

AFJ NOMINEE REPORT

# ALLISON

# EID



*U.S. Court of Appeals for the Tenth Circuit*

# CONTENTS

**INTRODUCTION, 1**

**BIOGRAPHY, 2**

**LEGAL AND OTHER VIEWS, 3**

Federalism, 3

Education, 3

Money in Politics and Elections, 7

Civil Justice, 9

*Torts, 9*

*Class Actions, 12*

*Prisoner Litigation, 12*

Criminal Justice, 13

*Juvenile Justice, 13*

*Fourth Amendment, 13*

*Fifth Amendment, 15*

*Sixth Amendment, 16*

*Recusal, 18*

Drug Reform, 19

Eminent Domain and Property Rights, 19

Environment, 20

Reproductive Rights, 20

Gun Safety, 21

Church and State, 21

**CONCLUSION, 22**

# INTRODUCTION

On June 7, 2017, President Donald Trump nominated Colorado Supreme Court Justice Allison Hartwell Eid for the seat on the U.S. Court of Appeals for the Tenth Circuit vacated by U.S. Supreme Court Justice Neil Gorsuch.<sup>1</sup> Eid's nomination defies the recommendation of the Judicial Conference of the United States, which creates guidelines for the administration of the federal courts, that the vacancy on the Tenth Circuit not be filled due to lack of caseload.<sup>2</sup>

In his rush to fill a seat the bipartisan Judicial Conference has recommended be left vacant, President Trump did not consult with Senator Michael Bennet, as past Presidents did with home state senators of the other party. Instead, the Trump Administration selected an ideologically-driven jurist who will undoubtedly carry out an ultraconservative agenda when elevated to the federal bench. Alliance for Justice opposes Eid's confirmation.

Eid's record reveals a jurist who, to an extraordinary degree, adheres to a rigid, ultraconservative partisan ideology. Both in academia and on the Colorado Supreme Court, she sided with Republicans in trying to prevent the creation of more competitive congressional districts and in working to undermine campaign finance laws. Her hostility to public education is notable; she has supported Republican efforts allowing public dollars to finance religious schools, attacks on increases in funding for public schools, and efforts to undermine

<sup>1</sup> Press Release, President Donald J. Trump Announces Judicial Candidate Nominations, The White House (June 7, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/07/president-donald-j-trump-announces-judicial-candidate-nominations>.

<sup>2</sup> Judicial Conference Asks Congress to Create New Judgeships, UNITED STATES COURTS (Mar. 14, 2017), <http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships>.

collective bargaining rights of teachers. She would have made it more difficult for unions to engage in the democratic process, and she supported corporations' long-term efforts to make it more difficult for consumers to hold businesses accountable. She would have allowed a private company to use eminent domain to build a petroleum pipeline. And, like her former boss, Justice Clarence Thomas, Eid repeatedly turns a blind eye to police misconduct, narrowing critical constitutional protections for those accused of committing crimes. Each of these causes has been championed by the far right.

In fact, in many of these cases and others, Eid's commitment to rigid ideology has pushed her into being an extreme outlier on the Colorado Supreme Court, taking positions agreed to by none of her colleagues. She was the only justice to side with Republican efforts to prevent more competitive congressional elections (*Hall v. Moreno*); she was the only justice who would have prevented Colorado from increasing school funding (*Mesa County Board of County Commissioners v. State*); she was the only justice who would have permitted police to search a cell phone that had been accidentally left, temporarily, in a locked bathroom (*People v. Schutter*); she was the only justice who believed police should have almost unchecked power to search cars without probable cause (*People v. Chamberlain and People v. McCarty*); and she was the only justice who tried to prevent a town from acquiring land to build a highway (*Department of Transportation v. Gypsum Ranch Co.*).

Moreover, Eid's academic writings

demonstrate that she is bent on undermining the ability of the federal government to protect the American people. She celebrated cases striking down the ban on guns in school zones and invalidating parts of the Violence Against Women Act. She has advocated for expanding the reach of those cases, promoting a limited reading of the Commerce Clause that has not been adopted since the New Deal. This position would wreak untold harm on everyday Americans who rely on the federal government for critical civil rights, employment, and environmental protections.

Eid's record also reveals that while she is ostensibly a principled jurist, she in fact is a results-oriented judge who is quick to discard stated principles when it serves corporate interests.

For example, Eid praised federalism and wrote approvingly of Supreme Court cases that restricted Congress's ability to legislate in areas of the environment and civil rights. Yet her support of "federalism" was faint-hearted; she praised Washington Republican "tort reform" legislation that would have imposed requirements on every civil justice system in the country.

Likewise, Eid has been very hostile to claims by injured individuals trying to hold corporations accountable, as exemplified by her efforts to protect ski resorts and hotels from liability, emphasizing the "burden" on "Colorado businesses" and innkeepers. Yet, when a *corporation* is a plaintiff, she quickly discards her anti-tort bias. In *Koenig v. PurCo Fleet Services, Inc.*, Eid allowed a rental car company to recover damages from a renter despite failing to show that it had suffered any losses.

Similarly, Eid has firmly established herself as the most outspoken critic of eminent domain on the Colorado Supreme Court. She would have prevented communities from building parks and open spaces, and even highways. But when a corporation is using eminent domain authority, she again jettisons her previously-stated "principles." In *Larson v. Sinclair Transportation Company*, Eid dissented from a majority of her colleagues and stood up for the eminent domain rights of a private company to build a petroleum pipeline.

Each of these cases contributes to a startling pattern in Justice Eid's jurisprudence: An unprincipled departure from previously articulated positions in order to advance corporate interests.

Given that the Judicial Conference has recommended leaving the Tenth Circuit seat vacant, and given that if confirmed, Eid will erode critical constitutional rights and legal protections, AFJ believes that she should not be confirmed.

## BIOGRAPHY

After graduating from Stanford University in 1987, Eid joined the Reagan administration as a Special Assistant and Speechwriter to Secretary of Education William Bennett.<sup>3</sup> Bennett, who served from 1985 to 1988, was controversial. *The New York Times* reported that he "rose to power by cultivating a spectrum of influential conservative groups ranging from the Heritage Foundation to the religious

<sup>3</sup> Colorado Supreme Court Biography for Allison H. Eid, [https://www.courts.state.co.us/Bio.cfm?Employee\\_ID=70](https://www.courts.state.co.us/Bio.cfm?Employee_ID=70) (last visited Aug. 11, 2017).

right, at all of which he was seen as one who could be trusted to carry out their agenda of a diminished Federal role in education.”<sup>4</sup> Bennett, who frequently spoke of the country’s “Judeo-Christian” values, was a staunch supporter of reducing federal student aid, eliminating bilingual education requirements, implementing voucher programs that could be used for parochial schools, school prayer, and mandatory AIDS testing for marriage license applicants.<sup>5</sup>

Eid then attended the University of Chicago Law School and, after graduation, clerked for Judge Jerry Edwin Smith on the U.S. Court of Appeals for the Fifth Circuit.<sup>6</sup> Eid then practiced commercial and appellate law in the Denver office of Arnold & Porter, LLP from 1992 to 1993, before clerking for Justice Clarence Thomas on the U.S. Supreme Court.<sup>7</sup> After her clerkship, Eid returned to private practice.<sup>8</sup>

In 1998, Eid joined the faculty of the University of Colorado Law School.<sup>9</sup> While there, she also served as the faculty advisor to the Federalist Society.<sup>10</sup>

In 2005, Republican Governor Bill Owens appointed Eid to serve as the state’s Solicitor General.<sup>11</sup> Eid served as Solicitor General until Governor Owens appointed her to the Colorado Supreme Court in February 2006.<sup>12</sup>

<sup>4</sup> Edward B. Fisk, *Regan’s Man for Education*, N.Y. TIMES (Dec. 22, 1985), <http://www.nytimes.com/1985/12/22/magazine/regan-s-man-for-education.html?pagewanted=all>.

