

AFJ NOMINEE REPORT

BRITT GRANT



U.S. Court of Appeals for the Eleventh Circuit

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INTRODUCTION

On April 10, 2018, President Trump [nominated](#) Britt C. Grant to fill a seat on the U.S. Court of Appeals for the Eleventh Circuit. Grant was nominated to [replace](#) Judge Julie E. Carnes, who will take senior status on June 18, 2018. Notably, Grant – only 40 years old with less than 12 years of legal experience (she graduated law school in 2007) – is on President Trump’s [short list](#) for the Supreme Court.

Like a vast majority of Trump’s nominees, Grant is a member of the Federalist Society, where she serves on the Atlanta Chapter Executive Board.¹ While Grant has just over one year of judicial experience on the Georgia Supreme Court, her record working at the Office of the Attorney General, including as Solicitor General of Georgia, shows evidence of a narrow-minded, elitist approach to cases that raises serious concerns about undermining critical rights and legal protections. In that capacity Grant:

- Fought to undermine important rights for women, defending a ban on abortions pre-viability, supporting a law that blocked Medicaid reimbursements for health providers that provide abortion care, and working to eliminate access to contraception coverage for millions of women (*Hobby Lobby*).
- Opposed equality for LGBTQ Americans (*Obergefell v. Hodges* and *Gloucester County School Board v. Grimm*).
- Worked to undermine the Voting Rights Act (*Shelby County v. Holder*) and supported efforts to

- suppress the vote (*Kobach v. U.S. Election Assistance*).
- Fought collective bargaining rights for public sector workers (*Friedrichs v. Cal. Teachers*).
- Supported challenges to laws that prohibit violent criminals from obtaining AR-15 style weapons (*Friedman v. City of Highland Park*).
- Opposed the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).
- Sought to weaken the Endangered Species Act.
- Defended purposeful discrimination in jury selection.

As the Senate Judiciary Committee reviews the troubling positions Grant took in the attorney general’s office, it’s important to note that Senate Republicans have previously articulated their belief that legal work done in an official government capacity is entirely subject to scrutiny as part of the judicial nomination process. As now-Judiciary Committee Chairman Chuck Grassley said in [opposing](#) Caitlin Halligan, then Solicitor General of New York, to be a judge on the D.C. Circuit, “Some of my colleagues have argued that we should not consider this aspect of [Caitlin] Halligan’s record, because at the time she was working as the Solicitor General of New York. But, no one forced Ms. Halligan to approve and sign this brief.”

Likewise, as Sen. Ted Cruz stated in May 2018, opposing Mark Bennett’s nomination to the Ninth Circuit based on Bennett’s work as Hawaii Attorney General, “[Bennett’s] record as Attorney

General of Hawaii, I believe, represents an advocacy position that is extreme and inconsistent with fidelity to law, in particular, he was an aggressive advocate as attorney general for gay marriage, he was an aggressive advocate demonstrating hostility to the first amendment and political speech, and most significantly, he was-he is an aggressive advocate for undermining the Second Amendment.”²

Similarly, the record Grant established in the attorney general’s office, in our view, “represents an advocacy position that is extreme,” in that she has sought to weaken rights of women, persons of color, LGBTQ Americans, and workers, as well as environmental protections. This record raises serious questions as to whether she will protect critical constitutional rights and legal protections for *all* persons.

Alliance for Justice opposes Britt Grant’s confirmation.

BIOGRAPHY

Britt Grant received her B.A. from Wake Forest University in 2000. Prior to law school, Grant worked for then-Congressman Nathan Deal and then as domestic policy advisor for President George W. Bush. Grant received her J.D. from Stanford Law School in 2007. After law school, she clerked for Judge Brett Kavanaugh. From 2008-2012 Grant was an associate at Kirkland & Ellis LLP in Washington, D.C. In 2012 Grant returned to Georgia, where she worked for the Office of the Georgia Attorney General, first as counsel for legal policy, and later as

solicitor general. There, she “joined other states to fight what we saw as federal overreach.”³ According to her questionnaire, Grant “drafted, reviewed, or edited” several briefs; however, the briefs only list the name of Georgia’s attorney general.⁴

As Governor, Nathan Deal [expanded](#) the Georgia Supreme Court from seven to nine justices, and Grant was [appointed](#) in January 2017 to fill one of these new seats. Two cases are illustrative of her brief tenure on the bench.

In [City of Richmond Hill v. Maia](#), 800 S.E.2d 573 (Ga. 2017), Grant ruled for a police officer who shared photographs of Sydney Sanders’s attempted suicide with his daughter, who then shared them at school. Sanders, who was 14 years old, was distraught at the photos being circulated, and later committed suicide. The victim’s family filed a wrongful death suit against the police officer, and Grant ruled that the case could not even go before a jury, even though the officer knew of the prior suicide attempt. Judge Clarence Seeliger dissented, arguing that “a jury could find that [the police officer] should have known that if the pictures of Sanders’s self-inflicted wounds were disseminated that it was ‘probable’ that Sanders would again attempt suicide, especially given that she had attempted suicide just the previous month.”

In [Barnett v. Caldwell](#), 809 S.E.2d 813 (Ga. 2018), Grant ruled that a teacher was entitled to immunity from a wrongful death suit filed by the parents of a student who had died during “horseplay”

after the teacher left her classroom unsupervised. Grant authored the majority opinion, finding that the parents could not prove that the school's policy of never leaving students alone in the classroom unsupervised was not "so clear, definite, and certain in directing [the teacher's] actions that it established a ministerial duty requiring no exercise of discretion whatsoever." *Id.* at 817. In a footnote, Grant goes far beyond the facts of the case, stating, "A duty is either discretionary or not, and an official cannot alter that fact by performing it well, poorly, or not at all."⁶ Judge Melton concurred in the decision, writing separately to criticize Grant's dicta in the footnote, noting that "[f]ar reaching (and, in this case, overly broad) rules like the one proposed by the majority should not be created in dicta, especially in an area of the law that requires an in depth consideration of the law and facts on a case-by-case basis."⁷

REPRODUCTIVE RIGHTS

As noted, Grant is on President Trump's short list for the Supreme Court. President Trump made clear he has a [litmus test](#) that any justice he nominates will "automatically" overturn *Roe v. Wade*, and given Grant's record, it is clear that Trump is confident she would pass this test.

As solicitor general, Grant [defended](#) a "fetal pain" law passed by the Georgia legislature in 2012. The law made it illegal for doctors to perform abortion after 20 weeks of pregnancy, with a few exceptions. The ACLU represented three obstetricians who challenged the law, arguing that since a fetus is not viable at 20 weeks, the Georgia law violates the Constitution. The ACLU [cited](#), among other precedents, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869-70 (1992). There, the Supreme Court stated that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Id.* at 871.

In January 2013, a Fulton County judge dismissed the lawsuit. Grant, then solicitor general, [commented](#) to the judge, "We think your order was correct and we expect it will be upheld." In 2017, the Georgia Supreme Court affirmed dismissal of the case on sovereign immunity grounds, holding that the state had not consented to be sued. *Lathrop v. Deal*, 801 S.E.2d 867 (Ga. 2017). Grant, then a justice on the court, [recused herself](#) from the case.

While working for the Office of the Georgia Attorney General, Grant also worked⁸ on an [amicus brief](#) supporting an Indiana law that blocked Medicaid reimbursements for health providers that provide abortion care. The Seventh Circuit Court of Appeals blocked enforcement of the

law, noting that Medicaid regulations give program participants the power to select their own health care provider. See [Planned Parenthood of Indiana, Inc., v. Commissioner of the Indiana State Department of Health](#), No. 11-2464 (7th Cir. 2012). The Supreme Court declined Indiana's petition for the writ of certiorari. See [Secretary of the Indiana Family and Social Services Admin. v. Planned Parenthood of Indiana, Inc.](#), 133 S. Ct. 2736 (2013).

Grant filed⁹ an [amicus brief](#) on behalf of Hobby Lobby in the case *Sebelius v. Hobby Lobby Stores Inc.* Similarly, Grant assisted¹⁰ with an [amicus brief](#) in *Conestoga Wood Specialties Corp. v. Sebelius* (which was linked with *Hobby Lobby*). The cases sought to establish a right of for-profit corporations to cite religious grounds for denying employees insurance coverage for contraception.

LGBTQ RIGHTS

As solicitor general, Grant assisted¹¹ on an amicus brief in [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015). The [brief](#) was also signed by then-Special Assistant Attorney General of Louisiana Kyle Duncan, who has since been confirmed as a federal judge. According to the brief, defining marriage as between a man and a woman does not violate the Constitution's guarantee of equal protection because "States may rationally structure marriage around

the biological reality that the sexual union of a man and a woman—unique among all human relationships—produces children[.]" and because "States may rationally place the man-woman definition in their constitutions—as many States have done—to ensure that the definition of marriage is altered only through the consensus of their citizens, and not through judicial interpretation."¹²

Grant also worked¹³ on the state's [brief](#) in the case [Gloucester County School Board v. G.G.](#), 137 S. Ct. 1239 (2017), where she challenged the federal government's guidelines calling for transgender students to be permitted to use facilities that conform to their gender identity.

VOTING RIGHTS

When the Supreme Court was considering [Shelby County v. Holder](#), 570 U.S. 529 (2013), Grant drafted, reviewed, or edited¹⁴ an [amicus brief](#) for six states, including Georgia, in support of gutting the Voting Rights Act (VRA). Ultimately, the Supreme Court struck down a key portion of the Voting Rights Act in a 5-4 decision.

Grant was also involved¹⁵ with the [brief](#) in a voting rights case, [Kobach v. U.S. Election Assistance Comm'n & Project Vote, Inc.](#), 722 F.3d 1183 (10th Cir. 2014), which involved documentary proof of citizenship as a voter registration requirement. According to the League of Women Voters, the

[requirement](#) “harmed voter registration drives and undermined congressional efforts to provide access to the ballot in federal elections[.]” For example, the U.S. Department of Justice [noted](#), “the district court’s finding in Arizona’s earlier litigation that Arizona’s documentation requirement prevented over 31,000 applicants from immediately registering to vote, with only 11,000 of those applicants subsequently registering.”

AFFORDABLE CARE ACT

Grant joined several other states to challenge the Affordable Care Act, filing¹⁶ an [amicus brief](#) that, had she been successful, would have eliminated critical tax subsidies for millions of Americans in 34 states. The Supreme Court [denied](#) certiorari in January 2015.

UNIONS AND COLLECTIVE BARGAINING

In [Friedrichs v. Cal. Teachers Ass’n](#), 136 S. Ct. 1083 (2016), Grant assisted¹⁷ with an [amicus brief](#) on behalf of Michigan

and eight other states, including Georgia. The brief argued that the Supreme Court should overrule [Abood v. Detroit Board of Education](#), 431 U.S. 209 (1977), noting that “it is time to abandon the meaningless distinction between collective bargaining and other political activity.”¹⁸ The Supreme Court affirmed the Ninth Circuit’s decision 4-4. See [Friedrichs v. Cal. Teachers Ass’n](#), 136 S. Ct. at 1083. The Supreme Court is currently hearing another case addressing the issue, [Janus v. AFSCME](#).

GUN SAFETY

After the U.S. Court of Appeals for the Seventh Circuit held in [Friedman v. City of Highland Park, Ill.](#), 784 F.3d 406 (7th Cir. 2015), that a city ordinance prohibiting possession of AR-15 style weapons or large-capacity magazines did not violate the Second Amendment, Georgia joined¹⁹ other states and filed an [amicus brief](#) urging the Supreme Court to grant a writ of certiorari. Grant’s brief argued, “In case after case, the lower federal courts have steadily undermined *Heller*, and the time has come for this Court to intervene[.]” and, “Each case that upholds a ban, however, poses an increasing threat to the policy in most States by suggesting that a federal ban could be constitutional. This Court’s involvement is needed to reaffirm *Heller* and the efforts in most States to protect the Second Amendment rights of their citizens.”²⁰

Ultimately, the Supreme Court denied certiorari, with Judge Clarence Thomas, joined by Justice Antonin Scalia, dissenting. See [Friedman v. City of Highland Park, Ill.](#), 136 S. Ct. 447 (2015).

DREAMERS AND THEIR PARENTS

Grant worked²¹ on amicus briefs in the case [U.S. v. Texas](#), 136 S. Ct. 2271 (2016), which involved the expansion of the Deferred Action for Childhood Arrivals (DACA) program to additional Dreamers and to the parents of U.S. citizens (Deferred Action for Parents of Americans and Lawful Permanent Residents-DAPA). After the Fifth Circuit ruled in favor of the state of Texas, Georgia joined Texas's [brief](#) opposing Supreme Court review which claimed that "respondents seek to protect their citizens from economic discrimination in favor of DAPA recipients[.]"²² After the Supreme Court granted certiorari, the state of Georgia signed onto the [respondents brief](#), which warned that "DAPA will impose significant education, healthcare, and law-enforcement costs on plaintiffs because it will cause additional aliens to remain in the country and consume these costly services."²³ Grant worked on both of these briefs.²⁴ The Supreme Court ultimately upheld the nationwide injunction

blocking the DAPA/DACA expansion 4-4. [U.S. v. Texas](#), 136 S. Ct. 2271 (2016).

ENVIRONMENT

Grant has challenged designations under the Endangered Species Act. First, in [Bldg. Indus. Ass'n of the Bay Area v. Dep't of Commerce](#), 792 F.3d 1027 (9th Cir. 2015), the court upheld the designation of sturgeon habitats. Grant assisted with an [amicus brief](#) that the state of Georgia joined in support of petitioners, contending that the "Ninth Circuit's decision declaring certain critical habitat decisions immune from judicial review threatens to undermine the important cost-benefit analysis Congress built into the Endangered Species Act."²⁵ The Supreme Court denied the petition for certiorari.

In [Alaska Oil & Gas Ass'n v. Jewell](#), 815 F.3d 544 (9th Cir. 2016), the Ninth Circuit held that the designated critical habitat for polar bear denning was not overly broad. Grant worked on an [amicus brief](#) arguing that the "Ninth's Circuit's expansive reading [of the Endangered Species Act] will impose significant costs on the States while doing little to nothing to conserve threatened and endangered species."²⁶ In 2017, the Supreme Court denied cert. See [Alaska v. Zinke](#), 173 S. Ct. 2110 (2017).

CRIMINAL JUSTICE

The case [Foster v. Chatman](#), 136 S. Ct. 1737 (2016), involved a *Batson* claim in which a defendant, Timothy Foster, argued that black jurors had been struck from his jury pool on the basis of race. Prosecutors had highlighted names of prospective black jurors on the jury venire list in green, with a legend indicating that the highlighting “represents blacks,” identified black prospective jurors as “B#1,” “B#2,” and “B#3,” and compared black prospective jurors, noting, “If it comes down to having to pick one of the black jurors, [this one] might be okay.” *Id.* at 1745. In an opinion by Chief Justice Roberts, the court held that the Supreme Court of Georgia had erred by denying his *Batson* claims because Foster had established purposeful discrimination, noting that “[t]wo peremptory strikes on the basis of race are two more than the Constitution allows.”²⁷ As solicitor general, Grant worked²⁸ on the [brief of respondent](#) Warden Bruce Chatman, arguing that Foster “failed in his burden to show purposeful discrimination in the jurors excusals.”²⁹

In [Pena-Rodriguez v. Colorado](#), 137 S. Ct. 855 (2017), after two jurors reported that a third juror made a number of biased statements about the defendant’s Mexican ethnicity, the court held that regardless of a state

evidentiary rule, the trial court must be permitted to consider the jurors’ testimony. In an opinion by Justice Kennedy, the Supreme Court held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”³⁰ Grant assisted³¹ with an [amicus brief](#) on behalf of Indiana and several other states, including Georgia, which claimed that “states with no-impeachment rules permissibly trust the deliberative process to expose and address bias, rather than unrealistically seek to perfect deliberations by undoing verdicts based on juror testimony.”³²

Grant also worked³³ on a brief in which the state of Georgia joined in the case [Glossip v. Gross](#), 135 S. Ct. 2726 (2015), arguing in support of Oklahoma’s execution method. The case involved the use of midazolam, an anesthetic that came under scrutiny after it was used in Oklahoma’s botched execution of Clayton Lockett. For Lockett, 43 minutes [passed](#) between the administration of midazolam and his death. The [brief](#) “urge[d] [the Supreme Court] to close the litigation floodgates and affirm the constitutionality of Oklahoma’s three-drug protocol.”³⁴ Moreover, the brief suggests “[t]hese practically painless executions provide real-world

evidence of midazolam's effectiveness as a sedative."³⁵ This is in stark contrast to evidence that it was ineffective at blocking the pain experienced by inmates including Lockett, which Justice Kagan [described](#) as "like being burned alive."

CONCLUSION

Grant's record raises concerns about her commitment to upholding the rights of immigrants, women, LGBTQ Americans, people of color, and the accused. In addition, her record is short for a prospective federal judge at any level. The fact that despite her comparative inexperience she is included on President Trump's short list for the nation's highest court, the Supreme Court, raises questions about whether her nomination is primarily motivated by a political agenda. Alliance for Justice opposes her confirmation.

ENDNOTES

- 1 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 3-4, available at: <https://www.judiciary.senate.gov/imo/media/doc/Grant%20SJO.pdf>.
- 2 Senate Judiciary Committee Executive Meeting, Recording at 49:40, available at: <https://www.judiciary.senate.gov/meetings/05/10/2018/executive-business-meeting> (May 10, 2018).
- 3 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 41.
- 4 Britt Grant, speaker, Gwinnett County Bar Association Law Day Dinner, Lawrenceville, Georgia (April 28, 2017).
- 5 *City of Richmond v. Maia*, 800 S.E.2d 573, 579 (Ga. 2017) (J. Seeliger, dissenting).
- 6 *Id.* at 852-53 (J. Melton, concurring).
- 7 *Id.* at 852 (J. Melton, concurring).
- 8 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 41.
- 9 *Id.* at 41.
- 10 *Id.* at 41.
- 11 *Id.* at 42.
- 12 Amici Curiae Brief Supporting Respondents at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2017).
- 13 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 43.
- 14 *Id.* at 41.
- 15 *Id.* at 41.
- 16 *Id.* at 42.
- 17 *Id.* at 41.
- 18 Amici Curiae Brief for Petitioners at 2, 24, *Friedrichs v. Cal. Teachers Ass'n.*, 136 S. Ct. 1083 (2016).
- 19 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 42.
- 20 Amici Curiae Brief in Support of Petitioners at 12, 13, *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015).
- 21 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 42.
- 22 Brief in Opposition of Certiorari at 18, *U.S. v. Texas*, 136 S. Ct. 2271 (2016).
- 23 Brief for the State Respondents at 27, *U.S. v. Texas*, 136 S. Ct. 2271 (2016).
- 24 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 42.
- 25 Amici Curiae Brief in Support of Petitioners at 1, *Building Industry Ass'n of the Bay Area v. Dep't of Commerce*, 792 F.3d 1027 (9th Cir. 2015).
- 26 Amici Curiae Brief in Support of Petitioners at 1, *Alaska Oil & Gas v. Jewell*, 815 F.3d 544 (9th Cir. 2016).
- 27 *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016).
- 28 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 42.
- 29 Brief in Opposition on Behalf of Respondent at 25, *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016).
- 30 *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).
- 31 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 43.
- 32 Amici Curiae Brief in Support of the Respondent at 19-20, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).
- 33 Sen. Comm. on the Judiciary, 115th Cong., Britt Cagle Grant Questionnaire for Judicial Nominees, 42.
- 34 Amici Curiae Brief Supporting Respondents at 3, *Glossip v. Gross*, 135 S. Ct. 2726 (2015).
- 35 *Id.* at 9.