



NAACP

January 13, 2020

The Honorable Lindsey Graham
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

**RE: OPPOSITION TO NOMINATION OF ANDREW BRASHER
TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I strongly urge you to oppose the nomination of Andrew Brasher to the U.S. Court of Appeals for the Eleventh Circuit. For decades, the NAACP has fought to ensure that nominees to the federal courts are diverse, fair, independent, and committed to the progress our nation has made in civil rights. Judge Brasher, appointed by Donald Trump to the Middle District of Alabama just eight months ago, fails this test in every possible way. He must not be elevated to the Eleventh Circuit.

The Senate should not even consider Andrew Brasher's nomination. The Senate should stop processing all federal judicial nominations made by an impeached president. On the day that Donald Trump was impeached by the House of Representatives, the NAACP called for a moratorium on all judicial nominations. Last week, we renewed our call and were joined by dozens of civil rights organizations.¹ We are in the middle of a constitutional crisis. The Senate is about to try the president of the United States for crimes against our democracy. Nothing is more important. Adding judges to the courts must wait.

Enabled by a Republican-led Senate, Donald Trump has already dramatically influenced the composition of the Eleventh Circuit, which covers Alabama, Georgia and Florida. In just three years, Trump has already appointed five of the twelve judges on the court. If Brasher were to be confirmed, Trump will have appointed half of this appellate bench. This has happened nowhere else in the country.

¹ Jessica Mason Pieklo, *Senate Republicans Must Stop Confirming the Judicial Nominees of an Impeached President*, REWIRE.NEWS, Jan 8, 2020, <https://rewire.news/article/2020/01/08/senate-republicans-must-stop-confirming-the-judicial-nominees-of-an-impeached-president/>

Moreover, Trump has contributed to one of the most devastating retreats in judicial diversity on any court. The Eleventh Circuit presides over the highest percentage of African-American residents of any circuit. Yet only one of its twelve judges is Black. Judge Charles Wilson was appointed by President Clinton and is now eligible to retire or take senior status. If that were to happen, this circuit court located in the Deep South would have no African-American representation whatsoever. This court is one retirement away from re-segregating.

Trump has now had six opportunities to appoint an African American to this court, and he has refused to do so each time. This has been particularly egregious in filling the two vacancies from Alabama, which has never had an African-American judge represent the state on the Eleventh Circuit. Completely ignoring this huge gap in diversity, Trump nominated two white males to the Alabama openings, Kevin Newsom and now Andrew Brasher. This is consistent with the appalling lack of diversity in Trump's judicial selections overall. Trump has not nominated a single African American to the appellate courts. His over-emphasis on white male nominees with extremist ideologies has had a devastating impact on the integrity and fairness of the judiciary.

Before his appointment to a federal trial court eight months ago, Judge Andrew Brasher spent his career as a movement lawyer with an extremist ideology. Although only 38 years old, he has amassed a long record of undermining the civil rights of communities of color, particularly in the area of voting rights, and going to battle against the rights of women, workers, and the LGBTQ community. He affirmatively sought opportunities to undermine voting rights and civil rights not only in Alabama but across the nation. He chose legal jobs which allowed him to aggressively press his personal ideological agenda and then took the most extreme positions possible. He even supported the nomination of another Trump judicial nominee to an Alabama federal court, Brett Talley, who had praised the KKK. Judge Brasher is simply unfit for service on the Eleventh Circuit.

It is patently offensive that Andrew Brasher is nominated to the very seat on the Eleventh Circuit once held by iconic civil rights judge Frank Johnson, Jr. Judge Johnson is nationally renowned for his courageous rulings to advance civil rights in the face of personal threats on his life. Among his most famous rulings, he allowed the Selma voting rights marchers to cross Edmund Pettus Bridge safely, desegregated Montgomery's buses, and enfranchised Black voters in *Gomillion v. Lightfoot*. It is simply unfathomable that Andrew Brasher would now occupy this iconic seat of justice.

OPPOSED VOTING RIGHTS

Andrew Brasher is an extreme example of Donald Trump's efforts to pack the courts with individuals who support voter suppression. Judicial selection is a central feature of this administration's assault on voting rights which is occurring on multiple fronts—from failing to enforce the Voting Rights Act to standing up a sham voter fraud commission to attempting to insert a citizenship question on the 2020 Census. As the NAACP report last summer demonstrates, many of Trump's judicial nominees have defended or enabled voter suppression.² Trump's installation of lifetime judges who will undermine voting rights will be a lasting legacy. We cannot allow Trump to further weaponize the bench to restrict the vote. These are lifetime strikes against our democracy.