<sup>5</sup> See, e.g., *id.*; Mark Lawrence, *Bennett Defends Controversial Style: Education Secretary Says He Helped Curb Decline of Schools*, L.A. TIMES (Sept. 7, 1988), [http://articles.latimes.com/1988-09-07/news/mn-1553\\_1\\_american-education](http://articles.latimes.com/1988-09-07/news/mn-1553_1_american-education); Bill Bennett Finally Turns Republican, WASHINGTON POST (June 27, 1986), [https://www.washingtonpost.com/archive/politics/1986/06/27/bill-bennett-finally-turns-republican/17bdfc0c-9490-44b5-80db-17e9744e0132/?utm\\_term=.a44719b8859a](https://www.washingtonpost.com/archive/politics/1986/06/27/bill-bennett-finally-turns-republican/17bdfc0c-9490-44b5-80db-17e9744e0132/?utm_term=.a44719b8859a); James Gerstenzang & David Lutter, *AIDS Marriage Test Debate Widens: President May Support Proposal but Issue Divides GOP*, L.A. TIMES (May 22, 1987), [http://articles.latimes.com/1987-05-22/news/mn-1223\\_1\\_aids-testing](http://articles.latimes.com/1987-05-22/news/mn-1223_1_aids-testing).

<sup>6</sup> Biography, *supra* note 3.

<sup>7</sup> Sen. Comm. on the Judiciary, 115th Cong., Allison Hartwell Eid: Questionnaire for Judicial Nominees 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Mark K. Matthews, *President Trump nominates Allison Eid to fill Neil Gorsuch’s seat on 10th U.S. Circuit Court of Appeals*, THE DENVER POST (June 7, 2017), <http://www.denverpost.com/2017/06/07/donald-trump-allison-eid-nomination-10th-circuit-court-of-appeals/>.

<sup>11</sup> Questionnaire, *supra* note 7, at 2.

<sup>12</sup> *Id.*

# LEGAL AND OTHER VIEWS

## I. FEDERALISM

In her academic work, Eid focused on “New Federalism,” or the Supreme Court’s efforts to narrow the scope of the federal government’s ability to legislate.<sup>13</sup> Eid applauded *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free School Zone Act of 1990) and *United States v. Morrison*, 529 U.S. 598 (2002) (invalidating parts of the Violence Against Women Act), both of which limited Congress’s power under the Commerce Clause.<sup>14</sup> Carried to its logical conclusion, Eid’s support for limiting Congress’s regulatory authority under “[t]he Commerce Clause behemoth” would have far-reaching and devastating consequences.<sup>15</sup> It would jeopardize the federal government’s ability to protect clean air, clean water, and crucial civil rights.

## II. EDUCATION

Eid has taken positions that would undermine Colorado public schools, like taking money from public schools to support religious institutions; making it difficult for public schools to be adequately funded; and allowing public schools to cut teachers and parents out of a process implemented to improve school

<sup>13</sup> Allison H. Eid, *Teaching New Federalism*, 49 ST. LOUIS U. L.J. 875 (2005); Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241 (2004); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL OF RTS. J. 1191 (2003).

<sup>14</sup> Eid, *Federalism and Formalism*, *supra* note 13, at 1191–95, 1205–08, 1236–37.

<sup>15</sup> Eid, *The Property Clause and New Federalism*, *supra* note 13, at 1257.

performance, while undermining collective bargaining for educators.

***Taxpayers for Public Education v. Douglas County School District***

In [\*Taxpayers for Public Education v. Douglas County School District\*, 351 P.3d 461 \(Colo. 2015\)](#), a school district provided vouchers that students could use to attend private schools, including religious schools. A group challenged the vouchers under a provision of the Colorado Constitution which prohibits public money from being used to fund religious schools. The Colorado Supreme Court found the vouchers unconstitutional: “[T]he Colorado Constitution prohibits school districts from aiding religious schools,” the Chief Justice wrote. *Id.* at 475. The voucher system “has created financial partnerships between the District and religious schools and, in so doing, has facilitated students attending such schools. This constitutes aid to religious institutions as contemplated by [the Constitution].” *Id.* Therefore, the court concluded that it could not “square the...resultant aid of religious schools with the plain language of [the Constitution].” *Id.* at 471.

Eid concurred in part and dissented in part. She disagreed with the court’s interpretation of the Colorado Constitution. In her view, the Constitution only “invalidates a public expenditure made ‘to help support or sustain’ church or sectarian schools.” *Id.* at 480 (Eid, J., concurring in part and dissenting in part). The Constitution “does not suggest,” she wrote, “that any program that provides public money for other purposes—for example, to assist students—is constitutionally suspect simply because the funds indirectly or incidentally benefit church or sectarian schools.” *Id.* She

also chastised the majority for failing “to consider whether [the constitutional section] is unenforceable due to possible anti-Catholic bias” of the enactors of the Colorado Constitution. *Id.*

The school district petitioned for review in the U.S. Supreme Court. On June 27, 2017, without reaching the merits, the Supreme Court vacated the judgment of the Colorado Supreme Court and remanded the case for further consideration in light of the Court’s decision in [\*Trinity Lutheran Church of Columbia, Inc. v. Comer\*, 137 S. Ct. 2012 \(2017\)](#).

***Mesa County Board of County Commissioners v. State***

Eid dissented alone in a 2009 case involving public school funding. In [\*Mesa County Board of County Commissioners v. State\*, 203 P.3d 519 \(Colo. 2009\)](#), the court upheld a Colorado law that altered the public school funding formula by increasing the funding required from municipalities. The effect of the law was an increase in local property taxes. *Id.* at 527–28. While the other six justices upheld the funding mechanism, Eid wrote that it conflicted with a state constitutional provision requiring voter approval of certain tax policies. In a sarcastic dissent, Eid criticized the majority for “discover[ing]” a previously undetected “gaping hole” in the state constitutional provision. *Id.* at 537 (Eid, J., dissenting). Eid framed the case as a struggle between the judiciary and legislature and the electorate, describing “the lengths to which the majority will go to ensure that no vote of the people ever be required with regard to issues surrounding this case.” *Id.*

The majority decision was hailed by the Democratic governor as “a victory for voters who wanted to support public education” but was attacked by Republican lawmakers, who called it a “full-scale attack on the Taxpayer’s Bill of Rights.”<sup>16</sup>

***City & County of Denver School District No. 1 v. Denver Classroom Teachers Ass’n***

[\*City & County of Denver School District, No. 1 v. Denver Classroom Teachers Ass’n, No. 15SC589, 2017 Colo. LEXIS 305 \(Colo. Apr. 24, 2017\)\*](#), concerned a 2008 law, which enabled schools to develop innovation plans. Under the law, a majority of teachers, along with school administrators, parents, and a member of the local business community, had to approve the plan, which was then sent to the school board for approval. *Id.* at \*35–36 (Gabriel, J., dissenting).

Eleven new schools had drafted innovation plans before any teachers were hired or any students had enrolled. *Id.* at \*2–10 (Rice, C.J.). These plans included waivers of teachers’ rights to collective bargaining. Yet only after the school boards approved the plans did a majority of teachers retroactively vote and pass them. *Id.* at \*7.

The Denver Classroom Teachers Association, the Denver Association of Educational Office Professionals, and others sued, arguing that the school board had improperly approved the innovation plans without the approval of the schools’ teachers.

The Colorado Supreme Court upheld the approval of the innovation plans. Chief Justice Nancy Rice stated that nothing in the statute

prevented the local school board from approving a new school’s innovation plan before it hired teachers. *Id.* at \*1. Allowing new schools to move forward with innovation plans, Chief Justice Rice said, furthered the purpose of the statute to promote “flexibility and autonomy to address the needs of students and the communities in which they live.” *Id.* at \*18. Eid concurred in the judgment. *Id.* at \*23–26 (Eid, J., concurring).

Three Justices dissented. Justice Richard Gabriel noted that the statute required that teachers approve the plan *before* it was submitted to the school board. *Id.* at \*30 (Gabriel, J., dissenting). To do otherwise would fly in the face of the statute’s purpose to include teachers in the development process to “foster[] innovation through collaboration between and among all of the interested parties.” *Id.* at 43. Justice Gabriel lamented that the “post hoc approvals allowed the schools to evade pre-submission teacher involvement” and, apparently, to condition the teachers’ employment on approval of the plans. *Id.* at 46.

