



Confirmed Judges, Confirmed Fears: The Continuing Harm Caused by Confirmed Trump Federal Judges

Although even some Republicans disagree with President Trump on issues like his declaration of a national emergency at our southern border, one Trump priority continues to draw consistent support from the right, even as it has alarmed progressives and moderates: Trump's efforts to pack our federal courts, particularly the Supreme Court and courts of appeals, 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.

In just over two years, aided and abetted by Senate Majority Leader Mitch McConnell, judge pickers at the Federalist Society and the Heritage Foundation, and dark money spenders like the Judicial Crisis Network, Trump has placed two far-right nominees onto the Supreme Court. In addition, the far right 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 March 31, 53 trial court judges and 37 powerful appellate judges totaling 90 altogether. In short, Trump has placed more lifetime judges on the federal bench per year “[than any other president in history.](#)”

These numbers translate into huge impact. It may well be correct that, as right-wing advocates have predicted, by this year Trump-appointed judges will be participating in “[more than 15,000 decisions every year.](#)” In fact, as of the end of March, data from the [Federal Judicial Center](#) shows that slightly more than 20 percent of all federal appellate court seats are filled with Trump lifetime appointments. And with Republicans now enjoying a 53-47 margin in the Senate, even more Trump judges are very likely.

PFAW's October 2018 [Confirmed Judges, Confirmed Fears report](#) demonstrated that after only about 18 months, Trump judges' opinions had already had a major impact, harming the rights of working people, religious minorities, women, voters, people of color, immigrants, and many more. We have seen even more damaging rulings since October, as more and more Trump judges join the bench. This report has been revised to include new decisions we have seen since October, and documents overall the damage done by the narrow-minded elitist judges appointed by Trump to the Supreme Court and the federal courts of appeals since the very first such judge was confirmed around two years ago.

With the 2020 election 18 months away, several Democratic presidential candidates have already begun discussing the importance of the federal courts in our next election. And there is no doubt that continuing the Trump court takeover will be a major rallying cry for Republicans. Voters around the country must continue to urge both Republican and Democratic senators to resist the Trump takeover between now and next November. And when the nation heads to the polls again next year, it is critical that Democrats and independent voters, not just conservative Republicans, pay attention to judicial nominations hold Republican senators accountable for their votes, and keep in mind that more Trump lifetime judges will put the rights and liberties of all Americans in even greater danger.

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 in October 2018. They have already caused serious damage, and threaten to do even more.

A. Decisions Since Kavanaugh Joined the Court

Although the Supreme Court has not yet issued decisions in most of the major cases on its docket after full briefing and oral argument, the Court has handed down a number of important rulings, several of which are from its so-called “shadow docket” – cases where the Court decides quickly whether to stay or let go into effect a lower court decision, based on written briefs and often without a signed opinion. Significant damage has resulted from several 5-4 rulings in which Kavanaugh and Gorsuch have clearly made the difference, and in several others, the Court was only one vote away from seriously harming rights and liberties. Specifically:

Immigration and Asylum

- Indefinite detention of legal immigrants: Trump Supreme Court Justices Brett Kavanaugh and Neil Gorsuch voted with the majority in a 5-4 Court decision in *Nielsen v. Preap* in March 2019, ruling that under federal law, immigrants who have been released after committing even minor crimes, such as minor drug offenses and illegally downloading music, should be picked up even years after their release and detained indefinitely pending possible deportation hearings. The ruling applies even to immigrants who have been in this country for decades, and even though they may well not be deported at all. Justice Stephen Breyer wrote a dissent joined by the Court’s moderate justices that explained that the majority had misinterpreted the law, and that the ruling “will work serious harm to the principles for which American law has long stood.” More detail is available [here](#).

- Asylum: Kavanaugh and Gorsuch also dissented in a 5-4 [ruling](#) by the Supreme Court in late December 2018 that rejected an effort by the Trump administration to immediately put into effect a ban it had ordered on individuals from other countries seeking asylum at anyplace other than a formal port of entry. As a result of a [lawsuit](#) challenging that ban, it had been put on hold by the lower courts while they considered the issue. Once again, their votes will be crucial when the Supreme Court reviews the issue on the merits.

Workers' Rights and Discrimination

- Military transgender ban: Justice Kavanaugh cast a deciding vote in a 5-4 decision in January 2019 in [Trump v. Karnoski](#) and [Trump v. Stockman](#) that dissolved preliminary injunctions in two lower courts and effectively permitted Trump's military transgender ban to take effect while the litigation goes forward, which could well take a year or more. In the meantime, the military will be able to reject transgender individuals from enlisting and can remove those now in the service. Trump Justice Neil Gorsuch was also one of the five justices who voted to reverse and dissolve the injunction that had stopped the policy from taking effect, while moderate Justices Ginsburg, Breyer, Sotomayor, and Kagan would have left the stay in place as the lawsuits against the policy continued. As one [commentator](#) put it, the 5-4 ruling suggests that the majority may be "willing to defer to Trump's snap judgment" when the Court takes up the case on the merits, even though the Court "might have gone the other way" if Justice Kennedy were still on the bench instead of Kavanaugh. More detail is available [here](#).

Reproductive Rights and Other Constitutional Issues

- Restrictive Louisiana abortion law: Votes in late 2018 and early 2019 by President Trump's two Supreme Court and four 5th Circuit appointees were almost enough to allow a restrictive Louisiana anti-choice law to go into effect, even though it is virtually identical to a Texas provision struck down by the Supreme Court three years ago. By a 5-4 vote with Justice Roberts joining the Court's four moderates, however, the Court halted the state law pending a decision on a request that the Court review the case on the merits. As one commentator put it, if the Court had declined the stay, the net result would have made *Roe v. Wade* "[all but dead](#)." The votes of Gorsuch and Kavanaugh could be critical when the Supreme Court considers the Louisiana law on the merits, which it is likely to do in [2019-20](#). Chief Justice Roberts was one of the three dissenters when the Court invalidated the Texas law in 2016. If he takes the same position when the Louisiana statute is reviewed on the merits, then the votes of Kavanaugh and Gorsuch could be decisive in effectively reversing the Texas decision and endangering *Roe v. Wade*. More information is available [here](#).

- **Religious Liberty:** Kavanaugh’s and Gorsuch’s votes were decisive in a 5-4 unsigned order in [Dunn v. Ray](#) that authorized the immediate execution of Domeneque Ray even though the 11th Circuit had ordered a temporary stay so it could consider a “powerful” claim that prison officials had violated his religious liberty. Specifically, even though Alabama generally allowed a state-employed Christian chaplain to be present to provide counsel when a prisoner is put to death, it refused to allow Ray to have an imam present for the same purpose. As the dissenters pointed out, rather than deferring to the appellate court as usually occurs in such matters, the majority refused to allow the 11th Circuit to even consider the religious liberty claim “just so the State can meet its preferred execution date.” More information is available [here](#).

B. Decisions Before Kavanaugh Joined the Court

As of the end of the Supreme Court term last year, Justice Gorsuch had 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 Carrier’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 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, Gorsuch [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 for most Americans, the federal courts of appeals have the final word, since the Supreme Court reviews less than 100 cases each year while the courts of appeals hear around [50,000 cases](#) annually. Trump has already filled 37 lifetime seats on those courts around the country, about one out of every five appellate court judgeships.

The raw numbers do not tell the full story. Slightly more than one-third of the appeals court judges appointed by Trump hold seats formerly held by judges appointed by Democratic presidents, and Trump has [shifted](#) the 3rd Circuit appellate court, which previously had a majority of judges nominated by Democratic presidents, into one with a “majority of Republican presidents’ choices,” with more such shifts likely in the next few years.

Even where Trump has filled appellate court seats formerly occupied by Republican appointees, moreover, the change has been very significant. Trump’s picks are generally younger, [whiter](#), and have a clearer right-wing “[ideological bent](#)” than previous nominees. As Brookings Institution nominations expert Russell Wheeler put it, when Trump [“replaces a 72-year-old slightly right-of-center judge with a 45-year-old conservative firebrand.”](#) it makes a big difference.

This conclusion becomes clear from the increasing number of decisions where Trump judges have helped produce results that harm people’s rights, despite dissents from Republican as well as Democratic judges. Mostly in rulings by three-judge appeals court panels around the country, Trump’s narrow-minded elitist appeals court judges have already written or joined dangerous

rulings concerning workers' rights and discrimination, immigration, corporations vs. consumers, reproductive rights and other constitutional issues like money in politics, and abuse of government authority. They have similarly written or joined dissents in these areas that would move the law further to the right if joined by additional Trump judges. The cases discussed below focus on those in which Trump appointees disagreed with the views of other appeals court judges, and most have been the subject of PFAW's [Confirmed Judges, Confirmed Fears](#) blog entries.

Discussed below are 86 mostly divided decisions involving Trump appellate court judges as of March 31, 2019. Thirty-nine of these were decided before the first release of the Confirmed Judges report in October 2018, and an even greater number of 47 such rulings were issued after that report. Decisions in each substantive area are divided into those with majority and dissenting opinions written or joined by Trump judges. The new cases not included in our October report are marked with an asterisk.

Workers' Rights and Discrimination

A. Majority Rulings Written or Joined by Trump Judges

***Trump Circuit Judges Cast Deciding Votes to Bar Age Bias Claims by Job Applicants**

All four Trump judges appointed to the 7th Circuit – Judges Barrett, Brennan, Scudder, and St. Eve – voted in favor of an 8-4 decision written by Scudder that ruled that job applicants cannot claim that an employer's hiring practices have a discriminatory impact on older workers. The case was considered by all 12 judges on the 7th Circuit, and reversed a three-judge court decision in favor of the job applicant. Four judges dissented, including noted conservative Judge Frank Easterbrook and one other Republican appointee. All eight judges in the majority were appointed by Republican presidents.

In [Kleber v. CareFusion Corp.](#), Dale Kleber had applied for a senior position in CareFusion's legal department. The job description stated that the company wanted someone with "no more than 7 years" of experience. Kleber, who was 58 at the time he applied, had more than seven years of experience, and his application was rejected in favor of a 29-year old who "met but did not exceed" the experience requirement. Kleber sued, contending that the maximum experience mandate had a discriminatory or disparate impact on older applicants. The district court dismissed his claim, but a three-judge panel ruled he should have the opportunity to prove his case.

The full 7th Circuit considered the case *en banc* in January 2019, and the majority ruled that the Age Discrimination in Employment Act (ADEA) does not authorize applicants to contend that

job requirements have a discriminatory or disparate impact based on age. Under “disparate impact” analysis as applied in race or sex discrimination cases under Title VII of the 1964 Civil Rights Act, if an applicant demonstrates that a job requirement has a disproportionate impact in excluding applicants based on race or sex, the applicant prevails unless the employer can demonstrate a business necessity for that requirement. But Scudder’s opinion asserted that the ADEA language does not allow such claims, and is limited to cases concerning intentional age discrimination. In other words, they held that age discrimination of the type alleged in this case is legal under the ADEA.

The four dissenting judges strongly disagreed. As both Judge Easterbrook and Judge Hamilton wrote in their dissenting opinions, the relevant language in Title VII is “identical.” Judge Easterbrook accordingly explained that while it could be argued that there is some ambiguity in the statute, the court should be bound by the clear decision of the Supreme Court in the landmark *Griggs v. Duke Power Co.* case that this statutory language supports disparate impact liability. Judge Hamilton also pointed out that the dissent’s view was clearly supported by the purpose of the law and “avoids drawing an utterly arbitrary line” between current employees and job applicants.

As Judge Hamilton explained, the majority opinion was effectively “closing its eyes to fifty years of history, context, and application.” But as a result of the votes by the Trump appointments, job applicants like Dale Kleber will not be able to bring discriminatory impact claims concerning age bias.

***Trump Judges “Drop an Anvil” on the Scale of Justice to Harm Workers’ Discrimination Claims**

In March 2019, Trump judge Kevin Newsom authored an *en banc* opinion for the 11th Circuit making it dramatically harder for victims of illegal job discrimination to have their day in court when there isn’t a “smoking gun.” As the dissent observed, the court took the balanced approach established by Congress and the Supreme Court and “drops an anvil on the employer’s side of the balance.” The case is [*Lewis v. City of Union City*](#). Trump judges Lisa Branch and Britt Grant joined Newsom’s opinion.

Jacqueline Lewis, an African American woman, worked as a detective with the Union City, GA police department. For health reasons including a previous heart attack, her doctor advised her not to engage in two mandatory trainings. In response, the department put her on unpaid leave until she could get medical clearance, and then fired her after 21 days. This was much shorter than the 90-day administrative leave given to two white men for being physically unfit for duty. Citing this different treatment, Lewis sued on the basis of discrimination on the basis of race and sex, as well as perceived disability.

Judge Newsom and the 11th Circuit majority upheld dismissal of her case before she could even get to trial, by increasing what courts have required the person bringing the claim to show at the very first stage of a case claiming they were discriminated against. Under longstanding Supreme Court precedent, all Lewis has to do to get past this first stage is show that the employer treated her worse than similarly situated people of a different race, sex, religion, etc. Plaintiffs haven't needed to prove their cases at this early stage, but instead only have to present facts that on their face show different treatment.

