

**Confirmed Judges, Confirmed Fears:  
The Devastating Harm Already Done by Confirmed Trump Federal Judges**

October 2018



A key pledge by Donald Trump that helped him capture the presidency was his promise to work with allies in the Senate, the Federalist Society, and elsewhere to transform the federal judiciary by appointing far-right judges to lifetime federal judicial posts. This includes not only the Supreme Court, but also lower federal courts, particularly the federal courts of appeal, which are the courts of last resort in the vast majority of cases. Such appointments not only fulfill a campaign pledge, but they also help advance the Right's longstanding goal of using the courts to advance a political agenda that benefits corporations, the wealthy and powerful over the interests of all Americans. That means packing the courts with narrow-minded elitist judges who will [dismantle](#) the New Deal and federal protections for the health, safety and welfare of all Americans as well as [undermine](#) other fundamental rights, like reproductive freedom, voting rights, and LGBTQ rights.

Unfortunately, Trump has so far kept this promise. In less than two years, with the help of Senate Majority Leader Mitch McConnell, judge pickers in the Federalist Society and the Heritage Foundation, and dark money spenders like the Judicial Crisis Network, and many others, Trump has placed two far-right nominees onto the Supreme Court. In addition, the Republican goal of “[f]illing out” the lower courts “[with an army](#) of conservative jurists” has seen an “historic” number of such judges placed on the bench for life—as of October 15, 53 trial court judges and 29 powerful appellate judges, totaling [84](#) altogether. This is already more than the 62 judges confirmed during President Obama's first two years, and the appellate court total of 29 is more than double the [11](#) confirmed at this point during Obama's first two years. Senate Republicans are hoping to increase the grand total to [137](#) by the end of 2018, more than doubling the Obama total. Right-wing advocates have predicted that by 2019, Trump-appointed judges will be participating in “[more than 15,000 decisions every year.](#)”

Although it has only been about 18 months since the first Trump-nominated judges began serving, their opinions have already had a huge impact, harming the rights of workers, religious and other minorities, women, voters, immigrants, and many more. This report documents the damage done by Trump-appointed narrow-minded elitist judges on the Supreme Court and the federal courts of appeals.

Voters have many issues to consider as they head to the polls over the next few weeks. What happens to our federal courts should be one of them. As Senate Majority Leader [McConnell](#) stated in encouraging conservative Republicans to vote, if Republicans “lose the Senate,” then “the project of confirming judges is over” for at least the next several years. On the other hand, if a compliant Senate continues to speed far right Trump judicial nominees to the bench at a record pace, the rights and liberties of all of us will be put in even greater danger. Democrats and independents, not just conservative Republicans, must keep this in mind as they vote in November.

## I. THE SUPREME COURT

So far, Trump has placed two narrow-minded elitist justices on the Supreme Court: Neil Gorsuch, who began on the Court in April 2017, and Brett Kavanaugh, who started earlier this month. Although predictions indicate that Kavanaugh will have a huge impact because he has replaced swing justice Anthony Kennedy, he has not yet voted publicly in any cases. Justice Gorsuch, however, has already done major damage in only 18 months on the Court.

Specifically, Gorsuch has cast the deciding vote in more than a dozen 5-4 decisions that harmed workers, voters, consumers, immigrants, and reproductive rights, as well as sustaining abuses of government authority. These decisions include:

### Workers' rights

- [\*Janus v. AFSCME\*](#) (2018): Gorsuch voted with the other arch-conservatives to overrule a decades-old precedent protecting the right of public sector employees to engage in effective collective bargaining. The Court ruled 5-4 that requiring non-members to pay fair-share fees for their representation violated the First Amendment, a claim rejected by conservatives like Eugene Volokh and William Baude, as well as the rest of the Court.
- [\*Epic Systems Corp. v. Lewis\*](#) (2018): Gorsuch was both the deciding vote and the author of this 5-4 opinion holding that employers can make agreement to one-on-one arbitration a condition of employment. This strips working people of the right to use class actions and other collective means to protect themselves, even though that right is specifically guaranteed in the National Labor Relations Act. As Justice Ginsburg explained in dissent, it will allow employers to violate minimum wage laws that protect our most vulnerable workers.
- [\*Encino Motorcars v. Navarro\*](#) (2018): Gorsuch joined in a 5-4 ruling that some 100,000 service advisors who work for auto dealerships are not entitled to overtime pay under federal law. As Justice Ginsburg wrote in dissent, this undermined more than 50 years of Supreme Court precedent that has narrowly interpreted exemptions to overtime pay requirements and thus provided important protection to vulnerable workers.

### Voting

- [\*Husted v. A. Philip Randolph Institute\*](#) (2018): Gorsuch was the deciding vote in a 5-4 ruling that upheld Ohio's voter purge practice triggered by non-voting, which threw [more than a million](#) voters off the voting rolls. Justice Sotomayor explained in dissent that the

majority ignored the history of voter suppression and upheld a program that furthered the disenfranchisement of minority and low-income voters that Congress set out to eradicate.

- [\*Abbott v. Perez\*](#) (2018): Gorsuch joined this 5-4 ruling that upheld Texas congressional and state house redistricting schemes which a three-judge lower court had unanimously found had been adopted with the intent to discriminate against people of color. In dissent, Justice Sotomayor bluntly called out Gorsuch and the other narrow-minded elitist justices for distorting the facts and the law in order to achieve the result they wanted.

## **Immigration**

- [\*Trump v. Hawaii\*](#) (2018): Gorsuch was the deciding vote in the 5-4 ruling that upheld Trump's infamous Muslim ban. As Justice Sotomayor explained in dissent, the ruling effectively approved "official religious prejudice," denied to "countless individuals the fundamental right of religious liberty," and "upend[ed] this Court's precedent."
- [\*Jennings v. Rodriguez\*](#) (2018): Gorsuch joined the other far-right justices in ruling 5-3 that federal immigration law does not require the government to hold bond hearings for detained immigrants. As Justice Breyer explained in dissent, this ruling could result in the confinement of thousands of people for months or years without any hope of bail, even though many end up being allowed to stay once their case is resolved.

## **Consumers vs. corporations**

- [\*Ohio v. American Express Co.\*](#) (2018): Gorsuch was the deciding vote in a decision that American Express' "anti-steering provisions," which prohibit merchants from encouraging customers to use other credit cards that have lower fees, do not violate antitrust laws, even though they result in higher prices for consumers. As Justice Breyer pointed out in dissent, the majority decision was also "contrary to basic principles of antitrust law."
- [\*California Public Employees' Retirement System v. ANZ Securities, Inc.\*](#) (2017): Gorsuch was the fifth vote in a ruling that limited the time that investors have to join class actions in securities cases. Justice Ginsburg explained in dissent that the decision would harm "the investing public" and "[gum up the works](#)" of class action litigation by giving companies an incentive to slow things down and thus effectively limit the number of people who join the case.

## Reproductive rights

- [\*NIFLA v. Becerra\*](#) (2018): Gorsuch joined the other ultra-conservatives in striking down California’s disclosure laws for fraudulent “crisis pregnancy centers” as unconstitutional compelled speech. Justice Breyer warned in dissent that this misguided reasoning could “radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk,” since virtually every disclosure law could be considered to compel speech.

## Abuse of governmental authority

- [\*McGhee v. Hutchinson\*](#) (2017): Gorsuch joined the other narrow-minded elitist justices in a 5-4 order denying several Arkansas prisoners’ request to a stay of execution by a method likely to cause excruciating pain. The manufacturer had stopped making a drug that, instead of putting prisoners to sleep, leaves them awake, paralyzed, and suffering agony that has been likened to being burned at the stake. In order to use up the state’s remaining supply of the drug before it passed its expiration date, Arkansas was rushing to execute eight people over eleven days. Several had serious legal arguments; for instance, one claimed he was actually innocent, but had a defense lawyer who was drunk during trial.
- [\*Murphy v. Smith\*](#) (2018): Gorsuch wrote a 5-4 decision that effectively limited the amount of damages that can be recovered when prison officials severely abuse or injure prisoners. Under his reasoning, someone who wins their case and gets damages and attorneys’ fees must pay the first 25 percent of those fees from the damages, rather than having them paid by the defendants, reducing the actual recovery, possibly down to zero. Justice Sotomayor pointed out in dissent that Congress had rejected language in the relevant law that would have done exactly what Gorsuch claimed the law required.
- [\*Currier v. Virginia\*](#) (2018): Gorsuch wrote this 5-4 opinion, which essentially allows the state to prosecute someone for a crime even after that person was found not guilty. Specifically, Currier was found not guilty of breaking and entering and grand larceny. At a second trial for committing the offenses with a firearm, Gorsuch wrote that the state could nevertheless use evidence of Currier’s alleged breaking and entering and grand larceny—for which he had previously been found not guilty.
- [\*Davila v. Davis\*](#) (2017): Gorsuch was the fifth vote in a ruling that when a state prisoner fails in a state post-conviction proceeding to challenge the ineffectiveness of the lawyer who handled his direct appeal, he cannot raise that claim in federal court—even if the failure was caused by ineffective assistance of his post-conviction lawyer. Justice

Breyer's dissent criticized this Catch-22, pointing out that it contradicted previous Court rulings concerning ineffective assistance of counsel during trials.

In addition to these 14 specific cases where Gorsuch has already done serious harm, his concurring and dissenting opinions suggest that even more damage can be done with the addition of Kavanaugh and perhaps other Trump nominees to the Supreme Court. For example, he [joined](#) a concurring opinion by Justice Thomas in the Texas redistricting case suggesting that Section 2 of the Voting Rights Act, which prohibits discriminatory voting actions by government, should not apply at all to redistricting decisions. Gorsuch opinions [threaten](#) comparable damage concerning money and politics, religious liberty, LGBTQ rights, and [gun safety](#).