***Lobato v. State***

In [\*Lobato v. State \(Lobato I\)\*, 218 P.3d 358 \(Colo. 2009\)](#), the Colorado Supreme Court held that a group of parents could challenge the state’s school funding system as contrary to the Colorado Constitution, which mandates a “thorough and uniform” system of public education. *Id.* at 362. The majority held that preventing the suit “would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to

<sup>16</sup> *Colorado Supreme Court Upholds \$1.7B School Tax*, DENVER POST (Mar. 16, 2009), <http://www.denverpost.com/2009/03/16/colorado-supreme-court-upholds-1-7b-school-tax/>.

fashion and to fund a ‘thorough and uniform’ system of public education.” *Id.* at 372.

Eid joined a dissent, which would have applied the political question doctrine in foreclosing judicial review of the parents’ claim. *Id.* at 376 (Rice, J., dissenting).

On remand, a trial court concluded that the public school financing system violated the Colorado Constitution. The Colorado Supreme Court reversed, holding the funding system constitutional. [Lobato v. State \(Lobato II\), 304 P.3d 1132 \(Colo. 2013\)](#). Writing for the majority, including Eid, Justice Rice explained that “courts must avoid making decisions that are intrinsically legislative” and that “[w]hile the trial court’s findings of fact demonstrate that the current public school financing system might not be ideal policy, this Court’s task is not to determine whether a better financing system could be devised, but rather to determine whether the system passes constitutional muster.” *Id.* at 1143–44.

Chief Justice Michael Bender and Justice Gregory Hobbs dissented, arguing that the majority’s holding “abdicates this court’s responsibility to give meaningful effect to the Education Clause’s guarantee that all Colorado students receive a thorough and uniform education.” *Id.* at 1144. He explained that

[t]he record . . . reveals an education system that is fundamentally broken. It is plagued by underfunding and marked by gross disparities among districts. Colorado’s school-age population has exploded, with dramatic increases in the number of Hispanic students, low-income students, English language learners, and students with special needs. The

General Assembly has failed to recognize these changes and to fund the increased costs necessary to education these children.

*Id.* Chief Justice Bender highlighted some of the troubling statistics, including the fact that while Colorado is one of the wealthiest states, it ranks 49th in per-pupil spending per \$1,000 of personal income, 45th in the nation for taxable resources dedicated to education, and last in the nation for spending on special education students. *Id.* at 1145, 1148. The dissent noted that chronic underfunding had led to the widest college-degree attainment gap between white students and Hispanic students in the nation and had prevented many schools from complying with the Americans with Disabilities Act. *Id.* at 1146–47. In one school, students had to carry a fellow classmate with limited mobility to the second floor so that she could attend class. *Id.* at 1147. The current funding system, Chief Justice Bender concluded, threatened the basic constitutional right to public education in Colorado. *Id.* at 1144–45.

### ***In re Dwyer***

In [In re Dwyer, 357 P.3d 185 \(Colo. 2015\)](#), Eid joined a majority opinion hostile to a challenge to Colorado’s education funding system. Amendment 23 to the Colorado Constitution requires an annual increase to “statewide base per pupil funding” for public education.” *Id.* at 187. After budget shortfalls, Colorado reduced statewide educational funding by implementing a spending cap and a “negative factor,” which reduced “each school district’s



funding by a fixed percentage.” *Id.* The plaintiffs sued, arguing that the negative factor violated Amendment 23. *Id.*

The Colorado Supreme Court dismissed the plaintiffs’ complaint. According to the majority, including Eid, Amendment 23 prevented the General Assembly from reducing *base* per pupil funding, not *total* per pupil funding. *Id.* at 191. Because the negative factor reductions did not impact *base* per pupil funding and only cut additional funding that was being provided above and beyond the base, it did not violate the law. *Id.*

Justice Monica Márquez, writing for herself and two other justices, disagreed. The plaintiffs had raised a viable claim, Justice Márquez argued, because implementation of the negative factor “fundamentally altered the school finance formula to calculate funding to conform to the legislatively predetermined spending cap. Hence, the legislature once again controls annual increases or decreases in school funding,” a result that Amendment 23 was passed to circumvent. *Id.* at 194. Moreover, a jury trial was necessary to resolve plaintiffs’ claim that the negative factor “operates to eliminate [the statewide increase in per pupil funding] and now renders the base per pupil funding component of the formula ultimately irrelevant.” *Id.* at 193.

### ***Immigrants’ Education***

As Colorado Solicitor General, Eid assisted in preparing a formal opinion for the Attorney General concluding that Colorado could not grant in-state tuition status to undocumented immigrants.<sup>17</sup>

<sup>17</sup> Formal Opinion of John W. Suthers, Colo. Att’y Gen., No. 06-01 (Jan. 23, 2006), available at <https://coag.gov/sites/default/files/content/uploads/ago/agopinions/john-w-suthers/2006/no-06-01.pdf>.

## **III. MONEY IN POLITICS AND ELECTIONS**

Both in her academic writings and as a Colorado Supreme Court Justice, Eid has acted to undermine voting rights and competitive elections, while supporting an increase in money in politics.

In a piece entitled *Bush v. Gore Legal Experts Dissect Supreme Court Decision and Its Long-Term Effects*, Eid stated that the decision in *Bush v. Gore* is “unremarkable from a legal standpoint.”<sup>18</sup> She added, “[h]ad the case been captioned Jones vs. Smith, instead of Bush vs. Gore, I doubt if it would even make the constitutional law textbooks.”<sup>19</sup> She argued that the legal reasoning in the case was not profound because the Warren Court created precedent involving the Supreme Court in election disputes when it created the “one person, one vote” principle.<sup>20</sup> She only found *Bush v. Gore* historical “because of its role in our democratic culture.”<sup>21</sup>

In a 2001 article entitled *A Spotlight on Structure*,<sup>22</sup> Eid suggests that the Supreme Court’s decisions in *Baker v. Carr* and *Reynolds v. Sims* unwisely opened the door to judicial intervention in elections. Eid commented that the Court, in those cases, “brushed aside concerns that it would be embroiled in the quagmire of politics.”<sup>23</sup> Nevertheless, a natural outgrowth of those decisions, Eid noted, was the Supreme Court’s intervention in *Bush v. Gore*.<sup>24</sup>

<sup>18</sup> Allison H. Eid, Editorial, *Bush v. Gore Legal Experts Dissect Supreme Court Decision and Its Long-Term Effects*, ROCKY MT. NEWS, (Dec. 17, 2000).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 72 U. COLO. L. REV. 911 (2001).

<sup>23</sup> *Id.* at 918

<sup>24</sup> *Id.* at 919.

On the bench, Eid has ruled on numerous cases involving election law related matters. Overall, Eid has been hostile to unions communicating with their members about campaigns, non-partisan, court-approved congressional redistricting, and disclosure of ballot initiative funders.

### ***Hall v. Moreno***

Eid was the sole dissenter in [\*Hall v. Moreno\*, 270 P.3d 961 \(Colo. 2012\)](#), where the Colorado Supreme Court upheld a court-imposed redistricting plan. In a detailed opinion, the majority held that “[t]he trial court reasonably balanced the many competing non-constitutional factors in a manner that will maximize fair and effective representation for all citizens. Its findings are supported by the record, which was compiled through a thorough, open, and fair process.” *Id.* at 982 (internal citation omitted).

Eid’s dissent, tracking arguments made by Republicans that “it was more important to preserve existing congressional boundaries,”<sup>25</sup> argued that “the district court abused its discretion by giving virtually no weight” to one specific enumerated factor, “the minimization of disruption of prior district lines.” *Id.* at 984 (Eid, J., dissenting).

### ***Colorado Education Association v. Rutt***

In [\*Colorado Education Association v. Rutt\*, 184 P.3d 65 \(2008\)](#), the Colorado Supreme Court held that teachers’ union staff organizing two walks—events for union members to volunteer to distribute campaign literature in support of a candidate for state senator—did not

violate Colorado’s ban on unions making campaign contributions and expenditures. *Id.* at 69–70. The court ruled that the union activity involved communication solely to members of the union, activity which is exempt from the restriction on campaign expenditures. *Id.* at 78.