The burden then goes to the employer to demonstrate some non-discriminatory, work-related reason for what they did. If it does so, then the plaintiff has to prove that the employer's excuse is a pretext. It is in these last two phases during which the parties debate details such as whether the examples of better treatment involve similar enough situations to be valid comparisons.

But Newsom's opinion put that debate at the very beginning of the process. The judges looked at the details of all three employees and found differences, making them conclude that Lewis hadn't even made the basic facial showing of discrimination. As a result, they upheld dismissing her lawsuit rather than letting her engage in discovery (such as getting relevant documents from the employer) and argue her case before a jury.

But as dissenting judge Robin Rosenbaum explained (joined by fellow judges Beverly Martin and Jill Pryor), the major Supreme Court precedent establishing these stages did not probe more closely into the comparisons until later in the proceeding, when the employer is providing non-discriminatory reasons and the plaintiff is arguing those reasons are simply pretext.

Stressing that most employers know better than to be open about discriminatory intent, Judge Rosenbaum wrote:

An employee often finds herself at a significant disadvantage to an employer when it comes to knowing the reasons for the employer's employment decision and to having access to information concerning both that decision and potential comparators. So we have recognized that the prima facie case is designed to include only evidence that is objectively verifiable and either easily obtainable or within the plaintiff's possession. [internal quotations and citations removed].

But not anymore, at least in the 11th Circuit. Working people in Alabama, Florida, and Georgia are out of luck.

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 Circuit Judges Join Ruling to Dismiss Deputy’s Case that Sheriff Improperly Fired Him for Statements During Political Campaign**

Trump 8th Circuit judges David Stras and Steven Graszczyk joined an opinion of the full court in March 2019 that reversed rulings by a three-judge panel and the lower court and threw out without trial a claim that a sheriff had improperly fired a deputy to retaliate against him for statements made by the deputy during a political campaign against the sheriff. This was despite a strong dissent by a Bush-appointed judge, which was joined by Trump judge Ralph Erickson, that the deputy should have had the opportunity to prove his case.

Donald Morgan, a deputy in Washington County, Nebraska, ran against incumbent Michael Robinson for sheriff in 2014. Six days after Robinson won, he fired Morgan based on statements made during the campaign. Morgan sued Robinson for retaliatory discharge in violation of the First Amendment, and Robinson claimed the case should be dismissed on summary judgment

without trial because he was entitled to qualified immunity for his official conduct. The district court disagreed, and ruled that Morgan should have the opportunity to prove his case and dispute the claim of qualified immunity; a three-judge panel of the 8th Circuit agreed.

But in *Morgan v. Robinson*, the 8th circuit reheard the case *en banc* and decided to reverse the two prior decisions and order dismissal of the case based on qualified immunity. Both Trump judges Stras and Grasz joined the majority opinion by a total of 8 judges. The majority argued that the sheriff could “logically and reasonably believe” that the decision to fire Morgan was within the discretion accorded to him as a public official to make a “reasonable, even if mistaken judgment” that the firing was important to preserving department morale and the public’s trust in the office.

Judge Bobby Shepherd, who was appointed to the 8th Circuit by President George W. Bush, strongly dissented, along with Judge Erickson and another judge. As the dissent explained, the majority’s ruling rested on the “impermissible factual finding” that Robinson fired Morgan because of the damaging and disruptive consequences of his campaign speech. But on summary judgment, the dissent explained, it is a well-accepted principle that an appeals court should not make factual findings and should view the facts “in the light most favorable” to the party opposing summary judgment i.e. Morgan. Under that standard, the dissent went on, the appeals court should accept the view that Robinson’s firing of Morgan was based on “his personal objections” to the campaign statements without a “reasonable belief” that the statements would have a disruptive effect on the department. Accordingly, the dissent concluded, Morgan should have a chance to prove his claims at trial.

The dissent harshly criticized the majority for “[f]ailing to remain faithful” to the limits of appellate review of summary judgment decisions and for “improperly weighing the evidence and finding critical facts” in favor of Robinson. The dissent also noted the “practical consequences” of the majority’s ruling: in small counties like Washington, where challengers to incumbents like Sheriff Robinson “often come” from within a department itself, the majority’s ruling would create a significant “risk” to in-office challengers like Morgan. And the majority decision clearly contradicted the Supreme Court’s repeated expression about the “importance of protecting First Amendment activity, especially in the context of elections.”

***Trump Circuit Judge Casts the Deciding Vote Against an Employee’s Discrimination and Family Medical Leave Claim**

In February 2019, Trump judge A. Marvin Quattlebaum cast the deciding vote in a 2-1 majority ruling against an employee and prevented her from presenting her Family and Medical Leave Act (FMLA) and discrimination claims against her employer at a trial.

Hannah P. was hired under a five-year contract to work as an operations analyst for the Office of the Director of National Intelligence (ODNI). She received glowing reviews and was a high performer. A few months into her contract, she was diagnosed with depression and prescribed medication. She immediately informed her supervisors. Two years into her contract, she was assigned to work on the Edward Snowden case, a high-stress project requiring long hours and weekend work. That assignment lasted 18 months, but after the assignment ended, her atypical work hours were not adjusted.

Due to the lingering stress of that project, Hannah began arriving late to work and was absent often. Her supervisor lightened her work load and developed a plan so that she could recover. Her depression persisted and her supervisor referred her to a counseling service through the employee assistance program (EAP). She was told that her participation in EAP was mandatory to maintain her contract position. During her EAP sessions, Hannah had to complete a diagnostic questionnaire and provide information regarding her medical history, her family's medical history, and the dosage of any medication she was taking. In a detailed conversation between Hannah's supervisor and Hannah's EAP counselor, the counselor allegedly disclosed Hannah's medical information, her concern about the agency's record retention policy and her reasons for her difficulties getting to work. Hannah later requested four weeks of medical leave which was advised by her psychiatrist. ODNI delayed its approval of her FMLA leave request, but it was ultimately granted. Upon her return from medical leave, Hannah was immediately assigned to lead a significant study and she responded to the daily needs of the project.

Between the end of the Edward Snowden assignment and her request for medical leave, Hannah applied and interviewed for three permanent positions at ODNI. Her interview for a cyber manager position went so well that the interview panel advanced her application to the chief management officer, who subsequently recommended she not be hired.

After completing her five-year term under the contract, Hannah filed suit against ODNI in district court. She asserted that the company failed to accommodate her depression, unlawfully disclosed her confidential medical information, refused to hire her for the cyber manager position, and retaliated against her for using FMLA leave when ODNI refused to hire her after she returned from leave. The district court granted summary judgment in favor of ODNI on all of Hannah's claims, and she appealed.

The majority in [*Hannah P. v. Daniel Coats*](#) agreed with the district court and concluded among other things that Hannah's conduct amounted to a significant attendance and reporting problem as a matter of law. Judge Roger Gregory, however, strongly dissented from the majority's opinion. He explained that the record showed that Hannah was an undisputedly excellent intelligence officer and that despite her depression, she excelled at her job. Her behavior was far from blatant and persistent misconduct. There were genuine issues of material facts regarding her claims of discrimination because of her disability, her FMLA leave, her required participation in

the EAP program and the company's choice not to hire her in retaliation for her FMLA qualifying leave, so she should have been allowed to take her case to trial.

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 Amy Coney Barrett Throws Out Claim of Unfair Arbitration Despite Dissent by Reagan Appointee

In May 2018, Trump 7th Circuit Judge Amy Coney Barrett 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."

B. Dissents Written or Joined by Trump Judges

***Trump Circuit Judge Tries to Prevent Employee with Parkinson's Disease From Trying to Prove Discrimination Based on Disability**

In December 2018, Trump judge James Ho of the 5th Circuit dissented from a 2-1 ruling reversing a grant of summary judgment against an individual with Parkinson's disease who contended that he was improperly placed on leave by his employer. In a decision by George W. Bush appointee Judge Jennifer Walker Elrod, the majority found that there was a sufficient factual question as to whether the employer's evaluation procedures were manipulated to produce a negative outcome against the employee. But Ho would have denied the employee an opportunity to prove his case and ruled in favor of the employer.

Michael Nall, a trainman with BNSF Railway, was diagnosed with Parkinson's disease in 2010. He had been working for the company since 1973. To clear him to work, BNSF required Nall to complete a medical status form for his trainman duties. Nall's neurologist cleared him to continue working. BNSF's doctor then revised the medical status form to instead include the duties of a switchman, different from his trainman duties. Although third party evaluations

cleared Nall for performing even these duties, he was nonetheless placed on leave by BNSF and never reinstated.

Nall filed an Equal Employment Opportunity Commission (EEOC) complaint against BNSF and prevailed. Nall then filed suit against BNSF in district court for discrimination and retaliation under the American with Disabilities Act (ADA) and the Texas Commission on Human Rights Act and lost. The district court granted summary judgment in favor of BNSF and Nall appealed.

In [*Nall v. BNSF Railway Company*](#), the majority concluded that BNSF's safety concerns were not clearly tied to Nall's ability to perform the tasks required for his job. The record indicated that Nall could perform those tasks. Rather, the majority concluded, BNSF's concerns were tied to his inability to perform the new job duties added by BNSF to the medical status form because of his Parkinson's disease. According to the majority, this cast doubt on the legitimacy of BNSF's concerns. Under the totality of the circumstances, the majority said, there was a material fact issue as to whether BNSF's reasons to refuse to reinstate Nall were merely excuses. Summary judgment for the employer was thus improper and he should have had the ability to try to prove his claims. But Ho dissented and would have ruled for the employer on the ADA claim without even a trial.

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 Joan Larsen Would Block Fired 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 in [*Henderson v. City of Flint*](#) 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

A. Majority Rulings Written or Joined by Trump Judges

***Trump Judge Amy Coney Barrett Writes Opinion to Uphold Visa Denial Despite Dissent by Reagan Judge**

7th Circuit Trump judge Amy Coney Barrett was the author and deciding vote in a 2-1 decision in [Yafai v. Pompeo](#) in January 2019 that affirmed a lower court order that dismissed U.S. citizen Mohshin Yafai's claim that the denial of his wife's application for a visa violated his right to due process of law Judge Kenneth Ripple, who was appointed to the 7th Circuit by President Reagan, strongly dissented, explaining that Barrett's decision "deprives Mr. Yafai of an important constitutional right."

Mr. Yafai and his wife Zahoor Ahmed were born in Yemen. When he became a naturalized U.S. citizen in 2001, he filed petitions with the Department of Homeland Security to permit his wife and several of their children to apply for immigrant visas, which were granted. But a consular official denied his wife's application, making what the dissent called a "single laconic statement" that she had improperly attempted to smuggle children into the United States. Despite clear evidence submitted by Yafai and Ahmed denying that claim, the denial stood and they filed suit in federal court.

The district court dismissed the claim as a matter of law under the "consular non-reviewability doctrine," a standard designed by the Supreme Court based on its interpretation of federal immigration law. Under that doctrine, a court should not review a decision by a consular official to deny a visa when the official acts "on the basis of a facially legitimate and bona fide reason." Barrett's 2-1 opinion affirmed the lower court decision, maintaining that the non-reviewability doctrine requires "nothing more" than the "assertion" of a legitimate reason for visa denial, as the consular official did in this case.

Judge Ripple vigorously disagreed. Based on a careful analysis of Supreme Court precedent, he explained that as a U.S. citizen, Mr. Yafai has a "constitutionally protected interest" in his wife's "presence in the United States," and that interest is "secured by ensuring that our Government's consular officials evaluate fairly her visa application." Even under the non-reviewability doctrine, however, Ripple concluded that such a fair evaluation had not occurred based on the record in the case.

Ripple explained that in previous cases, the 7th Circuit had carefully taken "notice of the evidence supporting the stated ground for inadmissibility." In this case, however, there was no such evidence, and the record suggested it was possible that the consular official "never considered the evidence submitted" that actually refuted any smuggling concerns. In fact, the government did not even submit "an affidavit or similar" assurance that "it actually took into consideration the evidence submitted by the applicant", nor did it attempt to "point to some factual support for the consular officer's decision."

Rather than directing the lower court to at least consider the merits of Yafai's claim, Ripple wrote, Barrett had decided to "rubber stamp the consular decision" based on an "overly expansive version" of the "judge-made" non-reviewability doctrine. The result, he concluded, was to ignore the principle that "Congress has given the judiciary the obligation to curb arbitrary action" with "no exception for the action of consular officials."

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

Trump 7th Circuit Judge Amy Coney Barrett 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.

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 (6th Cir. Aug.24, 2018).

***Trump Circuit Judge Writes Opinion to Deny Opportunity to Immigrant to Apply for Citizenship**

Trump Judge Marvin Quattlebaum of the 4th Circuit was the author and deciding vote in a 2-1 decision in January 2019 that affirmed the decision of immigration authorities and denied an immigrant from Guatemala the ability to apply to become a permanent resident and then a citizen. The dissent explained that the majority ruling was based on a “faulty reading” of the federal law that applies to people like Felipe Perez who enter the United States as juveniles.

Felipe Perez came to the United States at age 16 in 2014. He was apprehended by immigration authorities and then released to his brother, a legal U.S. resident in North Carolina, who obtained a temporary custody order from a state juvenile court concerning Felipe. Shortly after that, Felipe applied for special immigrant juvenile (“SIJ”) status under federal law, which allows any immigrant juvenile in the US to apply for SIJ status if they are under the custody of someone other than their parents. Someone who obtains SIJ status can then apply to become a lawful permanent resident and then a citizen.

