

AFJ NOMINEE REPORT

# ANDREW BRASHER

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

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# INTRODUCTION

On November 6, 2019, President Trump [announced](#) his intent to nominate Andrew Brasher to the United States Court of Appeals for the Eleventh Circuit. Brasher is nominated to replace George H.W. Bush appointee Edward Carnes, and if confirmed would be the sixth Trump nominated judge to the thirteen-person Eleventh Circuit. With the recent confirmations of Robert Luck and Barbara Lagoa, there are now seven Republican appointed judges and six Democratic appointed judges on the court.

Brasher is just 38 years old. He has only been a district court judge for six months. In that time, he has presided over just three trials that have gone to judgment; none of which were criminal matters. He has not written a published decision or an opinion concerning significant constitutional issues.

In other words, it is clear that Brasher was not nominated because of his long career as a lawyer or his experience as a judge. He was nominated because he will be a reliable vote on the bench to advance ultraconservative policies. In his short career as a lawyer, Brasher fought against voting rights, rights for women, communities of color, and the LGBTQ community and zealously worked to

dismantle consumer, worker, and environmental protections.

Alliance for Justice strongly opposes Brasher's confirmation.

# BIOGRAPHY

Andrew Brasher received a degree from Samford University and J.D. from Harvard Law School. Following law school, he clerked for Judge William H. Pryor Jr. on the Eleventh Circuit. He then spent four years in private practice at a firm in Birmingham, Alabama. From 2011 to 2019, he worked in the Alabama Attorney General's office, first as Deputy Solicitor General and then, for the last five years, as chief Solicitor General for the state. In January 2019, President Trump [nominated](#) him to serve as district judge for the Middle District of Alabama and, in May 2019, the Senate [confirmed](#) him.

In his prior nominations hearing, Senator Richard Blumenthal asked Brasher about deeply troubling positions he advocated for as Solicitor General of Alabama, including those involving civil rights, women's reproductive health, and gun safety. Brasher responded that he was merely an "advocate for the state and its agencies," and attempted to distance himself from his attacks on critical constitutional rights and legal protections. But, as Chuck Grassley said in opposing Caitlin Halligan, then Solicitor

General of New York, to be a judge on the D.C. Circuit, “[s]ome of my colleagues have argued that we should not consider this aspect of Halligan’s record, because at the time she was working as the Solicitor General of New York. But, no one forced Ms. Haligan to approve and sign this brief.” As Ted Cruz stated in opposing Trump nominee Mark Bennett because of Bennett’s work as Hawaii Attorney General, “[Bennett’s] record as Attorney General of Hawaii, I believe, represents an advocacy position that is extreme.” Similarly, the record Brasher established in Alabama “represents an advocacy position that is extreme.”

Finally, Brasher has a long record of affiliations with far-right groups. As a state official, he [coordinated](#) his legal strategy with the [Beckett Fund](#) and the [Alliance Defending Freedom](#). Both groups are virulently opposed to LGBTQ rights and have been [labeled](#) hate groups by the Southern Poverty Law Center (SPLC). He has spoken 16 times before the Federalist Society (which he joined in law school) and three times before the Koch-backed Rule of Law Defense Fund, a partisan [organization](#) founded to advance conservative policy goals among Republican attorneys general and led by former EPA Administrator Scott Pruitt.

# VOTING RIGHTS

Brasher has a disturbing record of eroding the voting rights of persons of color. He filed an [amicus brief](#) in *Shelby County v. Holder* that supported gutting the Voting Rights Act (VRA) on the grounds that the issues that had led to the need for the law had “faded away.” The *Shelby County* decision had struck down the preclearance requirement under the VRA, which required certain states with a history of voter suppression to receive approval from the Justice Department or court before implementing changes to their voting laws. Shortly after the Court’s decision, Alabama passed a strict voter ID law, despite [evidence](#) that this would disproportionately burden black communities in the state. As Solicitor General of Alabama, Brasher also [defended](#) the state’s felon anti-voter law that, according to one study, [disenfranchised](#) over 286,000 Alabamians, more than half of whom were black. He [supported](#) an Arizona law, [rejected](#) by the Supreme Court, that would have required voters to show proof of citizenship before voting. Brasher also has a history of defending unconstitutional racial gerrymanders in [Alabama](#) and in [Virginia](#) and, in his personal capacity, has [criticized](#) the Supreme Court’s efforts to remedy racial gerrymanders. He complained that the

Supreme Court had created “a low bar for plaintiffs to show racial predominance.”

In the Alabama gerrymandering case, Brasher argued that Alabama’s consideration of race in redrawing legislative districts was constitutional because race was not the predominant factor. He also argued that the very same Voting Rights Act he helped gut in *Shelby County* required Alabama to racially gerrymander the state. U.S. District Court Judge Myron Thompson, who heard the challenge, [called](#) this reliance on the Voting Rights Act a “cruel irony.” 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.”

