

August 26, 2020

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

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

RE: 10 Reproductive Health, Rights, and Justice Groups Oppose Confirmation of Toby Crouse

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Senate:

We are 10 reproductive health, rights, and justice organizations writing to express our strong opposition to the confirmation of Toby Crouse to the District Court for the District of Kansas.

Reproductive Justice is a framework rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. Reproductive Justice will be achieved when all people, of all immigration statuses, have the economic, social, and political power and resources to define and make decisions about our bodies, health, sexuality, families, and communities in all areas of our lives, with dignity and self-determination.

Every individual should have the right to make their own reproductive decisions, without facing impossible obstacles. We should be able to make decisions about our health care based on our own living conditions and circumstances. This also means that we should be able to plan whether or when to start or add to our family without outside interference, no matter where we seek care and without discrimination.

Given our commitment to reproductive rights and health, especially those most marginalized by policy and structural barriers in our society, we are deeply troubled by Mr. Crouse's nomination. His record shows a legal career built on opposition to issues that are fundamental to our ability to thrive and support for laws and policies that disproportionately harm people of color. Moreover, as organizations that work on a number of issues within the reproductive justice framework, including abortion access, LGBTQ rights, access to healthcare, economic justice, and immigration, Mr. Crouse's record of eroding these rights is alarming. Mr. Crouse has dedicated his legal career to attacking the values and priorities for which our organizations fight for with

our communities. It is especially inappropriate to push forth a judicial nominee with such a record during a global pandemic and public health crisis that is disproportionately affecting communities of color. In light of this record, we believe he lacks the qualifications to serve with the fairness and impartiality required of a judge.

### Undermining Reproductive Rights Based on Racist Stereotypes

One of the most disturbing aspects of Mr. Crouse's record is his long career opposing reproductive rights. During his time as Solicitor General of Kansas, the state participated in a number of amicus briefs that sought to further limit reproductive rights. For example, Kansas was involved in two different petitions for Supreme Court review on the issue of Medicaid funding for healthcare providers like Planned Parenthood.<sup>1</sup> The state also joined an amicus brief in the most recent contraceptive mandate case, *Little Sisters of the Poor v. Pennsylvania*, arguing to allow greater employer exemptions from the mandate and leaving as many as 125,000 women without contraceptive access.<sup>2</sup> Kansas also joined a number of other amicus briefs during Mr. Crouse's tenure related to abortion access, such as briefs in support of banning a common medical method of providing abortion care,<sup>3</sup> clinic licensure,<sup>4</sup> and attorney fee rewards related to litigation of unconstitutional abortion restrictions.<sup>5</sup>

The barriers that Mr. Crouse has supported disproportionately harm people of color. Because of systemic racism, communities of color face less access to care and health disparities, including the rate of unintended pregnancy.<sup>6</sup> As such, women of color also have a greater need for abortion care.<sup>7</sup> Restrictions on abortion care directly target and harm people of color, who already face

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<sup>1</sup> See: *Anderson v. Planned Parenthood of Kansas and Mid-Missouri*, 139 S.Ct. 638 (2018), cert. denied; Brief for Indiana, Georgia, Idaho, Kansas, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming as Amici Curiae, *Gee v. Planned Parenthood of the Gulf Coast*, 139 S.Ct. 408 (2018).

<sup>2</sup> Brief for the States of Texas, Alabama, Alaska, Arizona, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia as Amici Curiae, *Little Sisters of the Poor v. Pennsylvania*, 148 S.Ct. 2367 (2020).

<sup>3</sup> Brief of Louisiana, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Mississippi, Missouri, Montana, Nebraska, N. Dakota, Ohio, Oklahoma, S. Carolina, S. Dakota, Texas, Utah, W. Virginia, and Kentucky as Amici Curiae, *Harris v. West Alabama Women's Center*, 139 S.Ct. 2606 (2019), cert. denied.

<sup>4</sup> Brief for Kentucky, Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia as Amici Curiae, *Hill v. Whole Women's Health*, 2020 WL 3578684 (2020), cert. denied.

<sup>5</sup> Brief for Georgia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah as Amici Curiae, *Yost v. Planned Parenthood of the Southwest Ohio Region*, 2020 WL 1372952 (2020), cert. denied.

<sup>6</sup> Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, Guttmacher Policy Review, Volume 11, Issue 3 (Aug. 6, 2008), <https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture>.