The United States Citizenship and Immigration Service (USCIS) denied Felipe’s application, primarily because the custody order was temporary. This was despite the fact that the North Carolina juvenile court had found that the order was “as permanent as possible” under state law

since Perez would soon become 18. A federal district court dismissed a lawsuit by Perez, and the case was appealed to the 4th Circuit.

In [*Perez v. Cissna*](#), Judge Quattlebaum wrote a 2-1 decision affirming the dismissal of Felipe's claim. The opinion deferred to the agency and district court decision that at least in this case, a temporary custody order did not qualify Perez to apply for SIJ status.

Judge Robert King dissented. The requirement that a custody order be permanent, he explained, finds "no support" in the federal law creating SIJ status. He noted that the USCIS decision to require permanent custody was **not** based on rulemaking or another process that would entitle it to deference, but instead was in a "policy manual" that the courts have ruled is not given automatic deference. As a result, King explained, the term "custody" should be interpreted according to its "plain meaning," which does not allow the agency to impose the permanency requirement. Particularly since the state court had explained that the order was as permanent as it could have been, King concluded, the agency should have considered Felipe's application.

***Trump Circuit Judge Casts Deciding Vote to Allow Immigration Appeals Agency to Harm Lawful Permanent Resident**

Trump Judge Ralph Erickson of the 8th Circuit was the author and deciding vote in a 2-1 decision in December 2018 that misread the law and made a lawful permanent resident subject to deportation. An Immigration Judge (IJ) had ruled in Pedro Camacho's favor, but was reversed by the Board of Immigration Appeals (BIA), which then refused to reconsider its decision. Erickson wrote an opinion upholding the BIA's refusal. Judge Jane Kelly explained in her dissent that the BIA violated established rules making clear that it should not have reached its own "unsupported" factual conclusions and should have sent the case back to the IJ.

Pedro Camacho came to the U.S. in 1987 and became a legal permanent resident in 2000. After he was judged "removable" in 2015 as a result of several criminal convictions, he sought to adjust his status. At a hearing before an IJ, he explained that although he was innocent of charges of indecent contact with a minor, he had pled guilty in order to avoid the possibility of a "lengthy mandatory minimum sentence." Members of his community "testified to his good character," and he testified that the charges resulted from his ex-wife's attempt to "frame him." Although taking account of the conviction, the IJ decided that the record made it "dubious" that Camacho had committed the misconduct and granted his request for relief.

Immigration authorities then appealed to the BIA, which reversed the judgment and denied Camacho's later request to reconsider. One of his key arguments was that the BIA had improperly found as a fact that one of his alleged victims "attempted suicide following" the offense. Federal rules specifically provide that factual findings in such cases should be made by the IJ based on actual testimony, not the BIA based on arguments by attorneys.

In [*Camacho v. Whitaker*](#), Judge Erickson wrote a 2-1 decision upholding the BIA and rejecting Camacho's request for reconsideration. The majority claimed that the BIA did not make its own factual finding with respect to the suicide issue, but that the IJ explicitly stated that he gave some consideration to the conviction "because of testimony regarding an alleged suicide attempt."

Judge Kelly strongly disagreed. Relying on a careful review of the record of the hearing before the IJ, she explained that the IJ had "said nothing about whether the suicide attempt allegation factored into its analysis" of the conviction and that, although one witness had referred to such an attempt, the IJ "made no factual finding at all about the alleged suicide attempt." Under these circumstances, Kelly pointed out, it was clear that the BIA was relying on its own factual finding that such an attempt had occurred, and that this "unsupported" finding clearly "violat[ed]" federal rules. The case should have been sent back to the IJ for additional fact finding, she explained, rather than making Camacho immediately deportable despite the IJ's decision and Camacho's "long ties to his community and family."

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 Circuit Judge Casts Deciding Vote to Affirm Longer Prison Term for Immigrant, Despite Finding of Plain Error and Dissent by Bush Appointee**

Trump 5th Circuit Judge Don Willett cast the deciding vote in a ruling that affirmed a prison sentence of more than four years to Carlos Alberto Fuentes-Canales, who was convicted of re-entering the United States illegally—even though, as the opinion by Judge Priscilla Owen recognized, the lower court had committed “plain error” in handing down the sentence. Bush appointee Judge Leslie Southwick strongly dissented.

The case, *United States v. Fuentes-Canales*, is about a man who—after living in this country for 26 years—was deported after being convicted in Texas of unlawfully entering the home of his former wife. Shortly after his deportation, Fuentes-Canales attempted to come back to the United States, and then pleaded guilty to unlawful re-entry. Because of the prior Texas conviction, he received a more severe sentence than usual: more than four years’ imprisonment.

On appeal, the federal public defender argued that the enhanced sentence was improper because the Texas offense was not a crime of violence and that Fuentes-Canales was sentenced to jail for more than two years longer than he should have been. All three judges on the appellate court agreed that the trial court had made a clear legal mistake, and that the mistake affected Fuentes-Canales’ “substantial rights” because it resulted in a prison sentence of over two additional years. But Judges Owen and Willett nevertheless affirmed the sentence because they believed an enhanced sentence was justified based on their own review of the facts of the Texas case.

Judge Southwick strongly dissented. It is the appropriate function of a trial court to decide what sentence should be given, he explained, and appellate courts are properly “reviewers of sentences” for legal error, “never their effective creators.” The appeals court should “vacate and remand for resentencing when plain error prejudicing a defendant is shown,” he wrote, “without trying to decide whether the defendant got what we think he deserved.” There was no indication that the district court judge would have handed down the four-plus year sentence if he had analyzed the law and the sentencing guidelines correctly, Southwick elaborated, and it was thus an improper “exercise of discretion” to act as the majority did. In short, he concluded, “it is the district judge’s judgment that we review,” and we should not “substitute ours even when we can.”

But because Trump judge Don Willett sided with Judge Owen in the case, Mr. Fuentes-Canales was sentenced to be imprisoned for more than two additional years.

B. Dissents Written or Joined by Trump Judges

***Trump Judge Tries to Excuse Immigration Board’s Failure to Consider Child Hardship from Parent’s Deportation**

In March 2019, Trump 6th Circuit Judge John Nalbandian dissented from a decision, which was joined by a George W. Bush appointee, that ruled that the Board of Immigration Appeals (BIA) had abused its discretion by failing to even discuss new medical evidence that showed that deportation of a parent, Edmundo Solano-Abarca, would result in unusual hardship because of his sick daughter. Nalbandian claimed in dissent that he relied on his view that the BIA did not believe that the child was Solano-Abarca's daughter, even though the majority noted that a birth certificate in the record provided "uncontested proof" that she was.

Edmundo Solano-Abarca came to the United States from Mexico in 2001, and more than ten years later, the government sought to remove him. He contended his removal should be cancelled under a federal law when an immigrant has lived in this country for more than 10 years, has "established good moral character," has no disqualifying criminal convictions, and his removal would cause "exceptional and extremely unusual hardship" to a close relative who is a U.S. citizen. The government agreed that the first three criteria were met, but an Immigration Judge found there would be no "unusual" hardship with respect to Solano-Abarca's wife and the three children discussed at the hearing.

While an appeal to the BIA was pending, the family learned that a fourth child, a two-year old who had not been discussed at the hearing, was diagnosed with a rare neurological disorder and an abnormal brain MRI. The father filed a motion to reopen and reconsider the hardship issue. The BIA denied both the appeal and the motion to reopen and reconsider, and Solano-Abarca appealed the denial of the motion to the 6th Circuit.

In [*Solano-Abarca v. Barr*](#), Judges Gilbert Merritt and Julia-Smith Gibbons, who was nominated by President George W. Bush, ruled that the BIA had abused its discretion in denying the motion. Although they believed that the fourth child should have been mentioned earlier, they explained that under prior case law, the fact that the new medical evidence of hardship had arisen after the hearing meant that it should have been considered by the BIA. But the BIA had summarily denied the motion without even discussing the new medical evidence presented by the family, and "said nothing" about whether the harm resulting from the newly-discovered medical condition "rose to the level" of hardship required by law. Accordingly, the majority found, the BIA had "abused its discretion" by failing even to "discuss the fourth child's new medical evidence" in the context of the hardship standard, and the case was sent back to the BIA.

Nalbandian nevertheless dissented. He did not specifically dispute the majority's analysis, but concluded that the BIA "did not believe" that Solano-Abarca was the sick child's father and that the court should defer to that view. But this ignored the fact, as the majority pointed out, that a birth certificate in the record provided "uncontested proof that the fourth child is the petitioner's daughter." Fortunately, the majority did not agree with Nalbandian, and the BIA will be required to consider the hardship issue.

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 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 in October 2018. 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

Trump 6th Circuit Judge John Bush 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*.

***Trump Circuit Judge Votes Against an Individual’s Due Process Rights to Accurate Deportation Information**

In February 2019, Trump 2nd Circuit Judge Richard Sullivan dissented in a 2-1 decision and voted against an individual’s Fifth Amendment right to receive accurate deportation information prior to entry of a guilty plea, similar to arguments made by other Trump judges.

Jimmy Lozano was born in the Dominican Republic and came to the U.S. with his family when he was 12 years old. His mother became a naturalized U. S. citizen when he was 19 years old. Children of naturalized citizens can also become U.S. citizens before they reach the age of 18. After his mother’s naturalization, Lozano applied for and obtained a U.S. passport. He was even able to renew his passport through the State Department without incident.

Two years after obtaining his initial U.S. passport, Lozano pleaded guilty to a robbery charge and was sentenced to fewer than three years in jail. The pre-sentencing report for that conviction noted that Lozano was a citizen of the Dominican Republic but, at sentencing, the prosecutor stated he believed Lozano was a U.S. citizen.

Eleven years later, Lozano pleaded guilty to a separate drug offense. Before he was sentenced for that offense the State Department sent Lozano a letter revoking his passport because the passport had been issued in error. After that sentencing, Lozano received a deportation notice indicating that he was not a U.S. citizen and was subject to deportation based on his robbery conviction.

Lozano filed a petition with the district court to vacate the robbery conviction. He contended that the robbery conviction was in violation of his right to due process because he was misinformed about the deportation implications to his plea and was misled about his immigration status. The district court noted that the cases under the Fifth Amendment now recognize a right to accurate deportation information prior to entry of a guilty plea, but ultimately denied his petition and Lozano appealed.

The majority in [Lozano v. U.S.](#) explained that Congress enacted significant changes to immigration law that shifted deportation from being a remote consequence of certain convictions to being a virtually certain consequence of convictions. The majority sent the case back to the district court because they concluded the district court failed to determine two issues: whether there was an inquiry to determine whether Lozano was a citizen of the United States and whether Lozano would have pleaded guilty had he known he was subject to deportation.

Judge Richard Sullivan disagreed with the majority's decision. He argued that deportation is not a direct but a collateral consequence of a conviction and the district court is not required to explain the immigration consequences of a plea.

Consumers vs. Corporations

A. Majority Rulings Written or Joined by Trump Judges

***Trump Circuit Judge Stops Citizens' Groups from Raising Objections to Natural Gas Pipeline**

Trump judge Joan Larsen of the 6th Circuit was the author and deciding vote in a 2-1 decision in February 2019 that dismissed, for lack of standing, a petition to review air pollution permits issued to a company that wanted to build a natural gas pipeline in Ohio and Michigan. The dissent strongly disagreed, pointing out that Larsen's opinion was "inconsistent with the review procedure Congress created" and with "public safety."

Under the federal Natural Gas Act, when a gas company wants to build a pipeline, it must obtain pollution control permits from state authorities; if there is an objection to those permits, they must be challenged in the appropriate federal court of appeals. NEXUS Gas Transmission obtained air pollution permits for its proposed gas pipeline in Ohio and Michigan. Three citizens' groups strongly objected, raising concerns about air pollution and other environmental problems, and filed a petition for review directly with the 6th Circuit.

In [Protecting Air for Waterville v. Ohio Environmental Protection Agency](#), however, Judge Joan Larsen wrote a 2-1 decision dismissing the petition for lack of standing, without even considering the objections on the merits. Her opinion stated that the groups had failed to specifically mention standing in their opening brief, and that overall there was "not enough to show a concrete injury" from the pipeline.

Judge Gilbert Merritt strongly dissented. He pointed out that Congress had specified that review in courts of appeals was the only "forum for review" of objections like those of the citizens' groups, and that dismissal of a review petition based on complex standing doctrines was not a

“reasonable construction” of the statute. To the contrary, he explained, the “very fact that this is the only review process” for “a very dangerous activity” suggested that the groups had standing.

In addition, Judge Merritt demonstrated that the groups’ arguments and the administrative record below were “replete” with clearly adequate claims of injury based on prior case law. These included allegations concerning the aggravation of medical conditions like asthma from increased air emissions, other air pollution harm, and the risk of an “explosion or incendiary accident.” He concluded that it was “error” for Larsen to claim that there was no evidence that the groups or their members will be “harmed by the emissions” and the pipeline. But as a result of Larsen’s opinion, the serious allegations of environmental harm from the pipeline raised by the groups will not be considered.