² NAACP, Trump's Judicial Playbook: Weaponizing the Bench to Suppress the Vote, July, 2019, <https://naacp.org/wp-content/uploads/2019/07/WeaponizingTheBench.pdf>

Nominated to represent Alabama on the Eleventh Circuit, it is simply appalling that Judge Brasher engaged in so many aggressive efforts to oppose political participation by communities of color. Alabama is the birthplace of voting rights. Its federal courts—both district and appellate—have played a seminal role in upholding voting rights protections over the years. Today, voting rights cases continue to appear in frequent number on the Eleventh Circuit docket. Yet this is exactly where Trump wants to place Andrew Brasher, whose depth and breadth of opposition to voting rights is worse than any other Trump appellate nominee.

Andrew Brasher was on the wrong side of history when he argued to eviscerate the Voting Rights Act in *Shelby County v. Holder*.³ Brasher filed a brief in the *Shelby County* case, arguing that Congress violated the Constitution by reauthorizing Section 5 of the Voting Rights Act.⁴ Focusing exclusively on Alabama’s violent history in battling voting rights, he insulted all of us by refusing to recognize Alabama’s more recent efforts to restrict the vote: “Just as America has changed since 1965 and even since 1982, so has Alabama. Whatever race-relations issues now exist in the State, they are the same kinds of problems that every State in the Nation faces.”⁵ Brasher made the outrageous argument that Section 5 allows “the Department of Justice to discriminate between covered States.” He also invoked a States’ rights rationale by arguing that Section 5 “undermines state sovereignty in unanticipated ways.”⁶ He wrote: “Imposing these sorts of burdens on States was a necessary and appropriate exercise of emergency federal power when George Wallace was standing in a Tuscaloosa schoolhouse door and Bull Connor was turning hoses on innocent protestors on Birmingham’s downtown streets. It is not a necessary and appropriate exercise of federal power under the different conditions present today.”⁷

Astonishingly, Judge Brasher has refused to acknowledge the egregious harm caused by the *Shelby County* decision to millions of people of color residing in countless jurisdictions. At his hearing in December before the Senate Judiciary Committee, Senator Chris Coons (D-DE) asked Judge Brasher to identify an example of a discriminatory voting restriction that has been instituted after *Shelby County*.⁸ But Brasher refused to offer even one example. This constitutes a stunning response by someone applying for a position on a Deep South circuit court with a large voting rights docket, particularly at the very hearing designed to evaluate his fitness for that position. The impact of the Supreme Court’s ruling in *Shelby County*, which gutted the heart of the Voting Rights Act, has been devastating. The harm is widespread and well-documented. The U.S. Commission on Civil Rights has reported that twenty-three states have enacted newly restrictive statewide voter laws, which impose voter ID requirements, require documentary proof of citizenship to register to vote, allow voter purging, and eliminate early voting.⁹ Local measures to restrict the vote are rampant.¹⁰ According to the U.S. Commission on Civil Rights, voter suppression is at an all-time high.¹¹

³ 570 U.S. 529 (2013).

⁴ Brief of State of Alabama as Amicus Curiae Supporting Petitioner, *Shelby County v. Holder*, No. 12-96, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_soa_authcheckdam.pdf

⁵ *Id.* at 5.

⁶ *Id.* at 17, 19.

⁷ *Id.* at 19-20.

⁸ Hearing on the Nomination of Andrew Brasher to be United States Circuit Judge for the Eleventh Circuit, Senate Judiciary Committee, Dec. 4, 2019, <https://www.judiciary.senate.gov/meetings/12/04/2019/nominations>

⁹ U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report, Sept. 12, 2018, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

¹⁰ Leah Aden, NAACP LDF, Democracy Diminished, LDF’s Thurgood Marshall Institute, <https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local-Threats-to-Voting-Post-Shelby-County-Alabama-v.-Holder.pdf>

¹¹ U.S. Commission on Civil Rights, An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report, Sept. 12, 2018, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