<sup>7</sup> *Id.*

barriers to accessing reproductive health care, such as lower incomes, lack of language access and culturally competent care, lost wages for time off to obtain such care, and lack of childcare. During Mr. Crouse’s tenure, Kansas also joined an amicus brief in *Box v. Planned Parenthood of Indiana & Kentucky*.<sup>8</sup> The brief argued in favor of upholding burdensome state laws related to abortion care, including reason bans based on race, sex, and disability.<sup>9</sup>

We condemn this law in the strongest terms. These reason bans are based on racist stereotypes. The amicus brief cites an article entitled “U.S. Births Hint at Bias for Boys in Some Asians,” and cites the racist stereotype that Asian, Pacific Islander, and Middle Eastern people have a preference for sons and thus obtain abortions based on the sex of the fetus.<sup>10</sup> However, studies have shown that this is based on an incorrect, racist stereotype.<sup>11</sup>

While such claims are often cloaked in language of concern for women, they are often a wolf in sheep’s clothing. Rather than lifting the status of women, arguments like this are nothing more than another hypocritical attempt to ban abortions in this country – this time using immigrants, AAPI, and Middle Eastern women as the excuse. Supporters of sex-selective abortion bans claim they are necessary because of Asians and Middle Eastern people who migrate to the U.S. and bring “backward” values with them.<sup>12</sup> This stereotype about the values of the AAPI community is not only ugly—it’s dangerous. These bans could lead to racial profiling of AAPI and Middle Eastern patients being singled out for special questioning and even being denied care. Already, Asian-Americans report greater perceived discrimination from healthcare providers compared to non-Hispanic whites.<sup>13</sup>

Women of color, historically and presently, have faced reproductive oppression through policies, laws, and structures that have limited our ability to make our own reproductive decisions. Given this historical and ongoing oppression, it is critical to our communities that our courts uphold our

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<sup>8</sup> Brief for the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Governor Phil Bryant of the State of Mississippi as Amici Curiae, *Box v. Planned Parenthood of Indiana and Kentucky*, 139 S.Ct. 1780 (2019).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 23.

<sup>11</sup> Brian Citro, Jeff Gilson, Sital Kalantry & Kelsey Stricker, *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, (June 2014), <https://static1.squarespace.com/static/5ad64e52ec4eb7f94e7bd82d/t/5d2ca0d5cd54a90001b97595/1563205847373/replacing-myths-with-facts.pdf>.

<sup>12</sup> The Guttmacher Institute, *Banning Abortion in Cases of Race or Sex Selection or Fetal Anomaly*, (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly>.

<sup>13</sup> Chioun Lee, Stephanie L. Ayers, & Jennie Jacobs Kronenfeld, *The Association between Perceived Provider Discrimination, Health Care Utilization, and Health Status in Racial and Ethnic Minorities*, (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2750098/>

most basic and fundamental rights. As advocates for reproductive justice, we are deeply troubled by Mr. Crouse's work to undermine reproductive healthcare access and reproductive agency.

### Hostility Toward LGBTQ People

During Mr. Crouse's tenure as Solicitor General of Kansas, the state also joined an amicus brief in the case *Arlene's Flowers Inc. v. Washington*.<sup>14</sup> The brief argued in favor of a florist who sought to deny service to a same-sex couple despite the state's non-discrimination law.<sup>15</sup>

Mr. Crouse's opposition to LGBTQ rights is directly contrary to the values of reproductive justice. As organizations advocating for reproductive health, rights, and justice, we advocate for freedom to define and make decisions about one's sexuality and gender without resulting restrictions on basic civil rights and liberties. As Solicitor General of Kansas, Mr. Crouse endorsed participation in a brief that made dehumanizing arguments about LGBTQ communities and argued against their equal rights. We are deeply concerned that his work denying basic civil rights to LGBTQ communities will continue once on the bench, when he will have the power to decide in cases such as LGBTQ discrimination cases.

