time again, President Trump has nominated individuals like Mr. Brasher to lifetime positions on the federal bench in an effort to stack the courts with judges he believes will rubberstamp his radical agenda. Mr. Brasher is a crusading ideologue who has devoted much of his career to attempting to restrict voting rights, LGBTQ equality, reproductive freedom, environmental protection, and other critical civil and human rights. We urge the Senate to reject his elevation to the Eleventh Circuit, where his rulings would impact the 37 million residents of the three states within that circuit – Alabama, Florida, and Georgia.

Worked to Restrict Voting Rights: In 2013, in the infamous *Shelby County v. Holder* decision, five right-wing justices on the Supreme Court gutted the landmark Voting Rights Act, which had been repeatedly reauthorized by strong bipartisan majorities in Congress. Mr. Brasher filed an amicus brief asking the Court to do just that. He asserted that "Congress violated the Constitution" when it reauthorized the Voting Rights Act in 2006, and he declared: "The Alabama of 2013 is not the Alabama of 1965 – or of 1970, 1975, or 1982."[1] In a dissenting opinion, 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

[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).

role that the Voting Rights Act had played in jurisdictions like Alabama is troubling and indicates he would not have an open mind in such critical civil rights cases.

Mr. Brasher attempted to restrict voting rights in other cases as well. In *Thompson v. Alabama*, he argued that the district 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 eight 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 pre-empted by the National Voter Registration Act, which merely requires a registrant to assert he or she is a citizen under penalty of perjury.

In addition, Mr. Brasher 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 gerrymanding jurisprudence, complaining that the Supreme Court had created "a low bar for plaintiffs to show racial predominance."[8]

Fought Against LGBTQ 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 LGBTQ couples.

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[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).

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 commitment 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 Court did not grant certiorari in *Elane Photography* but 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 LGBTQ equality was also demonstrated by his maximum financial contribution in 2014 to Montana Supreme Court candidate Lawrence VanDyke, who expressed support for LGBTQ conversion therapy and wrote that "homosexuals can leave the homosexual lifestyle."[13] Mr. VanDyke has a long and troubling history of anti-LGBTQ activism, as outlined in our letter of opposition to his recent nomination by President Trump to the Ninth Circuit.[14]

Unwilling to Say *Brown v. Board of Education* Was Correctly Decided: Mr. Brasher refused to acknowledge that *Brown v. Board of Education* was correctly decided. This landmark and unanimous Supreme Court decision – handed down 65 years ago – ended legalized apartheid in America's school system and set the stage for racial integration in all facets of American life. Most of President Trump's judicial nominees have been willing to state unequivocally that *Brown* was correctly decided, but not Mr. Brasher. When asked by Senator Blumenthal at his district court hearing whether *Brown* was correctly decided, Mr. Brasher responded: "I think that commenting on whether Supreme Court decisions were correctly decided, that might be an interesting academic question, but in the context of a nominee for a judicial position, I think that would be inappropriate."[15] Nominees like Mr. Brasher who cannot bring themselves to affirm such a vital case as *Brown v. Board of Education* do not merit a lifetime appointment as a federal judge.

Attempted to Restrict Health Care Access for Women: Mr. Brasher 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.[16] The court

[11] http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusStates.pdf.
[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] https://civilrights.org/resource/oppose-the-confirmation-of-lawrence-vandyke-to-the-u-s-court-of-appeals-for-the-ninth-circuit/.
[15] https://www.judiciary.senate.gov/meetings/06/06/2018/nominations.
[16] 26 F.Supp.3d 1228 (S.D. Ala. 2014).

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."[17]

Mr. Brasher 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.[18] 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."[19]

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.[20] In this case, Mr. Brasher defended a discredited so-called expert witness, Vincent Rue, who has argued that abortion leads to mental illness.[21] The federal district judge was highly critical of the state's use of expert witnesses in this case,[22] 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. He 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."[23] Mr. Brasher's comments demonstrate that he would not be impartial on reproductive freedom matters.