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. 5th 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 Circuit Judge Writes Opinion and Casts Deciding Vote to Excuse Bank from Liability for Fraud**

Trump Judge Steven Graszc of the 8th Circuit was the author and deciding vote in a 2-1 decision in January 2019 to affirm a lower court order that granted summary judgment in favor of a bank that was accused of aiding and abetting in a Ponzi scheme that “swindled investors” out of over \$100 million. In that case, *Zayed v. Associated Bank*, Judge Jane Kelly dissented, explaining that there were clearly disputed issues of material fact and that the claims against the bank should have been brought to trial.

Five individual scammers were convicted and sent to prison for a Ponzi scheme that defrauded investors out of over \$100 million between 2006 and 2009. A court appointed R.J. Zayed as a receiver to try to collect funds to repay the victimized investors and, among other actions, Zayed filed suit against Associated Bank. He contended that the bank did more than provide routine banking services to the scammers, and that in particular through one bank employee, the bank “knew about and assisted in the scheme.”

The Minnesota district court, however, ruled in favor of the bank on summary judgment, and Graszc wrote a 2-1 decision that affirmed the ruling. The majority claimed that the evidence against the bank was “circumstantial” and that the bank did little more than provide ordinary banking services to the scammers.

Judge Kelly strongly disagreed in dissent. Deciding what conclusions to draw from circumstantial evidence, she explained, is “a function for the jury,” not for a judge on summary judgment. She recounted numerous examples of disputed facts that could have led a jury to conclude that the bank and its employee knew about the scammers’ improper conduct and “substantially assisted them.” For example, she noted, the record indicated that the employee was “intimately aware” of the scammers’ business, opened accounts for them without proper documentation, “personally assisted” one of the scammers in “improperly transferring millions of dollars from investor accounts” to the scammer’s account, and did much more than simply provide “ordinary banking services” to the scammers. As a result of Graszc’s decision, however, the receiver could not even present the investors’ claims to be decided by a jury at trial.

***Trump Circuit Judge Casts Deciding Vote to Dismiss Hospital Employees’ Fraud Case**

In February 2019, Trump 8th Circuit Judge Ralph Erickson cast the deciding vote in a 2-1 decision that dismissed hospital employees’ claims of serious fraud against the hospital in violation of the False Claims Act (FCA).

Stephanie Strubbe, an emergency medical technician (EMT), and Carmen Trader and Richard Christie, both paramedics, were employees at the Crawford County Memorial Hospital (CCMH) in Iowa. In 2014, they noticed significant irregularities with Medicare billing and requirements for a specific type of breathing treatment. Patients who didn’t need the treatment were getting it, and the treatment had to be logged at 30 minutes even if it took less time to complete, which resulted in inflated and fraudulent billing to Medicare. Trader and Christie also noticed that an employee was being billed as a paramedic without being properly licensed as such.

After reporting to the hospital board and other authorities, the employees sued the hospital and alleged that CCMH violated the FCA by submitting false claims for Medicare reimbursement and making false statements or reports to pay fraudulent claims. People are encouraged to file such claims under the FCA because they receive a portion of the damages caused to the government in such cases.

Without a trial or factual hearing, however, the district court ruled in favor of CCMH and stated that the employees lacked specifics and particularity concerning the fraudulent payments they alleged. The 8th Circuit Court of Appeals reviewed the case and the majority in [*USA, ex rel. Stephanie Strubbe v. Crawford County Memorial Hospital*](#) agreed with the district court.

Reagan appointee Judge Arlen Beam strongly disagreed, however, and argued that the employees more than adequately detailed the fraud they were alleging. The complaint contained 198 paragraphs including 55 paragraphs in the “Specific and Detailed Allegations” section. Their complaint spelled out the impropriety of the EMTs and paramedics being asked to perform work differently, detailed how they were “required to make false entries into the computer system” for Medicare billing, specified the “exponential increase” in the breathing treatments even as the number of hospital patients declined, and even provided a concrete example of a patient who clearly did not need breathing treatment but was required to get it. Judge Beam explained that the majority essentially held that short of “committing criminal activity by illegally accessing the hospital’s billing records,” however, it was impossible for the employees to claim Medicare billing fraud.

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 Mac, 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.

B. Dissents Written or Joined by Trump Judges

***Trump Circuit Judge Tries to Rule for Insurance Company Against Mother Who was Improperly Denied Insurance Benefits**

In December 2018, Trump judge Joan Larsen dissented from a 2-1 ruling reversing a judgment that severely limited punitive damages for a mother who was intentionally and improperly denied an insurance death benefit and improperly granted reduced punitive damages.

Thomas Lindenberg died in 2013. As part of his divorce agreement with Tamarin Lindenberg, Tamarin was the primary beneficiary of his life insurance policy. A month after Thomas died, Tamarin filed a claim with Jackson National Life Insurance Company to collect the death benefit from the policy. The insurance company declined and several months of back-and-forth communication followed without resolution. As a result of the impasse, Tamarin sued the insurance company — individually and as guardian of her and Thomas’ children. Tamarin also sought punitive damages against the company for its unjustified refusal to pay the death benefit.

The district court ordered the insurance company to pay the policy benefit of \$350,000 with interest. In addition, the jury in the case found that the insurance company breached its contract and the company’s refusal to pay the insurance claim was in bad faith, intentional, reckless, malicious or fraudulent. The jury ultimately awarded Tamarin punitive damages against the insurance company in the amount of \$3 million. But based on a Tennessee law that limited the amount of punitive damages that could be received, the court severely reduced — by \$2.3 million — the amount of punitive damages that the insurance company would pay to Tamarin and her children.

Both sides appealed. The 6th Circuit majority in [*Tamarin Lindenberg v. Jackson National Life Insurance Company*](#) vacated the judgment as to punitive damages, remanded to the district court to recalculate the punitive damages in accordance with the jury verdict, and concluded that the Tennessee statutory cap “violated the individual’s right to a trial by jury in the Tennessee constitution.” The majority also found that the insurance company’s “refusal to pay had no apparent basis under the law” and was “at least reckless,” clearly justifying significant punitive damages. Larsen, on the other hand, argued in dissent that the court should uphold the Tennessee damages limit and the severely reduced trial court judgment against the insurance company.

***Other Trump 6th Circuit Judges Join Larsen in Trying to Rule for Insurance Company Against Mother Who was Improperly Denied Insurance Benefits**

Trump judge Joan Larsen dissented from a 2-1 ruling last December reversing a judgment that severely limited punitive damages for a mother who was intentionally and improperly denied an insurance death benefit and improperly granted reduced punitive damages. In late March, the other Trump 6th Circuit judges (not including Eric Murphy and Chad Readler who had just been

confirmed) joined Larsen in dissenting from a decision by every other judge on the court, appointed by Republican as well as Democratic presidents, not to rehear the case.

The majority in the three-judge panel ruling in [*Tamarin Lindenberg v. Jackson National Life Insurance Company*](#) had ruled that a trial judge had improperly reduced by over \$2 million a punitive damages jury verdict against an insurance company that had refused in bad faith to pay insurance benefits to a mother and her children. The majority explained that a cap on such damages enacted by the Tennessee legislature “violated the individual’s right to a trial by jury in the Tennessee constitution.” Larsen dissented and would have upheld the severely reduced damages verdict. A petition was then filed to the full 6th Circuit to rehear the case.

In [*Lindenberg v. Jackson National Life Insurance Company*](#), every one of the 15 active judges on the 6th Circuit, whether appointed by Republican or Democratic presidents, voted against rehearing the case except four. These four were the Trump judges on the 6th Circuit—Larsen, joined by Bush, Thapar, and Nalbandian. They argued that the full court should reconsider the case and certify it to the Tennessee Supreme Court to decide whether to uphold the damages limitation.

Judges Clay and Stranch, who issued the original 2-1 decision in favor of the Lindenegs, explained that they were “incredulous” that the dissenters wanted not only to certify this case to the state supreme court, but also to establish “rigid, mechanical, and unflinching” criteria for such certification. They explained that the dissenters appeared to be challenging the “very jurisdiction” of the federal courts to decide questions of state law in cases involving citizens of different states like this one, jurisdiction that was based on provisions of the Constitution and federal law. The dissenters, they went on, were apparently seeking to “ignore their constitutional obligation to exercise the jurisdiction conferred by Congress” and “engage in judicial activism in contravention of Congress’s prerogative to define the jurisdiction of federal courts.”

Fortunately, no other judges on the 6th Circuit agreed with the four Trump judges, and the ruling in favor of the Lindenegs stands.

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 Circuit Judge Dissents from Ruling Ordering HHS Action to Avoid Irreparable Harm to Cystic Fibrosis Patients**

In December 2018, Trump judge Gregory Katsas of the District of Columbia Circuit was the dissenting vote in a 2-1 ruling concluding that the U.S. Department of Health and Human Services (HHS) must take action to facilitate insurance coverage for a unique feeding device crucial for individuals suffering from cystic fibrosis. The majority found that HHS' refusal would cause irreparable harm to patients and the manufacturer of the device.

Alcresta Therapeutics, Inc. and Jonathan Richard Flath v. Alex Michael Azar, Secretary of Health and Human Services concerns Relizorb, an internal feeding device that enables the digestion and absorption of essential fats for people with cystic fibrosis and with pancreatic problems. Alcresta, which manufactures the device, sought to have HHS assign a separate unique Medicare billing code for Relizorb that was important to allow insurance coverage. HHS denied that request. Alcresta, along with Jonathan Flath, a cystic fibrosis patient who relies on Relizorb but cannot pay for it without insurance coverage, sued in federal district court.

Flath and Alcresta sought a preliminary injunction against HHS in district court earlier in 2018. HHS issued a separate billing code after the motion was filed, but attached indicators to that code that still resulted in denial of insurance coverage. In July, the D.C. Circuit partially granted a request for an emergency injunction. HHS took action but continued to refuse to issue an "unencumbered" separate billing code, leading the D.C. Circuit to again consider the request for a preliminary injunction.

The majority granted the preliminary injunction. They reasoned that Flath and Alcresta proved that the absence of preliminary relief would cause irreparable harm. Flath demonstrated he could not afford to buy Relizorb without insurance coverage. Alcresta estimated its loss of sales at \$15.3 million dollars in 2017 alone, with additional losses expected in 2018, all because HHS' coding prevented use of the device by patients who need it because of the lack of reimbursement for the costs. Although monetary loss itself is generally not sufficient to show irreparable injury, the majority explained that it was "highly unlikely" that Alcresta could recover its losses from the government, and that Alcresta would "likely be forced to cease operations" without prompt relief.

Katsas' dissent, however, argued that Alcresta and Flath must exhaust possible remedies with HHS before the merits of the claim could be considered.

***Trump Circuit Judge Tries to Allow Bank to Immediately Foreclose on Family who would Become Homeless**

In February 2019, Trump 7th Circuit Judge Amy St. Eve dissented from an unsigned order joined by Republican-appointed Judge Ilana Rovner that temporarily stopped a decision from a lower court that would have authorized a bank to immediately foreclose on a home mortgage while the decision was being appealed. St. Eve dissented even though the foreclosure would have made the family in the house homeless.

In [*Deutsche Bank Natonal Trust Co. v. Cornish*](#), Deutsche Bank sued Tracy Cornish in federal court, claiming that it should be able to foreclose on a mortgage she had obtained to purchase a Flossmoor, Illinois house that she and her family lived in. Deutsche Bank had purchased the mortgage from another lender, which had unsuccessfully tried to foreclose the mortgage in state court. The federal district court found for the bank and ordered foreclosure. Cornish sought a temporary stay of the foreclosure pending her appeal, contending that she was likely to prevail on her argument that the final judgment against foreclosure in state court deprived the federal court of jurisdiction and that "she will suffer irreparable harm without a stay because her family will be homeless."

In a 2-1 decision, the 7th Circuit agreed to grant the stay, which it had granted on a preliminary basis a few months earlier. The majority pointed out that based on previous decisions, "stays pending appeals in foreclosure cases should be routine to prevent the irreparable harm of losing one's home." This was particularly appropriate; the majority went on, since the mortgage itself provides security for the bank if it prevails, so that a review of the probability of the appeal's success was not necessary.

Even though St. Eve agreed that a family like Cornish's would suffer "real loss" without a stay, however, she dissented because she thought Cornish had not proven that she was likely to win

her appeal. St. Eve had similarly dissented from the stay granted several months earlier, even though the majority pointed out that Cornish and her family “would likely have been evicted in a matter of days” and “without any meaningful opportunity to present her arguments in this court.” Fortunately for the Cornish family, St. Eve’s position was rejected by the majority.

***Trump Circuit Judge Tries to Dismiss Claims by Holocaust Survivors**

Trump D.C. Circuit Judge Greg Katsas dissented from a ruling by two other judges in [*Simon v. Republic of Hungary*](#) in December 2018, which ruled that 14 Holocaust survivors should be able to pursue in U.S. courts their damages claims against Hungary and a government-owned railway company. Katsas would have dismissed the claims, as did the district court, because the survivors did not sue in Hungary.

