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January 14, 2020

Senator Lindsey Graham
United States Senate
290 Russell Senate Office Building
Washington, D.C. 20510

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein:

We write in opposition to the nomination of Andrew Brasher to the Eleventh Circuit Court of Appeals.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) was founded in 1940 by Thurgood Marshall. It has been an entirely separate organization from the NAACP since 1957. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society. LDF has been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained. Many of LDF's most important cases were litigated in the Eleventh Circuit.

The Eleventh Circuit covers the states of Alabama, Florida and Georgia. Given the civil rights history of those states the decisions of the Eleventh Circuit have played, and continue to have, a unique and influential role in the development of civil rights law and protections. This is particularly true of cases involving voting rights.

Mr. Brasher has worked to undermine voting rights

Andrew Brasher is unsuited for a seat on the Eleventh Circuit. His record as an attorney is marked by decades-long hostility to civil rights. This is especially apparent from his work defending discriminatory voting practices in Alabama.

The right to vote lies at the very foundation of our democracy. Indeed, the Supreme Court has stated that the right to vote is "preservative of all rights."[1] Mr. Brasher's

[1] *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).

extensive and relentless involvement in undermining this fundamental right, and his efforts to limit the diversity of participation in our democracy, render him unqualified.

From 2011 to 2019, Mr. Brasher worked in the Alabama Attorney General's office, first as Deputy Solicitor General and then, for the last five years, as chief Solicitor General for the state. While working in these positions, Mr. Brasher worked to weaken the protections of the Voting Rights Act of 1965 (VRA) and defended Alabama's attempts to racially gerrymander legislative districts in order to dilute the vote of African Americans.

In 2013, Mr. Brasher filed an amicus brief in *Shelby County v. Holder* arguing that Section 5 of the VRA should no longer apply to Alabama as the state had changed significantly since the Voting Rights Act was passed in 1965.[2] The Supreme Court's decision in *Shelby* loosened the reins of protection and allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked. Mr. Brasher's involvement in this case demonstrates his hostility towards voting rights protections. Furthermore, the fact that the brief he filed ignored the state's myriad schemes to restrict the vote since 1965, as found by federal courts in numerous judicial opinions[3] and in the voluminous legislative record amassed by Congress in the 2006 reauthorization of the VRA, demonstrates his willful disregard of voter suppression efforts.

Despite numerous lawsuits[4] and reports[5] documenting evidence of voter suppression post *Shelby*, Mr. Brasher claimed that he was ignorant of the reality of voting

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[2] Brief of State of Alabama as Amicus Curiae Supporting Petitioner, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-96_pet_amcu_soa.authcheckdam.pdf.

[3] *Plump v. Riley,* No 2:2007cv01014 (M.D. Ala. 2007) (panel); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Florida State Conference of NAACP v. Browning*, 569 F. Supp. 2d 1237 (N.D. Fla. 2008); *U.S. v. Long County*, Case No. CV 206-040 (S.D. Ga. Feb. 10, 2006).

[4] *Georgia Muslim Voter Project v. Kemp* 918 F.3d 1262 (11th Cir. 2019); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019); *Jones v. DeSantis*, 2019 WL 5295192 (N.D. Fla. Oct. 18, 2019); *Jones v. Jefferson County Board of Ed*, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Ala. State NAACP v. Pleasant Grove*, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019); *Martin v. Kemp* 341 F. Supp. 3d 1326 (N.D. Ga. 2018); *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (ND Fla. 2018); *Wright v. Sumter County. Bd. of Elections*, 301 F.Supp.3d 1297 (M.D. Ga. 2018); *Hand v. Scott* 888 F. 3d 1206 (11th Cir. 2018); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018); *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017); *Thompson v. Alabama*, 2017 WL 3223915 (M.D. Ala. July 28, 2017); *Arcia v. Florida Secretary of State*, 772 F. 3d 1335 (11th Cir. 2014); *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F.Supp.3d 1338 (N.D. Ga. 2015); *Allen v. City of Evergreen*, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014)