### Attacking Voting Rights and Voter Protections for Communities of Color

Mr. Crouse also attacked voting rights protections and advocated for laws that suppress the votes of Black communities and other communities of color. Voter suppression efforts disproportionately impact people of color and have historically been wielded to limit the political power of Black communities.<sup>16</sup>

In one case, Mr. Crouse argued in favor of a law that required voters to show proof of citizenship before being allowed to register to vote.<sup>17</sup> Further, during Mr. Crouse's tenure, Kansas joined an amicus brief defending Pennsylvania state electoral maps which were gerrymandered in a way to artificially garner favorable electoral results for Republican candidates.<sup>18</sup>

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<sup>14</sup> Brief for the States of Arkansas, Texas, Alabama, Alaska, Arizona, Idaho, Kansas, Louisiana, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, as Amici Curiae, *Arlene's Flowers, Inc. v. Washington*, 138 S.Ct. 2671 (2018), cert. denied.

<sup>15</sup> *Id.*

<sup>16</sup> Theodore R. Johnson and Max Feldman, *The New Voter Suppression*, Brennan Center for Social Justice (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>.

<sup>17</sup> *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

<sup>18</sup> Brief for the States of Texas, Arkansas, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, and Wisconsin as Amici Curiae, *Scarnati v. Agre*, 138 S.Ct. 2602 (2018), cert. denied.

It is troubling that Mr. Crouse has relied on myths frequently used to restrict the right to vote among communities of color and supported efforts at suppressing the power of the vote. Although Mr. Crouse and other supporters of the law requiring proof of citizenship to vote claim that these laws are intended to end voter fraud, laws that are aimed at “ending voter fraud,” are actually intended to suppress the right to vote for communities of color.<sup>19</sup> If implemented, they could also lead to high rates of denials or intimidation of people of color who are perceived to not be citizens at polling places.

Laws like the ones Mr. Crouse has advocated for, directly harm communities of color. Mr. Crouse’s voting rights record demonstrates that he would not be a fair and equitable judge, and his place on the bench would further erode civil rights for communities of color.

### Opposition to Economic Justice in Labor

Mr. Crouse has also demonstrated his hostility towards economic justice in the areas of labor and education. When Mr. Crouse was Special Assistant Attorney General for Kansas, he submitted an amicus brief in the case *Home Care Association v. Weil*.<sup>20</sup> In this brief, Mr. Crouse argued against Department of Labor regulations that made home healthcare workers eligible for overtime pay and the federal minimum wage.<sup>21</sup>

Mr. Crouse’s involvement in this case demonstrates his hostility towards economic justice for underpaid workers. Annually, home healthcare workers make only \$25,330 per year.<sup>22</sup> They deserve better pay, as do other lower paid jobs. Mr. Crouse actively worked against providing home healthcare workers with basic pay protection.

Furthermore, the demographics of the home healthcare field show that it is a profession composed mainly of women and disproportionately of women of color. Specifically, 87% of home healthcare workers are women,<sup>23</sup> and 53% of home healthcare workers are people of color.<sup>24</sup> As the COVID-19 pandemic has shown us, home healthcare workers are essential workers

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<sup>19</sup> Vann R. Newkirk II, *How Voter ID Laws Discriminate*, The Atlantic (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/>.

<sup>20</sup> Brief of the States of Kansas, Arizona, Georgia, Michigan, Nevada, North Dakota, Tennessee, Texas, and Wisconsin in Support of Affirming the District Court, *Home Health Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015).

<sup>21</sup> *Id.*

<sup>22</sup> *Occupational Employment and Wages, May 2018*, U.S. Bureau of Labor Statistics, (Mar. 29, 2019), <https://www.bls.gov/oes/2018/may/oes311011.htm>.

<sup>23</sup> *Sex, Race, and Ethnic Diversity in U.S. Health Occupations (2011-2015)*, U.S. Department of Health and Human Services, Health Resources and Services Administration, Bureau of Health Workforce, National Center for Health Workforce Analysis, Table 1, (Aug. 2017), <https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/diversityushealthoccupations.pdf>.

<sup>24</sup> *Id.* at Table 2.

who have been risking their own safety to care for their patients. Meanwhile, Mr. Crouse has demonstrated that he has consistently worked against fair and just outcomes for communities of color. This is directly contrary to the values of reproductive justice, which advocates for economic justice, not increased barriers to just wages.

