

ALLIANCE FOR JUSTICE SNAPSHOT

Trump's Supreme Court Shortlist:

James Ho



Trump's Supreme Court Shortlist:

James Ho

James Ho, currently a judge on the U.S. Court of Appeals for the Fifth Circuit, is on President Trump's shortlist for the Supreme Court.

Reproductive Rights

President Trump has repeatedly reminded us that he will only put justices on the Supreme Court who will pass his litmus test of overturning *Roe v. Wade*. Trump said [overturning](#) *Roe* “will happen automatically... because I am putting pro-life justices on the court.” Ho meets this test.

In [Whole Woman's Health v. Smith](#), Ho wrote a concurring opinion that criticized abortion and accused a Republican judge of religious bias. The issue before the Fifth Circuit involved a discovery dispute in a case that challenged a Texas law requiring abortion clinic to bury fetal remains. The clinics bringing the challenge had requested to see communications between the Texas Conference of Catholic Bishops (TCCB), one of the parties involved in the lawsuit, and the state. TCCB claimed that the documents concerned internal religious issues and were therefore protected by the First Amendment. After a confidential review of the documents, a lower court disagreed and ordered the materials released as part of discovery. On appeal, Ho cast the deciding vote to reverse the decision. He also used it as an opportunity to attack reproductive rights, *Roe v. Wade*, and the lower court judge who had issued the original decision. He referred to abortion as a “moral tragedy,” stated that the case demonstrated “how far we've strayed” from the “original understanding” of the Constitution, and complained that the lower court judge had ordered the release of the documents to “retaliate against people of faith.”

Ho [voted](#) not to rehear the court's decision in *June Medical Services v. Gee*, after a conservative majority on the Fifth Circuit ruled to uphold a Louisiana abortion restriction that would require abortion providers to have admitting privileges at a nearby hospital. The law at issue served no medical purpose and is just another effort by state lawmakers to legislate abortion out of existence without directly overturning *Roe*. Moreover, the law is identical to a Texas law that was [struck down](#) by the Supreme Court in 2016 in *Whole Woman's Health v. Hellerstedt*. The Court held the law unconstitutional because it shut down clinics and did not benefit patients' health or safety. Ho ignored this clear Supreme Court precedent to allow the law to go into effect. The Supreme Court [reversed](#) in 2020, finding the admitting privileges requirement unconstitutional.

LGBTQ Equality

Ho [authored](#) the majority opinion in a case that upheld a lower court's decision to throw out a lawsuit brought by a transgender prisoner claiming that Texas prison officials violated her Eighth Amendment rights by showing "deliberate indifference" to her gender dysphoria, a diagnosed medical condition. Vanessa Lynn Gibson transitioned when she was sixteen years old. While in prison, she suffered from severe depression and suicidal thoughts and sought sex reassignment surgery (SRS). A prison doctor recommended an evaluation for the therapy; however, she was only provided hormone therapy and not the medically necessary procedure. Gibson filed a lawsuit, without the assistance of a lawyer, and the prison moved to have the case dismissed without a trial on qualified immunity grounds. The lower court rejected the prison's argument for qualified immunity but dismissed the case on the merits. Ho agreed. In his opinion, Ho intentionally misgendered the plaintiff and referred to her by her "deadname," her given name prior to her transition. In dissent, Judge Rhesa Barksdale, a George H.W. Bush appointee, criticized Ho for upholding summary judgment because the court was bound by the "bedrock" principle that prison officials could only get summary judgment without a trial if they had shown that there was no genuine dispute as to any material fact. As Barksdale pointed out, the "medical necessity of SRS in treating gender dysphoria" was an issue of material fact.

As solicitor general of Texas, Ho vigorously [defended](#) Texas's Defense of Marriage Act and the federal Defense of Marriage Act. Ho has [volunteered](#) with the First Liberty Institute, an organization that has taken strong stances against legal protections for the LGBTQ community as well as reproductive rights.

Criminal Justice

Ho has a troubling record when it comes to criminal justice. As Solicitor General of Texas, Ho has fought to maintain the death penalty in Texas, including [defending](#) Texas's lethal injection protocol.

In one case, Ho [dissented](#) from a decision overturning an improper sentence. Judge Wiener, a Republican appointee, ruled that the lower court had wrongly applied the Armed Career Criminal Act ("ACCA") to increase the sentence of Latroy Leon Burris, who had previously committed a robbery. Because robbery is not a violent felony under the ACCA, the court sent the case back to the lower court for resentencing. Ho would have allowed the improper sentence to stand.

