



January 14, 2020

United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way strongly opposes elevating Andrew Brasher to a seat on the Eleventh Circuit Court of Appeals.

As a threshold matter, the Senate should not be processing any lifetime judicial nominees while President Trump is under the cloud of impeachment for actions undermining the core foundation of our constitutional democracy: free and fair elections. But since Republican leadership in the Senate has chosen to proceed nonetheless, we take this opportunity to address Brasher's nomination in particular.

As background, this nomination continues two disturbing trends. First, Brasher is yet another circuit court nominee selected by this White House (and considered by the Senate) over the objection of a Democratic home state senator—in this case, Sen. Doug Jones. Second, although President Trump has had a record-breaking 50 circuit court nominees confirmed in just three years—that's one quarter of the entire active circuit court judiciary—not one of his circuit nominees has been African American.<sup>i</sup>

In 2011, Brasher chose to leave private practice at a major law firm in Birmingham to join the solicitor general's office, where his sole client would be the state of Alabama—a state well known for its hostility to voting rights, abortion rights, civil rights, LGBTQ equality, immigrant rights, and other core constitutional values. His work reflected his own extreme vision of the law and demonstrated that he was unqualified for a lifetime position at any level in our federal judicial system. Therefore, we opposed his confirmation last year to his current position as a federal judge in the Middle District of Alabama.

His scant record in the few months he has been on the bench has not given us reason to believe we were wrong, and it certainly does not warrant a promotion to an even more important and influential judicial position.

Brasher's record on voting rights was disturbing when the Senate previously considered his nomination. That record on the right upon which all others in a democracy depends must now be analyzed in a new context: Brasher has been nominated by a president who has been impeached for abuse of power in furtherance of sabotaging our country's elections.

Brasher submitted an amicus brief for Alabama in *Shelby County v. Holder*, urging the Supreme Court to gut the heart of the Voting Rights Act—the preclearance requirement. Congress had recognized preclearance as still necessary in 2006 to prevent discriminatory voting laws from going into effect. This decision was based on an enormous record of such state and local laws in the modern era. Nevertheless, in arguing that Congress had acted unconstitutionally, Brasher argued that Alabama today “is not the Alabama of 1965—or of 1970, 1975, or 1982.”<sup>ii</sup>

But no one claimed the state has not evolved at all. Brasher’s “straw man” argument does not change the fact that Section 5’s preclearance provision had prevented numerous discriminatory laws from going into effect, and that Alabama was second only to Mississippi in the number of voting laws struck down after the 1982 reauthorization as racially discriminatory under Section 2 of the Voting Rights Act.<sup>iii</sup>

The Supreme Court gutted preclearance in what history will record as one of its most infamous acts, opening the door for rampant voting discrimination. Yet at his December hearing, Brasher could not give even one example of the many discriminatory voting restrictions instituted after *Shelby County*. He also was unable to name any important recent voting rights decisions arising from Alabama or the other states of the Eleventh Circuit.

In fact, as state solicitor general, Brasher defended a racial gerrymander process that the Supreme Court subsequently struck down in *Alabama Legislative Black Caucus v. Alabama*.<sup>iv</sup> The state legislature had enacted a redistricting plan that transferred a significant portion of the black population that had previously been in majority-white districts into districts that were already majority-black, a process some have called bleaching. Brasher argued erroneously that this was necessary to comply with the then-required preclearance provision of the Voting Rights Act, a rationale the Supreme Court rejected in 2015.

Afterward, he authored an article for SCOTUSblog criticizing two subsequent racial gerrymandering cases: *Cooper v. Harris* and *Bethune-Hill v. Virginia State Board of Elections*, arguing that the Supreme Court should have made it harder for those harmed by racial gerrymandering to vindicate their rights. Specifically, he criticized the Court for not requiring plaintiffs to design and submit an alternative plan in order to get relief from a federal court.<sup>v</sup> This would be an enormous and needless hurdle. In Brasher’s December 2019 circuit court committee hearing, Sen. Coons asked why a Fourteenth Amendment claim should be contingent on a plaintiff’s ability to propose the remedy to fix unconstitutional governmental action.

Brasher gave an evasive and misleading response, saying he had been trying to make the “narrow point” that the Supreme Court has not given legislatures bright-line rules to follow. But the article was about more than that, and Sen. Coons pointed out that the nominee’s response did not address the question. When asked again in written follow-up questions, he simply restated the Court’s holding.<sup>vi</sup>

As Alabama’s deputy solicitor general, Brasher also submitted an *amicus* brief defending an Arizona law requiring proof of citizenship to vote in *Arizona v. Inter Tribal Council of Arizona*.<sup>vii</sup> The Supreme Court struck the law down for overriding federal protection provided by Congress through the National Voter Registration Act. Brasher submitted the brief not only for Alabama, but also for three other states, indicating a national leadership role in the effort.