Katsas agreed with the district court that the lawsuit should have been dismissed on the common law ground of [*forum non conveniens*](#), under which a court can refuse to take a case because there is another forum that the court considers much more appropriate. As the court of appeals majority explained, however, the lower court “committed material legal errors” in reaching that conclusion. Among other problems, the court of appeals explained, the lower court and Katsas failed to accord appropriate deference to the survivors’ choice of forum, since all wanted to sue in the U.S., where several of them live. In addition, the majority explained, Hungary did not meet the requirement of being a “strongly preferred location” because “Hungary is not home to any identified plaintiff, has not been shown to be the source of governing law, lacks a process for remediation recognized by the United States government, and is not the only location of material amounts of evidence.”

The majority criticized Katsas for faulting the survivors for not having “locked down the specific location of documents” concerning their individual claims, noting that discovery had not even begun and that he imposed no comparable obligation on Hungary with respect to locating documents. The majority further explained that while many relevant documents would be located in Hungary, the survivors showed that “an extensive collection of relevant records” concerning the Holocaust-era atrocities in Hungary was available at the U.S. Holocaust Museum in Washington, D.C.

As the majority explained, it would be “indisputably inconvenient” to “further delay the elderly [s]urvivors’ almost decade-long pursuit of justice.” Under previous D.C. Circuit case law, they pointed out, before dismissing a case like this one on *forum non conveniens* grounds, a district court “must ensure” that the dismissal “will not lead to a foreign sovereign ‘delaying exhaustion’” of remedies under its own law “in a way that could end up foreclosing the claims altogether.” Despite the district court’s failure to do that, Katsas would have upheld the dismissal of the survivors’ claims.

Reproductive Choice and Other Constitutional Issues

A. Majority Rulings Written or Joined by Trump Judges

***Trump Circuit Judges Vote to Uphold Defunding of Planned Parenthood**

All four Trump judges appointed to the 6th Circuit – Judges Thapar, Bush, Larsen, and Nalbandian – voted in favor of a divided 11-6 decision by the full court that reversed a prior three-judge panel ruling and upheld Ohio’s law that barred state health departments from providing funding to Planned Parenthood for health care services because it provides abortions with non-state funds. The decision directly contradicts the rulings of other courts, including a 10th Circuit decision that struck down such a ban over the dissent of then-Judge Neil Gorsuch.

[*Planned Parenthood of Greater Ohio v. Hodges*](#) concerns an Ohio law that bans state health departments from providing any funding for health care services to organizations which, with funding completely separate from the state, also provide abortion services. Planned Parenthood operated 28 health centers across the state that provided important reproductive health services to women, but was prohibited by the law from receiving further funds for these services, despite potentially “dramatic health consequences” to low-income and at-risk populations. Both a federal district court and a three-judge appellate panel struck down the ban.

The full 6th Circuit agreed to rehear the case *en banc*, and ruled in March 2019 that the Ohio law was constitutional because Planned Parenthood did not have a right to perform abortions and the state could condition the provision of state funds for other health care on abandoning the provision of abortions. All four Trump 6th Circuit judges agreed.

Judge Helene White, appointed to the 6th Circuit by President George W. Bush at the suggestion of Michigan Democratic Senators, strongly dissented for herself and five other judges. White explained that the majority’s decision both unduly burdened the right to choose and improperly imposed an unconstitutional condition on Planned Parenthood’s receipt of state funding by requiring it to not provide abortions, regardless of whether Planned Parenthood had an independent right to do so. She noted that a decision upholding an Indiana law relied on by the majority did not apply because, unlike the Ohio law, the Indiana statute “did not prohibit funding for any entity that promotes” or affiliates with another entity that promotes or provides abortions. The majority’s assertion that the “unconstitutional conditions” doctrine did not apply in the Ohio case, she concluded, “contorts a doctrine that aims to prevent the government from manipulating rights out of existence” in order to “permit the state to leverage its funding to launch a thinly veiled attack on women’s rights.”

The 6th Circuit decision [contradicts](#) a 2016 10th Circuit ruling striking down a similar Utah law, despite the dissent of then-Judge Gorsuch. Justices Thomas, Alito and Gorsuch have recently [criticized](#) the Court for declining to review lower court decisions that have blocked state efforts to cut off Planned Parenthood funding. At least in Ohio, Michigan, Tennessee, and Kentucky that are included in the 6th Circuit, however, the *en banc* ruling joined by all four Trump appointees will [“drastically restrict access to health care and education services.”](#)

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.”

***Votes of Trump 5th Circuit Judges Almost Unleash Louisiana Anti-Choice Law**

As discussed above with respect to the Supreme Court, votes by President Trump’s two Supreme Court and four 5th Circuit appointees were almost enough to allow a restrictive Louisiana anti-choice law to go into effect, even though it is virtually identical to a Texas provision struck down by the Supreme Court three years ago. The 5th Circuit appointees included Judges Willett, Ho, Engelhardt, and Oldham, who played a decisive role in the full 5th Circuit decision not to rehear the case and allow a 2-1 panel decision to put the restrictive law into effect.

Originally enacted in 2014, Louisiana’s restrictive law would severely limit women’s reproductive choice by imposing the onerous and medically unjustified requirement that doctors performing abortions have nearby hospital admitting privileges. The requirement was almost identical to a similar mandate passed by Texas that was struck down in a 5-3 vote by the Supreme Court in 2016 in [Whole Woman’s Health v. Hellerstadt](#). The Court had stayed enforcement of the Louisiana law in 2016 and directed the lower courts to reconsider the statute in light of the Texas decision.

The district court in Louisiana then held a six-day trial and issued a 116-page decision entering a permanent injunction against the law in [June Medical Services v. Gee](#) in April 2017. The court specifically found that as a result of the law, there would be only “one provider and one clinic”

in the entire state that could perform abortions, as opposed to six doctors and five clinics before the law was passed. The court concluded that “a substantial number” of Louisiana women – 70 percent of those who choose to seek abortion – would be unable to obtain one in the state. The court also found that the hospital privileges requirement would produce “no medical benefit,” and would thus not further the state’s interest in women’s health, but increase delays and health risks to Louisiana women, as well as substantially burdening their right to reproductive choice.

In September 2018, a 5th Circuit panel [reversed](#) the district court’s decision 2-1, finding that the law would not impose a “substantial burden” on access to abortion. Reagan appointee Patrick Higginbotham vigorously dissented. He explained that the majority “fails to give the appropriate deference” to the extensive factual findings of the district court, and instead was improperly and “essentially conducting a second trial” based on “the cold appellate record.” Based on the trial court record, Higginbotham explained, it was clear that the Louisiana law had both the purpose and effect of creating a “substantial burden” on women’s reproductive rights, as did the law in Texas.

The full 5th Circuit [decided](#) not to reconsider the case in January 2019, and Trump appointees played a decisive role. Six judges, including Higginbotham and one other conservative Republican appointee, voted to rehear the case. But nine judges, including four Trump appointees, voted to deny rehearing. Four of the dissenting judges wrote that the panel decision was “in clear conflict” with the Supreme Court’s decision in the Texas case, and that the majority of the full 5th Circuit was “apparently content to rely on strength in numbers rather than sound legal principles in order to reach their desired result.” (The fifth Trump appointee, Kyle Duncan, did not participate in the decision since he had [helped the state defend](#) the Louisiana law in court.)

By a 5-4 vote with Justice Roberts joining the Court’s four moderates, however, the Supreme Court halted the state law pending a decision on a request that the Court review the case on the merits. As one commentator put it, if the Court had declined the stay, the net result would have made *Roe v. Wade* [“all but dead.”](#)

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.

B. Dissents Written or Joined by Trump Judges

***Trump Circuit Judge Tries to Strike Down New Jersey Law Banning Rapid-Fire Ammunition Used by Assault Weapons**

Trump 3rd Circuit Judge Stephanos Bibas dissented from an opinion by two other judges in December 2018, and argued that New Jersey’s limit on the amount of ammunition in a single firearm magazine to ten rounds, aimed at decreasing the harm caused by assault weapons in mass shootings, was unconstitutional. This was despite the fact, as Bibas acknowledged, that five other circuit courts of appeals had already upheld similar laws.

In *Association of New Jersey Rifle and Pistol Clubs v. Attorney General*, Judges Patty Shwartz and Joseph Greenaway issued a decision upholding a district court judgment that denied a request for a preliminary injunction against the ammunition law and concluding that it was constitutional. They explained that the law was part of the state’s response to active and mass shootings, which the legislature found had “increased by 160% from the prior decade.” They agreed that, as the district court had concluded, the law imposed “minimal burdens on lawful gun owners” and was “reasonably tailored” to meet New Jersey’s goal of “reducing the number of casualties” in “mass shootings.” Unlike in other tragic mass shootings, the ban would limit the amount of rounds that could be fired from a single weapon without reloading, therefore allowing “victims to flee and bystanders to intervene.”

Judge Bibas vigorously dissented. He claimed that the majority was attempting to “water [the Second Amendment] down and balance it away.” The majority strongly disagreed and explained, contrary to Bibas’ charge, that it was not engaging in “balancing” or “rational basis” analysis and was not imposing an improper burden of proof on the law’s challengers. Instead, the majority explained, it and the lower court had determined that the state properly bore and met the burden of proving that the law was constitutional.

The majority also rejected Bibas’ claim that only empirical studies “demonstrating a causal link” between such limits and a reduction in mass shooting deaths could meet the state’s burden. The majority explained that other evidence was appropriate to demonstrate the “reasonable fit” that is required between the law and its goals, and that Bibas’ mandate would paralyze states like New Jersey until there were extensive studies analyzing a “statistically significant number” of mass shootings before they could take “action to protect the public.” Despite Bibas’ claim that the New Jersey legislature and the five other courts of appeal around the country that have upheld such laws were wrong, the 3rd Circuit majority sustained the New Jersey law.

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 Amy Coney Barrett Tries to Partly Overturn Federal Law Banning People Convicted of Felonies from Possessing Firearms**

In March 2019, Trump 7th Circuit Judge Amy Coney Barrett dissented from a decision by two other Republican appointees and argued that the long-standing federal law that bars people convicted of felonies from possessing firearms was unconstitutional as applied to an individual convicted of mail fraud. As the majority pointed out, not a single other federal appeals court has agreed with that view.

In [*Kanter v. Barr*](#), an individual convicted of felony federal mail fraud filed a lawsuit, claiming that it was unconstitutional to apply to him the federal and state laws that ban people convicted of felonies from possession of firearms. His claim was dismissed by a federal district court, and that decision was affirmed 2-1 by a panel of the 7th Circuit Court of Appeals. Judges Joel Flaum and Kenneth Ripple, both appointed by President Reagan, concluded that, in accord with the governing standard in cases concerning such constitutional claims, the government had established that the laws were “substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes.”

Judge Barrett did not disagree with that overall standard. She claimed, however, that the government had not introduced sufficient evidence that “disarming all nonviolent felons” substantially advances the government’s interest or that “Kanter himself shows a proclivity for violence.” To prevent the Second Amendment from being treated as a “second-class right,” a phrase similar to that used by other Trump judges in firearms cases, she argued that the laws were unconstitutional as applied to Kanter.

The majority made clear that it was not treating the Second Amendment as a “second-class right,” but carefully explained why it was joining every other federal appellate court that had ruled on such issues in rejecting Kanter’s claim. Most courts, the majority noted, had rejected the idea of as-applied challenges to such laws because of the great difficulty in evaluating “countless variations in individual circumstances.” Even among those courts like the 7th Circuit that permit such challenges, the majority went on, no court had “ever actually upheld such a challenge” by a person convicted of a felony.

The majority went on to consider historical evidence about whether the right to bear arms during colonial times had included people convicted of felonies. Barrett had claimed that unlike the right to vote or to serve on juries, there was not clear evidence that any colonial-era legislatures had categorically barred people who had been convicted of felonies from owning guns. The

majority disagreed, noting that both a prior 7th Circuit decision and most historians had concluded that “the founders conceived of the right to bear arms as belonging only to virtuous citizens,” and that even people convicted of non-violent crimes fell outside the scope of the Second Amendment.

Nevertheless, the majority went on to carefully analyze Kanter’s arguments, and concluded that the government had shown that “prohibiting even nonviolent felons like Kanter” from possessing guns was “substantially related to its interest in preventing gun violence.” The majority pointed to prior court statements, including by the 7th Circuit, determining that although “most felons are nonviolent,” a person with a felony conviction is more likely than those with no criminal history to “engage in illegal and violent gun use.” The majority noted that the government had pointed to a number of studies that echoed that conclusion, including one that found that even handgun purchasers with one prior misdemeanor on their record “were nearly 5 times as likely” as those with no previous criminal convictions “to be charged with new offenses involving firearms or violence.”

In short, while fully respecting history and precedent in connection with the Second Amendment, the Reagan appointees in the majority in *Kanter* upheld the laws prohibiting people convicted of serious felonies, whether violent or not, from possessing firearms in order to prevent gun violence, contrary to Barrett’s dissent.