Eid dissented. She argued that the salaries paid to union staff members to organize campaign events did not fall within the membership communication exception, which should be construed narrowly because there were “adequate alternatives for union expression through the use of segregated funds.” *Id.* at 83–86 (Eid, J., dissenting).

### ***Gessler v. Colorado Common Cause***

In [\*Gessler v. Colorado Common Cause\*, 327 P.3d 232 \(Colo. 2014\)](#), the court held that the Colorado Secretary of State did not have the authority to raise campaign finance reporting limits for issue committees, groups whose purpose is to support or oppose a ballot question. The Colorado Constitution imposed a \$200 contribution and expenditure reporting threshold for issue committees. The provision required both retrospective and prospective reporting. The Secretary of State later issued a rule increasing the threshold from \$200 to \$5,000 and eliminating the retrospective reporting requirement. *Id.* at 233.

Eid, dissenting in part, would have held that the Secretary had the authority to increase the reporting threshold to \$5,000. *Id.* at 238–41 (Eid, J., concurring in part and dissenting in part). By stripping the

<sup>25</sup> Court explains Colorado redistricting decision, DENVER POST (Feb. 27, 2012), <http://www.denverpost.com/2012/02/27/court-explains-colorado-redistricting-decision-2/>.

Secretary of State of his ability to promulgate such a rule, Eid lamented, the only way for an issue committee to be excused from certain reporting requirements was through post-hoc, case-by-case adjudication. *Id.* at 240. Citing [FEC v. Wisconsin Right to Life, 551 U.S. 449 \(2007\)](#), Eid argued that this scheme “raise[d] serious First Amendment concerns.” *Gessler*, 327 P.3d at 240.

### ***Hanlen v. Gessler***

In [Hanlen v. Gessler, 333 P.3d 41 \(Colo. 2014\)](#), Eid dissented in a case involving the counting of votes in a nonpartisan school board election. After ballots had been printed and voting had begun, election officials determined that one of the candidates was ineligible because she did not actually live in the district. *Id.* at 44. As a result, the Secretary of State approved an emergency rule that allowed an election official to unilaterally decide, even after ballots have been printed and votes cast, that a previously certified candidate was not eligible. *Id.*

The Colorado Supreme Court struck down the rule, saying only the courts have the authority to declare a previously certified candidate ineligible. *Id.* at 47.

In her dissent, Eid argued that the rule was valid and that votes cast for the ineligible candidate should not be counted. Eid argued that a possible misapplication of the rule to a candidate who was in fact eligible was not a good reason to invalidate the rule. *Id.* at 53 (Eid, J., dissenting). Eid’s reasoning would put the burden on the individual running for office who had been deemed ineligible: If the candidate believed she was improperly disqualified, she would have to sue and seek to force election officials to count the votes cast for her.

## **IV. CIVIL JUSTICE**

Eid has written extensively in praise of efforts by lawmakers to limit the ability of aggrieved individuals to bring lawsuits and recover damages. She also has argued in favor of making it more difficult for individuals to join together in class action lawsuits to hold corporations accountable and for inmates to bring civil rights lawsuits.

### **A. TORTS**

In *The Tort Reform Debate: A View from Colorado*,<sup>26</sup> Eid said that the “best thing” about Colorado was reform that “abolished joint and several liability in most cases, and has capped punitive damages...”<sup>27</sup> Eid explained that the beauty of federalism is that if people disagree with the new system, they can choose not to visit Colorado: “The point is, Colorado’s tort system may not be the ‘best’ in some abstract sense, but it is the best for Colorado.”<sup>28</sup>

Yet Eid—who, as noted, supported significant limits on Congress’s authority under the Commerce Clause and in support of federalism—apparently had few qualms about the federal government telling states how to manage their civil justice systems. In *Tort Reform and Federalism: The Supreme Court Talks, Bush Listens*,<sup>29</sup> she praised the George W. Bush Administration’s effort to pass federal “tort reform.” She supported President Bush’s HEALTH Act, which involved limits on medical malpractice lawsuits, including

<sup>26</sup> 31 SETON HALL L. REV. 740 (2001).

<sup>27</sup> *Id.* at 740.

<sup>28</sup> *Id.* at 741.

<sup>29</sup> Allison Eid, *Tort Reform and Federalism: The Supreme Court Talks, Bush Listens*, ABA: HUMAN RIGHTS MAGAZINE VOL. 29 No. 4 (2002).

capping noneconomic damages, abolishing joint and several liability, and limiting punitive damages.

In addition to her writings, Eid participated in numerous tort cases on the Colorado Supreme Court, consistently ruling in favor of protecting corporations and limiting recovery for harmed plaintiffs. In fact, she regularly ruled against workers and consumers seeking to hold employers and corporations accountable.

### ***Westin Operator, LLC v. Groh***

In [\*Westin Operator, LLC v. Groh\*, 347 P.3d 606 \(Colo. 2015\)](#), Eid dissented in a case that held a hotel could be liable for evicting an intoxicated guest into a foreseeably dangerous environment. Jillian Groh, a registered Westin Hotel guest, returned to the hotel late one night with a group of friends. *Id.* at 609. Groh and her friends were intoxicated. *Id.* Although no hotel guest complained about noise and the group advised the hotel guards that they were drunk and could not drive, security guards evicted the group from the hotel and refused to allow the friends to wait in the lobby to call a taxicab despite freezing temperatures outside. *Id.* at 609–10. Seven members of the group then packed into Groh’s car and, with a drunk driver behind the wheel, crashed into another car. *Id.* at 610. The accident killed one person and left Groh in a persistent vegetative state. *Id.*

The majority held that the Westin Hotel was not entitled to summary judgment: “[W]e hold that a hotel that evicts a guest has a duty to exercise reasonable care under the circumstances. This requires the hotel to refrain from evicting an intoxicated guest into a foreseeably dangerous environment.” *Id.* at 616. Thus, a jury had to decide, based on all of the relevant facts about

the condition of the guests, the outside environment, and the knowledge of the defendants, whether the hotel was liable.

In her dissent, Eid criticized the majority for placing too high a duty of care on innkeepers to ensure that evicted guests have transportation. *Id.* at 620 (Eid, J., dissenting). The majority’s opinion, Eid concluded, unreasonably burdened the Colorado hotel industry. *Id.*

### ***Fleury v. IntraWest Winter Park Operations Corp.***

In [\*Fleury v. IntraWest Winter Park Operations Corp.\*, 372 P.3d 349 \(Colo. 2016\)](#), Eid authored a majority opinion preventing the widow of a skier who had died in an avalanche at a ski resort from recovering damages. Salynda Fleury brought a negligence and wrongful death suit against Winter Park after her husband was killed by an avalanche at the resort while skiing on an open, designated, in-bounds trail. *Id.* at 350. Fleury claimed that, although Winter Park knew that avalanches were likely to occur in the area where her husband was skiing that day, it neither warned skiers about this risk nor closed the area. *Id.* Winter Park knew about the avalanche warnings from the Colorado Avalanche Information Center, the unstable snow on the Trestle Trees run, and the areas within the resort that were most susceptible to avalanches. *Id.*

Eid held avalanches were “inherent dangers and risks of skiing.” *Id.* at 350. Consequently, Eid’s opinion prevents skiers from recovering for injuries resulting from in-bounds avalanches.

Justice Márquez, along with Justice Gabriel, dissented. She accused the majority of unduly shielding resort operators from liability: “Under today’s holding, even a family of novice skiers traversing the mountain must be expected to look uphill, gauge the steepness of the slope, the quantity of fresh snow, and the multitude of other factors that avalanche forecasters consider, and assume the risk of being swept away by an avalanche.” *Id.* at 356 (Márquez, J., dissenting). The majority’s holding, Justice Márquez continued, removes any incentives ski operators have to “mitigate the risk of avalanches and to protect skiers within their ski areas.” *Id.*

#### ***City of Brighton v. Rodriguez***

In [\*City of Brighton v. Rodriguez\*, 318 P.3d 496 \(Colo. 2014\)](#), Eid dissented from a decision holding that a woman who fell and injured herself at work was entitled to workers’ compensation. The majority held that because the fall “would not have occurred but for employment” she was entitled to compensation, even though she had lost consciousness and could not remember how she fell. *Id.* at 504. Eid dissented and said workers’ compensation should not cover injuries “where the cause is not known” even if the injury occurred at work. *Id.* at 510 (Eid, J., dissenting).

