



January 16, 2020

The Honorable Lindsey Graham
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington D.C. 20510

RE: Lambda Legal Opposes the Confirmation of Andrew Brasher

Lambda Legal urges you to oppose the nomination of Andrew Brasher to the United States Court of Appeals for the Eleventh Circuit. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and every one living with HIV, through impact litigation, policy advocacy, and public education.

After a comprehensive review of Judge Brasher’s record, we have concluded that his views on civil rights are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law. Judge Brasher’s history of opposing protections for LGBT people leaves us with serious doubt that he will be able to administer fair and impartial justice to LGBT litigants appearing before him. There are over one million people who identify as LGBT who live in Alabama, Florida and Georgia, and there are no explicit nondiscrimination protections for LGBT people in those states.¹ Absent these state-level protections, it is crucial that litigants have confidence in the fairness and integrity of the federal courts. We strongly urge you to oppose his nomination.

In his short career, Judge Brasher has distinguished himself through his anti-LGBT advocacy. While serving as Solicitor General of Alabama, Judge Brasher worked closely with the Alliance Defending Freedom²—an organization notorious for its campaigns against LGBT people—in order to submit an amicus brief asking the U.S. Supreme Court to deny same-sex couples the freedom to marry in the *Obergefell v. Hodges* case.³ Judge Brasher’s amicus brief employed long-since discredited arguments that “[biological] parents together are best suited to provide optimal care for their children.” Furthermore, the brief denigrated the ability of same-sex couples to provide loving homes by positing

¹ Movement Advancement Project, *Percent of Adult LGBTQ Population Covered by Laws*, https://www.lgbtmap.org/equality-maps/lgbt_populations (Alabama has an estimated 117,739 LGBT population, Florida has an estimated 785,231, and Georgia has an estimated 360,618).

² The Southern Poverty Law Center (SPLC) has designated ADF as a hate group for their vicious attacks on LGBT people Alliance Defending Freedom, Southern Poverty Law Center (2019) available at <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

³ Brief for State of Alabama as Amicus Curiae, p. 13, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) available at http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14-556_State_of_Alabama.pdf.

that biological parents have a “natural inclination to care for their children” and are thus “best suited to raise their offspring.”⁴ In fact, the evidence has definitively established that there is no difference in outcomes for children raised by same-sex households than there is for children raised in opposite-sex households.⁵ Judge Brasher’s reliance on such arguments suggests that he will ignore facts that do not conform with his particular policy preferences, and calls into doubt his ability to administer fair and impartial justice more broadly. Judge Brasher also wrote a personal blogpost arguing against marriage equality asserting that marriage equality is an area that state policymakers should be able to impose their preferences at the expense of the fundamental rights of a vulnerable minority.⁶ Such arguments are deeply troubling for someone nominated to a position where they may be asked to exercise their constitutional duty to vindicate rights of minority groups who are not able to defend their protections at the ballot box.

Less than a month after the Supreme Court rejected Judge Brasher’s offensive and groundless arguments and ruled in *Obergefell* that same-sex couples may not be deprived of the right to marry, Judge Brasher gave a presentation to a group of probate judges in Alabama outlining many of his criticisms and counterarguments to the Supreme Court’s decision and went so far as to criticize unmarried Supreme Court Justices for recognizing that same-sex couples “hope not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”⁷ His disparaging comments about the *Obergefell* decision were made in his private capacity, and therefore only bolster our conclusion that the arguments he made about *Obergefell* represent his personal views, and not just those of an advocate doing his job. His disparaging of this decision leads us to doubt whether he will treat this case and other decisions vindicating the rights of LGBT people as binding precedent, and his comment about cases to come suggests that he is rooting for future cases that will undermine those protections. Finally, his bizarre comment about the “unmarried Supreme Court justices” demonstrates a disturbing disrespect for the members of the court, poor judgment, and a lack of judicial temperament, none of which are qualities that anyone should want in someone nominated for a lifetime appointment to the court of appeals.

Our concern that Judge Brasher will be actively looking for ways to undermine pro-LGBT decisions is not just speculation, but proven by his actions. Judge Brasher worked feverishly to enlist other states to join an amicus brief asking the U.S. Supreme Court to grant certiorari to hear an appeal of a decision issued by the New Mexico Supreme Court holding that a photography company that chose to deny services to same-sex couples discriminated on the basis of sexual orientation.⁸ Judge Brasher urged the Court to take up the case in order to create an exemption based on what Judge Brasher viewed as compelled speech and to green light the ability to enact *further* exceptions to “public accommodations

⁴ *Id.* 6-7.

⁵ See Nanette Gartrell, M.D. et al, *Same-Sex and Different-Sex Parent Households and Child Health Outcomes*, JOURNAL OF DEVELOPMENTAL BEHAVIORAL PEDIATRICS, (April 2016), available at https://journals.lww.com/jrnl/dbp/Abstract/2016/04000/Same_Sex_and_Different_Sex_Parent_Households_and.1.aspx

⁶ Andrew Brasher, *Symposium: Good faith and caution, not irrationality or malice*, SCOTUSblog, (Jan. 16, 2015), available at <https://www.scotusblog.com/2015/01/symposium-good-faith-and-caution-not-irrationality-or-malice/>.

⁷ Andrew Brasher, *Understanding the Supreme Court’s Same-Sex Marriage Decision*, (July 29, 2015), Alabama Probate Judges Conference, Tuscaloosa, Alabama.

⁸ Brief of Alabama, Arizona, Kansas, Michigan, Montana, Oklahoma, South Carolina, and Virginia as Amicus Curiae Supporting Petitioner (Dec. 13, 2013), available at <https://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusStates.pdf>.

and same-sex marriage laws.”⁹ The U.S. Supreme Court ultimately declined to hear the case, but Judge Brasher’s relentless efforts to erode or eliminate protections for LGBT people demonstrates that he will not be able to set aside his personal beliefs in order to serve as a fair and impartial adjudicator of justice.

Because many issues never reach the Supreme Court, who sits on the courts of appeals will have a significant and lasting impact on the development of the law. Most circuit courts have only between 10 and 20 judges who serve as the court of last resort in thousands of Federal cases. The Eleventh Circuit handles thousands of appeals, but there are only 12 judges on the Court. Therefore, the potential influence of any single court of appeals judge on the direction of a circuit’s jurisprudence is significant. Stakes this high demand careful attention to the impact that any confirmation will have on various communities, including but not limited to the LGBT community.

For this reason, we echo the NAACP’s serious concerns regarding Judge Brasher’s record of working to undermine voting rights and civil rights across the country.¹⁰ We also share the NAACP’s dismay over the lack of diversity on the Eleventh Circuit, which currently has only one African-American judge on the court who is eligible for senior status, raising fears that the Eleventh Circuit is “one retirement away from re-segregating.”¹¹ The Eleventh Circuit presides over the highest percentage of African-American residents in the country and for our court system to be fully respected and seen as legitimate in the minds of all people whose rights it has the power to uphold, the people making decisions within the judiciary must reflect the incredible diversity of the United States.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sasha Buchert, Senior Attorney, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal

⁹ *Id.* at 2. (“...this Court’s guidance would benefit state lawmakers who are considering proposals to enact conscience-based exceptions to public accommodations and same-sex marriage laws.”)

¹⁰ *Opposition to the Nomination of Andrew Brasher to the U.S. Court of Appeals for the Eleventh Circuit*, NAACP (January 13, 2020) available at <https://naacp.org/wp-content/uploads/2020/01/BrasherNAACP.pdf>

¹¹ *Id.*