The Supreme Court rejected Brasher’s position in 2015. It [held](#) that “there is strong, perhaps overwhelming, evidence that race did predominate as a factor” when Alabama’s legislature drew the boundaries. On remand, George W. Bush appointee 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.

# REPRODUCTIVE RIGHTS

Like other Trump nominees, Brasher meets President’s Trump’s [litmus test](#) of hostility to *Roe v. Wade*. In 2014, Brasher, on behalf of the Alabama Attorney General, [told](#) a crowd, “The ACLU and Planned Parenthood want a fight and we will give them one.” In his personal capacity, Brasher has [questioned](#) the validity of *Planned Parenthood v. Casey*, stating that it was “an uncertain area of the law [and] it’s not exactly clear what the standard should be.”

Brasher has defended unlawful anti-choice policies, [including](#) an [unconstitutional](#) law that would allow a judge in a judicial bypass proceeding to appoint an attorney for a fetus, the district attorney to testify to whether the minor was mature enough to make the decision to have an abortion, and the woman’s parents to be a party to the case. As made clear by the Supreme Court, states that have parental consent statutes must allow a minor to obtain a court order to bypass her parent’s or guardian’s consent. Alabama’s law, however, would have turned judicial bypass proceedings into an adversarial proceeding where the interests of the fetus, the minor’s parents, and the state could all be wielded against the

constitutional rights of a woman. A federal judge [struck down](#) the law, writing “the judicial bypass option is rendered meaningless if, as in Alabama’s bypass statute – which has no counterpart in any other state bypass law – parents or legal guardians can participate as parties under some circumstances, and if there are insufficient safeguards to protect the anonymity of the minor.”

Brasher also defended laws [requiring](#) abortion providers to have admitting privileges at nearby hospitals, [restricting](#) where facilities that provide abortions can be located, and “effectively [criminaliz\[ing\]](#) the most common method of second-trimester abortion.”

He also challenged the contraception coverage accommodation of the Affordable Care Act. He authored a comment letter in which he [tailored](#) his messaging to “the public relationships strategy of the Beckett Fund and the Alliance Defending Freedom.” In addition, he authored a brief [arguing](#) that the accommodation – which permitted religious nonprofits to opt out of the contraception insurance coverage requirement by signing a form objecting to the requirement and sending it to a third-party provider – was a violation of religious freedom. A district court rejected his argument, and the Eleventh Circuit agreed, [writing](#) “[w]e reject the plaintiffs’ claims because we conclude that the

regulations do not substantially burden their religious exercise and, alternatively, because (1) the government has compelling interests to justify the accommodation, and (2) the accommodation is the least restrictive means of furthering those interests. “

## CIVIL RIGHTS

Brasher filed an [amicus brief](#) in support of an unconstitutional Florida law mandating that applicants receiving Temporary Assistance for Needy Families (TANF) must pay for their own drug tests. A [study](#) in thirteen states showed that less than 1% of people who were forced to submit to drug tests under such laws tested positive for drugs. Moreover, it had the effect of stigmatizing low-income people by suggesting that people who need federal assistance are more likely to use drugs. The Eleventh Circuit struck down the law, [finding](#) that it stripped away the “legitimate expectations of privacy” of low-income families “by virtue of [their] poverty.”

Brasher was also [involved](#) in a lawsuit arguing that it was unconstitutional for the Census Bureau to count people who are not citizens as part of the decennial census, consistent with the Trump Administration’s goal of undercounting immigrants. Brasher [said](#) that he “discussed the case with employees of the Alabama Attorney General’s Office” and

met with the Congressman who is a co-plaintiff in the lawsuit.

Brasher also [signed](#) a brief urging the Supreme Court to review the Eleventh Circuit's unanimous decision to strike down a highly controversial immigration law. Among other things, the Alabama [law](#) required the detention of any person stopped by the police for any reason who could not provide documentation that they were lawfully in the country; required that public schools determine students' citizenship status; prohibited courts from enforcing contracts with undocumented immigrants if the other party knew (or should have known) the immigrant's status; made it a crime to knowingly rent housing to undocumented immigrants; and made it a crime to knowingly "transport" an undocumented immigrant (i.e., drive them anywhere).

Most recently, at his district court nomination hearing, Brasher was unwilling to say whether he believed *Brown v. Board of Education* was correctly decided. Whereas some Trump nominees have praised the decision, his refusal to say if he agreed with one of the most important civil rights cases in American history clearly demonstrates Brasher's hostility to civil and human rights.

# LGBTQ RIGHTS

Brasher has a record of opposing LGBTQ rights. He [filed](#) an amicus brief opposing marriage equality in *Obergefell*, in which he argued that marriage is not a fundamental right and that bans on same-sex marriage were lawful because the government has a legitimate state interest in keeping children with both of their biological parents. He wrote that "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." He also wrote, "Every child has an inborn nature that joins together the natures of two adults, and the child's biological parents are uniquely positioned to show the child how to recognize and reconcile these qualities within herself." This theory has been widely [debunked](#) by studies that show no difference in outcomes for children who are raised by same-sex couples.