#### ***Koenig v. PurCo Fleet Services, Inc.***

As shown in the preceding cases, Eid is very concerned about any burden placed on employers and businesses. She is very concerned about the burden on hotels if they are liable for intoxicated guests driving, when those guests have been kicked out of the hotel and prevented from calling a cab. She is

concerned about the burden on ski resorts if they are required to warn skiers of the risk of avalanches. And, she is concerned about employers having to pay workers’ compensation when employees are injured at work.

Yet when the plaintiff is a corporation, Eid apparently has no problem ruling for a plaintiff.

In [\*Koenig v. PurCo Fleet Services, Inc.\*, 285 P.3d 979 \(Colo. 2012\)](#), Eid authored a majority opinion making it easier for a rental car company to collect damages from a consumer. In that case, Judith Koenig hit a deer while driving a rental car. PurCo sued Koenig for damages “for loss of the vehicle’s use during the time it was being repaired.” *Id.* at 980. Although the rental car company provided no evidence that it had suffered any loss due to the car being out of commission, Eid concluded that it could still recover damages: “[R]easonable rental value is an appropriate measure of damages in a commercial setting even where the chattel owner would have made ‘no profit at all’ on the project in which the chattel was to be used.” *Id.* at 983.

Justices Rice and Hobbs dissented, arguing that PurCo was not entitled to damages unless it could show that it had suffered lost profits. Under basic contract law, the dissent noted, “when a breach of contract results in a delay of the use of property, the aggrieved party is entitled to lost profits as its remedy,” nothing more. *Id.* at 985 (Rice, J., dissenting).

## B. CLASS ACTIONS

Given her bias against workers and consumers who seek to hold corporations accountable, it is no surprise that Eid has been hostile to the certification of class action lawsuits. Most significantly, when it comes to plaintiffs proving the elements required to certify a class, Eid has advocated for Colorado to adopt the more difficult-to-meet “preponderance of the evidence” standard, which the U.S. Supreme Court adopted in [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. 338 (2011). See [Jackson v. Unocal Corp.](#), 262 P.3d 874, 890 (Colo. 2011) (Eid, J., dissenting); [BP America Production Co. v. Patterson](#), 263 P.3d 103, 115 (Colo. 2011) (Eid, J., concurring); [Garcia v. Medved Chevrolet, Inc.](#), 263 P.3d 92, 103 (Colo. 2011) (Eid, J., concurring). The Colorado Supreme Court rejected that standard and instead held that questions of class certification are left to the discretion of the trial court without a specific burden of proof requirement. See, e.g., *Jackson*, 262 P.3d at 882. If the court had adopted Eid’s proposed standard, it would have made it more difficult for people to band together to sue large corporations for wrongdoing.

*Jackson v. Unocal Corp.*, illustrates how Eid’s approach would close the courthouse doors. There, a group of plaintiffs sued Unocal Corporation, Unocal Pipeline Company, and Union Oil Company of California after removal of an oil pipeline contaminated large tracts of soil with asbestos. 262 P.3d at 877. The Colorado Supreme Court upheld the trial court’s certification of the class and rejected the preponderance of the evidence standard for assessing class certification issues. *Id.* at 882. The majority reasoned that leaving class certification to the discretion of the trial court without a specific burden of proof requirement

would be consistent with the direction that Rule 23 be liberally construed in light of Colorado’s policy of favoring the maintenance of class action suits. *Id.*

Eid dissented, arguing that the class should not have been certified and criticizing the majority’s “standardless approach.” *Id.* at 890 (Eid, J., dissenting).

## C. PRISONER LITIGATION

As Colorado Solicitor General, Eid submitted a brief in the U.S. Supreme Court opposing the request for review of an inmate whose civil rights lawsuit had been dismissed because he had failed to exhaust administrative remedies for at least one of his claims.<sup>30</sup> Applying the “total exhaustion rule,” the Tenth Circuit concluded that if the inmate’s complaint contained *any* unexhausted claim, all claims had to be dismissed. See [Clark v. Colo. Dep’t of Corr.](#), 151 F. App’x 640 (2005). Eid agreed with the Tenth Circuit, arguing that total exhaustion served the purposes of the Prison Litigation Reform Act (“PLRA”) to reduce prisoner litigation and promote judicial economy. The U.S. Supreme Court *unanimously* rejected Eid’s position in a later case, [Jones v. Bock](#), 549 U.S. 199 (2007). Chief Justice John Roberts emphasized that the policy arguments favored by Eid would actually have the adverse effect, that “inmates will file various claims in separate suits, to avoid the possibility of an unexhausted claim tainting the others. That would certainly not comport with the purpose of the PLRA to reduce the quantity of inmate suits.” *Id.* at 223. The Supreme Court ultimately

<sup>30</sup> Brief of Respondents in Opposition to Petition for Writ of Certiorari, *Clark v. Colo. Dep’t of Corr.*, 549 U.S. 1190 (2007) (No. 05-816).

remanded *Clark* in light of its decision in *Jones*. See [Clark v. Colo. Dep't of Corr., 549 U.S. 1190 \(2007\)](#).

## V. CRIMINAL JUSTICE

Eid's record on criminal justice is startlingly hostile to individuals accused of committing crimes. In case after case, Eid makes clear her pro-police and pro-prosecution leanings, often dissenting from her colleagues to express her displeasure with the outcome of cases that hold the police accountable for misconduct.

### A. JUVENILE JUSTICE

In two cases—[People v. Tate, 352 P.3d 959 \(Colo. 2015\)](#), and [People v. Vigil, 372 P.3d 1045 \(Colo. 2015\)](#)—Eid authored opinions holding that the U.S. Supreme Court's opinion in [Miller v. Alabama, 567 U.S. 460 \(2012\)](#), which held that juvenile offenders could not be sentenced to life without the possibility of parole, was not retroactive because, in her view, *Miller* was a procedural, rather than substantive, rule. The U.S. Supreme Court, in [Montgomery v. Louisiana, 136 S. Ct. 718 \(2016\)](#), disagreed with Eid's conclusion and held that *Miller* announced a substantive rule that applied retroactively to cases on state collateral review.

### B. FOURTH AMENDMENT

Eid has repeatedly, and consistently, argued for narrowing Fourth Amendment protections. She is willing to overlook blatantly unconstitutional police conduct, and she is so extreme that she is regularly an outlier on the Colorado Supreme Court. She even would have allowed the police to use evidence obtained only after two officers viciously beat a suspect and fractured bones

in his face, requiring six hours of medical treatment. [People v. Vigil, 242 P.3d 1092 \(Colo. 2010\)](#).

In *Vigil*, a police officer saw a drug sale and approached Clovis Vigil. Vigil said he did not want to answer questions and began to walk away. *Id.* at 1094. The officer then told Vigil he was under arrest, and struck Vigil with a martial arts “back fist” to his face, fracturing multiple bones. *Id.* A second officer tried to spray Vigil with a chemical repellant and then struck him three times with a metal baton. *Id.* Both officers forced Vigil to the ground, kned him in the back, and handcuffed him. *Id.*

Vigil then agreed to give the officers the bags of cocaine in his pocket. *Id.* An ambulance took Vigil to a hospital, where he received six hours of medical treatment, after which he was taken to the police department. *Id.* at 1094–95. Although he still required medical treatment, the very same two officers who injured him interrogated him, forced him to sign a Miranda waiver, and Vigil then gave various inculpatory statements. *Id.* at 1095. Because the arresting officers used force against Vigil at the time of his arrest, the Colorado Supreme Court affirmed the trial court's order suppressing the bags of cocaine and Vigil's confession. *Id.* at 1096–97.