## **II. THE FEDERAL COURTS OF APPEALS**

In the vast majority of federal court cases, the federal courts of appeals have the final word, since the Supreme Court reviews less than 100 cases each year. Trump has already filled 29 lifetime seats on those courts around the country, about one out of every six [authorized](#) appellate court judgeships. As Majority Leader [McConnell](#) has bragged, that is a record pace for “any administration in history.” The first of Trump's appellate judges began hearing cases in June of 2017.

Unlike the Supreme Court, appeals court judges generally review cases in panels of three judges on each case, and they cannot choose which cases they hear, so the proportion of high profile appellate court decisions is lower than in the Supreme Court. Nevertheless, Trump-nominated appeals court judges have already written or joined dangerous opinions or dissents concerning workers' rights and discrimination, immigration, corporations vs. consumers, reproductive rights and other constitutional issues like money in politics, and abuse of government authority. The cases discussed below focus on those where Trump appointees disagreed with the views of other appeals court judges, and many have been the subject of PFAW's [Confirmed Judges, Confirmed Fears](#) blog entries. Discussed below are 38 cases decided as of October 10, 2018.

### **Workers' Rights and Discrimination**

#### **Trump Judge Amy Coney Barrett Votes to Allow Business to Racially Segregate its Workplaces**

On November 21 2017, Trump appeals court Judge Amy Coney Barrett of the 7th Circuit Court of Appeals joined four other Republican-appointed judges in refusing to rehear a [three-judge panel decision](#) (rendered by three of those four judges) about a workplace racial segregation

case, *United States EEOC v. Autozone Inc.* Three other court of appeals judges—Judges Wood, Rovner, and Hamilton—nominated by both Democratic and Republican presidents, strongly dissented.

As these [three dissenting judges explained](#), the panel decision had approved Autozone’s policy in Chicago of “segregating employees and intentionally assigning members of different races to different stores” because the particular employee who had complained to the EEOC after being transferred from one store to another had received a lateral transfer. He could not prove that the “intentional maintenance of racially segregated stores diminished” his “pay, benefits, or job responsibilities.”

The three judges explained that this attempted return to the “separate but equal” doctrine was wrong under fair employment laws, just like it is under the Constitution, since “deliberate racial segregation by its very nature has an adverse effect on the people subjected to it.” In addition, not being able to work at their preferred location based on their race clearly has an adverse effect on an employee.

At the very least, the dissenting judges explained, the “importance of the question and the seriousness with which we must approach all racial classifications” made the case “worth the attention of the full court.” But Barrett voted against having the full court of appeals even consider the case.

### **Trump Judge John Bush Casts Deciding Vote to Prevent Age Bias Case from Going to a Jury**

Trump 6th Circuit Judge John K. Bush cast the deciding vote that upheld the dismissal of a claim by a 76-year old Michigan woman who contends that she was fired in violation of the federal Age Discrimination in Employment Act (ADEA). The dissenting judge explained that there was clearly enough evidence that Joanne Alberty should have had a chance to present her case to a jury to decide.

In the case, [Alberty v. Columbus Twp.](#), Alberty had been working for Columbus Township in rural Michigan as a deputy clerk and then as assistant to the Township’s assessor for 16 years. Despite an “impeccable” performance record, she was fired shortly after requesting a raise and was replaced by someone 44 years younger. Even the majority (Bush and Julia Smith Gibbons, who wrote the opinion) agreed this was enough to state a *prima facie*—sufficient on its face—case of age discrimination requiring the Township to explain the firing. But the majority upheld a grant of summary judgment against Alberty (meaning that the case doesn’t go to trial) because the Township claimed she was fired due to a budget shortfall and she did not submit a “direct admission” that the Township fired her because of her age.

Judge Eric Clay strongly dissented. He explained that a jury could reasonably reject the Township’s explanation, and in fact could find it “so unsatisfactory and lacking in credibility that

it can only be explained as an excuse that the Township concocted to cover up its discriminatory action.” This was for a few reasons: a) the budgetary explanation was only offered after the lawsuit, b) the Township’s budget actually showed a surplus, and c) the budget not only gave Alberty’s successor an initial wage payment and training allowance that provided “negligible relief” from Alberty’s wages, but also paid her successor the exact same wages as Alberty, plus paying for more training, within a few months. A few months after that, the successor got another raise, making her “a far more expensive employee than Alberty had ever been.” Under Supreme Court case law in ADEA cases, the dissent explained, this conflict was for a jury to resolve, and Alberty’s case should not have been thrown out.

Judge Clay was even more critical of Gibbons and Bush for claiming that their decision was justified because of the fact that there was not a direct admission that age was a factor in Alberty’s firing. Under Supreme Court precedent, he explained:

“a mere lack of direct evidence does not weaken an otherwise ample record of circumstantial evidence. Otherwise, an employer could never be held liable for discrimination—no matter how suspicious the circumstances or how demonstrably false the employer’s proffered explanation—as long as the employer did not admit to its discriminatory animus.”

Bush’s decision to join with Gibbons in refusing even to give Ms. Alberty a chance to take her case to a jury is extremely disturbing. It not only flies in the face of Supreme Court precedent, but it also reflects a hostility to civil rights that is a significant concern with respect to Trump’s nominees to our nation’s federal courts.

### **Trump Judges Kevin Newsom and Lisa Branch Keep the Door Open for Anti-Gay Job Discrimination**

In July 2018, with the help of two Trump judges, the 11th Circuit issued a ruling against LGBTQ equality that perfectly demonstrates the far Right’s vision of the federal courts as a place where ideology trumps the law and where the promise of equality goes to die. In [\*Bostock v. Clayton County Board of Commissioners\*](#), the majority turned away the legal claim of Gerald Lynn Bostock, an employee who had been discriminated against due to his sexual orientation. In refusing to even consider Bostock’s argument that this constituted unlawful sex discrimination under Title VII, the court had to ignore one of the Supreme Court’s most important Title VII precedents.

Back in 1979, the 11th Circuit ruled in *Blum v. Gulf Oil* that sexual orientation discrimination isn’t covered by Title VII. But that conclusion was completely undercut by the Supreme Court a decade later in a seminal 1989 case called *Price Waterhouse v. Hopkins*, which established that employment actions based on sex stereotypes constitute prohibited sex discrimination under Title

VII. When a three-judge circuit panel recently claimed it was still bound by the older circuit precedent until the circuit en banc reanalyzed it under *Price Waterhouse*, a judge sought exactly that much-needed en banc review.

Trump judges Kevin Newsom and Lisa Branch voted against review, and their position carried the day over a powerful dissent by Obama nominee Robin Rosenbaum (joined by another Obama nominee, Jill Pryor).

In 2011, about 8 million Americans identified as lesbian, gay, or bisexual. Of those who so identify, roughly 25% report experiencing workplace discrimination because their sexual preferences do not match their employers' expectations. That's a whole lot of people potentially affected by this issue.

Yet rather than address this objectively en-banc worthy issue, we instead cling to a 39-year-old precedent that was decided ten years before *Price Waterhouse v. Hopkins*, the Supreme Court precedent that governs the issue and requires us to reach the opposite conclusion of Blum. Worse still, Blum's "analysis" of the issue is as conclusory as it gets, consisting of a single sentence that, as relevant to Title VII, states in its entirety, "Discharge for homosexuality is not prohibited by Title VII."

Rosenbaum observed that regardless of how a judge comes out on the substantive legal question, the court owes it to the public to analyze the impact of a major Supreme Court case on the older circuit precedent.

I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people.

*Bostock v. Clayton County Board of Commissioners* is one among several appellate court decisions with a certiorari petition before the Supreme Court concerning whether Title VII prohibits discrimination based on sexual orientation. If the Supreme Court agrees to consider the issue, the legitimacy of any 5-4 ruling with the corruptly confirmed Justice Kavanaugh in the majority could be seriously questioned.

### **Trump Judge Amul Thapar Would Make it Easier to Get Away with Sex Discrimination**

If Trump judge Amul Thapar of the 6th Circuit had had his way in an August 2018 case called [\*McClellan v. Midwest Machining\*](#), corporations could more easily intimidate employees into giving up their Title VII rights. Fortunately, his view was the dissent in that case.

The question is whether the right to sue under Title VII or the federal Equal Pay Act (EPA) is limited by an old common law rule called “the tender-back doctrine.” (Generally, “common law” refers to rules established by courts and is still followed in the absence of contrary laws adopted by legislatures or agencies.) That doctrine states that contracts agreed to under duress can be declared void by the innocent party if they return any benefits they received from the contract within a reasonable time.

In this case, Jena McClellan alleges she was fired from Midwest Machinery because she was pregnant. She was pressured into signing a severance agreement, which she didn’t fully understand. Under the agreement, she would get \$4,000 and waive any claims against the company. She thought the “claims” referred to items like back pay. This was in August 2015.

In November 2016, after she met with an attorney, she filed suit for sex discrimination. Her complaint also alleged sex-based discrimination company-wide in job assignments and pay rates, in violation of Title VII and the EPA. Three weeks later, at her lawyer’s advice and before the company’s response was due, she wrote a check to the company returning the \$4,000 and rescinding the agreement she’d been pressured to sign.

The district court ruled that she couldn’t sue because she had kept the money for too long, and did not return it until after filing suit. But the 6th Circuit majority reversed, ruling that the common law “tender-back doctrine” does not apply to federal lawsuits under Title VII and the EPA. Otherwise, employers could easily pressure or deceive employees they discriminate against into signing away the rights that Congress has guaranteed them. Working people with few financial resources would be particularly susceptible to such bullying tactics. This would frustrate the statutes’ purpose of eliminating sex-based discrimination from the American workplace.

Writing in dissent, Judge Thapar would have applied the common law rule to cases under Title VII and the EPA. In this instance, he would have remanded the case and make McClellan persuade the judge that her delay in returning the money was reasonable.

In other words, Judge Thapar would have given employers a tool to avoid the consequences of their illegal job discrimination. That fits the corporate agenda, but it is contrary to laws that protect working people.