[5] NAACP Legal Def. & Educ. Fund, Inc., *Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm* Elections (2019), https://www.naacpldf.org/wp-content/uploads/Democracy_Defended__9_6_19_final.pdf; Jonathan Brater et al., *Purges: A Growing Threat*

discrimination in his state. During his nomination hearing, Senator Coons asked Mr. Brasher to "give an example of a discriminatory voting restriction that [was] implemented after *Shelby*."[6] Although multiple states immediately implemented voter ID laws post *Shelby* which have been shown to be discriminatory,[7] Mr. Brasher could not call to mind a single instance, replying that he "had not researched that issue."[8] Indeed, when pressed further, Mr. Brasher could not name a single significant voting rights case decided by the Eleventh Circuit—the court to which he is nominated.[9] It is impossible to believe that Mr. Brasher is, or was, unaware of discriminatory voting changes instituted since the *Shelby* decision, as he was involved in and oversaw the defense of numerous challenges to voting practices in his position as Solicitor General. In that position, Mr. Brasher would have had to familiarize himself with the relevant case law which the parties relied upon and sign off on the arguments advanced by his staff.

Additionally, since the *Shelby* decision, several federal courts have found that the legislatures passed racially discriminatory voting laws intentionally, for the purpose of discriminating against Black and/or Latinx voters.[10] Nominated to preside over a jurisdiction of states in the Deep South, with some of the most conspicuous and nefarious cases of voter suppression, Mr. Brasher's purported lack of knowledge/awareness regarding these highly discriminatory efforts is difficult to believe and patently unacceptable.

Mr. Brasher does not just implausibly claim ignorance of contemporary instances of voting discrimination in his state, he has actively worked to restrict the right to vote for the formerly incarcerated. In *Thompson v. Alabama*, Mr. Brasher defended Alabama's felon anti-voter law, which prohibits formerly incarcerated people from voting if they are

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to the Right to Vote, Brennan Center for Justice at NYU School of Law (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf; Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sep. 2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

[6] Senate Judiciary Committee Hearing (Dec. 4, 2019) at 00:52:50-00:54:12 https://www.judiciary.senate.gov/meetings/12/04/2019/nominations.

[7] *Citizens Without Proof*, Brennan Center for Justice at NYU School of Law (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

[8] Senate Judiciary Committee Hearing at 00:54:02-00:54:12.

[9] *Id.*, 00:54:12-00:55:42.

[10] In Texas, a trial court held that the state enacted its strict voter ID law with the purpose of discriminating against Black and Latinx voters (*Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017); In Wisconsin, a federal court struck down various voting restrictions under the VRA, and found one, a limitation on hours for in-person absentee voting, based on intentional discrimination in violation of the Fifteenth Amendment (*One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016)); And in North Carolina, the Fourth Circuit Court of Appeals found that the North Carolina legislature worked with "surgical provision" to ensure that its omnibus voting law would disproportionately disenfranchise African American voters (*N.C .State Conf. of NAACP v. McCrory,* 831 F.3d 204, 214 (4th Cir. 2016)).

convicted of a felony involving moral turpitude and are unable pay the fines and fees associated with their conviction—even after completing their sentence.[11] This law, which Mr. Brasher defended, is a modern-day poll tax which disenfranchises more than 286,000 Alabamians[12] and impacts Black voting-age citizens at three times the rate of white voting-age citizens.[13]

Defended unconstitutional gerrymandering

As Solicitor General of Alabama, Mr. Brasher defended the state's egregious attempts to racially gerrymander legislative districts and dilute the vote of African Americans and people of color. In *Alabama Legislative Black Caucus, et. al v. Alabama et al.,* African-American state legislators alleged that the state drew maps packing voters of color into majority Black districts to achieve partisan gains and reduce the African American population's influence in other districts.[14] In arguments before the Supreme Court, Mr. Brasher defended the state's maps arguing that Alabama's consideration of race was constitutional because it was not the predominant factor. The Supreme Court rejected Mr. Brasher's argument, finding that "there [was] strong, perhaps overwhelming, evidence that race did predominate as a factor."[15] On remand, the Eleventh Circuit—the court to which Mr. Brasher is nominated—found that twelve Alabama legislative districts had an unconstitutional overreliance on race in drawing legislative boundaries.[16] Even after these judicial findings, Mr. Brasher doubled down on his arguments, writing in a SCOTUSblog post that the ruling created "a low bar for plaintiffs to show racial predominance."[17] When any political party engages in racial gerrymandering it constitutes a violation of fairness and democracy. To assert the Supreme Court's standard of proof is too low demonstrates disregard for the significance and prevalence of the issue.