### Opposition to Immigrant Justice

Mr. Crouse was also involved in Kansas' participation in a number of amicus briefs that supported policies harming immigrant communities. In particular, Kansas joined a brief supporting the policy intended to rescind the Deferred Action for Childhood Arrivals (DACA) program,<sup>25</sup> arguing in favor of putting 700,000 DREAMERS at risk of deportation.<sup>26</sup> The DACA is vital for many communities of color. The majority of DACA recipients, about 9 in 10, were born in Latin America.<sup>27</sup> The DACA program is also important for Asian and Black communities. Asians make up 10% of the population eligible for DACA.<sup>28</sup> Four of the top 24 countries of origin for DACA recipients are Asian countries -- South Korea, the Philippines, India, and Pakistan.<sup>29</sup> About 36,000 African immigrants are also eligible for DACA.<sup>30</sup> Under Mr. Crouse's tenure, Kansas also joined an amicus brief defending the Trump administration's attempts to put a citizenship question on the 2020 Census.<sup>31</sup> Had this been successful, the Census would have severely undercounted immigrant communities,<sup>32</sup> leading to less allocation of funding and political power.

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<sup>25</sup> Brief for the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Kansas, Louisiana, Nebraska, South Carolina, South Dakota, and West Virginia, and Governor Phil Bryant of Mississippi as Amici Curiae, *Dep't. of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891 (2020).

<sup>26</sup> Adam Liptak & Adam D. Shear, *Trump Can't Immediately End DACA*, *Supreme Court Rules*, (Jun. 18, 2020), <https://www.nytimes.com/2020/06/18/us/trump-daca-supreme-court.html>.

<sup>27</sup> Gustavo López & Jens Manuel Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, Pew Research Center, (Sept. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

<sup>28</sup> Chris Fuchs, *Asian-American Advocates Blast Trump Decision to End DACA Program*, NBC News, (Sept. 5, 2017), <https://www.nbcnews.com/news/asian-america/asian-american-advocates-blast-trump-decision-end-daca-program-n798996>.

<sup>29</sup> *Id.*

<sup>30</sup> Jeanne Batalova, Sarah Hooker, and Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, Migration Policy Institute, (Aug. 2014), <https://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action>.

<sup>31</sup> Brief of Oklahoma, Arkansas, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, South Carolina, Texas, Utah, and the People of the State of Colorado Ex Rel. Cynthia H. Coffman, in her official capacity as Colorado Attorney General as Amici Curiae, *Dep't. of Commerce v. Southern District of NY*, 139 S.Ct. 2779 (2019).

<sup>32</sup> Ted Mellnik & Kate Rabinowitz, *Where a citizenship question could cause the census to miss millions of Hispanics*, The Washington Post, (Jul. 4, 2019), <https://www.washingtonpost.com/politics/2019/06/06/where-citizenship-question-could-cause-census-miss-millions-hispanics-why-thats-big-deal/?arc404=true>.

Kansas also joined an amicus brief supporting the racist and xenophobic Muslim Ban under the leadership of Mr. Crouse.<sup>33</sup> This Muslim Ban targeted seven Middle Eastern/Southwest Asian, Muslim majority countries based on a long history of oppression, villianization, racism, and Islamophobia directed toward the people of these countries.

Immigrant justice is integral to achieving reproductive justice. Anti-immigrant laws that ban certain or deport immigrants based on racist and xenophobic logic and seek to drain political power and necessary funding from immigrant communities threaten the safety and stability of immigrant communities and are directly contrary to the reproductive justice principle that all people regardless of immigration status have the right to live and nurture our families in safe and healthy environments.

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For people of color, threats to reproductive rights, LGBTQ rights, voting rights, economic justice, and immigrant rights are threats to our bodily autonomy and undermine our ability to make decisions about our own lives and families. People of color rely on the protections enforced by courts, yet Mr. Crouse has repeatedly demonstrated a career-long commitment to rolling back the rights that determine our health, freedom, and well-being. As a judge in the District Court for the District of Kansas, Mr. Crouse will have the power to decide many cases involving critical legal protections for groups whom he has long worked against. We cannot support a nominee who will disregard the daily realities and needs of communities of color. For the foregoing reasons, we strongly urge you to oppose the confirmation of Toby Crouse to the District Court for the District of Kansas.

Sincerely,

National Asian Pacific American Women's Forum  
URGE: Unite for Reproductive and Gender Equity  
In Our Own Voice: National Black Women's Reproductive Justice Agenda  
National Abortion Federation  
Population Connection Action Fund  
NARAL Pro-Choice America  
We Testify  
National Council of Jewish Women  
National Network of Abortion Funds  
National Partnership for Women & Families

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<sup>33</sup> Brief for the States of Texas, Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia, Paul P. LePage, Governor of Maine, and Phil Bryant, Governor of Mississippi as Amici Curiae, *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).