### **Trump Judge Amy Coney Barrett Throws Out Claim of Unfair Arbitration Despite Dissent by Reagan Appointee**

Trump 7th Circuit Judge Amy Coney Barrett recently wrote an opinion that dismissed a case against an arbitration board which, according to two fired employees, improperly conducted the

former employees' arbitration against the employer. Judge Diane Sykes joined the opinion, but Reagan appointee Judge Kenneth Ripple strongly dissented from the dismissal.

In the case, [Webb v. Financial Industry Regulatory Authority](#) (known as FINRA), brokers Nicholas Webb and Thad Beversdorf were fired by their employer, Jefferies & Company, Inc., and decided to challenge their firing through an arbitration conducted by FINRA. After two and a half years without resolution, however, they withdrew their claims and sued FINRA in state court, contending that FINRA had interfered with the arbitrators' discretion, failed to train them properly or provide them with appropriate procedural tools, and failed to permit reasonable discovery (a pre-trial procedure where evidence is collected by both sides). FINRA removed the case to federal court, and the lower court sided with FINRA.

When the fired employees appealed, however, rather than deciding the merits of the appeal, Judges Barrett and Sykes dismissed the case for lack of federal jurisdiction, despite the objections of both FINRA and the fired employees. The majority claimed that there was no federal jurisdiction because although the plaintiffs and defendants were citizens of different states and thus the case could qualify for federal jurisdiction because of diversity of citizenship, the amount at stake in the case was less than the required \$75,000 because the only way that threshold could be reached would be to include the employees' claims for attorneys' fees.

Judge Ripple strongly dissented. He explained that the fees sought by the fired employees were not for litigating the lawsuit against FINRA, but instead were damages that they had suffered by having to pay attorneys during the improperly conducted arbitration. Ripple explained why Illinois law, which everyone agreed was controlling, allowed for such damages in this type of case.

But even if the majority disagreed, he explained, the clearly established test for federal jurisdiction provides that a case removed to federal court based on diversity jurisdiction should remain there unless it is a "legal certainty" that there is no jurisdiction, and federal courts should not engage in "guesswork" about what state law provides. As Ripple explained, the majority had engaged in precisely that kind of "guesswork," admitting that it could not say with certainty whether an Illinois court would allow such damages.

Ripple criticized the majority for ignoring well-established case law and effectively encouraging district courts to "follow its example today of becoming bogged down in reading 'tea leaves' on the content of state law." The result was to delay the resolution of the employees' claims as they were sent back to state court and deny FINRA its "rightful federal forum." Ripple concluded that the majority opinion effectively violated "established practice, grounded in well-settled case law across the Nation."

## **Trump Judge Joan Larsen Would Block Whistleblower from Court**

Natasha Henderson worked as the city administrator of Flint, Michigan, when it was under state-controlled receivership. She alleged that in 2016, she was fired in retaliation for reporting potentially illegal conduct by the mayor, in violation of Michigan's whistleblower-protection law and her First Amendment speech rights. A three-judge panel of the 6th Circuit ruled that her case could go to trial, but Trump judge Joan Larsen wrote a dissent that—if it became law—would make it extremely difficult for a fired whistleblower to ever make their case to a jury of their peers, both in public and in private employment.

City officials had requested that any private donations to help those affected by the lead crisis be made to a nonprofit fund administered by the Community Foundation of Greater Flint. Henderson learned that Mayor Karen Weaver was directing staff to funnel offered donations away from the city-approved fund and instead into a 527 organization that she had formed on her own. Henderson felt personally obligated to report this to the interim chief legal officer, Anthony Chubb. Three days later, the mayor met with Chubb and the city's HR officer and Henderson was given a termination letter with no explanation.

Larsen would have prevented Henderson from making her case to a jury because, according to Larsen, Henderson hadn't presented enough evidence that the mayor even knew about the accusation at the time of the firing. Judge Larsen relied on Chubb's testimony that he had not told the mayor about it until after the firing. But rather than let a jury decide the factual question of timing and motive, as the other two judges directed, Larsen arrogated this role to herself. Here are just some of the things that Larsen tried to prevent Henderson from telling a jury:

- When Henderson asked the mayor why she was being fired, the mayor said the city couldn't afford her salary. But Henderson pointed out that her salary was paid by the state and not the city, so that could not have been the real reason. Perhaps this would make a jury suspect any subsequent rationale the mayor might give, but Larsen would have prevented that.
- Chubb had a motive to lie. When Henderson was fired (with Chubb's support), Chubb was hoping the mayor would make his interim job permanent. Then, when she hired someone else, Chubb sued. But before Chubb's testimony in Henderson's case, the mayor approved a \$56,000 settlement with Chubb. Perhaps they had made a deal about his testimony? These are exactly the kind of questions of credibility that juries address every day.

In both public and private employment, retaliation against whistleblowing is a real problem. Laws to protect whistleblowers are worthless if judges like Joan Larsen can block victims from arguing their case before a jury in a court of law. Cases like this are why so much in corporate dark money is being spent to get President Trump's judges on the bench.

## **Trump Judge Stephanos Bibas Joins Criticism of Important Ruling Protecting Transgender Student Rights**

A unanimous 3rd Circuit panel issued a ruling in July 2018 protecting transgender students in a Pennsylvania school district against an attack by the right-wing Alliance Defending Freedom (ADF). ADF had argued that a school district policy allowing transgender students to use facilities corresponding to their gender identity was illegal. Trump 3rd Circuit Judge Stephanos Bibas joined a dissent from the entire circuit court's decision to let that ruling stand. The dissenters strongly criticized the panel decision for the "implication" that Title IX *requires* (rather than simply *permits*) schools not to discriminate against transgender students regarding locker room and bathroom facilities.

In the case, [\*Doe v. Boyertown Area School Dist.\*](#), ADF claimed that the school district's voluntary policy violated the Constitution and Title IX of the Education Amendments of 1972, which bans discrimination on the basis of sex in school districts that receive federal funds. The trial court rejected an ADF motion for a preliminary injunction against the policy, finding that ADF was unlikely to succeed on its claims, and a three-judge panel of the 3rd Circuit denied an appeal. In a [ruling](#) by seven judges including Republican-appointed Chief Judge Smith, a motion to have the full 3rd Circuit reconsider the case was rejected. But four judges, including Bibas, dissented from that denial of rehearing.

The dissenting judges explained that they were not disagreeing with the specific decision to reject a preliminary injunction against the school district's policy. Instead, they sharply criticized the panel decision because of what they called its "implication" that it would have been illegal for the school district to require that transgender students use facilities that corresponded to their gender at birth. This claim, the dissenters argued, was "unsupported" and "unsupportable," and the case should have been reheard so that the allegedly offending language could have been eliminated.

In fact, the dissenters were wrong on both counts. The panel decision, which had been revised after the rehearing petitions were filed, went out of its way to state that "we need not decide" the issue raised by the school district of whether barring transgender students from using facilities corresponding to their gender identity would violate Title IX. The panel did nothing more than note that such a discrimination claim would have been raised if the school district had barred such use by transgender students, and that the district "can hardly be faulted" for adopting a policy that avoids those issues, particularly since the policy that ADF wanted had been adopted by a Wisconsin school district but later found to violate Title IX by the 7th Circuit court of appeals.

More disturbing was the dissent's suggestion that it was "unsupported" and "unsupportable" to claim that requiring transgender students to use facilities corresponding to their gender at birth would violate Title IX. Although the courts are not unanimous on the subject, as the dissent

observed, the panel opinion specifically referred to the 7th Circuit decision that ruled that such a requirement would violate Title IX. Other courts have issued similar rulings, including in the [Gavin Grimm case](#), and that was the [interpretation](#) of Title IX adopted by both the Justice Department and Education Department, until it was reversed under the Trump Administration. The claim by Bibas and the other dissenters that such an interpretation is “unsupported” and “unsupportable” is extremely troubling.

## **Immigration**

### **Trump Judge Amy Coney Barrett Rejects Immigrant Torture Claim Without Even Considering the Merits**

Trump 7th Circuit Judge Amy Coney Barrett recently wrote an opinion in [Alvarenga-Flores v. Sessions](#) that affirmed the Bureau of Immigration Appeals’ (BIA) rejection of an El Salvadoran’s request for protection from deportation under the Convention Against Torture (CAT) that was never even considered on the merits. This was because the immigration judge who considered the case found the immigrant’s story not credible because of what the dissent described as “trivial” inconsistencies in his description over a three and a half year period of what had happened to him. The dissenting judge pointed out that previous 7th Circuit case law requires that despite such minor inconsistencies, requests for protection under CAT and to withhold involuntary removal should be considered on the merits. But Judge Barrett and Bush appointee Diane Sykes disagreed and affirmed the BIA decision to deport the immigrant back to El Salvador.

Gerson Elsio Alvarenga-Flores was an El Salvadoran student living with his parents. When he came to the United States, he sought protection because of serious fear of torture and mistreatment by gang members and the unwillingness of his government to provide any protection. As he explained, when he was in a cab with friends on one occasion, a gang of armed men approached, demanded that the passengers exit, shot into the cab when they did not, and pursued Alvarenga when he ran from the cab, although they did not catch him. He went to the police but they said they “could not help.” He began to receive at his parents’ home in which gang members “threatened to kill” him. Several days later, gang members boarded a public bus that Alvarenga was on and chased him, both on and off the bus, although he escaped. Fearing more persecution by the gang, which was part of a widespread gang problem in El Salvador, Alvarenga sought protection in the United States.