Trump Judge James Ho Shows His Extremism on Money in Politics

5th Circuit Judge James Ho issued a money-in-politics dissent on April 18, 2018 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 Circuit Judge Tries to Strike Down Lobbyist Registration and Disclosure Law as applied to Unpaid Lobbyist on Free Speech Grounds**

Trump 8th Circuit Judge David Stras dissented from an opinion by two other Republican-appointed judges in late November and argued that Missouri's lobbyist registration and disclosure law violated the First Amendment as applied to an unpaid conservative lobbyist. The majority strongly disagreed with Stras' attempt to expand the reach of decisions like *Citizens United* and explained that the state's interest in transparency and public disclosure of who is trying to influence legislation clearly warranted the minimal burdens imposed by the law.

Ronald Calzone is the president, director, and unpaid lobbyist for Missouri First, a conservative nonprofit organization that regularly lobbies members of the state legislature. He filed a First Amendment challenge to the Missouri lobbying registration and disclosure law. The law simply requires filling out a form and paying a \$10 fee once each year, as well as filing additional reports concerning lobbying-related expenditures. The district court rejected his claim that the law was unconstitutional as applied to him as an unpaid lobbyist, and he appealed.

In [*Calzone v. Summers*](#), Judges Steven Colloton and Bobby Shepherd, both appointed by President George W. Bush, affirmed the lower court decision, but Judge Stras dissented. The majority explained that it was improper to consider Calzone's additional argument that he makes no lobbying-related expenditures, as Judge Stras did in dissent, because that argument had not been raised below or even in the court of appeals until oral argument, noting that Stras' view to the contrary was "unfair" to the lower court and to the state. All three judges agreed that *Citizens United* required "exacting scrutiny" of the law as applied to Calzone, but Stras claimed that the state's interest in "transparency" was not enough.

The majority strongly disagreed, explaining that based on precedent, there was a strong interest in disclosure of who is "pressuring and attempting to influence legislators." They also noted that even unpaid lobbyists could offer "things of value" to legislators, raising the state interest in "avoiding the fact or appearance of public corruption." The burden of complying with the law was "minimal," they stated, particularly if Calzone did not make lobbying-related expenditures as he claimed in the court of appeals.

Overall, the majority concluded, the state system was "precisely that which we have previously held would satisfy" the requirement that such a disclosure law have a "substantial relationship" to the state's interests. Stras' dissent, on the other hand, would have further extended efforts in *Citizens United* and similar cases to misuse the First Amendment to undermine important public disclosure laws.

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 12th 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 6th 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 Circuit Judge Harshly Criticizes Supreme Court Church-State Precedent**

Two Trump judges on the 9th Circuit, Ryan Nelson and Michael Bennett, joined a dissent from a December 2018 denial of rehearing that would have reversed a panel decision affirming a lower court ruling striking down a school board policy of government-sponsored prayer at school board meetings. Judge Nelson wrote an additional dissent that harshly criticized existing precedent and suggested that the Supreme Court should [“reconsider its longtime”](#) ruling on church-state separation.

In [Freedom from Religion Foundation v. Chino Valley Unified Sch. Dist. Bd. Of Educ.](#), a three-judge panel of the 9th Circuit affirmed an injunction against a school board policy that provided for an opening prayer at board meetings that are “open to the public and include [] student attendees and participants,” as young as elementary school age. The prayers were led by local clergy and, in some cases, school board members and school officials. The panel explained that Supreme Court decisions permitting legislative prayer in Congress and elsewhere did not apply to the school board setting where students are present, as two other courts of appeal had ruled, and analyzed the prayer policy under the long-established *Lemon v. Kurtzman* standard of the Supreme Court. Under that decision, a government policy must have a secular purpose, cannot have the primary effect of promoting religion, and cannot excessively entangle government with religion. Based on a careful review of the record, the court found that the policy failed the first prong of the test because it clearly had the religious purpose of promoting prayer, noting that several board members had specifically stated the objective of promoting recognition of Jesus Christ.

Although a clear majority of the 9th Circuit denied a full court rehearing of the case, eight judges [dissented](#), including Nelson and Bennett. The dissent sharply [criticized](#) the panel decision, claiming it was inconsistent with Supreme Court and other precedent. Nelson wrote an additional dissent in which he specifically condemned *Lemon*. Paraphrasing Justice Scalia, he claimed that the “*Lemon* ghoul” has “stalked the lower courts, no longer just frightening little children but increasingly devouring religious expression in the public square.” He pointedly noted that a pending Supreme Court case to be decided by June will give the Court the opportunity to address the “contours of *Lemon* under the Establishment Clause.”

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 11th 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 11th 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 Circuit Judge Joins Dissent Arguing for Special Privileges for Religious Speech**

In December 2018, Trump judge Gregory Katsas of the District of Columbia Circuit joined a [dissent](#) by one other judge from the full D.C. Circuit’s decision not to reconsider the panel decision in [*Archdiocese of Washington v. Washington Metropolitan Area Transit Authority \(WMATA\)*](#). The dissent argued that there should be a special exception for religious advocacy ads from the WMATA policy that limits its ad space on buses and trains to commercial ads and bans political, religious, advocacy, or other issue-oriented ads. The seven other D.C. Circuit judges, including one appointed by President George H.W. Bush, voted not to rehear the case.

In 2015, WMATA adopted its controversial and criticized policy that limits ad space to commercial ads, which has been challenged by free speech advocates across the ideological spectrum but sustained by the lower courts. (See, e.g., [ACLU v. WMATA](#); [American Freedom Defense Institute v. WMATA](#).) These rulings were based on the Supreme Court decision in 1974 in [Lehman v. City of Shaker Heights](#), which allowed a public transit company to determine that

its ad space was not a public forum, but a closed forum limited to commercial ads so long as the exclusion of issue ads is reasonable and neutral as to viewpoint. WMATA's policy accordingly applies to political ads regardless of viewpoint and to both pro and anti-religious advocacy. WMATA based its policy on increased security and vandalism concerns with respect to issue ads, the increased administrative burden of reviewing and responding to complaints about such ads, and the adverse publicity that it had previously had about them.

The Washington Archdiocese nevertheless brought a lawsuit against WMATA in 2017 challenging the refusal to sell it ad space for a pro-religious ad campaign around Christmastime entitled "Find the Perfect Gift," which the Archdiocese explained was "an important part" of its "evangelization efforts." The district court denied a preliminary injunction in the case, and the Archdiocese appealed to the D.C. Circuit. It contended, and Judges Katsas and Griffith later agreed, that even if WMATA can exclude other issue ads, it was required by Supreme Court precedent to make a special exception for religious ads, and cannot exclude religion as a topic even from its non-public forum.

The panel decision rejected this claim and upheld the denial of a preliminary injunction. (The panel originally included Judges Rogers, Wilkins, and Kavanaugh, but Kavanaugh did not participate in the panel decision, which was issued after he was confirmed to the Supreme Court, although he was [critical](#) of the WMATA policy during oral argument). As the panel explained, the decisions relied upon by the Archdiocese did *not* say that it was impermissible to exclude the topic of religion altogether from a non-public forum, but instead ruled that banning "religious viewpoints on otherwise includable topics" was improper. Seven of the nine participating D.C. Circuit judges summarily rejected a petition to reconsider the decision.

The Archdiocese's position, the panel explained, would force government to discriminate in non-public forums in favor of religion and against "political speech" that is equally valued under the First Amendment. But that is precisely what would result from the position advocated by Judges Griffith and Katsas in dissent.

Abuse of Governmental Authority

A. Majority Rulings Written or Joined by Trump Judges

***Two Trump Circuit Judges Rule that There is No Remedy for a Violation of a Homeowner's Privacy Rights**

Two Trump judges on the 6th Circuit, including John Nalbandian and Amul Thapar, issued an October decision in [Brennan v. Dawson](#) that there would be no remedy for what they agreed was a violation by a sheriff's deputy of a homeowner's privacy rights. The violation included repeatedly knocking on the homeowner's doors and windows for an hour and a half,

manipulating a home security camera, and turning on a nearby police cruiser's lights and siren. Judge Karen Nelson Moore strongly dissented from the majority's ruling that the deputy should be immune from an invasion of privacy lawsuit because it was not "clearly established" at that time that it violated the Fourth Amendment.

Deputy James Dawson knocked on the door of Joshua Brennan's home one evening in 2015 in order to administer a breathalyzer test, which was permitted under the terms of Brennan's probation. When there was no answer to repeated knocking on the front door, Dawson remained on the property and walked around and around the house for 90 minutes knocking on doors and windows without ever attempting to obtain a search warrant (and apparently without telephoning Brennan). At one point, Dawson "physically manipulated" Brennan's home security camera by taping over its lens pointing towards the front door, and twice "activated his police cruiser's lights and siren to rouse Brennan." When Brennan emerged, he promptly took the breathalyzer test, which read zero. Dawson nevertheless arrested Brennan for allegedly violating his parole for not submitting promptly enough to the breath test, although a state court judge dismissed that charge.

Brennan later sued Dawson and other police officials for violating his privacy rights under the Fourth Amendment. The district court dismissed the case without considering the merits of the privacy claim, ruling that Dawson was entitled to qualified immunity because it was not "clearly established" under the law whether Brennan's privacy rights were violated. Brennan appealed, and a three-judge panel of Judges Nalbandian, Thapar, and Karen Nelson Moore considered the case.

In an opinion by Nalbandian, he and Thapar actually agreed that Dawson had violated Brennan's privacy rights as a homeowner under the Fourth Amendment. Nevertheless, they ruled that there would be "no relief" for Brennan because they believed that the law was not "clearly established" before Dawson committed the misconduct and that Dawson should be immune from being sued.

Judge Moore strongly dissented from the qualified immunity ruling, pointing out that it was "clear" that a Supreme Court decision in 2013 "prohibited Dawson's conduct" in 2015. In a situation like this case, Moore explained, the Court ruled that when initial knocks are not answered, police can wait "briefly" and then must "leave" unless they have a warrant. Perhaps Dawson could have gone to the back door and tried once again, Moore explained, but the 90-minute course of conduct by Dawson clearly went beyond the "reasonable steps" permitted by the Court's decision. As Moore concluded, "no reasonable officer" could have believed that Dawson's conduct was permissible, and Dawson was "not entitled" to immunity from Brennan's invasion of privacy lawsuit. As a result of the decision by Nalbandian and Moore, however, Dawson got that immunity, and Brennan received absolutely no remedy for the invasion of privacy he endured.

***Two Trump Circuit Judges Affirm Dismissal of Pilot’s Privacy Claim Against Police Who Woke and Arrested Him for Sleeping in a Pilot’s Lounge**

Trump Judges Michael Brennan and Amy St. Eve affirmed a lower court decision that dismissed as a matter of law an invasion of privacy claim by an airplane pilot who, while sleeping in a pilot’s lounge at an airport, was awoken by two police officers who did not identify themselves and searched and arrested him. Dissenting judge Ilana Rovner noted that “no reasonable officer” would have acted that way, and would have given the pilot a chance to prove his claim.

At 4:30 a.m., pilot Eric Ericson was sleeping in the pilot’s lounge at the Rochelle Municipal Airport when he was awoken by Phillip Frankenberg and Aaron Rodabaugh. They demanded that he provide identification, but did not identify themselves as police officers. The just-awakened Ericson declined, and Frankenberg and Rodabaugh proceeded to arrest and search him, and sent him to jail, where he was detained until later that day. Charges against him were dismissed.

Ericson then sued the officers for invasion of privacy under the Fourth Amendment. The district court dismissed the case as a matter of law, and the case was appealed to the 7th Circuit. In an unsigned opinion in [*Ericson v. Frankenberg*](#), Judges Brennan and St. Eve affirmed the dismissal of the claim, arguing that the officers had probable cause to arrest Ericson for loitering.

Judge Rovner strongly dissented. Since a dismissal as a matter of law must assume that the facts alleged by a plaintiff are true, those facts made clear that Ericson was not “remain[ing] in any one place for no apparent purpose” and thus “loitering,” but was sleeping late at night in a pilot’s lounge, as pilots sometimes do. In addition, she pointed out, the Rochelle loitering ordinance was virtually identical to a Chicago ordinance that had been struck down as unconstitutional “twenty years before these officers arrested Ericson.”

Although the majority argued that Ericson (who represented himself in the lower court) had not raised this argument, Rovner responded that the fact that “the unrepresented plaintiff failed to apprehend the importance of this point does not mean that we are similarly constrained.” On the contrary, she explained, the court “should not countenance an arrest made for a non-existent crime and we should certainly not do so on a motion to dismiss.” But that is exactly what Brennan and St. Eve did, depriving Ericson of the ability to try to prove his invasion of privacy claim.

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 judgement 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 5th 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 Circuit Judge Writes Opinion and Casts Deciding Vote to Deny Transgender Prisoner a Chance to Show Deliberate Indifference by Officials Concerning Gender Dysphoria

Fifth Circuit Trump judge James Ho was the author and deciding vote in a 2-1 decision in [*Gibson v. Collier*](#) in March 2019 that affirmed a lower court decision that threw out without trial a claim that Texas prison officials violated the 8th Amendment by showing "deliberate indifference" to gender dysphoria, a transgender prisoner's medical condition. The dissent, by a judge appointed by President George H.W. Bush, was particularly critical of the majority for ignoring the established principle that prisoners' medical conditions must be evaluated individually and for deferring to the blanket Texas prison rule prohibiting sex reassignment surgery (SRS).