DEFENDED RACE-BASED REDISTRICTING

At the same time he was denying Alabama's recent efforts to suppress the vote in the *Shelby County* litigation, Andrew Brasher defended the State's reliance on race in legislative redistricting. African-American state legislators had filed a lawsuit alleging that the Republican-led legislature violated the Constitution and the Voting Rights Act by redrawing the state's legislative districts by packing them into majority black districts and thereby reducing their influence in other districts.¹² Brasher argued the case before the Supreme Court, contending that Alabama's consideration of race in redrawing legislative districts was constitutional because it was not the predominant factor. He took the absurd position that Section 5 of the Voting Rights Act, which he helped gut, required lawmakers to racially gerrymander the state, by maintaining the same number of majority-minority districts with similar percentages of minority voters. U.S. District Court Judge Myron Thompson, who heard the challenge at the trial level, called this reliance on the Voting Rights Act a "cruel irony."¹³ Judge Thompson noted that, even as Alabama sought to gut Section 5, it was "relying on racial quotas... and seeking to justify those quotas with the very provision it was helping to render inert."¹⁴

The Supreme Court rejected Brasher's position. It held "there is strong, perhaps overwhelming, evidence that race did predominate as a factor" when Alabama's legislature drew the boundaries.¹⁵ On remand, one of the Eleventh Circuit's most conservative judges, William Pryor, authored an opinion ruling that 12 of Alabama's legislative districts were unconstitutional because the legislature relied too heavily on race in drawing their boundaries.¹⁶ Brasher also went out of his way to defend unconstitutional gerrymanders in Virginia in an amicus brief.¹⁷ In his personal capacity, Brasher publicly complained about the Supreme Court's rulings on legislative redistricting, lamenting that they created "a low bar for plaintiffs to show racial predominance."¹⁸

OPPOSED RE-ENFRANCHISEMENT OF PREVIOUSLY INCARCERATED INDIVIDUALS

Andrew Brasher also sought to prevent previously incarcerated persons from exercising their voting rights. Alabama is notorious for its discriminatory laws which disenfranchised anyone convicted of a felony involving moral turpitude, impacting black voting-age citizens at three times the rate of white voting-age citizens.¹⁹ In *Thompson v. Alabama*, plaintiffs challenged the felony disenfranchisement law as racially discriminatory in violation of the 14th and 15th Amendments.²⁰ It also alleged that the requirement to pay fines and fees in order to restore the right to vote amounted to a poll tax in violation of the U.S. Constitution

¹² Stephanie Mencimer, *After Gutting the Voting Rights Act, Alabama Cites It As an Excuse for Racial Gerrymandering*, MOTHER JONES, Nov. 12, 2014, <https://www.motherjones.com/politics/2014/11/alabama-supreme-court-racial-gerrymandering/>

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

¹⁶ Mike Cason, *Federal Judges Rule Alabama Must Redraw Legislative Districts*, AL.COM, Jan. 20, 2017, https://www.al.com/news/birmingham/2017/01/federal_judges_rule_alabama_mu.html?fb_comment_id=1507377399291426_1510873022275197

¹⁷ Brief of Alabama and Texas as Amicus Curiae in Support of Appellants, *Wittman v. Personhuballah*, No. 14-1504, <https://www.scotusblog.com/wp-content/uploads/2016/01/14-1504-tsac-Alabama.pdf>

¹⁸ Andrew Brasher, Symposium: A Recipe for Continued Confusion and More Judicial Involvement in Redistricting, May 23, 2017, <https://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/>

¹⁹ Anna Bodi & Danielle Lange, *Thompson v. Alabama: Addressing the Racist Roots of Felon Disenfranchisement*, ACSBlog, Sept. 30, 2016, <https://www.acslaw.org/acsblog/thompson-v-alabama-addressing-the-racist-roots-of-felon-disenfranchisement/>

²⁰ *Id.*

and the Voting Rights Act.²¹ Andrew Brasher sought to dismiss the case, but the court allowed the case to move forward.²²

WOULD REQUIRE PROOF OF CITIZENSHIP TO REGISTER TO VOTE

In a case involving voting rights outside of Alabama, Andrew Brasher went out of his way to file an amicus brief defending Arizona's Proposition 200, which required documentary proof of citizenship when registering to vote. Brasher authored the brief on behalf of Alabama and several other states, seeking reversal of the Ninth Circuit's ruling that the National Voter Registration Act takes precedence over state law.²³ Brasher argued that the Ninth Circuit decision "expands the power of a federal agency, which can now preempt validly-enacted state laws, and it unjustifiably increases the federal government's involvement in state and local elections."²⁴ The Supreme Court rejected his arguments by 7-2, in an opinion by Justice Scalia, *Arizona v. Inter Tribal Council of Arizona*.²⁵ The Court held that the National Voter Registration Act preempted Arizona law and required only that a voter attest to citizenship rather than demonstrate proof of it. The ruling affirmed the importance of Congressional power in protecting voting in federal elections at a time when states are restricting the right to vote.