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[11] *Thompson v. Alabama*, 2017 WL 3223915 (M.D. Ala. July 28, 2017).
[12] Connor Sheets, *Too poor to vote: How Alabama's 'new poll tax' bars thousands of people from voting,* AL.com (Oct. 4, 2017), https://www.al.com/news/2017/10/too_poor_to_vote_how_alabamas.html.
[13] Anna Bodi & Danielle Lange, *Thompson v. Alabama: Addressing the Racist Roots of Felon Disenfranchisement*, ACSBlog (Sept. 30, 2016), https://www.acslaw.org/expertforum/thompson-v-alabama-addressing-the-racist-roots-of-felon-disenfranchisement/.
[14] Stephanie Mencimer, *After Gutting Voting Rights Act, Alabama Cites It As an Excuse for Racial Gerrymandering*, Mother Jones (Nov. 12, 2014), https://www.motherjones.com/politics/2014/11/alabama-supreme-court-racial-gerrymandering/.
[15] *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).
[16] Mike Cason, *Federal Judges Rule Alabama Must Redraw Legislative Districts*, AL.com (Jan. 20, 2017), https://www.al.com/news/birmingham/2017/01/federal_judges_rule_alabama_mu.html.
[17] Andrew Brasher, *Symposium: A Recipe for Continued Confusion and More Judicial Involvement in Redistricting*, SCOTUSblog (May 23, 2017), https://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/.

In addition, while Solicitor General, Mr. Brasher also oversaw efforts to deny non-citizens representation in the decennial census.[18] The complaint, which Mr. Brasher "reviewed…, [and] suggested edits to[,]" alleged that it was unconstitutional for the U.S. Census Bureau to count noncitizens when determining congressional and electoral apportionment.[19] Most of the noncitizens who would be excluded are Latino.

Mr. Brasher's repeated attempts to suppress active and diverse participation in democracy—through his work defending discriminatory voting practices and racial gerrymandering as well as his oversight of efforts to deny census representation to Latino residents—demonstrates an extreme bias and indifference for the constitutional rights of people of color and renders him unfit to serve as a federal Court of Appeals judge.

Supported criminal policies with known discriminatory bias

Despite robust and well-known evidence of racial bias and countless incidents of wrongful convictions,[20] Mr. Brasher has repeatedly defended and sought the death penalty in cases involving constitutionally inadequate representation and a defendant who could not afford counsel. In a 2013 case *Hinton v. Alabama,* Mr. Brasher filed an amicus brief arguing that a death row defendant had adequate counsel despite evidence that the defendant's attorney was unaware of a law fundamental to the case.[21] The Supreme Court issued a *per curiam* opinion, rejecting Mr. Brasher's argument that the defendant's attorney was reasonably effective and competent. In a 2017 case, *McWilliams v. Dunn*, Mr. Brasher ignored a defendant's right to access a competent psychiatrist and pursued the death penalty for a defendant with a mental illness.[22] The Supreme Court, again, found Mr. Brasher's argument in defense of Alabama's actions unconstitutional. Moreover in 2015, Mr. Brasher wrote a blog arguing that lawsuits challenging the constitutionality of methods of lethal injections which may result in pain and suffering, were disingenuous

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[18] Complaint, *State of Alabama et al. v. United States Dep't of Commerce*, No. 2: 18-cv-00772-RDP (N.D. Ala.), https://www.brennancenter.org/sites/default/files/legal-work/Alabama_v_Dept-of-Commerce_Complaint.pdf.
[19] Andrew Brasher, *Responses to Questions for the Record* at 25 (Dec. 11, 2019), https://www.judiciary.senate.gov/imo/media/doc/Brasher%20Responses%20to%20QFRs.pdf.
[20] Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations, University of California Irvine (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf; Talia Roitberg Harmon, *Race for Your Life: An Analysis of the Role of Race in Erroneous Capital Convictions*, 29 Crim. Just. Rev. 76 (2004), https://heinonline.org/HOL/P?h=hein.journals/crmrev29&i=88.
[21] Brief in Opposition, *Hinton v. Alabama,* 571 U.S. 263 (2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/Hinton-BIO.pdf.
[22] *McWilliams v. Dunn*, 582 U.S. ___ (2017).

attempts to obtain a "*de facto* life sentence through delay."[23] The constitutionality of methods with which the state intends to take a person's life must be of the utmost importance to all those involved in capital punishment to ensure due process and to respect the dignity of human life. LDF has consistently voiced dismay regarding the use of lethal injection cocktails to carry out executions.[24] Lethal injection and other methods of execution are gravely serious matters, and Mr. Brasher's refusal to acknowledge the sincerity of concern is unbefitting a federal judge.