While Eid agreed the statements were involuntary, she would have permitted the drugs to be introduced into evidence. She argued that, although the police beat Vigil, the cocaine was the product of a valid search incident to arrest. *Id.* at 1099 (Eid, J., concurring in part and dissenting in part).

Also illustrative of her distaste for Fourth Amendment protections are three cases in which Eid was the lone dissenter. She would allow police virtually unchecked authority to search cellphones and search cars.

**[People v. Schutter, 249 P.3d 1123 \(Colo. 2011\)](#)**: The Colorado Supreme Court held that police improperly searched a cell phone that had been accidentally locked in a store's bathroom. The court noted that forgetting a phone in a locked bathroom does not eliminate the expectation of privacy.

**[People v. Chamberlain, 229 P.3d 1054 \(Colo. 2010\)](#)**: Applying [Arizona v. Gant, 556 U.S. 332 \(2009\)](#), the Colorado Supreme Court suppressed evidence in the form of drug paraphernalia found in a car after the defendant had been arrested for false reporting, when the officer already had her driver's license, registration and proof of insurance. It was not reasonable, the court held, that her vehicle would contain any additional evidence of the offense of arrest.

**[People v. McCarty, 229 P.3d 1041 \(Colo. 2010\)](#)**: This case had similar facts to *Chamberlain*, in that police searched John McCarty's car and discovered drugs after McCarty admitted he had purchased a "pot pipe." The majority held that there was no reasonable suspicion that McCarty's car contained additional evidence of drug paraphernalia, so under *Gant*, there was no probable cause.

Also, in [People v. Gutierrez, 222 P.3d 925 \(Colo. 2009\)](#), The court suppressed evidence obtained from an unlawful search and seizure

of 5,000 client files from a tax preparer's office that were later used to investigate immigration violations and identify theft. The court emphasized that a client has a reasonable expectation of privacy in his tax records. Eid dissented, despite the majority's conclusion that "[t]he warrant in this case permitted an unbridled search conducted . . . 'with the hope of uncovering evidence of criminal activity, which practice seems more in line with the writs of assistance in colonial America.'" *Id.* at 944.

Although not a criminal case, [Sebastian v. Douglas County, 366 P. 3d 601 \(Colo. 2016\)](#), is also telling. Police stopped the car that Fabian Sebastian was riding in and a K-9 was ordered to chase two men who fled from the car. The K-9, however, attacked Sebastian, who was seated in the car with his hands up. Officers eventually pulled the K-9 off Sebastian, but only after he suffered serious injuries. Sebastian sued under 42 U.S.C. § 1983, alleging that he was intentionally seized in violation of the Fourth Amendment.

Writing for the court, Eid ruled the Constitution is only violated if the police intentionally released a K-9 to apprehend a specific suspect. It is not violated when an officer just releases a K-9 in a particular "space." *Id.* at 607. Justices Hood and Márquez dissented. They argued that "[u]ltimately, the faulty premise supporting today's majority opinion...is that an actionable seizure requires the intent to acquire physical control over a specific target or a target within some specific space, as opposed to simply releasing the dog with the intent that the dog find and bite any person in any space." *Id.* at 609



(Hood, J., dissenting).

Finally, in cases like [People v. Arapu, 283 P.3d 680 \(Colo. 2012\)](#) and [People v. Cox, No. 16SA187, 2017 Colo. LEXIS 88 \(Feb. 6, 2017\)](#), Eid wrote for a divided court in upholding police conduct. In *Arapu*, Eid concluded that a detective had not exceeded the scope of an immigrant’s consent to enter his apartment. Andrian Arapu told the detective he could enter the apartment for the limited purpose of ensuring that a woman in the apartment did not pose a danger to officer safety. After the detective entered, he proceeded to ask the woman questions and brought federal ICE agents in to search the apartment. As three dissenters noted, no reasonable person would have thought that his consent to monitor a person for officer safety included questioning and allowing federal agents to conduct a warrantless search. *Arapu*, 283 P.3d at 689–90 (Bender, J., dissenting).

And in *Cox*, Eid reversed a trial court’s suppression of drugs evidence found in a car trunk that was searched after police noticed John Cox was “unusually nervous” and a K-9 smelled marijuana. *Cox*, No. 16SA187, at \*3–4. As two justices noted in dissent, because possessing small amounts of marijuana is legal in Colorado, the dog sniff was not probative of whether Cox was carrying illegal drugs. Moreover, nervous behavior is not enough to establish probable cause. *Id.* at \*3–5 (Hood, J., dissenting).

[People v. Herrera, 357 P.3d 1227 \(Colo. 2015\)](#), is an outlier for Eid. She affirmed the suppression of text messages that were discovered during a search of a phone when officers accessed a folder that was not within the purview of the search warrant. *Id.* at 1230–34. Two

justices dissented, arguing that the folder was within the scope of the warrant or, alternatively, was in plain view. *Id.* at 1234 (Rice, C.J., dissenting).

Finally, also relevant, Eid, as Colorado Solicitor General, submitted a brief opposing certiorari in the U.S. Supreme Court in a case arguing that third-party consent to search a home is valid even when the co-occupant is present and objects to the search.<sup>31</sup> In that case, police asked Allen Miller if they could search his home on suspicion of drug activity.<sup>32</sup> When he declined, officers asked Miller’s wife, who consented to the search.<sup>33</sup> Officers found a methamphetamine laboratory in the home and the court declined to suppress the evidence as the product of an unlawful search.<sup>34</sup> Eid argued that the officers had not violated the Fourth Amendment. In a later case, the Supreme Court rejected the same argument made by Eid. See [Georgia v. Randolph, 547 U.S. 103 \(2006\)](#). Justice David Souter, writing for the Court, concluded that “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable.” *Id.* at 106. The Supreme Court ultimately remanded the case in which Eid had filed a brief in light of its decision in *Randolph*. See [Miller v. Colo., 547 U.S. 1037 \(2006\)](#).

## C. FIFTH AMENDMENT

As with her jurisprudence on the Fourth Amendment, Eid would permit coercive and intimidating police conduct during

<sup>31</sup> Brief in Opposition to Petition for Writ of Certiorari, *Miller v. Colo.*, 547 U.S. 1037 (2006) (No. 04-1679).

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

interrogations. Four cases in which she *dissented* from the majority of the Colorado Supreme Court are illustrative:

[\*People v. Ramadan\*, 314 P.3d 836 \(Colo. 2013\)](#): Eid dissented from a decision suppressing statements as involuntary when the police told Jasim Ramadan, who had aided the United States during the Iraq war and had been brought to the U.S. as a teenager after his family was killed, that if he did not tell the truth, he would likely be deported to Iraq where he would face violence or death. *Id.* at 838, 840–41.

[\*People v. Redgebol\*, 184 P.3d 86 \(Colo. 2008\)](#): Eid dissented from a decision suppressing statements a Sudanese refugee made after he said he wanted a lawyer. The majority emphasized there was poor translation, including of his *Miranda* rights, frequent interruption of the translations, different cultural background, limited education, and illiteracy. There was also evidence that the defendant gave nonsensical answers that showed he had no idea what was happening. *Id.* at 95–99.

[\*People v. Lynn\*, 278 P.3d 365 \(Colo. 2012\)](#): Eid dissented from a decision that suppressed statements made during an interrogation after the defendant said “when can I talk to a lawyer?” The court found this to be an unambiguous request for counsel that, under *Miranda* and its progeny, required the officers to cease questioning the defendant. *Id.* at 366–67.

[\*People v. Elmarr\*, 181 P.3d 1157 \(Colo. 2008\)](#): Eid dissented from a decision that held that custodial interrogation had taken

place without a *Miranda* warning when detectives visited Kevin Elmarr after his ex-wife had been found dead, he had been driven to the sheriff’s department in an unmarked police car without handcuffs, and he was taken to a closed-door interview room and interrogated by an officer with an aggressive style. *Id.* at 1159–61.