SOUGHT TO EXCLUDE NON-CITIZENS FROM CENSUS

Astonishingly, Andrew Brasher also oversaw Alabama's efforts to deny non-citizens representation in congressional apportionment and electoral college determinations. The Trump administration already unsuccessfully sought to add a citizenship question to the 2020 Census, overriding longstanding practice and eliciting at least seven lawsuits,²⁶ before being rejected by the Supreme Court.²⁷ Addition of a citizenship question would certainly have chilled participation in the Census by communities of color, especially immigrant communities, resulting in lower response rates and less accurate data.

But the Solicitor General Office headed by Andrew Brasher went much further than that. It filed a lawsuit on behalf of Alabama, claiming that it is unconstitutional for the Census Bureau even to count non-citizens as part of the decennial census.²⁸ This is far more extreme than the Trump administration which sought to collect non-citizen data, but never argued against inclusion of undocumented persons in the Census itself. The Constitution requires the counting of persons in each state regardless of citizenship or immigration status. While Andrew Brasher was not listed on the complaint,²⁹ which was filed after his nomination to the federal bench,³⁰ he headed the Solicitor General's office and supervised the attorneys who filed the

²¹ *Id.*

²² *Thompson v. Alabama*, 2017 U.S. Dist. LEXIS 211512 (M.D. Ala.), <https://www.afj.org/wp-content/uploads/2018/05/Thompson-v.-Alabama-2017-U.S.-Dist.-LEXIS-211512-1.pdf>

²³ Brief on Behalf of Alabama, Georgia, Kansas & Texas As Amicus Curiae Supporting Petitioners, *Arizona v. Inter Tribal Council of Arizona*, No. 12-71, <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-71-NVRA-Amicus-FINAL-to-Cockle-8-17-12.pdf>

²⁴ *Id.*

²⁵ 570 U.S. 1 (2013).

²⁶ H. Wang, *Hurdles Remain as Final Countdown Begins for 2020 Census*, WGBR, Jan. 10, 2019.

²⁷ *U.S. Department of Commerce v. New York*, 139 S. Ct. 2551 (2019).

²⁸ Complaint, *State of Alabama et al. v. U.S. Department of Commerce*, No. 2: 18-cv-00772-RDP (N.D. Ala.), https://www.brennancenter.org/sites/default/files/legal-work/Alabama_v_Dept-of-Commerce_Complaint.pdf

²⁹ *Id.*

³⁰ President Trump Announces Twelfth Wave of Judicial Nominees, Apr. 10, 2018, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-twelfth-wave-judicial-nominees-twelfth-wave-united-states-attorneys-sixth-wave-united-states-marshals/>

litigation. Mr. Brasher admitted that he “discussed the case with employees of the Alabama Attorney General’s office,”³¹ attended a “meeting in which the litigation was discussed with the Congressman who is a co-plaintiff in the lawsuit,”³² and, most tellingly, reviewed and edited the complaint.³³ Civil rights organizations representing the Latino community successfully intervened in the lawsuit, arguing that “the Trump administration cannot be trusted to adequately defend this wholly unupportable suit.”³⁴

HOSTILE TO LGBTQ RIGHTS

Andrew Brasher argued against marriage equality for the LGBTQ community. He authored an extremely harsh amicus brief on behalf of Alabama in *Obergefell v. Hodges*, defending its ban on marriage equality: “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.”³⁵ As he has done in other contexts, he railed against federal intervention: “But this case is about more than marriage. It is also about the proper role of the federal courts in scrutinizing state policy decisions.”³⁶ The Supreme Court rejected Brasher’s rationale.³⁷ While the case was pending, Brasher authored a blog post in a personal capacity, stating: “These are the areas where state policy makers deserve the freedom to respectfully disagree and where societal consensus should be achieved through the ballot box instead of the courtroom.”³⁸ In his personal capacity, Brasher donated to a Montana Supreme Court candidate who supported LGBTQ conversion therapy.³⁹