Brasher also [led](#) other states in filing an amicus brief in a case over whether a photography company violated a New Mexico antidiscrimination law by refusing to photograph a same-sex wedding. The brief [argued](#) that the photographer should be able to refuse to provide her services to a same-sex couple based on her personal opposition to same-sex marriage.

# DEATH PENALTY AND CRIMINAL JUSTICE

While Solicitor General of Alabama, Brasher repeatedly [defended](#) death sentences that were struck down by the courts. In one instance, he [sought](#) the death penalty for a defendant with mental illness after denying him sufficient access to a competent psychiatrist as required under federal law. The Supreme Court found the states' actions unconstitutional and struck down the sentence. In another instance, Brasher [filed](#) an amicus brief in support of a Florida law that allowed judges to overrule juries and impose death penalties, in which he argued that "Judicial sentencing improves the general deterrent effect of capital punishment." He also [advocated](#) for the position that children can be sentenced to life in prison without possibility of parole.

# WORKERS & CONSUMER PROTECTIONS

Brasher has worked to diminish the power and leverage of unions. As Solicitor General, he [defended](#) an Alabama law that retaliated against the Alabama Education Association by restricting its members' ability to pay dues to the association unless it stopped engaging in any political activity.

Brasher's record on consumer protections is equally troubling. He has [repeatedly](#) demonstrated that he is far more interested in protecting corporations from litigation than making it possible for individuals to hold big businesses accountable for injuries to consumers. In a case that involved a multi-million dollar company that had produced false consumer reports, Brasher [filed](#) an amicus brief that advocated for making it harder for people to band together in a class action in order to sue corporations that had injured them. Despite their importance, Brasher argued that "abusive" class actions result in "firm-killing damages."

Brasher, joining Scott Pruitt and Texas Governor Greg Abbott, also [sued](#) to invalidate the Dodd-Frank Act. His brief



asserted that the Consumer Financial Protection Bureau unconstitutionally vested power in a single director rather than a board, that its mandate violated the nondelegation doctrine by lacking an intelligible principle, and that the circumstances of the director's recess appointment violated the Appointments Clause. The Dodd-Frank Act has served a vital role in protecting consumers since the 2008 financial crisis. Brasher's hostility towards this important legislation demonstrates his disdain for regulations designed to protect the lives of everyday people.

## ENVIRONMENT

In *North Dakota v. EPA*, Brasher [served](#) as the lead attorney for Alabama in a lawsuit that sought to invalidate the Obama Administration's expansion of the Clean Water Act (CWA). The EPA announced in 2015 that it was broadening the definition of "Waters of the United States" so that more bodies of water were protected by the CWA. The expansion only affected around [3%](#) of the nation's waterways; however, the lawsuit claimed that the new regulation was a gross overreach of government power. The [purpose](#) of the rule was to protect vital streams and wetlands that provide drinking water for over 117 million Americans, filter pollution, and reduce the impacts of flooding and erosion. In

addition to his lawsuit, Brasher gave [two speeches](#) criticizing the Clean Water Rule, one of which was for the Yale Law School chapter of the Federalist Society.

Brasher has also attacked protections for endangered species. As Solicitor General, he [filed](#) a brief on behalf of Alabama and 17 other states that argued that the Fifth Circuit's understanding of what constitutes "critical habitat" under the Endangered Species Act was overly broad. His brief argued against protecting land that is necessary to support species that are facing extinction on the grounds that doing so "almost always results in a lost economic opportunity." He [filed](#) another amicus brief in a similar case related to the Ninth Circuit's reading of "critical habitat," in which he argued that "the Ninth Circuit's decision gives the [U.S. Fish and Wildlife] Service unfettered power to declare areas critical habitat."

## GUN SAFETY LAWS

While Solicitor General, Brasher also filed amicus briefs challenging gun laws that were passed in [New York](#) and [Connecticut](#). In the aftermath of the Sandy Hook Elementary School shooting, which [took](#) the lives of 20 children and 6 adults, both states banned

semiautomatic firearms as part of a broader movement to prevent mass shootings. Brasher submitted briefs in lawsuits challenging the new laws, arguing that it should be easier to overturn restrictions on gun possession in court, and soliciting other states to sign on. Brasher also argued that “studies show that the federal ‘assault weapons ban’ had no measurable effect on gun violence.” In fact, [multiple studies](#) have shown that there were fewer mass shootings while the Assault Weapons Ban was in effect, and that there were significantly more after it expired.

## CONCLUSION

Throughout his career, Andrew Brasher has advocated for ideologically extreme positions and his record suggests that he will not be a neutral and fair-minded judge. For these reasons, Alliance for Justice strongly opposes his confirmation to a lifetime seat on the Eleventh Circuit.