Also relevant is [\*People v. Theander\*, 295 P.3d 960 \(Colo. 2013\)](#). Eid authored the majority opinion reversing the trial court’s suppression of statements made by a woman confined to a hospital bed after a suicide attempt. After several hours of being incoherent and semi-conscious, police interrogated Stephanie Theander in her hospital room and she made inculpatory statements. *Id.* at 965. The next day, the officers again interrogated Theander without the presence of an attorney and without reading her *Miranda* warnings. *Id.* at 966. Three justices dissented, arguing that Theander’s statements should have been suppressed because they “were the product of a police-dominated, coercive atmosphere and were involuntary.” *Id.* at 972 (Bender, J., dissenting).

## D. SIXTH AMENDMENT

With very few exceptions, Eid also has sought to limit the reach of the Sixth Amendment’s guarantees, including the right to counsel.

Most notably, where an attorney has a conflict of interest in representing a client, the Colorado Supreme Court held that

in order to establish ineffective assistance of counsel the defendant must show “both a conflict of interest and an adverse effect resulting from that conflict.” [West v. People, 341 P.3d 520, 524 \(Colo. 2015\)](#). In that case, the defendants had argued that their attorneys were ineffective because they had concurrently or successively represented trial witnesses who testified against the defendants. *Id.* at 523. The standard articulated by the court was too lenient for Eid. She argued that, in addition to the majority’s requirements, a defendant should have to show that the prejudicial situation specifically arose because of “the simultaneous representation of multiple defendants accused of jointly committing the same offense,” which they had not done in those two cases. *Id.* at 535 (Coats, J., dissenting).

#### ***Close v. People***

In another attack on ensuring access to fair representation, Eid dissented in [Close v. People, 180 P.3d 1015 \(Colo. 2008\)](#). In that case, James Close asked the court to appoint new counsel after his public defender failed to raise the applicability of a case that could have reduced Close’s sentence from sixty to thirty years. *Id.* at 1017. The trial court ruled that Close’s request for new counsel was time barred. *Id.* The Colorado Supreme Court vacated the trial court’s judgment, ordering the trial court to “appoint conflict-free counsel to investigate and pursue potential relief from operation of the post-conviction time bar... based upon the justifiable excuse or excusable neglect exception...and a colorable claim of ineffective assistance of counsel...” *Id.* Eid dissented, arguing that remand was unnecessary since, she argued, the case that Close asked be applied was insufficiently analogous to his own. *Id.* at 1022–23 (Eid, J.,

dissenting).

#### ***Marshall v. People***

In [Marshall v. People, 309 P. 3d 943 \(Colo. 2013\)](#), Eid authored the majority opinion holding that the defendant’s Sixth Amendment rights were not violated when a lab report was admitted into evidence despite the fact that the lab technician who conducted the testing did not testify. After Dina Marshall was involved in a car accident, she consented to a urinalysis. *Id.* at 944. A supervisor from the lab that had conducted the urinalysis testified at Marshall’s trial and introduced the positive lab results into evidence. *Id.* at 945. Despite the Sixth Amendment’s requirement that a defendant have the opportunity to confront all witnesses against her, Eid concluded that the admission of the lab report without the testimony of the lab technician did not violate Marshall’s rights. *Id.* at 946.

Chief Justice Bender and Justice Brian Boatright dissented, arguing that admission of a lab report “through testimony of a supervisor who neither performed the laboratory analysis nor supervised its performance” was unconstitutional. *Id.* at 949 (Bender, J., concurring in part and dissenting in part). Without the testimony of the technician who performed the test, Justice Bender argued, Marshall was denied the “opportunity to challenge the skill, qualifications, methodology and trustworthiness of the analyst, even though the validity of the underlying data wholly depends on the analyst.” *Id.* at 952 (internal quotation marks omitted).

### ***Peña-Rodriguez v. People***

In a ruling that departs from her typical pattern of hostility to the accused, Eid joined Justice Márquez’s dissent in [Peña-Rodriguez v. People, 350 P.3d 287 \(Colo. 2015\)](#), arguing that a defendant’s Sixth Amendment right to be tried “by an impartial jury” was violated. In that case, Miguel Angel Peña-Rodriguez, who is Hispanic, had been charged with various counts of sexual misconduct with a victim younger than fifteen. *Id.* at 288. The jury convicted Peña-Rodriguez on three misdemeanor charges. *Id.* at 289.

After the jury had been dismissed, two jurors told Peña-Rodriguez’s attorney that a third juror made racially-biased remarks during deliberations. *Id.* at 288–89. Peña-Rodriguez presented this evidence of bias to the judge who determined that, while inappropriate, the juror’s comments did not entitle Peña-Rodriguez to a new trial. *Id.* at 289. Colorado’s “no-impeachment” rule prevented inquiry, after a verdict had issued, into the jury’s deliberations. *Id.* at 290.

The Colorado Supreme Court upheld the trial court’s judgment. Eid joined Justice Márquez’s dissent, which would have required the trial court to hold a hearing about whether racial bias infected the verdict. Justice Márquez argued that the rule of evidence at issue “cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury.” *Id.* at 294 (Márquez, J., dissenting).

The United States Supreme Court subsequently heard the case and reversed the Colorado Supreme Court. See [Peña-Rodriguez v.](#)

[Colorado, 137 S. Ct. 855 \(2017\)](#). The Court concluded that the Sixth Amendment permitted inquiry into the racial bias of the jurors.

## **E. RECUSAL**

### ***Schupper v. People***

In [Schupper v. People, 157 P.3d 516 \(Colo. 2007\)](#), Eid authored the majority opinion in a case involving recusal of a trial judge in a criminal case. Sanford Schupper had filed motions to disqualify the judge, in part alleging that his past role as supervisor of one of the prosecutors led to improper bias. *Id.* at 517. All of the motions were denied. *Id.* After Schupper’s conviction and sentencing, the judge finally recused himself “stating that he was uncomfortable continuing to sit on Schupper’s case because of the level of antagonism between counsel for the defense and prosecution” based on his personal relationship and past supervision of one of the prosecutors. *Id.* at 522 (Bender, J., dissenting). Eid concluded that the earlier motions were properly denied despite the judge’s later recusal and admission of discomfort presiding over the case. *Id.* at 517 (Eid, J.)

Justice Bender, along with two other Justices, dissented. Justice Bender argued that by the judge’s own admission he was uncomfortable with his ability to be unbiased and that retroactive recusal with a remand for a new trial was appropriate. *Id.* at 522 (Bender, J., dissenting).

## VI. DRUG REFORM

Eid has taken positions that have been hostile to the legalization of possession of small amounts of marijuana in Colorado and to Colorado's legalization of medical marijuana.

For example, in [\*People v. Boyd\*, 387 P.3d 755 \(2017\)](#), the court held that Amendment 64 to the Colorado Constitution, which legalized possession of less than one ounce of marijuana, prevented the state from continuing to prosecute cases that were not yet final at the time of the Amendment's effective date. *Id.* at 756. Eid dissented, arguing that because the possession of a small amount of marijuana was illegal at the time the crime was committed, the state should be permitted to continue its prosecution. *Id.* at 758 (Eid, J., dissenting).

Further, in [\*People v. Crouse\*, 388 P.3d 39 \(2017\)](#), Eid authored the majority opinion holding that medical marijuana seized from a person who was later acquitted of state drug charges could not be returned because federal law preempted the "return" provision of the medical marijuana. *Id.* at 40. Chief Justice Rice and Justices Gabriel and Hood dissented, arguing that the "return" provision of the medical marijuana amendment did not conflict with federal law. *Id.* at 43 (Rice, C.J., dissenting).

Finally, under Colorado law, it is an unfair and discriminatory labor practice to fire an employee based on the employee's "lawful" outside-of-work activity. Dish Network fired Brandon Coats, a quadriplegic confined to a wheelchair, because of his "state-licensed use of medical marijuana at home during nonworking hours." See [\*Coats v. Dish Network, LLC\*, 350 P.3d 849, 850 \(Colo. 2015\)](#). Eid,

writing for the court, held that Coats's use of medical marijuana, in compliance with Colorado law, was not a "lawful activity" because it still violated federal law.