Ho voted to [uphold](#) a sentence that was increased based on a presentencing report, even though, as the dissent explained, the report lacked the required "adequate evidentiary basis with sufficient indicia of reliability."

Ho voted with four other Trump judges to [rule](#) that the Double Jeopardy Clause

of the Constitution did not bar the second prosecution of Ricky Langley for murder. Six years after Langley was acquitted of first-degree murder by a jury, the state sought to retry him for second-degree murder with intent to kill. A lower court ruled that the charges were not barred by the Double Jeopardy Clause, but the decision was reversed by a panel on the Fifth Circuit. Ho voted with a majority on the Fifth Circuit to rehear the case, and then joined the majority opinion that held that the second prosecution was not barred, even though the issue of whether Langley had the specific intent to kill had already been litigated. In a strongly worded dissent, Judge Wiener wrote that the majority opinion “disrupts settled double jeopardy doctrine” and is “likely to confuse” other courts. As a result, the state was allowed to retry Langley for a crime he had already been acquitted of.

Ho [voted](#) against a civil judgement for a 21-year-old who was declared “actually innocent” after being held in jail for four years for a crime he did not commit. When George Alvarez was 17 years old, he was arrested on suspicion of public intoxication and burglary. While he was detained, he had an altercation with a police officer and was charged with assault. A video of the incident that would have proved his innocence was not disclosed to Alvarez and, as a result, he decided to plead guilty. Four years later, Alvarez learned of the video and brought a habeas petition challenging his sentence. After a new trial was ordered, the court overturned his conviction. Alvarez then sued the City of Brownsville for violating *Brady v. Maryland*, which requires evidence that could prove innocence be disclosed to a criminal defendant. The lower court found a *Brady* violation and awarded Alvarez over \$2 million. On appeal, Ho voted to throw out the award. Ho agreed with the majority that a *Brady* violation is not established when material is not shared during the plea deal process. As a result, states do not have to provide evidence of innocence to a criminal defendant unless the case goes to trial, even though this evidence is critical to a defendant’s decision regarding whether or not to take a plea deal.

Police Misconduct

Ho has a troubling record of refusing to hold government officials, including law enforcement authorities, accountable for constitutional violations. He has repeatedly tried to deny the victims of police shootings a chance to bring lawsuits against officers.

In one notable case, Ho [dissented](#) from a ruling by the full Fifth Circuit that upheld a lower court’s decision to deny qualified immunity to police officers who shot Ryan Cole, a suicidal teenager who was pointing a gun at his own head. As a result of being shot multiple times by the officers, Cole suffered permanent “cognitive impairment, partial paralysis, and other serious mental and physical injuries.” If Ho had his way, the boy and his family would have been denied a trial on the grounds that the officers were not liable for actions taken in the course of their law enforcement duties.

Similarly, Ho [dissented](#) from another decision that ruled that the family of a 25-year-old black man should have the chance to prove that police improperly shot and killed their son. The police had been pursuing an armed Black man in a brown shirt who kept disappearing from their view. While they were looking for him, they saw Gabriel Winzer, who was wearing a blue jacket, riding towards them on his bicycle with a toy gun in his hands. He was more than 100 yards away. Within six seconds of spotting him, the officers opened fire and shot Winzer, who fled back to his house. The police followed him to his backyard and then tried to arrest him and his father. When Winzer resisted arrest, they tasered him. Winzer was pronounced dead at the scene. After a lower court ruled to dismiss the case without a trial, a panel on the Fifth Circuit reversed. A full court then voted not to rehear the case; however, Ho dissented. Ho didn't believe that Winzer's family deserved a chance to prove their son's wrongful death.

Ho also cast the deciding vote to [uphold](#) a lower court ruling to allow evidence that was the result of an illegal stop and frisk. As the dissent pointed out, Justin Darrell was doing nothing wrong when he was stopped, and his actions did not “furnish the minimal level of objective justification needed for a detention or seizure.”

Torture

While at the Department of Justice Office of Legal Counsel, Ho [authored](#) a memo on the Geneva Conventions. Ho's work was then [cited](#) in the infamous Bybee-Yoo “Torture Memo” that “paved the way for waterboarding of terrorism suspects and other harsh interrogation tactics[.]” The specific passage that cites Ho's memo [argued](#) that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) “distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.” Ho's memo was cited as evidence that Common Article 3 of the Geneva Conventions “contains somewhat similar language” that distinguishes torture from other types of “cruel treatment” toward prisoners.