Brasher has also defended numerous laws severely restricting women’s ability to exercise their right to abortion pursuant to *Roe v. Wade* and *Casey v. Planned Parenthood*. One particularly disturbing litigation decision illustrates his cavalier approach to the integrity of our federal court system. This occurred in a case defending a Targeted Regulation of Abortion Providers (TRAP) law similar to one subsequently struck down by the Supreme Court in *Whole Woman’s Health v. Hellerstedt*. In that case, Brasher introduced two allegedly expert witnesses that the trial judge, in striking down the TRAP law, found to be of dubious honesty. In particular, the judge concluded that one of the witnesses “displayed a disturbing apathy toward the accuracy of his testimony” and noted that his research “seemed to be driven more by a bias against abortion and a desire to inflate complication rates than by a true desire to reach an accurate estimate of the dangerousness of abortion procedures.”<sup>viii</sup> Regarding the second “expert” witness Brasher offered, the judge concluded that he “lacks judgement, is dishonest, or is profoundly colored by his bias.”<sup>ix</sup>

In his testimony to the Judiciary Committee, Brasher did not take responsibility for this. He apparently took no action to ensure his office not rely on these “experts” in the future, nor did he seek to determine how his office determined they were reliable in the first place—actions one would expect from an officer of the court who had unknowingly presented fraudulent information during a trial.

Another time Brasher showed an apparent disregard for the accuracy of the “facts” he presented to the court was in his *amicus* brief in *Obergefell v. Hodges*, arguing that same-sex couples seeking to marry fall outside the protection of the Equal Protection Clause.<sup>x</sup> In written questions for the record, Sen. Booker asked him for the empirical bases of certain dubious claims he had made to support the assertion that allowing same-sex couples to marry would harm children. Sen. Booker also asked if Brasher had been aware of the numerous studies behind the scientific consensus that there are no significant differences in outcomes for children raised by parents of the same sex versus parents of the opposite sex.

Brasher responded that because the state’s legal argument rested on the application of the “rational basis” standard:

The State’s arguments did not turn on empirical evidence, and no empirical evidence was offered in support.<sup>xi</sup>

In defending a legal system that caused enormous harm to same-sex couples and to their children, Brasher apparently did not care whether the “facts” he presented to the court were true or not. Although both the “rational basis” test and zealous representation of a client give lawyers

significant latitude in their legal arguments, attorneys should not use them as excuses to wholly untether themselves from facts.

Brasher has refused to provide any hint as to how he would approach legal questions. Senators sought to engage him in a legal discussion of key Supreme Court precedents such as *District of Columbia v. Heller*, *Burwell v. Hobby Lobby*, *Shelby County v. Holder*, and *Citizens United v. FEC*. But he stated that as a sitting judge and a circuit court nominee, “it is generally not appropriate ... to provide personal opinions about particular Supreme Court decisions or dissents from those decisions.”

Yet when asked in his QFRs about Justice Breyer’s dissent in a recent death penalty case called *Glossip v. Gross*, he stated:

When confronting a constitutional question, a court must “examine[] the Constitution’s text and structure, as well as precedent and history bearing on the question.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015). Respectfully, Justice Breyer’s opinion in *Glossip* does not meaningfully address the text, structure, history, or the original understanding of any provision of the Constitution. In fact, as noted in Justice Thomas’s separate opinion in *Glossip*, certain of Justice Breyer’s concerns are inconsistent with express textual commitments in the Constitution.<sup>xii</sup>

His willingness to engage with senators on this Supreme Court case belies his protestations about it not being appropriate to provide personal opinions about other Supreme Court rulings.

We urge senators to oppose this nomination.

Sincerely,



Marge Baker  
Executive Vice President for Policy and Program

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<sup>i</sup> “Biographical Directory of Article III Federal Judges, 1789-present,” Federal Judicial Center, <https://www.fjc.gov/history/judges/search/advanced-search>.

<sup>ii</sup> Amicus brief of Alabama in *Shelby County v. Holder*, p. 4, [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-96\\_pet\\_amcu\\_soa.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_soa.pdf).

<sup>iii</sup> *Shelby County v. Holder*, 570 U.S. 529, 582 (2013) (Ginsburg dissenting).

<sup>iv</sup> *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257.

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<sup>v</sup> Andrew Brasher, “A recipe for continued confusion and more judicial involvement in redistricting,” SCOTUSblog, May 23, 2017, <https://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting>.

<sup>vi</sup> Andrew Brasher Question For the Record (QFRs), <https://www.judiciary.senate.gov/download/brasher-responses-to-questions-for-the-record>, p. 24.

<sup>vii</sup> *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247.

<sup>viii</sup> *Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1381 (M.D. Ala. 2014).

<sup>ix</sup> Id.

<sup>x</sup> Amicus brief of Alabama in *Obergefell v. Hodges*, [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556\\_State\\_of\\_Alabama.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556_State_of_Alabama.pdf).

<sup>xi</sup> QFRs, pp. 37-38.

<sup>xii</sup> QFRs, p. 40.