HARSH CRIMINAL JUSTICE RECORD

In the criminal justice area, Andrew Brasher repeatedly supported unconstitutional practices. He filed an amicus brief defending Florida’s death penalty sentencing law,⁴⁰ which the Supreme Court found unconstitutional because it allowed judges to overrule juries and impose the death penalty.⁴¹ Arguing before the Supreme Court in another case, Brasher sought to impose the death penalty for a defendant with mental illness, despite the state’s failure to provide sufficient access to a competent psychiatrist as required under federal law.⁴² In *McWilliams v. Dunn*, the Court concluded the defendant had been denied assistance in presenting his defense. Although the Court declined to decide whether “a state must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team,” it concluded

³¹ Brasher Responses to Written Questions from Senate Judiciary Committee Ranking Member Dianne Feinstein for Nomination to Middle District of Alabama, on file with Senate Judiciary Committee.

³² *Id.*

³³ Brasher Responses to Written Questions from Judiciary Committee Member Chris Coons for Nomination to Eleventh Circuit, on file with Senate Judiciary Committee.

³⁴ MALDEF News Release, Latinos Successfully Intervene in Alabama Lawsuit That Would Have Certain Immigrants Treated as Non-Persons under Constitution, Dec. 13, 2018, <https://www.maldef.org/2018/12/latinos-successfully-intervene-in-alabama-lawsuit-that-would-have-certain-immigrants-treated-as-non-persons-under-constitution/>

³⁵ Brief of Amicus Curiae State of Alabama In Support of Respondents, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14- 571, 14-574, http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556_State_of_Alabama.pdf

³⁶ *Id.*

³⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁸ Andrew Brasher, *Good Faith and Caution, Not Irrationality or Malice*, SCOTUSBLOG, Jan. 16, 2015,

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

³⁹ <http://www.rightwingwatch.org/post/right-quietly-pours-money-into-montana-hoping-to-flip-pivotal-state-supreme-court/>

⁴⁰ Brief of Amicus Curiae Alabama and Montana in Support of Respondent, *Hurst v. Florida*, No. 14-7505,

https://www.scotusblog.com/wp-content/uploads/2015/08/14-7505_amicus_resp_AlabamaMontana.authcheckdam.pdf

⁴¹ *Hurst v. Florida*, 136 S. Ct. 616 (2016).

⁴² Brief of Respondents, *McWilliams v. Dunn*, No. 16-5294, https://www.scotusblog.com/wp-content/uploads/2017/04/16-5294_resp.pdf

that Alabama fell “dramatically short” of the requirement to provide an indigent defendant “with access to a mental health expert who is sufficiently available to the defense.”⁴³ In an important case involving the rights of juvenile defendants, Andrew Brasher advocated for life sentences with no possibility of parole.⁴⁴ In *Miller v. Alabama*, the Supreme Court held that mandatory life-without-parole sentences for children convicted of homicide are unconstitutional under the Eighth Amendment.⁴⁵ The ruling affected countless individuals whose sentences did not take into account their age or other mitigating factors.

The Senate must refuse to elevate Judge Andrew Brasher to the Eleventh Circuit. He is an extreme ideologue who sought to undo civil rights progress everywhere he turned. It is a travesty to think he would preside over communities of color within the Eleventh Circuit who are protected by the Voting Rights Act and who depend on the federal courts to dispense equal justice under law. Andrew Brasher’s record is one of extremism and bias, rather than impartiality and fairness. Our nation requires federal judges who will respect the progress we have made in civil rights. We urge the Senate to reject Judge Brasher’s nomination to this powerful circuit court in the South.

Thank you for considering the NAACP’s strong opposition to this nomination. Should you have any questions or comments, please contact Hilary Shelton, Director of the Washington Bureau and Senior Vice President for Policy and Advocacy at his office at (202) 463-2940.

Sincerely,



Derrick Johnson, President and CEO

cc: Members of the Senate Judiciary Committee

⁴³ *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

⁴⁴ Brief of Respondent, *Miller v. State of Alabama*, No. 10-9646, https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-9646_respondentalabama.authcheckdam.pdf

⁴⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).