Ho's memo was not made public, nor was it listed in his Senate Judiciary Committee questionnaire when he was nominated to the Fifth Circuit.

Protections for the Wealthy and Powerful Over the Rights of All

On the Fifth Circuit, Ho has consistently sided with the wealthy and the powerful over everyday people. He has made it more difficult for workers and consumers to hold corporations and bad actors accountable, and he has made

[clear](#) his desire to tie the hands of the agencies that Congress has recognized as having the knowledge and experience to enforce critical laws, safeguard public protections, and ensure the health and safety of the public.

Ho voted not to rehear a [case](#) that severely undermined the Fair Housing Act (“FHA”). A panel on the Fifth Circuit had previously blocked claims brought under the FHA against a discriminatory policy whereby apartment management companies refuse to rent homes to people who want to use government vouchers to help pay their rent. This practice has a disproportionate impact on Black people. Ho joined a majority on the Fifth Circuit to reject a request for a rehearing, which left the decision in place even though, as both the Fifth Circuit and the Supreme Court have held, practices with a disparate impact on minorities violate the [FHA](#).

Ho would have [prevented](#) a lower court from forcing a large company to pay an arbitration award to an employee who had been unlawfully discharged. While Nicole Quezada worked for the construction company, she began suffering from “peripheral edema” and “venous insufficiency,” which caused “pain, swelling, and numbness in her extremities.” She requested “light work” and “frequent bathroom breaks,” but her employer, Bechtel, refused to accommodate her. She was later laid off. Following her removal, Quezada brought claims against Bechtel for violation of the Americans with Disabilities Act, which she was required by her employment contract to arbitrate. An arbiter awarded her \$98,000 plus attorney’s fees in arbitration. Quezada then went to federal court to enforce the award. Both the district court and the Fifth Circuit ruled in her favor, but Ho dissented. Had he prevailed, Quezada would have been denied recourse.

Ho [dissented](#) from a decision that ruled in favor of an individual with Parkinson’s disease who alleged that he was improperly placed on leave by his employer. After Michael Nall was diagnosed with Parkinson’s, his employer, BNSF Railway, required him to submit medical forms confirming his continued ability to work as a trainman. Even though he was cleared to do so by his doctor, BNSF put him on leave and never reinstated him. Nall brought a lawsuit alleging violation of the Americans with Disabilities Act and Texas law, which was dismissed by a district court. On appeal, a panel on the Fifth Circuit reversed the decision, finding that BNSF’s safety concerns were not clearly the reason for their decision to place Nall on leave given he had been repeatedly cleared to work by medical examiners. If Ho had prevailed, Nall would not even have a chance to prove that he had been unlawfully dismissed by his employer due to his diagnosis.

Ho [dissented](#) from a decision that ruled for a pension fund in a securities fraud case brought against a company and its former CFO. The company was having financial issues, which the CFO and other officers at the company decided not to report in their SEC filings as required by law. They later admitted to overstating their income by \$87 million and an investigation revealed that the former CFO and other officers had made improper accounting decisions. After

a lower court dismissed the pension funds securities fraud claims, a panel on the Fifth Circuit ruled that these claims should be allowed to go forward. In dissent, Ho argued that the case should be thrown out because the pension fund's claims were not specific enough.

Gun Safety

As Solicitor General, Ho submitted an amicus brief for Texas and 37 other states in [McDonald v. Chicago](#), a 2009 case challenging Chicago's handgun ban. Ho argued that if the law was upheld, "millions of Americans will be deprived of their Second Amendment right to keep and bear arms as a result of actions by local governments, such as the ordinances challenged in this case." He also claimed that the right to bear arms was critically important "to securing all our other liberties[.]"

Voting Rights

In 2020, Judge Ho [dissented](#) from a Fifth Circuit ruling that rejected a lawsuit by several white voters alleging discrimination in violation of the Voting Rights Act (VRA). The plaintiffs argued that a redistricting plan in Dallas County had violated the VRA by "diluting Anglo votes." In his dissent, Judge Ho went to great lengths to give the plaintiffs a second opportunity to prove a violation of the VRA.

Ho would have [reheard](#) a Fifth Circuit panel decision that upheld the City of Austin's campaign contribution limits. In his dissent, Ho criticized U.S. Supreme Court precedent and argued that all limits on campaign contributions are unconstitutional, even though U.S. Supreme Court has repeatedly upheld contribution limits for many decades.