



September 16, 2020

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way opposes the nomination of Toby Crouse to be a federal district court judge in Kansas. In 2018, Crouse became Kansas's solicitor general, which allowed him to advance state officials' efforts to curtail abortion rights, make it harder to vote, and target certain groups for discrimination. His hostility to the basic rights that courts are supposed to protect and his efforts to avoid answering questions about his record make him a disturbing choice for the federal bench.

Introduction: As an initial matter, the Senate should not be confirming any judicial nominees under the current circumstances. Our country is facing multiple crises that threaten any hope of achieving a just and equitable society: an unchecked pandemic that is killing more than 1,000 people in the United States every day; systemic racism in law enforcement that puts Black and Brown Americans in daily jeopardy; and a president who is subverting the rule of law, ignoring democratic norms, and now threatening the very integrity of our elections through his attacks on voting and refusal to provide the resources necessary to conduct a safe and secure election. The Senate has before it measures passed by the House, in some cases months ago, to address these emergencies. They include the HEROES act to provide testing and treatment for COVID, essential support to local and state governments to meet the challenges of confronting the pandemic, and critical election security resources; the Justice in Policing Act, an overdue first step in addressing the challenges of systemic racism in law enforcement; and the Delivering for America Act, to provide critical financial support for the U.S. Post Office and roll back the steps taken by the Postmaster General that could jeopardize the Postal Service's ability to deal with the anticipated volume of mailed-in ballots this November. But instead of dealing with any, let alone all, of these measures, the Senate majority turns to confirming even more Trump nominees to lifetime seats on our federal courts. The nation is in crisis – this is not a time for “business as usual.”

Right to Abortion: As solicitor general, Crouse defended Kansas restrictions on abortion and other reproductive rights and joined several *amicus* briefs defending such restrictions in other states. For instance, he urged courts to uphold Alabama's criminal ban on the most common method of second-trimester abortion—the only method that could be used outside of a hospital starting at the fifteenth week of pregnancy.¹ In another *amicus* brief, he argued that Indiana can constitutionally force people to have medically unnecessary ultrasounds at least 18 hours before an abortion, despite the significant financial and other burdens imposed, particularly on low-

income people who face lengthy travel to one of the state's tiny number of health centers that can offer the mandatory "treatment."ⁱⁱⁱ He also submitted an amicus brief arguing for the constitutionality of an Indiana requirement that parents be notified when a minor has an abortion.ⁱⁱⁱ To tell the court that such measures don't even have the intent, let alone the effect, of imposing a substantial burden on people seeking an abortion is to ask that court to participate in a deception.

Crouse tried to use the courts to advance another anti-choice deception in arguing that Kansas could cut Planned Parenthood affiliates off from Medicaid funding on the basis of notoriously doctored and discredited "sting" videos. The Tenth Circuit struck down the spending ban in February 2018.^{iv} The state's petition for certiorari to the Supreme Court stated that videos had "reveal[ed]" misconduct by Planned Parenthood, prompting Sen. Chris Coons to ask the nominee what evidence that claim was based on.

Crouse replied that he had not authored the petition for certiorari and was not the counsel of record, although his name was on the petition (which the Court has denied). More importantly, Crouse told Sen. Coons the petition "cites as support for that statement the Tenth Circuit's decision..."^v But the quoted section of the circuit court opinion was simply reciting the allegations made by Kansas based on the misleadingly edited videos and does not constitute judicial support for those allegations. When district court judges cite precedent, they must be able to distinguish between factual findings and a party's allegations.

Voting Rights: All rights within a democracy flow from the right to vote, making the protection of that right one of the most solemn obligations a judge has. However, Crouse has sought judicial approval for measures designed to take that right away based on the fiction of voter fraud. He has defended a Kansas law requiring people to show documentary proof of citizenship when registering to vote, citing a "compelling interest in preventing voter fraud" because such fraud would "undermine our democracy." However, he was only able to provide evidence of 129 instances over twenty years of noncitizens seeking to register. The restriction—which had already blocked 30,000 Kansans from voting—was deemed unconstitutional by the Tenth Circuit.^{vi}

When asked by senators if he actually had any evidence that voter fraud is a widespread problem, he did not provide any.^{vii} Nor could he tell senators what evidence he had that requiring proof of citizenship is actually effective at preventing voter fraud.^{viii} He even told senators on the Judiciary Committee that he has "not studied whether facially neutral voting restrictions can have a disproportionate impact on minorities."^{ix}

Targeting Certain Communities for Mistreatment: Crouse signed on to an amicus brief urging the Supreme Court to take the case of Arlene's Flowers v. Washington. He argued that a florist has a constitutional right to refuse to provide flowers for a same-sex couple's wedding in violation of state anti-discrimination laws because she has a sincerely based religious belief

against the marriage her flowers would be displayed at. Senators asked Crouse about his views concerning the constitutionality of laws barring discrimination in public accommodations.

For instance, Sen. Dianne Feinstein asked, “if a florist [can] refuse to provide services for an interracial wedding if the marriage violated the florist’s ‘core religious convictions.’” But Crouse gave a non-responsive answer, stating only that states may not prohibit interracial marriage.^x Similarly, Sen. Coons asked if under the amicus brief’s rationale “a florist [has a constitutional right to] refuse to provide services to a couple based on their race, religion, or nationality?” This time, Crouse responded that it would be inappropriate to give his “personal view on an issue that has not been resolved by the Supreme Court.”^{xi} In fact, more than half a century ago, the Supreme Court described as “frivolous” the claim that a merchant’s religious beliefs can exempt them from Congress’s prohibition of racial discrimination in public accommodations.^{xii}

Crouse has also joined amicus briefs seeking judicial authorization for clearly lawless actions against immigrants. He urged the Supreme Court to let the Trump administration rescind DACA and add a citizenship question to the 2020 census, even though the record presented by the Justice Department to support the decisions in both cases was clearly contrived to justify actions that would severely harm immigrant communities. It is disturbing that a nominee for the federal bench has supported such deception against the courts.

Conclusion: We urge senators to oppose confirming Toby Crouse to a lifetime seat as a federal judge.

Sincerely,



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ⁱ West Alabama Women's Center v. Williamson, 900 F.3d 1310 (11th Cir. 2018).

ⁱⁱ Planned Parenthood of Indiana & Kentucky v. Commissioner of the Indiana State Department of Health, 896 F.3d 809 (7th Cir. 2018).

ⁱⁱⁱ Planned Parenthood of Indiana & Kentucky v. Adams, 937 F.3d 973 (7th Cir. 2019).

^{iv} Planned Parenthood of Kansas and Mid-Missouri v. Andersen, 882 F.3d 1205 (10th Cir., 2018).

^v Crouse response to Senators’ Written Questions For the Record (QFRs),

<https://www.judiciary.senate.gov/download/crouse-responses-to-questions-for-the-record>, p. 19.

^{vi} Fish v. Schwab, 957 F.3d 1105 (10th Cir. 2020).

^{vii} QFRs, pp. 2-3, 36-37.

^{viii} QFRs, pp. 2-3.

^{ix} QFRs, p. 21.

^x QFRs, pp. 1-2.

^{xi} QFRs, p. 20.

^{xii} *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 n. 5 (1968).