Vanessa Lynn Gibson (referred to in the case as "Scott Lynn Gibson") is a transgender prisoner in Texas. Designated male at birth, Gibson began her transition at age 16 and has been "diagnosed as having a medical condition known today as 'gender dysphoria.'" Suffering from severe depression and having threatened suicide, Gibson sought surgery to treat her gender dysphoria. Even though a prison physician had recommended evaluation for the surgery, that

evaluation never occurred. Gibson instead received hormone and other therapy because Texas policy does not allow SRS under any circumstances.

Acting without an attorney, Gibson filed suit in federal court. Prison officials claimed that summary judgment should be granted in their favor without a trial based on immunity grounds. The district court denied the immunity claims, but went forward on its own, without separate briefing or argument, to grant summary judgment for the prison officials on the merits and dismissed Gibson's case.

On appeal, Ho wrote a 2-1 decision affirming the lower court's ruling. Although admitting the "unusual" procedural history of the case, Ho elected to decide the merits of the summary judgment ruling against Gibson based on what he characterized as a concession by Gibson's court-appointed attorney on appeal that the merits of the claim should be reached. Based primarily on a decision four years earlier by the 1st Circuit that had rejected a prisoner's claim that the denial of SRS was cruel and unusual punishment under the Eighth Amendment, Ho affirmed the lower court ruling and dismissed Gibson's case.

Judge Rhesa Barksdale, who was appointed by President George H.W. Bush, strongly dissented. Regardless of what concessions may have been made by Gibson's attorney, Barksdale explained, the court itself was bound by the "bedrock" principle that prison officials could properly get summary judgment and avoid a trial only if they had shown that there was no genuine dispute as to any material fact, including the "medical necessity of SRS in treating gender dysphoria" for Gibson. Largely because they thought they should get summary judgment on immunity grounds, Barksdale went on, the prison officials had failed to do so. In fact, as he pointed out, the 1st Circuit case rejecting SRS that Ho relied on had *not* been decided on summary judgment, but only after a full trial where testimony and facts were presented.

Barksdale was particularly critical of Ho's reliance on the Texas policy that ruled out SRS on a blanket basis without individualized assessment. As Barksdale explained, accepted case law in the 5th Circuit and elsewhere required that in order to determine whether prison officials have violated the 8th Amendment because of "deliberate indifference" to a prisoner's medical condition, it was important to consider whether and how the prisoner's medical needs and course of treatment had been individually evaluated. Where "failure to provide" particular medical care was "based on an administrative policy" rather than on "medical judgment", Barksdale stated, the result "could constitute deliberate indifference" prohibited under the Eighth Amendment under established case law. This was particularly true in Gibson's case, Barksdale noted, since a prison physician had specifically recommended that Gibson be evaluated for SRS. "The majority consistently misconstrues the correct standard," Barksdale wrote, under which the case should have been sent back to the district court to give Gibson an opportunity to prove deliberate

indifference in this particular case. “[F]undamental fairness,” Barksdale concluded, demanded no less.

***Trump Judges Reverse Panel in Which Barrett Had Dissented and Uphold Deprivation of Right to Counsel**

In June 2018, our “[Confirmed Judges, Confirmed Fears](#)” series reported on a [dissent by 7th Circuit judge Amy Coney Barrett](#) that would have denied a defendant in a criminal case his constitutional right to counsel. Unfortunately, in December, the panel’s ruling protecting the right to counsel was reversed by the circuit *en banc* in an opinion authored by another Trump judge, Amy St. Eve. She was joined by both of Trump’s other nominees on the circuit (Barrett and Michael Scudder), as well as by all of the judges nominated by Presidents Ronald Reagan and George W. Bush. The case was [Schmidt v. Foster](#).

Scott Schmidt was on trial for murder and wanted to present an important defense. Ordinarily, the defendant’s attorney would present his case to the judge explaining why this defense was available to his client. But in this case, the trial judge held a closed session before the trial to question the defendant and—critically—ordered that his lawyer not participate. Based on that session, the trial judge ruled that Schmidt could not present his chosen defense at trial, and he was convicted of first-degree murder. A three-judge panel had recognized in 2018 that this unconstitutionally denied Schmidt the effective assistance of counsel, a decision that Barrett dissented from.

St. Eve’s December 2018 opinion overruled the panel. The new majority criticized the trial judge but ruled that there was no clearly established Supreme Court precedent on the matter. Having unmoored itself from clearly controlling law, the majority upheld the conviction because (the judges wrote) there wasn’t enough deprivation of counsel to be unconstitutional. For instance, even though the lawyer was prohibited from speaking during Schmidt’s conversation with the judge, he was nevertheless in the room. Not only that, but the judge allowed them to consult with each other beforehand. In addition, the trial judge’s questions were based on filings that the lawyer had written. There had also been a recess during which Schmidt could consult with his lawyer before having to answer more of the judge’s questions without being able to get help from his lawyer. Given these facts, St. Eve wrote that the court couldn’t presume that Schmidt had been prejudiced by what happened.

Writing for the dissenting judges, Judge David Hamilton sharply criticized the majority for focusing on such factors:

The majority, not the Supreme Court, has introduced here the notion that only a “complete” denial of counsel requires a presumption of prejudice.

Hamilton explained that this is a straightforward case of a constitutional violation:

If the judge had simply said that he wanted to hear what the accused had to say without any counsel even present, I could not have imagined, at least before this case, that any court in the United States would find such interrogation acceptable without a valid waiver of counsel by Schmidt himself.

The only difference here is that Schmidt's lawyer was physically present in the room, but the judge might as well have gagged him: he ordered the lawyer not to "participate" in this critical stage of the prosecution. I don't see a constitutional difference between an absent lawyer and a silenced lawyer.

Unfortunately for Schmidt and for the Bill of Rights, Trump's judges in the 7th Circuit—Amy St. Eve, Amy Coney Barrett, and Michael Scudder—carried the day. (Trump nominee Michael Brennan did not participate in the case.)

***Trump Circuit Judge Writes Opinion and Casts Deciding Vote to Deprive Individual of Hearing on Whether He Received Ineffective Assistance of Counsel**

Trump Judge David Stras of the 8th Circuit was the author and deciding vote in a 2-1 decision in November 2018 to affirm a lower court order that rejected a claim of ineffective assistance of counsel without an evidentiary hearing in *Adetokunbo Olubunmi Adejumo v. U.S.* Judge Jane Kelly strongly dissented, explaining that the record did not “conclusively show” that there was no basis for relief, which is required to dismiss such a claim without a hearing. As the majority itself acknowledged, the attorney's alleged errors could have led to an additional four years or more of imprisonment.

After Adetokunbo Olubunmi Adejumo was convicted for bank fraud and identity theft, he filed a post-conviction motion to vacate his sentence, contending that he had received ineffective assistance of counsel that led to a significant increase in his sentence. Specifically, he maintained that his lawyer had failed to advise him that his decision to testify at a pre-trial release hearing could lead to a decision to increase his sentence, and had failed to continue to contest the government's claim concerning the amount of loss caused, as a “reasonable attorney” would have done. Under the law, Adejumo was to get an evidentiary hearing on his claims unless the facts and record “conclusively show” that his claims were invalid.

The district court dismissed Adejumo's claims without a hearing and in a 2-1 decision written by Stras, the 8th Circuit affirmed. Adejumo's testimony had resulted in four more years in prison because the judge had concluded that he testified falsely, Stras maintained. Stras continued that Adejumo's oath to tell the truth should have been enough to warn him, and it was a “speculative risk” that the attorney need not have warned him about the at additional prison time that would result. Judge Kelly strongly disagreed, explaining that the oath was “no substitute” for Adejumo's lawyer warning him about possible increases in his sentence for the underlying

offenses if the judge found that his testimony at the pre-trial release hearing was false. Nor was the risk “remote or speculative,” she explained, because the official commentary on the U.S. Sentencing Guidelines specifically warns of such consequences, which a “reasonable lawyer” should warn a client about. Under those circumstances, she concluded, Adejumo should have received a hearing on his claims.

Kelly similarly explained that Adejumo should have received a hearing concerning his contention that his lawyer failed to continue to contest the government’s assertion of the loss amount for which he was responsible, which also affected his sentence. The majority had agreed that the government made “confusing” statements on that issue at a hearing, and Kelly found there was a “colorable claim” that Adejumo’s lawyer had erroneously admitted that there was no dispute as to the loss amount. Accordingly, she concluded, Adejumo was at least “entitled to an evidentiary hearing” to resolve “disputed facts” on the issue.

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, or 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.

***Trump Circuit Judge Casts Deciding Vote to Refuse to Allow Death-Row Prisoner to Present Claim that State Improperly Withheld Evidence**

Trump judge John K. Bush of the 6th Circuit was the deciding vote in a 2-1 order in December 2018 that misread the law and ruled that an individual sentenced to death could not raise in federal court a contention that the state had improperly failed to disclose DNA and other evidence that could have led to him being absolved from the charges against him. Judge Karen Nelson Moore strongly dissented, pointing out that the majority was interpreting an important Supreme Court case on the issue as if the dissent was “actually the opinion of the Court.”

David Allen was sentenced to death for a robbery and murder in Ohio in 1991. After his state appeals were denied, he filed a claim in federal court (referred to as a petition for a writ of *habeas corpus*) under federal legal and constitutional provisions that authorize someone convicted in state court to challenge that conviction for violating the Constitution or federal law after state appeals are complete. When his *habeas* petition was denied by a lower federal court, he asked the appellate court to postpone his appeal after a state court decided to order DNA testing of gloves found near the scene of the murder. After proceedings that lasted more than a decade, state courts rejected his claims that the state had improperly failed to disclose the gloves and DNA evidence that could have led to his acquittal, and he moved in federal appellate court to have his *habeas* petition sent back to the lower court so he could raise the DNA claim as part of his *habeas* petition.

In a 2-1 decision in which Bush was the deciding vote in *Allen v. Mitchell*, 2018 U.S. App.Lexis 34242, the 6th Circuit Court of Appeals denied the motion. The majority ruled that the motion was a “second successive” *habeas* application concerning the same underlying state conviction and that under federal law, it could not be considered unless Allen met the “high hurdle” of proving by “clear and convincing evidence” that “no reasonable factfinder” could have convicted him if the evidence had been presented. Under that standard, the majority rejected the claim.

Judge Moore vigorously dissented. Her primary reason was that the majority should not have ruled Allen's argument a "second successive" claim under federal law because Supreme Court precedent provided that, contrary to the majority, an individual can properly raise a new argument without it becoming a "second successive" claim when the underlying information (in this case, the DNA evidence on the gloves) was not available earlier and the argument was raised as soon as it reasonably could have been. The majority's opinion, she pointed out, interpreted a dissent by Justice Thomas in an important case on the issue ([Panetti v. Quaterman](#)) as if it was "actually the opinion of the Court." In fact, Judge Moore pointed out, the majority's ruling would give state prosecutors an incentive to "withhold materially exculpatory evidence until after a petitioner" completes his initial federal *habeas* claim.

Judge Moore explained that Allen should be able to have his claims fully considered by the federal district court. She concluded that the majority's refusal to permit that, which resulted from Bush's deciding vote, was "precisely the sort of 'far reaching and seemingly perverse' result the Supreme Court has twice extolled us to avoid" when constitutional rights are at stake in *habeas* proceedings.

***Trump Judge Uses "War on Terror" Law to Approve Prosecution After Statute of Limitations**

Trump judge Mark Bennett cast the deciding vote in a divided 9th Circuit panel decision extending two congressional authorizations for military force, one against those involved with 9/11 and the other against Iraq to an ordinary case of fraud. The case is [United States v. Jucutan](#).

The U.S. Army has a program in which soldiers try to recruit new members to serve in the military and are paid for each successful enlistment. Jordan Jucutan was one such recruiter. He was accused of fraudulently submitting names and private information (like Social Security numbers) of potential recruits who had not actually agreed to join the military. Specifically, he was indicted for wire fraud and aggravated identity theft, which have a five-year statute of limitations. However, the federal government did not begin its criminal proceedings against Jucutan until after that period had passed.

On December 10, 2018, a divided panel of the 9th Circuit ruled that Jucutan can be prosecuted anyway because of a federal law tolling the statute of limitations for certain crimes "directly connected with or related to" a congressionally-authorized use of military force (the Wartime Suspension of Limitations Act, or WSLA). The panel—with Judge Bennett casting the deciding vote—ruled that since the recruitment program was created to fight the "war on terror," it was covered by the 2001 and 2002 congressional authorizations of military force against the 9/11 perpetrators and against Iraq.

Judge Marsha Siegel Berzon dissented, explaining that neither authorization was so expansive. Simply recruiting a force to combat international terrorism is not “directly connected with or related to” the authorization of 2001 (against those who helped carry out the 9/11 attacks) or of 2002 (against Iraq), as required by the WSLA.

Judge Berzon also pointed out that the Supreme Court has warned lower courts that the WSLA should be “narrowly construed” and “interpreted in favor of” enforcing ordinary statutes of limitations.

***Trump Appellate Judge Sets Up a Catch-22 for a Party without a Lawyer**

Eighth Circuit Trump judge Steven Grasz was the deciding vote upholding the dismissal of a prisoner’s claim that prison officials had denied him medical treatment in violation of the Eighth Amendment. Essentially, the petitioner in [*Doering v. Kelley*](#) was punished for not being a lawyer.