## VII. EMINENT DOMAIN AND PROPERTY RIGHTS

Eid has strongly opposed anything but the most circumscribed exercise of eminent domain. Perhaps not surprisingly, the one exception came in support of a private oil pipeline company. This pattern suggests that Eid is protective of property rights only insofar as they do not conflict with the interests of a large corporation.

For example, in [\*Town of Telluride v. San Miguel Valley Corp.\*, 185 P.3d 161 \(Colo. 2008\)](#), Eid, dissenting alone, would have prevented municipalities from condemning certain property for parks, recreation and open spaces. And in [\*Department of Transp. v. Gypsum Ranch Co., LLC\*, 244 P.3d 127 \(Colo. 2010\)](#), Eid, again dissenting alone, would have prevented the condemnation of a mineral estate for the purpose of highway improvements. Moreover, in [\*Wolf Ranch, LLC v. City of Colorado Springs\*, 220 P.3d 559 \(Colo. 2009\)](#), Eid, again dissenting, would have prevented a city from imposing a drainage fee as a condition of approval to develop, arguing it was a regulatory taking.

The contrast with [\*Larson v. Sinclair Transp. Co.\*, 284 P.3d 42 \(Colo. 2012\)](#) is telling. There, over Eid's dissent, the Colorado Supreme Court held that state law did not grant a private company the power to use eminent domain to construct a

petroleum pipeline. The majority noted that it must “construe narrowly statutes which confer condemnation power upon private entities” and concluded that the legislature only “intended to authorize eminent domain power for the construction of electric power infrastructure,” not petroleum pipelines. *Id.* at 45.

## VIII. ENVIRONMENT

When it comes to the environment, Eid has made it more difficult for Coloradans to ensure their health and safety. In [Colorado Oil & Gas Conservation Commission v. Grand Valley Citizens’ Alliance](#), 279 P.3d 646 (Colo. 2012), the Grand Valley Citizens’ Alliance sued to force a public hearing regarding issuance of a permit to drill wells near a contaminated nuclear blast site. The Colorado Oil and Gas Conservation Commission had denied the hearing request because, it concluded, only operators, surface owners, and relevant local governments could request a hearing. *Id.* at 647.

Eid, writing for the majority, held that the Commission properly denied the hearing request, finding that a hearing on a permit to drill was not mandatory. *Id.* at 648.

Justice Hobbs dissented, arguing that “[w]hen the ‘relevant local government’ declines to pursue a hearing before the Commission on an application for a permit to drill that raises significant issues of public health, safety and the environment, the local government’s aggrieved citizens should have their evidence and witnesses heard.” *Id.* at 650 (Hobbs, J., dissenting).

Moreover, in *The Property Clause and New Federalism*,<sup>35</sup> Eid specifically highlighted the fact that the Supreme Court’s “New Federalism”

<sup>35</sup> *Supra* note 13.

narrowed the federal government’s ability to enact environmental legislation. Eid praised [Solid Waste Agency of Northern Cook County v. Army Corps of Engineers](#), 531 U.S. 159 (2001), where the Supreme Court struck down the EPA’s migratory bird rule.<sup>36</sup>

## IX. REPRODUCTIVE RIGHTS

Although Eid has not made her views on reproductive rights overtly clear, two things suggest that she would be hostile to a woman’s right to choose whether to have an abortion. First, Eid appeared on President Trump’s list of potential Supreme Court Justices who would “automatically” overturn *Roe v. Wade*.<sup>37</sup>

Second, Justice Eid twice dissented from the Colorado Supreme Court’s denial of a writ of certiorari in a case involving graphic images of aborted fetuses displayed by protesters during church services. See [Scott v. Saint John’s Church in the Wilderness](#), No. 12SC658, 2013 Colo. LEXIS 51 (Jan. 7, 2013); *Scott v. Saint John’s Church in the Wilderness*, No. 08SC791, 2009 Colo. LEXIS 832 (Sept. 14, 2009). Applying strict scrutiny based on the compelling interest of protecting children from disturbing images, the Colorado Court of Appeals upheld an injunction preventing such displays. See [Saint John’s Church in the Wilderness v. Scott](#), 296 P.3d 273 (Colo. App. 2012). The Colorado Supreme Court elected not to hear the case, as did the U.S. Supreme Court, [Scott v. Saint John’s Church in the Wilderness](#), 133 S. Ct. 2798 (2013). While there are no written opinions

<sup>36</sup> *Id.* at 1256.

<sup>37</sup> Dan Mangan, *Trump: I’ll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

explaining the rationale of the Colorado Supreme Court, Eid's dissents state that she would have granted the petitions for certiorari. Her dissents have been pointed to by pro-life advocates as evidence that she would be supportive of efforts to overturn *Roe v. Wade*.<sup>38</sup>

## X. GUN SAFETY

Although Eid, as a justice, has not been involved with many cases involving gun rights, as state Solicitor General, Eid argued that a more permissive Colorado state law should trump Denver ordinances, which banned ownership of assault weapons.<sup>39</sup> As a result, Eid had to recuse herself from a case involving a challenge to the assault weapon ban, leaving the Colorado Supreme Court deadlocked in a 3-3 split and the ban upheld.<sup>40</sup>

Further, Eid authored the court's opinion striking down the University of Colorado's handgun ban. *Regents of the University of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012). Eid, writing for a unanimous court, explained that Colorado law, which permits all permittees to carry a concealed weapon, "intended to divest the Board of Regents of its authority to regulate concealed handgun possession on campus." *Id.* at 498–99. Thus, the University of Colorado cannot ban a student from carrying a concealed weapon so long as the student complies with the requirements of state law.

## XI. CHURCH AND STATE

Eid has promoted an incredibly expansive view of the role of religion in society. As noted

above, she favored taxpayer dollars funding religious schools.

Also relevant, she supported exempting religiously-affiliated retirement homes from paying taxes. In *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812 (Colo. 2009), Catholic Health Initiatives Colorado ("Catholic Health"), a nonprofit affiliated with the Roman Catholic Church, operated a facility for the elderly in Pueblo, Colorado called Villa Pueblo Towers. *Id.* at 814. The City of Pueblo assessed Pueblo Towers \$22,000 in unpaid sales and use taxes. *Id.* Catholic Health argued that it was exempt under a local ordinance that exempted charitable organizations. *Id.*

The majority held Villa Pueblo was not exempt from paying taxes because it was not providing housing services in a free and voluntary manner. *Id.* at 823–25. Instead, "they are provided on a quid pro quo transactional basis," requiring residents to pay a monthly fee of \$1,130 to \$2,374. *Id.* at 815, 824.

Eid dissented, arguing that the majority permitted the City of Pueblo to discriminate against a religious organization, compared to other charitable organizations, in violation of the First Amendment. *Id.* at 826–31 (Eid, J., dissenting). In doing so, Eid relied on an argument not raised by Catholic Health, which did not allege that it was subject to discriminatory treatment because of its status as a religious organization. *Id.* at 825 n.9 (Martinez, J.).

<sup>38</sup> Calvin Freiburger, *A Pro-Life Look at Donald Trump's Supreme Court Nominees*, LIVE ACTION (May 19, 2016), <https://www.liveaction.org/news/a-pro-life-look-at-donald-trumps-supreme-court-nominees/>.

<sup>39</sup> Howard Pankratz, *Supreme Court Upholds Denver Weapons Ban*, DENVER POST (Jun. 5, 2006), <http://www.denverpost.com/2006/06/05/supreme-court-upholds-denver-weapons-ban/>.

<sup>40</sup> *Id.*

# CONCLUSION

Justice Eid has proven time after time that she is an ultraconservative ideologue committed to supporting right-wing causes. Both in her time on the bench and in her academic writing, Eid has predictably sided with the wealthy and powerful over everyday Americans. She has fought to limit the role of the federal government in protecting critical constitutional rights and protections and she has displayed hostility toward workers' rights, public education funding, constitutional protections for those accused of committing crimes, and reforms aimed at ensuring fair and open elections. Eid's record, coupled with the recommendation from the Judicial Conference that the Tenth Circuit seat not be filled, leads Alliance for Justice to oppose Justice Eid's nomination to the Tenth Circuit.