In 2015, Mr. Brasher defended a Florida law which would allow judges to overrule juries in imposing death penalty sentences.[25] While the Supreme Court found the law unconstitutional, as counsel of record Mr. Brasher argued in favor of the law asserting that "Judicial sentencing improves the general deterrent effect of capital punishment."[26] In fact, there is no credible evidence that the death penalty deters crime.[27] Moreover, the death penalty provides a stark example of pervasive racial inequalities in our nation's criminal justice system. The relevant data demonstrates that African Americans are overrepresented on death row,[28] and that those who look "more-black" are twice as likely to receive the death penalty.[29]

Initially refused to acknowledge Brown v. Board of Education

In 2018, Mr. Brasher was nominated to the district court for the Middle District of Alabama. At his nomination hearing, Senator Blumenthal asked if he believed *Brown v. Board of Education* was correctly decided. Mr. Brasher equivocated in his response, stating "I think that commenting on whether Supreme Court decisions were correctly decided, that might be an interesting academic question, but in the context of a nominee

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[23] Andrew Brasher, *Symposium: The death penalty lives to fight another day*, SCOTUSblog (Jun. 29, 2015), https://www.scotusblog.com/2015/06/symposium-the-death-penalty-lives-to-fight-another-day/.
[24] NAACP Legal Def. & Educ. Fund, Inc., *LDF Statement on U.S. Supreme Court's Decision on Drug Lethal Injection* (Jun. 29, 2015), https://www.naacpldf.org/press-release/ldf-statement-on-u-s-supreme-courts-decision-on-drug-lethal-injection/.
[25] Brief of amici curiae Alabama and Montana in Support of Respondent, *Hurst v. Florida* 577 U.S. __ (2016), https://www.scotusblog.com/wp-content/uploads/2015/08/14-7505_amicus_resp_AlabamaMontana.authcheckdam.pdf.
[26] *Id* at 16.
[27] *Studies on Deterrence, Debunked* Death Penalty Information Center (2019), https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies.
[28] Matt Ford, *Racism and the Execution Chamber,* The Atlantic (Jun. 23, 2014), https://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081/; *Executions by Race and Race of Victim*, Death Penalty Information Center https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Jan. 10, 2020).
[29] Jennifer Eberhardt, *Bias in the justice system is real, and the death penalty reveals it,* The Los Angeles Times (Mar. 21, 2019), https://www.latimes.com/opinion/op-ed/la-oe-eberhardt-bias-death-penalty-20190321-story.html.

for a judicial position, I think that would be inappropriate."[30] The decision in *Brown v. Board of Ed.* was a watershed moment in the fight for racial justice. The ruling not only banned segregation in our schools, but it also redefined equality in the eyes of the law, setting the stage for racial integration in all facets of American life. The ruling is not simply the Court's most vital civil rights decision; it is also the Court's most vital decision about the rule of law. While in 2018, Mr. Brasher did not find it appropriate to comment on the correctness of *Brown v. Board of Ed.,* he has since retracted his statement. In December 2019, at his nomination hearing for the Eleventh Circuit, Mr. Brasher affirmed that *Brown v. Board of Ed.,* was indeed correctly decided.[31]

Conclusion

Mr. Brasher's work to create barriers, obstacles, and restrictions to the right to vote, his efforts to dilute the voting power of African Americans, his implausible claim that he is unaware of well-documented and adjudicated claims of voting discrimination in his state, his defense of unconstitutional racial gerrymandering, and the additionally troubling aspects of his work advancing the death penalty in circumstances that raised significant constitutional questions, render him unsuited to a seat on the Eleventh Circuit. For all of the foregoing reasons, we strongly encourage the Committee to vote against confirmation of Andrew Brasher for a seat on the Eleventh Circuit Court of Appeals.

Sincerely,

Sherrilyn A. Ifill

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[30] Senate Judiciary Committee Hearing, 01:51:32-01:51:52, (Jun. 6, 2018), https://www.judiciary.senate.gov/meetings/06/06/2018/nominations.
[31] Senate Judiciary Committee Hearing, 01:32:08-01:33:05 (Dec. 4, 2019), https://www.judiciary.senate.gov/meetings/12/04/2019/nominations.