As a result of decisions by immigration authorities and Judges Barrett and Sykes, however, he also received no relief in the U.S. His claim for asylum (which is based on a different law than the Convention Against Torture) was rejected on statute of limitations grounds, on which the appeals court unanimously agreed. But the immigration judge refused even to consider the merits of his claim for CAT protection and his claim to withhold involuntary removal to El Salvador

because the judge found “inconsistencies” in Alvarenga’s description of what happened to him, specifically concerning precisely where in the cab he and his friends were seated and which end of the bus the gang members entered. Barrett and Sykes found there was “substantial evidence” to support this ruling. But dissenting judge Thomas Durkin explained that the inconsistencies were “minor” and “not material,” that they were easily explained by the fact that Alvarenga simply provided “greater detail” when asked to describe more specifically what happened at one point, and that the majority was disregarding binding 7th Circuit precedent that held that “reasonable explanations” for such “discrepancies must be considered” by immigration authorities. Under controlling precedent, Durkin explained, the decision should have been remanded for reconsideration, including reconsideration of corroborating evidence from Alvarenga’s parents. But Barrett and Sykes refused.

### **Trump Judge John Nalbandian Casts Deciding Vote for Immediate Deportation Rather Than Waiting a Short Time for a Hearing**

On August 24, 2018, Trump 6th Circuit Judge John Nalbandian cast the deciding vote that allowed federal immigration authorities to immediately remove Jorge Moreno-Martinez, an undocumented immigrant who had been married to a U.S. citizen for ten years, has two children who are U.S. citizens, and has a “clean police record.” Earlier that month, federal immigration authorities had ordered immediate execution of a removal order that dated back to 2011, and had also scheduled a hearing with an immigration judge on August 29, but wanted to carry out the removal even before the hearing. Judge Nalbandian and Judge Clay issued an order refusing to stay the removal even until after the hearing. Judge Gilbert Merritt strongly dissented, pointing out that there was a “factual dispute” as to whether Moreno-Martinez received proper notice of the reinstatement of the old removal order, that his attorney had filed a motion to reopen the immigration court proceedings, and that a hearing was scheduled in Detroit on August 29. Under those circumstances and in light of Moreno-Martinez’s good record, Merritt explained, he “should be allowed to remain in this country” at least until the proceedings were concluded. But Nalbandian cast the deciding vote that authorized immediate removal. See *Moreno-Martinez v. Sessions*, 2018 U.S. App. Lexis 24190 (6<sup>th</sup> Cir. Aug.24, 2018).

### **Trump Judge David Stras Dismisses Asylum Claim despite Strong Dissent**

Trump Circuit Judge David Stras of the 8th Circuit wrote the opinion and was the deciding vote in ruling that the court did not have jurisdiction to review an administrative decision to refuse to process an asylum application in [Burka v. Sessions](#). Judge Jane Kelly issued a strong dissent, criticizing the majority for basing its decision “on a factual finding the agency never made.”

Barite Koshe Burka is a 63-year old Ethiopian woman who “fears persecution by the Ethiopian government because of her involvement in a local women's group and her husband's status as a

political dissident,” and in fact “experienced past persecution” there. She came to the United States on a temporary visa, and applied for asylum more than a year later (after the ordinary deadline for such applications), contending that her husband’s later disappearance was a material “changed circumstance” that affected her eligibility for asylum and allowed a later filing under the law.

Both the immigration judge and the Board of Immigration Appeals rejected her claim as untimely, and Stras’ 2-1 decision affirmed the decision in August 2018. As Judge Kelly pointed out in dissent, however, the immigration judge never actually found that the change in circumstances was not material, but the 8th Circuit majority improperly did. Instead, the immigration judge’s decision was based on the “erroneous legal premise” that “only new fears” can qualify as a “changed circumstance” allowing a later filing of an asylum application. As Judge Kelly explained, Burka was maintaining that her husband’s disappearance was itself a changed circumstance that led to “a material worsening of the risk of persecution she will face if she returns to Ethiopia.” Based on the proper legal standard, Judge Kelly explained, the case should have been returned to the agency for consideration of Burka’s asylum claim. But Stras refused.

### **Trump Judge Amul Thapar Tries to Excuse Lawyer Who Failed to Advise Permanent Resident about Deportation Risk of Guilty Plea**

Trump 6th Circuit Judge Amul Thapar recently argued in dissent in [\*Rodriguez-Penton v. United States\*](#) that a lawyer did not provide ineffective assistance of counsel when he failed to warn his client, a legal permanent resident from Cuba, that pleading guilty to an unrelated drug offense could cause deportation. The majority of the three-judge 6th Circuit panel disagreed, reversed a lower court ruling, and ordered that the lower court reconsider the case and determine whether there was a reasonable probability that, with effective assistance of counsel, Rodriguez-Penton could have secured a more favorable sentence that would have eliminated the risk of deportation that he now faces.

Daynel Rodriguez-Penton emigrated from Cuba to the United States with his parents more than 12 years ago, and is a lawful permanent resident of the U.S. with a green card. He was charged in 2011 with improper possession and attempted distribution of a prescription painkiller. Upon advice of his lawyer, he accepted a guilty plea and sentence which, he learned only later, was sufficiently long that he could be deported as a result, even though he had lived in the U.S. legally for more than 10 years. After he lost an appeal, Rodriguez-Penton brought a case in federal court, contending that he had received ineffective assistance of counsel because his lawyer had failed to advise him of the risk of deportation and failed to work to achieve a plea bargain that would have put his sentence below the level that risked deportation.

The trial court rejected the claim, but the 6th Circuit reversed on appeal. The majority of the three-judge panel ruled that the lower court had applied the wrong standard when analyzing the case. Under relevant case law, the majority explained, the lower court was required to determine

whether there was a “reasonable probability” that if his lawyer had properly advised him and represented him effectively during plea bargaining, he would have obtained a plea agreement that would not have created “adverse immigration consequences” -- the deportation risk.

Thapar strongly dissented, claiming that the majority’s opinion “announces a new right” to plea bargaining that transformed “plea bargaining into an absolute entitlement.” The majority just as strongly criticized Thapar’s dissent, explaining that it was *not* creating a right to plea bargain. Instead, it explained, it was simply ruling that when the government decides to enter into plea negotiations, as it did in this case, an individual has the right to effective assistance of counsel during that critical stage of the proceeding, and that a person is deprived of that right when his counsel does not represent him effectively and even advise him of harmful immigration-related consequences, as several other federal courts of appeal have ruled. But Thapar would have seriously harmed lawful permanent residents like Rodriguez-Penton by ruling that defense lawyers could completely ignore the dangerous risk of deportation in representing clients and cavalierly subject them to such risks.

### **Trump Judge John Bush Argues for Ignoring Failure to Warn Naturalized Citizen of Consequences of Plea**

Another Trump 6th Circuit judge, John Bush, similarly would have harmed a legal immigrant in his dissent in [\*United States v. Hatem Ataya\*](#). The majority in that case invalidated a plea agreement and conviction by a naturalized U.S. citizen, largely because the authorities failed to warn him that he “might face denaturalization” as a result of his conviction. Bush dissented, claiming that Ataya would “have probably lost” if he had gone to trial and thus “cannot show” that he would have pleaded not guilty if he had received the warnings. The majority criticized the dissent for making “unsupported assumptions” and for being inconsistent with prior case law, which included *Rodriguez-Penton*.

### **Consumers vs. Corporations**

#### **Trump Judge Don Willett Casts Deciding Vote to Give President Power to Fire Head of Independent Housing Agency, Based on Kavanaugh Theory**

Trump 5th Circuit Judge Don Willett cast the deciding vote in a July 2018 ruling that struck down a federal statute providing that the president could fire the head of an independent federal housing agency, the Federal Housing Finance Agency (FHFA), only for cause. Based in large part on a theory advanced by then-D.C. Circuit judge Brett Kavanaugh, which was rejected by the majority of the D.C. Circuit, the 5th Circuit majority effectively amended the statute to require that the president be able to fire the head of FHFA for any reason at all, despite a dissent from the chief judge of the circuit. Willett went even further and argued in dissent that the court should rule on a statutory challenge to FHFA actions that displeased large real estate investors, despite contrary rulings by three other federal circuit courts.

The case, *Collins v. Mnuchin*, concerns a law passed by Congress and signed by President Bush to help “reverse a national housing market meltdown” and deal with the mortgage and financial crisis a decade ago. The two government-sponsored entities (GSEs) that are “mainstays of the U.S. mortgage market” – Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation) – were beginning to experience financial instability because of the large number of toxic subprime mortgage loans by banks. To “protect the fragile national economy from future losses” and help consumers, Congress established FHFA as an independent agency to ensure that Fannie and Freddie operate “in a safe and sound manner.” Among its other actions, FHFA arranged for the Department of the Treasury to provide over \$200 billion in financing to the GSEs, in return for an agreement to pay back that funding expeditiously, which required deferring payment of dividends to large investors who are shareholders of the GSEs.

The shareholders objected and filed suit, claiming that the FHFA did not have authority to take the action under the law, and that the FHFA itself was unconstitutional because it is led by a single director who can be removed by the president only for cause. The district court found for the agency on both claims, and the investors appealed. The three judges who heard the appeal split differently on the two issues.

In a 2-1 unsigned decision by Judge Willett and Judge Haynes, the appeals court agreed with the investors that the FHFA as structured by Congress was unconstitutional. They relied heavily on the reasoning of Judge Kavanaugh in arguing in dissent that the Consumer Financial Protection Bureau was unconstitutional in *PHH Corp. v. CFPB*. They cited Kavanaugh’s dissent eight times, and argued as he did that having a single director removable only for cause “diminishes Presidential power” so much that it violates Article II of the Constitution. As a remedy, they ordered that the law be effectively rewritten to allow the President to remove the FHFA director for any reason at all.

The majority of the full D.C. Circuit had rejected Kavanaugh’s claim, pointing out that it “flies in the face” of previous Supreme Court decisions and “defies historical practice,” and that the CFPB statute was a “valid exercise” of Congress’ law-making authority. Fifth Circuit Chief Judge Stewart agreed with the D.C. Circuit majority and dissented in the 2-1 decision, pointing out that there was an FHFA oversight board and that the FHFA set-up was similar to that of the Social Security Administration. In some respects, the 2-1 majority in *Collins* went even further than Kavanaugh did in *PHH*, because Kavanaugh distinguished FHFA as an agency that does not exercise “core Article II executive power” in bringing law enforcement actions as does CFPB, even as he noted that FHFA’s status was “contested.”

Judge Willett went even further. He filed a dissent from the ruling by Chief Judge Stewart and Judge Haynes that upheld the district court’s dismissal of the claim that the FHFA action to help finance the GSEs violated the law. Willett was extremely sarcastic in describing the action,

asserting that it “forever trapped” the GSEs in a “zombie-like trance” and that they were “bled of their profits quarter after quarter in perpetuity.” Yet even Willett recognized that three other circuit courts of appeal had ruled that the action “falls squarely within the FHFA’s authority” and that “Congress could not have been clearer” about leaving “hard operational calls to FHFA’s managerial judgment.” The 5th Circuit panel majority rejected the investors’ claims and Willett’s arguments “on the same well-reasoned basis” as in the three other rulings.

Willett’s opinions and rhetoric in *Collins* are extremely troubling. One commentator has noted that the reasoning of the 2-1 majority on the constitutionality of the FHFA could even be used to “strip independence from the Federal Reserve’s Board of Governors.”

### **Trump Judge James Ho Votes in Favor of Company Accused of Securities Fraud Despite Company’s Admission of Overstating Its Income by \$87 Million**

In August 2018, a three-judge panel of the 5th Circuit ruled by a 2-1 vote that allegations by a pension fund supported a strong inference of intent by the company and its former CFO to commit securities fraud. Trump appointee Judge James C. Ho dissented.

In [\*Alaska Electrical Pension Fund v. Asar\*](#), the pension fund filed suit for securities fraud against Hanger Inc., the largest provider of orthotic and prosthetic patient care in the United States, and the company’s former CEO, CFO and COO. The fund claimed that the company and its officers had concealed facts that later caused a drop in stock price. Its allegations were primarily based on Hanger’s audit committee investigation report. Hanger had been struggling with large internal control problems and failed prior audits. Hanger did not disclose all of its weaknesses on its SEC filings, only a few. The pension fund alleged that Hanger actually had 93 weaknesses in their internal controls. Hanger subsequently issued a restatement to correct its understated issues, including admitting that it overstated its income by \$87 million. After an audit committee investigation, the findings concluded that the former CEO and CFO emphasized their desire to achieve certain financial targets which may have contributed to inappropriate accounting decisions and that the former CFO engaged in inappropriate accounting practices.

The district court dismissed the securities fraud claims, but the 5th Circuit panel ruled that the claims against the former CFO and Hanger, Inc. should be allowed to go forward, explaining that the audit committee report supported a strong inference of scienter, which means an intent to deceive or defraud. But Judge Ho dissented in favor of the corporation and its former CFO, claiming that the allegations were not specific enough.

### **Trump Judge Kevin Newsom Gives Consumer’s Asset to Corporation despite Declaration of Bankruptcy**

In [\*Max v. Northington\*](#), Trump 11th Circuit judge Kevin Newsom wrote and was the deciding vote in a 2-1 decision that reversed a bankruptcy judge and allowed Title Max, a multi-state lending corporation, to repossess a car belonging to an individual who had declared bankruptcy, rather than sharing its value with other creditors. Judge Wilson strongly dissented, stating that the majority had allowed Title Max to “sidestep” the requirement that it object to the bankruptcy plan earlier by “changing litigation positions on appeal”, and that the result would “undermine long-established principles” of bankruptcy law.

## **Reproductive Choice and Other Constitutional Issues**

### **Trump Judge James Ho Takes Potshot at *Roe v. Wade*, Accuses District Judge of Religious Bias, and Casts Deciding Vote to Quash Discovery in Abortion-Related Case**

Not only did Trump 5th Circuit Judge James Ho cast the deciding vote in an important discovery dispute in an abortion-related case in July 2018, but he also went out of his way to write a concurring opinion that explicitly criticized abortion, implicitly went after *Roe v. Wade*, and accused another judge of anti-religious bias with no basis.

The case, [\*Whole Woman’s Health v. Smith\*](#), concerns a challenge to a Texas regulation and law that requires abortion clinics to bury fetal remains, which the plaintiff clinics explain will substantially burden women’s access to abortion unless a third party fully bears those costs. The lower court agreed and issued a preliminary injunction against the requirement.

One of the important issues in the case concerns the offer of the Texas Conference of Catholic Bishops (TCCB) to pay such costs. The clinics sought to review communications between TCCB and the state and other documents and emails via routine pre-trial discovery. TCCB objected to producing some materials because it claimed they concerned internal religious issues and other materials protected by the First Amendment, but after a confidential review of the documents (which TCCB suggested), both a magistrate and the district judge concluded that the materials “have no religious focus” and “do not discuss church doctrine,” but instead concern facts about the burial issue. The court accordingly ordered the materials to be produced. TCCB nevertheless appealed the order requiring discovery.

In a decision that dissenting Judge Gregg Costa called a “stark departure” from the norm, the majority of the panel agreed to review the discovery issue and quashed the discovery against TCCB. Judge Ho joined the majority opinion of ultra-conservative Judge Edith Jones, who claimed that the discovery violated TCCB’s rights under the First Amendment, the Religious Freedom Restoration Act (RFRA) and discovery rules. Judge Costa was highly critical, pointing out that the majority had not even reviewed the documents voluntarily produced by TCCB for confidential court review, which the lower court found did not raise First Amendment or

religious issues. There was “no basis” for the majority’s opinion, Costa pointed out, since they did not even “look at” the documents at issue and fully consider the lower court’s decision.

In addition to joining the majority, however, Judge Ho went on to file a separate concurring opinion. The case, he claimed, shows “how far we have strayed” from what he called the “text and original understanding” of the Constitution. TCCB had the right to express its views about what Ho called the “moral tragedy” of abortion, he stated. Nothing in the Constitution’s “text or original understanding,” he asserted, conflicted with the Texas law, despite the preliminary injunction ruling (which was not overturned) that it created a substantial burden on protected abortion rights under *Roe* and *Casey*. Ho also asserted that the discovery and the expedited schedule ordered by the district court were in fact an attempt to “retaliate against people of faith” and joined similar criticism in Jones’ opinion. Judge Costa was extremely critical of these “troubling” comments, pointing out that the claims about the motives of the plaintiffs and the trial judge were “pure conjecture.”

Further criticism of Ho has come from legal commentator [Mark Joseph Stern](#). Ho’s concurrence, Stern points out, places *Roe v. Wade* “squarely in his crosshairs.” And Ho’s “astonishing” attack on the trial judge was an attempt to malign him as an “anti-Catholic bigot” with “nonexistent” evidence of religious animosity. As Stern explained, the district judge was a Reagan appointee who has had a record of “lengthy and impeccable service,” and was specifically asked by Chief Justice Roberts to serve temporarily in Texas to ease a judicial shortage. But to Ho, Stern wrote, “any judge who does not bend over backward to accommodate religion is a bigot.”

### **Trump Judges James Ho, Don Willett, Kyle Duncan, and Kurt Engelhardt Fume over the Second Amendment and Vote to Reconsider Decision Upholding Federal Gun Law**

The 5th Circuit was already very conservative when Donald Trump took office. He has now filled nearly 30 percent of the court’s active judgeships, making it even more extreme. One demonstration of that occurred in July 2018 in a Second Amendment case called [Mance v. Sessions](#).

If you can easily bypass a state’s gun safety laws just by buying a gun somewhere else, the state’s gun safety measures are severely undercut. Congress chose to protect states’ ability to establish and enforce their own laws to reduce gun violence by, among other things, requiring that firearms dealers sell guns only to state residents. In this case, a panel of the 5th Circuit upheld the law’s constitutionality. Without having to decide these questions, it assumed for the purposes of the case that residency restrictions are not the type of “longstanding regulatory measures” that are presumptively constitutional, and that they should be subject to the strictest level of scrutiny. The panel concluded that even under those assumptions, the law was constitutional under the Supreme Court’s 2008 *Heller* precedent.

A majority of the 5th Circuit declined to reconsider the case en banc. Judge Stephen Higginson pointed out in his concurrence that “the panel opinion gave petitioners the benefit of the doubt at every step of [its] analysis.” Several conservative judges dissented, including each of the Trump judges on the court. James Ho and Don Willett each wrote a dissent (which was joined by the other Trump judges, Kyle Duncan and Kurt Engelhardt) complaining that the Second Amendment is not given respect and that the decision should be reconsidered. Willett wrote:

The Second Amendment is neither second class, nor second rate, nor second tier. The “right of the people to keep and bear Arms” has no need of penumbras or emanations. It’s right there, 27 words enshrined for 227 years.

In this context, “penumbras and emanations” is a contemptuous dismissal of the idea that the Constitution protects a person’s right to privacy. Conservatives claim to oppose that idea because the word “privacy” is not mentioned in the Constitution, nor are specific examples like “the right to marry” or “the right to contraception” or “the right to abortion.” Movement conservatives have, as a major goal, the overruling of Supreme Court precedent recognizing these constitutional rights, and Trump’s judges have long been part of that effort.

Willett quotes the text of the Second Amendment to contrast the apparent legitimacy of the right to bear arms for self-defense with the purportedly illegitimate right to privacy. But the text of the Second Amendment says nothing at all about “the inherent right of self-defense” or a right to “use arms in defense of hearth and home.” Instead, it mentions militias. It is one of the few constitutional provisions that explicitly states its purpose.

Gun violence kills innocent people every day, and firearms are used to intimidate law-abiding people throughout the country. That isn’t what the Second Amendment is about.

### **Trump Judge James Ho Shows His Extremism on Money in Politics**

Fifth Circuit Judge James Ho issued a money-in-politics dissent on April 18 that shows just how extreme President Trump’s judicial nominees have been.

The case was [\*Zimmerman v. Austin\*](#), in which a former Austin, Texas, city council member challenged the city’s campaign contribution cap limit of \$350 per election for city council members representing fewer than 100,000 people. This did not involve independent expenditures, which were the subject of *Citizens United* and which are theoretically independent of the candidates and parties. To the contrary, this case involved direct campaign contributions.

To avoid the damage caused by corruption and the appearance of corruption, the Supreme Court has long held that limitations on direct contributions to campaigns are not subject to the highest level of scrutiny under the First Amendment, and the district court upheld the law, as did a

unanimous 5th Circuit panel. But one of the judges not on the panel asked the entire court to reconsider the ruling *en banc*. All but two judges on this very conservative court voted against the idea: James Ho and Edith Jones.

Judge Ho wrote a lengthy dissent, making clear how extreme his views on money in politics are. He even attacked the legitimacy of limiting how much money a person or business can give to a candidate.

[T]he First Amendment prophylactically protects speech from government intrusion. Yet campaign contribution limits turn this principle on its head: They prophylactically prohibit protected speech, in hopes of targeting the “appearance” of unprotected activity in the form of quid pro quo corruption.

By design, contribution limits categorically bar all contributions over a certain threshold, irrespective of the purpose or motivation of the donor. But this is dramatically over-inclusive. Many contributions have nothing to do with the appearance of—let alone any actual—quid pro quo corruption. Countless Americans contribute for no other reason than to “support candidates who share their beliefs and interests.” [internal citation removed]

He also found unacceptable the idea that a legislature could draw lines regarding campaign finance contributions, such as Austin’s \$350 limit:

It is at best “conjectural” that a \$351 contribution to help defray the costs of campaign speech would create a genuine risk of an unlawful quid pro quo exchange.

The dissent made clear that Ho would hand our democracy over to the highest bidder:

If the government cannot regulate independent expenditures, what government interest is served by regulating only campaign contributions? As any proponent of campaign finance regulation will tell you, a donor with suspect intentions can circumvent campaign contribution limits—and achieve his nefarious goals—simply by making independent expenditures instead. So either the government regulates everything—or there’s no point in regulating any of it.

This extremism comes as no surprise: More than 20 years ago, he wrote in a Federalist Society publication that we should “abolish all restrictions on campaign finance.” His extremism is why [the money in politics reform community opposed his nomination](#) last year.

Of course, this is also exactly why the Federalist Society selected him for President Trump to nominate. As with many other Trump judges, James Ho's vision of the law would be fatal to our democracy.

### **Trump Judge Amul Thapar Tries to Favor Religious School and Harm Municipality in Zoning Case**

On September 18, 2018, Trump 6th Circuit Judge Amul Thapar dissented in [\*Tree of Life Christian Schools v. City Of Upper Arlington\*](#) concerning the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The court majority, including judges appointed by Presidents Clinton and George W. Bush, affirmed a lower court ruling that the city had not violated RLUIPA by failing to grant a zoning exception to a Christian school. Thapar dissented, arguing for an interpretation of RLUIPA that is contrary to most courts of appeals and would have granted questionable favorable treatment to the religious school.

In order to help generate revenue, the small city of Upper Arlington, Ohio adopted a plan that restricts the "small portion" of its land zoned as commercial for commercial use only, excluding both secular and religious schools from that area. Despite this restriction, Tree of Life Christian Schools (TOL) bought a large office building in the area and tried to get the city to agree to use it for a pre-K to 12<sup>th</sup> grade school. When the city refused, the school sued, claiming that the city violated a provision of RLUIPA that forbids a local government from treating a religious institution "on less than equal terms with a nonreligious" institution. When the district court ruled against it, TOL appealed.

In accordance with most other federal appellate courts, the two judges in the majority on the Sixth Circuit panel, Ronald Lee Gilman and Julia Smith Gibbons, explained that in determining whether there has been "equal" treatment, the court should look at "similarly situated" uses or institutions as the proposed religious use. Clearly the city was treating religious schools just like nonreligious ones, and even though the city had permitted a daycare facility to operate within the commercial area, the lower court had found that the daycare center generated much more revenue than would a school, and so there was no "equal terms" violation.

Judge Thapar dissented. He claimed that the majority, as well as most other appellate courts, were violating this country's "sacred vow" to not discriminate against religious groups by narrowly interpreting RLUIPA. Specifically, he argued that the "similarly situated" test was wrong, and that in this case, other uses like hospitals should also be considered. This would not only contradict most other courts, but would also effectively give religious institutions preferential treatment in such zoning cases. As the majority pointed out, "preferred treatment" under RLUIPA would be "inconsistent" with the statutory mandate of equality and "likely run afoul" of the Establishment Clause of the First Amendment. Thapar also maintained that TOL should be treated as a church or place of worship, but the majority explained that this claim had

been previously “abandoned” by TOL and that Thapar’s “resurrection” of the claim on his own was “unwarranted.”

### **Trump Judge Kevin Newsom Urges Overruling of Precedent on Establishment of Religion**

In [\*Kondrat'yev v. City of Pensacola\*](#), Trump 11th Circuit Judge Kevin Newsom was part of a three-judge panel which, in accord with existing precedent, affirmed a lower court decision that ruled that a large cross maintained by the city on public property violated the Establishment Clause of the First Amendment. But Newsom made clear that he reached that decision only reluctantly, and argued in a concurring opinion that a previous 11th Circuit precedent on the subject should be overruled. He strongly suggested that long-established Supreme Court precedent that prevents the government from endorsing religion should be or has been overruled as well.

Newsom focused particularly on the fact that, as with similar cases, the cross had been used and maintained on public property for many years before it was challenged. According to Newsom, that “historical acceptance” should be “decisive” in determining that there was no First Amendment violation. He acknowledged that a prior 11<sup>th</sup> Circuit opinion concerning a similar large public cross in Georgia was directly to the contrary, but argued that the previous decision should also be reconsidered by the full court of appeals. Newsom claimed that the Supreme Court’s fundamental decision in *Lemon v. Kurtzman* had been “much maligned” and effectively overruled, and that the principle that government cannot endorse religion under the Establishment Clause had “fallen out of favor” and should be ignored. Only if a practice can be found to violate “history” and “tradition,” according to Newsom’s view, would the current Supreme Court find that it is inconsistent with the Establishment Clause. According to Newsom, large public crosses maintained on public property would not qualify. Newsom and another judge who wrote a concurring opinion also argued that the prior decision was wrong with respect to standing to bring such an Establishment Clause claim.

An [\*amicus curiae\*](#) brief filed by the Anti-Defamation League, the Baptist Joint Committee for Religious Liberty and others explained what was wrong with these claims. Based on Supreme Court and other precedent and the history of the Establishment Clause, the brief explained that the Pensacola ruling was “not only doctrinally compelled but also historically justified and critically important to prevent religiously based civil strife that would intrude on our fundamental commitment to religious freedom for all.”

Judge Newsom’s concurring opinion suggested that the full 11<sup>th</sup> Circuit should reconsider the Pensacola decision. In fact, the case may well get a bigger audience. The [\*Becket Fund\*](#), which represents Pensacola, asked the Supreme Court to review the decision less than two weeks after it was issued on September 7.

### **Trump Judge Amul Thapar Votes to Allow Public Officials to Lead Christian-Only Prayer**

Sixth Circuit Judge Amul Thapar voted with the full court majority in a closely divided decision to allow public officials to lead and direct the public to join them in exclusively Christian prayer at public Board of Commissioners meetings in [Bormuth v. County of Jackson](#). Six judges vigorously dissented, pointing out that the case went far beyond the chaplain-led legislative prayers previously approved by the Supreme Court, and clearly promoted a particular religion. In fact, the dissent explained, Board members were “affirmatively excluding non-Christians” from leading prayer and “publicly deriding citizens who voice their objections.” Thapar even concurred in a footnote with just two other judges that Justice Thomas’ view in a recent case – that government promotion of religion should not be considered “coercive” unless it is specifically backed “by force of law and threat of penalty.” – should be recognized as the law.

## **Abuse of Governmental Authority**

### **Trump Judges James Ho and Don Willett Vote to Excuse Concealing of Exculpatory Evidence and Reverse Damages Verdict for Innocent Man Falsely Imprisoned**

In September 2018, the majority of the full 5th Circuit, including Trump-nominated Judges James C. Ho and Don R. Willett, dismissed a civil judgment in favor of a person who was declared “actually innocent” after the city failed to disclose evidence that would have proven his innocence and he was kept in prison for four years.

In [George Alvarez v. The City of Brownsville](#), Alvarez, a 17-year-old ninth-grade student who received special education services in Texas, was arrested for suspicion of public intoxication and burglary of a car. While he was confined, an altercation with a prison official occurred and Alvarez was charged with assault. Although videos were taken of the incident, they were not disclosed to Alvarez and, faced with the likely testimony of prison officials against him, he pleaded guilty after plea negotiations.

After being imprisoned for about four years, however, the videos of the encounter surfaced in an unrelated case. Upon becoming aware of the videos, Alvarez filed for a writ of habeas corpus in Texas state court, claiming the Brownsville Police Department withheld the videos in violation of the Supreme Court case, *Brady v. Maryland*, which requires that evidence that could prove someone’s innocence (“exculpatory evidence”) be disclosed to a defendant. The state district court recommended a new trial for Alvarez. In the new trial, Alvarez was declared “actually innocent,” and the charges against him were dismissed altogether.

Alvarez sued the City of Brownsville for civil rights violations and nondisclosure of exculpatory video evidence in violation of *Brady*. The district court granted Alvarez summary judgment, and a jury awarded Alvarez \$2,300,000. The City of Brownsville appealed, and a majority of the full 5th Circuit, including Ho and Willett, threw out the \$2,300,000 judgment and concluded

that *Brady* did not apply because, they claimed, a *Brady* violation is not established when material is not shared during the plea deal process.

Three judges vigorously dissented. There was simply no good reason, one pointed out, why the federal constitutional right of a defendant to exculpatory evidence should not apply during the plea bargaining stage. As Judge Gregg Costa explained, “it is difficult to think of greater deprivations of liberty than the government’s allowing someone to be held in prison without telling him that there is evidence that might exonerate him.”

### **Trump Judge Kyle Duncan Casts Deciding Vote to Stop Remedy for Unconstitutional Imprisonment of Poor People**

Trump Judge Kyle Duncan of the 5th Circuit was the deciding vote in a 2-1 decision in August, 2018 to stay a remedy ordered by a lower court for the Harris County, Texas practice of keeping poor people in jail who cannot pay bail on minor misdemeanor offenses, without even determining whether release without bail would pose any problems. The 5<sup>th</sup> Circuit had previously agreed that this was an unconstitutional practice; in this case, Judge Graves’ strong dissent pointed out that as a result of the recent majority decision, the county’s “unconstitutional bail practices will continue to deny equal protection and due process” to poor people in the Houston area.

[\*O’Donnell v. Harris County\*](#) was filed as a class action in 2016 challenging what the trial judge found was the county’s practice of imposing “de facto orders of pretrial detention” on all poor people charged with minor misdemeanor offenses, such as driving without a license. The county imposed a set amount of bail for each particular offense, and did not consider whether the individual could pay the amount or whether there was any risk of the individual not appearing if released without bail. The court issued a preliminary injunction against the practice. In early 2018, the 5th Circuit agreed that the practices were unconstitutional, but sent the case back to the trial court to issue a narrower preliminary injunction. The district court did so promptly, and the county filed an appeal, asking that the preliminary injunction be stayed or stopped while the court fully considered its appeal.

In a 2-1 [ruling](#) in which Duncan cast the deciding vote, a different 5th Circuit panel agreed to stay the injunction, claiming that it was still too broad. Key to its holding was the majority’s claim that the decision to hold a poor person in jail, sometimes for days, before an individualized hearing was subject only to “rational basis” review –that is, that the decision would be upheld against a constitutional challenge as long as there was a “rational basis” for it. As the dissenting judge pointed out, however, that claim was “foreclosed” by the 5th Circuit’s own contrary ruling on the previous appeal, and also “squarely contravenes” Supreme Court precedent. The district court’s revised and “narrowly tailored” injunction, Judge Graves explained, “fully comport[ed]” with the 5th Circuit’s previous decision. But Judge Duncan’s deciding vote meant that the

injunction would be suspended and the unconstitutional jailing of poor people in Harris County would continue.

### **Trump Judge Amul Thapar Would Diminish Fourth Amendment Protections Against Invasion of Privacy**

If Trump 6th Circuit Judge Amul Thapar's dissent in a September case called [\*Morgan v. Fairfield County\*](#) became law, police would have more leeway to invade your property and look for illegal activities without a warrant.

In general, absent exigent circumstances, law enforcement officials without a search warrant cannot legally invade your privacy at home any more than any other stranger can. Under the Fourth Amendment, they can knock on the front door and ask to speak with you or to conduct a search, and you have the constitutional right to say no and close your door, just as you can with any other stranger.

In Fairfield County, Ohio, the sheriff's department required that if a law enforcement official performs such a "knock and talk," other law enforcement must surround the house for extra protection and to prevent anyone inside from running away. In this case, they were positioned just five to seven feet away from Neil Morgan and Anita Graf's house, on the sides and in their backyard.

The first police unit member knocked at the front door, Morgan opened it and said he did not want to talk, and then closed the door. But then an officer in the backyard said he could see some marijuana plants on the second floor balcony. So the first unit member forced his way through the front door, brought the residents outside, and prevented them from leaving while his colleagues got a warrant to search the house, based on the plants on the balcony.

The majority of a three-judge panel on the Sixth Circuit recognized that the county's policy made it liable for a constitutional violation:

"The right to be free of unwarranted search and seizure would be of little practical value if the State's agents could stand in a side garden and trawl for evidence with impunity. And the right to privacy of the home at the very core of the Fourth Amendment would be significantly diminished if the police—unable to enter the house—could walk around the house and observe one's most intimate and private moments through the windows."

Judge Thapar, President Trump's first circuit court nominee, disagreed. He wrote in dissent that the word "search" as understood by the framers was limited to "investigating a suspect's property with the goal of finding something," regardless of whether there was a reasonable expectation of privacy. He wrote that the county's policy was intended to block potential exits and prevent anyone from leaving, not to have the police there to search for anything. So, he concluded, intruding into Morgan and Graf's backyard and looking up at their balcony was not a "search."

And since it wasn't a search, the county policy was constitutional: police did not need a warrant to surround a person's house just a few feet from the structure and peer inside.

Thapar criticized long-established Supreme Court precedent incorporating people's reasonable expectation of privacy into the constitutional analysis:

A "search" under the Fourth Amendment is thus easier to identify when we are faithful to the ordinary and original meaning of the term, and the concept is broader than the Court's current jurisprudence contemplates."

Yet in this case, Thapar's redefinition gives much *narrower* protection, not broader. The authority that Thapar would grant could clearly lead to serious abuses by police.

### **Dissenting Trump Judge Amy Coney Barrett Sides with Trial Court Judge Who Interrogated Defendant but Ordered His Lawyer Not to Participate**

Trump 7th Circuit Judge Amy Coney Barrett dissented from a May 2018 ruling that a man on trial for murder was denied the effective assistance of counsel when the trial judge held a closed session before the trial to question the man, Scott Schmidt, and ordered that his lawyer could not participate. As a result of that session, the judge ruled that Schmidt could not present an important defense at trial, and he was convicted of first-degree murder.

In the case, [\*Schmidt v. Foster\*](#), Schmidt was pursuing what is referred to as federal *habeas corpus* relief from a Wisconsin state court conviction that was affirmed on direct appeal. Congress and the Supreme Court have made clear that federal courts can grant such relief and effectively reverse a state court conviction only where the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" according to Supreme Court precedent. The 7th Circuit majority, including Judge David Hamilton and Judge Diane Wood, ruled that Schmidt's case met this rigorous standard.

Specifically, Schmidt did not deny that he had killed his wife, but wanted to rely at his trial on the state law defense of "adequate provocation," including testimony from some 29 witnesses, to mitigate the crime to second-degree homicide.

The state trial judge conducted a hearing before the trial to determine if there was enough evidence to present the defense to a jury. Schmidt's lawyer presented written and other evidence at that hearing, but the judge then decided that he himself would question Schmidt—alone—at a closed session. The judge ordered that Schmidt's lawyer could attend the session, but could not "speak or participate." After his questioning of Schmidt, the judge ruled that the defense could *not* raise the issue of "adequate provocation" to the jury at trial, and Schmidt was convicted of first-degree murder.

The 7th Circuit majority found that this “unprecedented” closed session in which Schmidt’s lawyer could not participate clearly violated his right to effective assistance of counsel under the Sixth Amendment and that the state appellate court rejection of that claim was an “unreasonable application” of “clearly established Supreme Court precedent” and caused “substantial prejudice.” As a result, they ruled that Schmidt should be given a new trial or resentenced to the lesser punishment he would have received for second-degree homicide.

Barrett, however, dissented. She accepted the state’s argument that the closed session had not been specifically determined by the Supreme Court to be a “critical stage” in a criminal proceeding where the right to counsel applied, particularly since it was not an “adversary” proceeding where prosecutors or police were present, and that a judge could properly conclude that the procedure did not violate Schmidt’s rights.

The majority strongly disagreed. It was not surprising, they explained, that there was no Supreme Court case specifically about the closed session, since that session—including the judge’s “ground rules for his inquisition” of Schmidt—was so unprecedented. That session, the majority elaborated, was similar to the way judges effectively conduct trials in “European legal systems” and is “not compatible with America’s judicial system.”

The majority carefully analyzed the Supreme Court’s rulings on the right to counsel, and concluded that what mattered was not whether prosecutors or police were present at a proceeding, but whether the defendant faced a “confrontation” with the government—in this case, the judge—during which the assistance of a lawyer would be useful and “substantial rights” are at stake. That was clearly true here, the majority ruled. In contrast, the arguments of the state and Judge Barnett “unreasonably applied” Supreme Court precedent and “ignored reality in favor of a formalism that the Court has not adopted.”

Judge Barrett was outvoted by the majority in *Schmidt*. But with one more vote, she would not only have deprived him of his Sixth Amendment rights, but also set a precedent that would have harmed others throughout the circuit (Illinois, Indiana, and Wisconsin) and made much more difficult the appropriate federal court review of improper state convictions.

### **Trump Judge Kevin Newsom Casts Deciding Vote to Throw Out Claim of Inhumane Confinement Conditions**

In May 2018, Trump 11th Circuit Judge Kevin Newsom cast the deciding vote that reversed a district court and dismissed a lawsuit by a person in jail awaiting trial alleging that he had been subjected to unconstitutional and inhumane conditions of confinement, including grossly unsanitary conditions. The district court had ruled that a number of the individual’s claims should be presented to a jury, and one of the judges on appeal agreed, but Newsom joined a 2-1 unsigned *per curiam* (by the court) opinion that dismissed the claim completely based on

qualified immunity. (“Qualified immunity” generally means that a government employee can’t be held personally liable in court for their official actions unless they clearly violated the law or the Constitution.)

In the case, [\*Saunders v. Sheriff of Brevard County\*](#), Oberist Saunders had been sent to jail in Brevard County, Florida after his arrest. Following a month of incarceration and treatment for an attempted suicide, he was confined for a total of 69 days in a mental health housing unit known as “the Bubble.” According to the complaint he later filed, Saunders was subjected to cruel and inhumane conditions in the Bubble, particularly unsanitary conditions.

As the dissenting judge explained, individuals like Mr. Saunders were “forced to walk barefoot in cells covered with virtually every type of bodily waste and fluid, from urine and feces to semen and vomit. Because there were no beds in the cells, nor any other type of platform above the floor, Mr. Saunders and his cell-mates had to sleep on mats directly on the waste-filled floor.” As another prisoner explained, “I’m walking\_ in [urine,] I’m tracking it across [the cell] and I’m getting it in my mat, then I’m sitting there laying in it. . . . So in essence, I’m sleeping in [urine].” And “even though the sleeping bag-style mats were immediately and constantly soiled, Mr. Saunders testified that he was never given new bedding and thus had to sleep on the soiled mat for months at a time.” Saunders also explained that the Bubble was overcrowded and very hot, and that he was forced to eat in unsanitary conditions, including getting no eating utensils or soap in his cell to wash his hands.

The primary issue on appeal was whether Saunders’ complaint against the official who ran the Bubble should go to a jury, as the trial court ruled, or should be dismissed without trial based on qualified immunity. The 2-1 majority including Newsom reversed the lower court and ruled that the claim should be dismissed, based on the jail’s claims that the cells were cleaned and that the restrictions were related to concerns about physical safety.

Judge Beverly Martin vigorously dissented. It was improper, she explained, to dismiss Saunders’ claims without trial based on the jail’s assertions as opposed to the allegations in Saunders’ complaint, particularly since the jail never explained the relationship between depriving prisoners of sanitary items and physical safety—and since Saunders had explained that the cleanings were only twice a week and totally inadequate.

Martin pointed out that Saunders established that the official in charge of the Bubble was “deliberately indifferent” to the “overcrowded and unsanitary conditions” and that under binding precedent, the claims should have gone to a jury. The official was similarly deliberately indifferent to the pleas by Saunders to alleviate the conditions, which led to a panic attack during which Saunders “was banging his head against the steel door—with blood streaming down his face.” Qualified immunity was clearly inappropriate without presenting the case to a jury, Judge

Martin explained, because previous cases had clearly established that deliberate indifference to such conditions was unconstitutional. In addition, she pointed out, the official was not only deliberately indifferent, but also “laughed” at Mr. Saunders “while he was beating his head on the door,” an act of “‘obvious cruelty’ for which there is no qualified immunity.”

As Judge Martin explained, the majority opinion “downplays the conditions Mr. Saunders faced, describing them as ‘troubling’ and ‘unpleasant.’” But these adjectives “do not accurately describe the gratuitous cruelty Mr. Saunders endured at the Brevard County Jail. Our Constitution does not turn a blind eye to these types of conditions, and neither should we.”

But as a result of the deciding vote by one of President Trump’s judges, Saunders’ case was dismissed without even going to a jury.

### **Trump Judges John Bush and Amul Thapar Refuse to Permit Brothers to Present to a Jury a Claim that Deliberate Indifference Contributed to Brother’s Death in Prison**

In June 2018, Trump 6th Circuit Judges John Bush and Amul Thapar affirmed a trial court decision that granted summary judgment against a claim that doctors in a Michigan prison were deliberately indifferent to a prisoner’s complaints of liver and related problems that caused severe pain and contributed to his death. This was despite a strong dissent by Judge Karen Nelson Moore that the prisoner’s brothers, who continued the case after their brother had died in prison, had produced enough evidence to present their claim to a jury to decide.

In the case, [\*Rhinehart v. Scutt\*](#), Kenneth Rhinehart had filed suit against officials and doctors at a Michigan state prison complaining about what Judge Moore called the treatment that “he did – and did not – receive” for painful liver disease while a state prisoner. After a number of episodes of hospitalization and significant pain, Rhinehart died while in prison several years after he filed suit under the Eighth Amendment. His brothers Lewis and David then took over the case, in which extensive medical and other discovery took place. The district court granted summary judgment against the Rhineharts, ruling that there was not enough evidence to take the case to a jury and that the doctors and officials were entitled to judgment as a matter of law. The case was then appealed to the 6th Circuit.

In a 2-1 decision, Judge Bush joined by Judge Thapar affirmed the district court decision. All three judges agreed that in order to prevail under the Eighth Amendment, a prisoner must prove that doctors or officials showed “deliberate indifference to a prisoner’s serious illness or injury,” with the majority noting that there was a “paucity of evidence” on the Eighth Amendment and prisoners during the Founders’ era because imprisonment “was not a typical form of punishment” during that time. The majority went on to summarize the evidence below and

concluded that “a reasonable jury could not find” that the Rhineharts could meet the Eighth Amendment standard and thus agreed with the district court.

With respect to claims against two doctors involved in treating Rhinehart, however, Judge Moore strongly disagreed and dissented. One doctor, she explained, had failed to ensure that Rhinehart was monitored by a specialist after he was initially hospitalized for his liver disease. While he was in the hospital, Rhinehart had been treated for several specific complications of liver disease that can cause pain and death, and the hospital doctor recommended that after he was discharged, he should be monitored occasionally and treated as necessary by a specialist concerning these complications. Based on the evidence, Moore explained, a reasonable jury could find that the failure to refer Rhinehart to such a specialist for this purpose “deprived” him of the opportunity to be monitored for “grave risks,” and that later medical crises that he suffered “could have been avoided” by such monitoring. Based on the evidence, Moore went on, the prison doctor effectively “did nothing” after learning of Rhinehart’s problems after he returned from the hospital, therefore allowing a jury to conclude that he was “deliberately indifferent” to Rhinehart’s medical needs. Although Moore acknowledged that a jury could well have found for the doctor despite the evidence, “I do not see why,” she stated, the appellate court should draw that conclusion as the majority did, rather than having the jury perform that important fact-finding function.

Moore also thought that a jury should determine whether a second doctor violated the Eighth Amendment standard for failing to order a procedure called TIPS after Rhinehart was later hospitalized again and suffered severe pain. Based on the evidence, she explained, a reasonable jury could well find that the doctor knew that the procedure would have “prolonged and improved” Rhinehart’s life and helped avoid severe pain, but that the doctor “purposefully disregarded a known risk” in failing to provide the treatment.

Moore concluded by noting that it “may be tempting to some” to “minimize the decency that is due” to prisoners with serious medical conditions. “But the Eighth Amendment obligates us,” she explained, “to take our commitments to those who cannot provide for their own medical care seriously.” Unfortunately that lesson was lost on Judges Bush and Thapar, who formed the majority in the Rhinehart case.

### **Other Cases Concerning Abuse of Government Authority**

In addition to those discussed above, there are a number of other recent decisions concerning abuses of government authority, mainly with respect to criminal justice, where Trump appellate judges have played an important and troubling role. One case that did not concern criminal justice is [\*Morley v. CIA\*](#), in which Trump D.C. Circuit nominee Greg Katsas joined with now-Justice Brett Kavanaugh in affirming a denial of statutory attorneys’ fees to a person who had

obtained documents from the CIA after years of litigation under the Freedom of Information Act. Conservative Republican appointee Karen LeCraft Henderson wrote a long dissent, explaining that the majority opinion “distorts” the Court’s “settled” test for awarding such fees.

A number of additional decisions concern sentencing in criminal cases:

- [\*Beeman v. United States\*](#): Trump judges Newsom and Branch join 11<sup>th</sup> Circuit decision not to rehear case despite dissent explanation that longer sentence was based on erroneous interpretation of statute;
- *United States v. Heard*: 2018 U.S. App. Lexis 25705 (6<sup>th</sup> Cir. Sept. 11, 2018): Trump judges Larsen and Thapar affirm enhanced sentences despite demonstration by dissent that sentences were “substantively unreasonable;”
- *United States v. Johnson*: 2018 U.S. App. Lexis 27478: Trump judge Bush casts deciding vote to dismiss appeal of sentence despite demonstration by dissent that “all parties” agreed that an appeal was proper;
- [\*United States v. Burris\*](#): Trump judge Ho dissents from decision by Republican-appointed judge to remand case to cure improperly long sentence;
- [\*United States v. Hanchett\*](#): Trump judge Engelhardt dissents from decision joined by conservative Republican-appointed judge to vacate part of sentence requiring mental health assessment and possible treatment after release;
- [\*United States v. Gipson\*](#): Trump 5th Circuit judge Ho casts deciding vote to affirm enhanced sentence based on presentencing report, despite dissent demonstration that report lacked the required “adequate evidentiary basis with sufficient indicia of reliability”;
- [\*Ovalles v. United States\*](#): Trump judge Newsom writes and Trump judge Branch concurs in full 11<sup>th</sup> Circuit decision on enhanced sentence despite dissent explanation that decision “strays from the plain text of the statute and Supreme Court precedent.”

Trump appellate judges have also participated in cases questioning some states’ methods of execution, although they have uniformly voted to approve such methods. Trump judges Grasz, Stras, and Erickson cast deciding votes to deny full court rehearing in [\*Bucklew v. Precythe\*](#) concerning Missouri’s method of execution as applied to a prisoner with a severe medical condition, which the Supreme Court is scheduled to decide in 2018-19. Trump judge Thapar cast a deciding vote in the full 6th Circuit decision in [\*Fears v. Morgan\*](#) to allow Ohio to resume executing prisoners via a three-drug cocktail that one witness [described](#) as causing serious and “unconstitutional pain and suffering.”

Three other cases concerning abuse of authority in the criminal justice system involving Trump appellate judges include:

- [\*United States v. Moya\*](#): Trump 10th Circuit judge Eid dissents from order joined by Republican-appointed chief judge Tymkovich to exclude government expert testimony because of failure to provide proper notice;
- [\*Peffer v. Stephens\*](#): Trump 6th Circuit judge Bush issues ruling allowing police to search a person's entire house if the home computer may have been used in commission of a crime, which has been [criticized](#) as an “astonishingly broad” decision that “guts” the “right to privacy;” and
- [\*United States v. Sitzmann\*](#), Trump D.C. Circuit judge Katsas casts deciding vote to reject claim of ineffective assistance of counsel despite explanation by dissent that majority's failure to send back to trial court for factual review is a clear “departure from the law of the circuit.”