Alan Doering is serving out his sentence in an Arkansas prison, where officials denied him access to Hepatitis C medication. He sued the prison pro se (meaning he didn’t have a lawyer), claiming that the denial was causing irreversible liver damage. He asked the court to provide him with counsel and a medical expert, motions that the trial court denied because Doering had filed them too early, and then a second time that was too late. The trial court judge dismissed the Hepatitis C and several other claims under a process called summary judgment: Even accepting Doering’s version of the facts as true, the judge ruled that he didn’t have a legal case.

Doering appealed to the 8th Circuit, but he lost in a divided 2-1 ruling in which Grasz was the deciding vote. Judge Jane Kelly dissented in part. She explained that Doering had requested counsel and a medical expert to help him when he first filed his petition, not knowing that procedural rules call for those requests to be made later. She continued:

Although his second request was admittedly belated, the district court had sufficient time to consider the motion on the merits but concluded that counsel was unnecessary because the case is insufficiently complex. Yet the district court denied Doering counsel while simultaneously granting summary judgment in favor of the defendants due to Doering’s failure to rebut the medical evidence on the adequacy of his current Hepatitis C treatment—a task which, in my view, required the assistance of counsel and a medical expert.

Courts are supposed to give some leeway to parties who don’t have lawyers. Instead, Judge Grasz cast the deciding vote to trap a *pro se* petitioner alleging a constitutional violation in a catch-22.

B. Other Majority Rulings Written or Joined by Trump Judges on 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. Links to available blog posts are included. Specifically:

- [**United States v. Padgett*](#): Trump judge Branch [casts](#) deciding vote to dismiss appeal for government breach of plea agreement.
- [*Beeman v. United States*](#): Trump judges Newsom and Branch join 11th Circuit decision not to rehear case despite dissent explanation that longer sentence was based on erroneous interpretation of statute.
- [**United States v. Cox*](#): Trump judge Grasz casts deciding vote to affirm sentence more than 60 years greater than called for by federal sentencing guidelines.
- [**Snider v. United States*](#): Trump judge Bush [casts](#) a deciding vote against an individual sentenced for an offense erroneously defined under federal sentencing guidelines.
- [*United States v. Heard*](#), 2018 U.S.App. Lexis 25705 (6th 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. 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 11th Circuit decision on enhanced sentences despite dissent explanation that decision "strays from the plain text of the statute and Supreme Court precedent."
- [**United States v. St. Hubert*](#): Trump judges Newsom and Branch cast deciding votes to limit review of harsher sentences

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.”

Several other cases where Trump judges wrote or joined majority rulings upholding abuse of government authority in the criminal justice system involving Trump appellate judges include:

- [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”;
- [Moya v. Garcia](#): Trump 10th Circuit judges Eid and Carson joined a decision denying rehearing of a claim that people were kept in jail for long periods without arraignment in violation of due process, despite a dissent joined by the Republican-appointed chief judge;
- [*Unites States v. Munksgard](#): Trump 11th Circuit Judge Newsom [writes](#) 2-1 opinion upholding a felony criminal conviction even though the prosecution had failed to prove a key element of the crime beyond a reasonable doubt.
- [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.”

C. Dissents Written or Joined by Trump Judges on Abuse of Governmental Authority

***Trump’s 4th Circuit Judges Would Broaden Coverage of an Unconstitutional Criminal Law**

The 4th Circuit Court of Appeals issued an 8-7 *en banc* ruling in January in a criminal justice case in which both of President Trump’s nominees on the court—Julius Richardson and Marvin Quattlebaum—were among the dissenters. All but one of the dissenters was a Republican-nominated judge, with Richardson authoring a separate dissent that only Quattlebaum joined. The Trump judges sought to uphold a conviction under an unconstitutionally vague criminal law by rewriting it in a way that the Supreme Court has clearly rejected.

In [United States v. Simms](#), Joseph Decore Simms had been convicted of brandishing a firearm in connection with a “crime of violence.” The underlying “crime of violence” in his case was a conspiracy to commit a robbery. But in two recent cases involving materially identical statutes,

the Supreme Court has struck them down as too vague to give fair notice as to exactly what activities are encompassed by the terms “crime of violence” or “violent felony.” That is important, because the Due Process Clause protects people from being convicted for doing something that is not clearly defined as a criminal act.

As the 4th Circuit majority pointed out, the Supreme Court has twice in recent years instructed lower courts how to interpret statutes like the one in this case. Under *Sessions v. Dimaya* (2018) and *Johnson v. United States* (2015), the issue for the judge is not whether the specific defendant in a particular case before the court did something that posed a substantial risk of violence while committing the underlying crime. Instead, judges have been directed to imagine the “ordinary case” of the underlying crime to determine if there is a substantial risk of violence.

Accordingly, the 4th Circuit majority asked whether the underlying crime—conspiracy to commit robbery—has a substantial risk of violence. Answering that question would involve exactly the same type of guesswork and lack of fair notice as in *Johnson* and *Dimaya*. In a straightforward application of precedent, the *en banc* majority struck the law down as unconstitutionally vague.

The seven dissenting judges urged the court to interpret the law differently, asking whether there was a substantial risk of violence in the particular incident before the court. The main dissent argued that this was the best way to interpret the statute.

But in his separate dissent, Trump judge Richardson (joined by Trump judge Quattlebaum) agreed with the other dissenters on how to interpret the law, but for a very different reason. They did not care what the *best* way to interpret the statute is. In order to avoid striking the law down as unconstitutional, they would have used the case-specific approach and upheld the criminal conviction as a “fairly possible” interpretation of the law. But as the majority explained, that interpretation has already been foreclosed by the Supreme Court.

In a concurring opinion, Judge James Wynn (joined by Judge Pamela Harris) pointed out that the dissenters’ interpretation would actually broaden the universe of defendants subject to the criminal statute at issue:

By relying on constitutional avoidance to expand a criminal statute’s reach, my dissenting colleagues embrace an unprecedented application of the doctrine of constitutional avoidance that empowers the judiciary to usurp Congress’s exclusive authority to establish crimes and punishments.

Judge Wynn observed that:

neither my dissenting colleagues nor the government points to a single case in which the Supreme Court has sanctioned the use of constitutional avoidance in a manner that expands the scope of a criminal statute, as it would if we applied the case-specific approach to Section 924(c)(3)(B).

***Trump Judge Amy Coney Barrett Tries to Deny Post-Conviction Relief Despite Prosecutor Hiding Hypnosis of Key Eyewitness**

In February 2019, Trump 7th Circuit Judge Amy Coney Barrett dissented from a decision written by Republican appointee William Bauer in [Sims v. Hyatte](#) that Mack Sims, who had been imprisoned for 20 years for allegedly shooting a security guard, should get post-conviction relief when it was discovered that the prosecution deliberately concealed the fact that the key eyewitness against him had been hypnotized to improve his memory. Although Barrett agreed that the “suppressed evidence of hypnosis undermined confidence in the verdict,” she [nevertheless] claimed that the court should have deferred to an Indiana appeals court that had denied any post-conviction relief to Sims.

In late 1993, Indiana prosecutors charged Mack Sims with shooting a security guard, Shane Carey. At trial, the prosecution “relied almost exclusively” on Carey, “the only witness who could possibly identify the shooter” given the facts on the night of the shooting, in order to “establish their case against Sims.” Although Carey was unequivocal in identifying Sims as the shooter at trial, Sims’ defense attorney tried to cast doubt on his testimony by questioning him about an early instance when Carey was shown only Sims’ picture, another time when Carey was “unable to identify the assailant in a photographic lineup,” the “subdued” lighting at the scene, and “inconsistencies” in Carey’s early description of the assailant. Sims was nevertheless convicted, sentenced to 35 years in prison, and did not prevail on appeal.

Sims later filed for post-conviction relief and learned for the first time, at an evidentiary hearing in 2012, that Carey had been hypnotized months before the trial and, according to one witness, clearly identified Sims “only after hypnotism.” Indiana courts nevertheless denied post-conviction or *habeas corpus* relief, finding that the suppression of evidence was not “material” since there was some evidence of pre-hypnosis identification, that the state showed that Carey’s in-court identification of Sims was independent and unequivocal, and that since Sims’ lawyer had cross-examined Carey on the identification issue anyway, there was not a “reasonable probability” that disclosing the hypnosis before trial would have changed the outcome of the jury verdict. A federal district court denied *habeas corpus* relief on similar grounds.

In an extensive 25-page opinion by Judge Bauer, the 7th Circuit reversed. Judge Bauer explained that the state courts’ conclusion that the suppression of the hypnosis evidence was not material to Sims’ conviction was “contrary to” and an “unreasonable application of clearly established federal law.” He noted that the Supreme Court had “clearly established that strong and non-

cumulative impeachment evidence related to an important trial witness is material” under the law. Even though the Indiana appellate court agreed that evidence from a hypnotically-enhanced witness is “inherently unreliable,” Bauer went on, the state court “went astray” by focusing on whether the testimony was admissible, *not* on the “potential effects on the outcome of the trial” if the facts of the hypnosis had not been suppressed and were available to Sims’ lawyer at trial. Based on Supreme Court precedent and other material concerning the unreliability of witnesses who had been hypnotized, Judge Bauer noted that Carey’s testimony would have been subjected to “withering cross-examination” and could well have affected the outcome of the trial.

Judge Barrett nevertheless dissented, arguing that the majority should have deferred to the Indiana court’s conclusion that Carey’s identification “never wavered.” But as the majority explained, Barrett’s attempt to “assail [] our opinion” failed to refute the conclusion that Supreme Court and other precedent “show beyond reasonable dispute that the prosecutor’s deliberate concealment of the hypnosis evidence” warranted post-conviction relief.

***Four Trump Circuit Judges Try to Reverse Injunction Against Law Criminalizing Threats of Even Legal Action Against Public Officers**

Four Trump judges on the 5th Circuit, including James Ho, Kyle Duncan, Kurt Engelhardt and Andrew Oldham, joined a dissent from a denial of rehearing by right-wing judge Edith Jones that would have reversed a panel decision that struck down under the First Amendment a Louisiana law that criminalized making threats of even lawful action against public officers. If adopted, the dissent would have made it much harder to challenge criminal laws that improperly prohibit actions protected by the First Amendment.

Travis Seals was arrested by police in connection with a dispute with a neighbor. He contended that he was improperly pepper-sprayed, objected to the arrest, and threatened “to make lawful complaints” about the officers’ conduct. Among other things, he was charged with violating a Louisiana law that criminalizes “the use of violence, force, or threats” on any public officer. The local district attorney’s office later dismissed the charges, but maintained that it could prosecute under the state law until four years after the arrest, in December 2019.

In 2016, Seals and another person arrested with him brought a civil suit against the police and others, seeking damages and an injunction against the law. They claimed that the statute was overbroad under the First Amendment because it made it illegal even to make “threats” to take lawful action like pursuing complaints against the police. Although the damages claim is still pending, the district court agreed that the law was overbroad and issued an injunction against enforcement of the prohibition against “threats.” The state appealed, and a three-judge panel of the 5th Circuit affirmed in [*Seals v. McBee*](#).

On October 31, 2018, however, eight 5th Circuit judges, including four Trump appointees, strongly [dissented](#) from a decision by the full court not to rehear the decision, and made clear that they thought that the district court and the three-judge panel were wrong. (They came within one vote of prevailing, since eight judges voted against rehearing and a majority is needed to rehear a case). Six of the eight joined a dissent that argued that Seals did not have standing to challenge the law at all, since the charges against him were dismissed. If their view had prevailed, not only would the specific state law have been upheld, but it would also be much harder to challenge overbroad laws that threaten First Amendment rights. As explained in the original panel decision (which included Trump nominee Don Willett), where the government will not absolutely disavow prosecution and can still prosecute under a challenged law, the Supreme Court has made clear that a person “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”

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 6th 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.

D. Other Dissents Written or Joined by Trump Judges Trying to Uphold Abuses of Government Authority

In addition to those discussed above, there are a number of other recent decisions where Trump judges have written or joined dissents and tried to uphold abuses of government authority, mainly with respect to criminal justice. A number of additional decisions concern sentencing in criminal cases. Links to related blog posts are included where available. Specifically:

- [*United States v. Burris*](#): Trump judge Ho dissents from decision by Republican-appointed judge to remand case to cure improperly long sentence;
- [**Reid v. Hurwitz*](#): Trump D.C. Circuit judge Katsas [dissents](#) from majority decision, including one Republican-appointed judge, that allowed a prisoner to present a claim that his constitutional rights were violated by being repeatedly placed in solitary confinement
- [**United States v. Shrum*](#): Trump 10th Circuit judge Eid agreed that evidence was improperly seized but argued in [dissent](#) that police should get another chance to justify their conduct.

- [**Tolliver v. Noble*](#): Trump 6th Circuit judge Bush [dissents](#) from majority ruling, including by one Republican-appointed judge, that former prisoner was improperly denied an opportunity to file an amended complaint for deprivation of constitutional rights.
- [**United States v. Garcia*](#): Trump 7th Circuit judge Sullivan tries to uphold drug conviction despite no direct evidence based solely on agent interpretation of phone call
- [*United States v. Hanchett*](#): Trump 5th Circuit 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. 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.