Challenged Environmental Protections: Mr. Brasher worked to undermine important federal environmental laws. In *Georgia v. McCarthy*,[24] 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

[17] 818 F.3d 1122, 1129 (11th Cir. 2016).
[18] https://www.afj.org/wp-content/uploads/2018/05/Brasher-brief-RHS.pdf.
[19] 268 F.Supp.3d 1261, 1295 (M.D. Ala. 2017).
[20] https://www.prochoiceamerica.org/wp-content/uploads/2018/05/Andrew-Brasher_NARAL.pdf.
[21] https://en.wikipedia.org/wiki/Vincent_Rue.
[22] 33 F.Supp.3d 1381 (M.D. Ala. 2014).
[23] https://www.afj.org/wp-content/uploads/2018/05/Brasher-Pro-Life-Rally.pdf.
[24] 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015).

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."[25] 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.[26] The Court sidestepped those arguments and remanded the case for further proceedings.

Involved in Alabama Challenge to Census Counting of Non-Citizens: Alabama filed a lawsuit making the extreme argument that it is unconstitutional for the Census Bureau to count non-citizens as part of the decennial census.[27] 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 supervised at the time. 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."[28] Mr. Brasher's involvement in this ideological lawsuit, which mirrors 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 spent most of his career working in the aggressively 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.[29]

Mr. Brasher has been a member of the Federalist Society since 2003, when he joined as a first-year law student. For six years, he 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.[30] 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.[31] Mr. Brasher simply lacks the independence and fair-mindedness necessary to serve in a lifetime appointment as a federal judge.

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[25] http://www.scotusblog.com/wp-content/uploads/2016/12/16-596-cert-amicus-alabama.pdf.
[26] http://www.scotusblog.com/wp-content/uploads/2018/01/17-71-17-74-cert-tsac-alabama.pdf.
[27] https://www.al.com/news/index.ssf/2018/06/alabama_lawsuit_tip_of_the_spe.html.
[28] Andrew Brasher, Responses to Questions for the Record, June 13, 2018.
[29] https://www.judiciary.senate.gov/imo/media/doc/Brasher%20SJQ.pdf.
[30] *Id.*
[31] https://maplight.org/story/conservative-group-led-by-epa-chief-pruitt-received-dark-money-to-battle-environmental-regulations/.

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Lack of Home-State Senator Support: Nominating someone over the objection of home-state senators departs from past Senate tradition and subverts the Constitution's advice and consent process. As former Senator Hatch astutely observed in 2014: "Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."[32] This institutional check has never been more important than today, with a president who undermines the legitimacy of judges and their rulings, and who prioritizes personal loyalty over fealty to the law.

Alabama Senator Doug Jones has not returned the blue slip for Mr. Brasher's Eleventh Circuit nomination, and such opposition from a home-state senator traditionally would have been a bar to the nominee even receiving a Senate hearing. Senator Jones voted against Mr. Brasher's nomination in May 2019 when he was confirmed on a rare party-line vote of 52-47. Nominating Mr. Brasher for a promotion to the Eleventh Circuit under these circumstances is an affront to Senator Jones. But in their zeal to pack the federal courts with extreme, right-wing ideologues, Senate Republicans have been confirming Trump judicial nominees at a record pace and over the strong objection of the very senators elected to represent the state where the judge would preside.

When Republicans controlled the Senate during the Obama administration, they did not provide a hearing or vote to a single nominee who lacked support from both home-state senators. Under President Trump, however, Senate Republicans have employed a complete double standard and given a hearing to 17 circuit court nominees who were so extreme they could not earn the support of one or both home-state senators: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, Joseph Bianco, Kenneth Lee, Daniel Collins, Daniel Bress, Peter Phipps, Steven Menashi, Lawrence VanDyke, and Patrick Bumatay. Mr. Brasher, whose hearing has been scheduled for tomorrow, will be the eighteenth such nominee. Senate Republicans have destroyed the blue slip tradition for circuit court nominees, and future presidents and Senates are unlikely to revive it.

Disturbing Lack of Diversity: President Trump's lack of commitment to diversifying the federal judiciary is deeply disturbing. President Trump has appointed the least diverse group of nominees in decades.[33] The 18 Trump circuit court nominees listed above who have been advanced through the Senate Judiciary Committee over home-state senators' objections are all men, and 15 of the 18 are white. Of his 55 appellate nominations, none are African American. Only one is Latinx. And only 11 are women. His district court nominees are similarly nondiverse. 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 Andrew Brasher to the U.S. Court of Appeals for the Eleventh Circuit. Thank you for your consideration of our

[32] https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role.
[33] https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/.

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views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, or Lena Zwarensteyn, Fair Courts Campaign Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO