

AFJ NOMINEE REPORT

LEE

RUDOFISKY



U.S. District Court for the Eastern District of Arkansas

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INTRODUCTION

On July 8, 2019, President Trump [nominated](#) Lee Rudofsky to the United States District Court for the Eastern District of Arkansas, for the seat previously held by Judge [J. Leon Holmes](#). Rudofsky's record paints a clear picture of a partisan warrior bent on curtailing critical rights and protections for everyday people. His nomination conforms to the Trump Administration's stated goal of appointing judges who will assist in tearing down civil rights, health care access, environmental protections, workers' rights, consumer protections, and the federal agencies that enforce them. Born in 1979,¹ Rudofsky is among the many young lawyers Trump has nominated to serve on the federal bench. This is consistent with the Trump Administration's strategy of naming ever-younger individuals to lifetime appointments on the federal bench to ensure a rightward tilt to our justice system for decades to come.

As the Senate Judiciary Committee reviews the troubling positions Rudofsky took as Solicitor General of Arkansas, it's important to note that Senate Republicans have consistently held nominees accountable for their work as government lawyers. Republican opposition to Michael Bogren's work as an attorney representing the City of Lansing, Michigan led to Bogren's [withdrawal](#). Senator Ted Cruz [opposed](#) Mark Bennett's nomination to the Ninth Circuit

based on Bennett's work as Hawaii's attorney general,² stating "[Bennett's] record as Attorney General of Hawaii, I believe, represents an advocacy position that is extreme and inconsistent with fidelity to law."³ And former-Judiciary Committee Chairman Senator Chuck Grassley is on record [opposing](#) Caitlin Halligan, then Solicitor General of New York, to be a judge on the D.C. Circuit, saying "[s]ome 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."

In the [words](#) of Senator Cruz, the record Rudofsky established in the attorney general's office, in our view, "represents an advocacy position that is extreme." His record of aggressive advocacy for partisan and right-wing causes suggests he will be unable to act as an independent, fair-minded jurist. Alliance for Justice strongly opposes Rudofsky's confirmation.

BIOGRAPHY

Rudofsky is [currently](#) the Senior Director of the Global Anti-Corruption Compliance Team at Walmart. He previously worked as an assistant general counsel for Corporate Affairs & Government Relations at Walmart from 2014-2015. Rudofsky is also an adjunct professor at the University of Arkansas

School of Law.⁴ Rudofsky also briefly worked as an adjunct professor, teaching Environmental Law and Regulation, at the George Mason University Antonin Scalia Law School⁵ – a university to [which](#) “millions of dollars in donations from conservative-leaning donors like the Charles Koch Foundation had come with strings attached.”

From 2015-2018, Rudofsky served as the Solicitor General of Arkansas, where he helped lead many of the state’s conservative cases and policies – including [leading](#) Arkansas in becoming the first state to [successfully](#) strip Planned Parenthood of crucial Medicaid funding and [assisting](#) other states in their attempts to do the same.⁶ Rudofsky’s role as Arkansas’ solicitor general included his involvement in virtually every major case; as he noted in his [Senate Judiciary Questionnaire](#): “In addition to the matters I handled directly, I also reviewed and revised nearly all briefs from our civil and criminal departments before they were filed in the Arkansas Supreme Court or any federal courts of appeal.”⁷ He added: “On novel or sensitive legal matters, I helped those departments plan and supervise legal strategy for trial litigation in both the state and federal courts.” He also “created and ran a formal moot court program for the office” where he “complete[d] a deep dive into the briefs and trial record of almost every case argued by the Office.”⁸

Prior to becoming solicitor general, Rudofsky worked in private practice for several years at Kirkland & Ellis, LLP.⁹ He also worked for a number of Republican campaigns as counsel, including as the deputy general counsel and director of Legal Election Day Operations for Mitt Romney for President 2012 and deputy general counsel and acting general counsel for the Steve Poizner for Governor of California campaign.¹⁰

From 2006-2007, Rudofsky clerked for Judge Andrew Kleinfeld on the Ninth Circuit and from 2005-2006 for Justice Robert Cordy on the Supreme Judicial Court of Massachusetts. He received his J.D. from Harvard Law School in 2005, his Master of Public Affairs from Cornell in 2002, and his B.S. from Cornell in 2001.¹¹

[Starting](#) early in college and law school, Rudofsky built his reputation opposing – and demeaning – liberals and progressive ideas.¹² For example, in a 2001 [article](#), Rudofsky described his Democratic student government opponents with the label “liberal/socialist,” and claimed he worked his “way through the common web of liberal deceit and trickery” to undercover an “[A] Gore styled-plot to steal” a student body election. He also labeled his student body election opponents as “socialist foot soldiers.” This language echoed similar descriptions Rudofsky used against prominent Democrats, including his [claim](#) in 2000 that “[Hillary] Clinton has done

nothing in her life to even consider her worthy of a seat in the United States Senate.”¹³

Rudofsky joined the ultraconservative Federalist Society – an outside group to which Trump has delegated important aspects of the judicial nomination process – in 2002 and currently serves as the vice president of the Northwest Arkansas Lawyers’ Chapter. Rudofsky has also been a member of the National Rifle Association (NRA).¹⁴

He has supported many of Trump’s most problematic judicial nominees, including [Jeff Mateer](#), [Kyle Duncan](#), [Eric Murphy](#), [Patrick Wyrick](#), [Britt Grant](#), [Andrew Brasher](#), [Andrew Oldham](#), and [Brett Talley](#).¹⁵ He [worked on](#) an article praising the nomination of [Neil Gorsuch](#) and wrote an opinion piece publicly supporting [Brett Kavanaugh’s](#) nomination to the Supreme Court.¹⁶

In [advocating](#) for Kavanaugh’s confirmation, Rudofsky – like Kavanaugh during his hearing – showed his animosity toward Democrats alleging that, “in sum, what the Democrats managed to do on the first day of the hearings was to show they don’t really give a hoot about Judge Kavanaugh’s credentials or whether Judge Kavanaugh is a mainstream judge.” He specifically [called out](#) Senator Sheldon Whitehouse for “unleash[ing] a verbal assault on 72 recent 5-4 decisions of the Supreme Court” where

the conservative majority of the Court ruled in favor of corporate interests, “in which [Whitehouse] believed a Justice Kavanaugh would’ve sided with the majority.” He also criticized Senator Dianne Feinstein for “fault[ing] Justice Kavanaugh for saying nice things about the legal analysis in Justice Rehnquist’s dissent in *Roe v. Wade*.”

REPRODUCTIVE RIGHTS

As Solicitor General of Arkansas, Rudofsky fought to undermine and eviscerate constitutionally protected reproductive rights. He demonstrated his personal opposition to reproductive rights in a 2016 Federalist Society [podcast](#) on abortion rights and [Whole Woman’s Health v. Hellerstedt](#):

[T]he framers of the Fourteenth Amendment would find it interesting to say the least to suggest that a practice that was banned at the time of the Fourteenth Amendment in many states actually violated the Fourteenth Amendment. I don’t think that’s a legitimate and useful argument. I think the framers of the Fourteenth Amendment would suggest that banning abortions, prohibiting abortions, regulating abortions did not violate the Fourteenth Amendment.¹⁷

Rudofsky also minimized the right to access crucial reproductive health services. In defense of so-called “rights of conscience,” Rudofsky worked on an [article](#) claiming that “[f]ar too often these days, the federal government or our sister states force people to act in a way that violates a sincerely held religious belief, even when it’s completely unnecessary.” As an example, he asked readers to “[c]onsider the family-owned pharmacy punished for refusing to dispense Plan B – an *abortifacient* – even though the owner believes doing so violates his religious principles” [emphasis added].

I. DEFUNDING PLANNED PARENTHOOD

Perhaps the most infamous achievement of Rudofsky’s career was his leadership in stripping millions of people of vital health care and reproductive rights in Arkansas.

[According](#) to the Arkansas attorney general’s office, Rudofsky “advised Attorney General [Leslie] Rutledge on several key proceedings, including being the only state in America to successfully terminate Medicaid program funding to Planned Parenthood.” In 2015, Arkansas Governor Asa Hutchinson [ordered](#) the Arkansas Department of Human Services [ADHS] to end its contract with Planned Parenthood. This drastic move came [after](#) the emergence of videos that falsely and negatively depicted Planned Parenthood facilities and policies; these [misleading](#) videos were later widely discredited. During

the case, Rudofsky is [reported](#) as misleadingly alleging that “one video suggests that tissue was taken from an aborted fetus while its heart was still beating.”

When impacted patients sued Arkansas, Rudofsky led Arkansas’ defense of its move to strip Planned Parenthood of Medicaid funding in [Doe v. Gillespie](#). The lower court [ruled](#) in favor of the patients and found “that because any suspension of Medicaid payments would result in threatened irreparable harm to the Jane Does and because the quality of [Planned Parenthood’s] care rendered to Arkansas patients does not appear to be questioned by ADHS or other officials at this time, the resulting harm to the Jane Does, who are [Planned Parenthood]’s patients, is greater than the potential harm to ADHS’s pursuit of its stated public policy objectives.”¹⁸ In reaching this determination, the court noted how the “centers provide family planning services to men and women, including contraception and contraceptive counseling, screening for breast and cervical cancer, pregnancy testing and counseling, and early medication abortion” and that “[i]n 2014, almost 40% of PPH’s Little Rock, Arkansas, patients, and 15% of its Fayetteville, Arkansas, patients were insured through Medicaid.”¹⁹ The court upheld an injunction to prevent the law from going into effect.

Despite these findings, Rudofsky [led](#) Arkansas in appealing the ruling before the

Eighth Circuit. The court held that the patients did not have an individual right to bring the suit and therefore could not demonstrate the likelihood of success on the merits needed to uphold an injunction. This resulted in Arkansas being the first state to terminate vital Medicaid funding from Planned Parenthood facilities – immeasurably [hurting](#) low-income and vulnerable patients and families across Arkansas. Rudofsky did not stop there; he also assisted other states in their attempts to block individuals from accessing vital health care, including [Louisiana](#) and [Texas](#).

II. ABORTION BANS

At a time when state after state is enacting draconian abortion bans, it is especially concerning that Rudofsky supported Arkansas' efforts to implement a 12-week abortion ban.

In 2013, Arkansas [passed](#) an abortion [ban](#) that would restrict abortion access after 12 weeks of pregnancy if a so-called fetal “heartbeat” can be detected – even though a fetus at 12 weeks does not meet the [viability](#) standard provided in [Planned Parenthood v. Casey](#). When the bill was challenged, a federal district court stopped the bill from coming into effect. It [held](#) “that the twelve-week abortion ban [] prohibits pre-viability abortions and thus impermissibly infringes a woman's Fourteenth Amendment right to elect to terminate a pregnancy before viability.”²⁰

Arkansas appealed to the Eighth Circuit, which [affirmed](#) the district court's injunction against the abortion ban. Despite failing in his request to have the Eighth Circuit rehear the case, Rudofsky [persisted](#) and petitioned the Supreme Court to “revisit and overturn its unnecessary and constitutionally infirm viability rule.”²¹ He argued the issue in the case was “about the impropriety of a judicially-imposed rule – free from any serious constitutional mooring – that sets in stone ‘viability’ as the point before which the *State's profound interests* must give way to *a woman's desire to terminate her pregnancy*” [emphasis added].²² By doing so, Rudofsky was essentially arguing for overturning abortion rights precedent in *Roe v. Wade* and *Planned Parenthood v. Casey*.

Moreover, he proposed that the availability of adoption services and “safe haven” laws made a person's constitutional right to have an abortion less firm: “While Arkansas law admittedly prohibits some pre-viability abortions, a woman has a reasonable amount of time to terminate her pregnancy in the first twelve weeks of gestation, and a *woman can abandon her child after the child is born without consequence*” [emphasis added].²³ Further, he emphasized the problematic view that “[t]he State's interest in fetal life does not begin at viability; rather, the State's interest begins at ‘the outset of pregnancy.’”²⁴ In conclusion, Rudofsky argued that it “is time for the Court to renounce the incoherent viability

rule, and this case is a perfect vehicle for the Court to do so."²⁵ The Supreme Court [denied](#) the petition to hear the case.

III. TRAP LAWS

In recent years, anti-abortion and anti-contraception advocates have developed and implemented what are known as “targeted restrictions on abortion providers” ([TRAP](#)) laws. In the wake of breaking news that Arkansas may [potentially](#) become the seventh state with just one abortion clinic, Rudofsky's work to prevent people from receiving abortion care stands out. These TRAP laws come in various forms, but all share the aim of imposing unnecessary, burdensome requirements on abortion providers to the point of preventing a reproductive health services facility from being able to perform crucial, constitutionally affirmed services.

In 2016, the Supreme Court held in [Whole Woman's Health v. Hellerstedt](#) that because certain TRAP laws in Texas put “a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access ... and each violates the Federal Constitution.”²⁶ Rudofsky, on behalf of the state of Arkansas, [worked](#) on a [brief](#) supporting Texas in its effort to impose these burdensome, unconstitutional TRAP laws.

Later, in 2017, despite the Supreme Court's binding precedent in *Whole Woman's Health*, Rudofsky defended Arkansas' own

TRAP law involving medication abortion. In [Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley](#), the Eighth Circuit vacated and remanded the lower district court's holding, which had prevented a TRAP law from going into effect that imposed restrictions on abortion facilities that provided medication abortion to patients.

When Planned Parenthood petitioned for the Supreme Court to take up the case, Rudofsky wrote Arkansas' [brief](#) in opposition. He argued [erroneously](#) that medication abortions are dangerous procedures, thus concluding that the Arkansas law requiring “medication abortion providers to have a contractual relationship (to ensure follow-up treatment if needed) with a physician that has admitting privileges” was not an undue burden.²⁷ However, the “working arrangement”²⁸ Rudofsky argued for was in fact eerily similar to the provision that the Supreme Court clearly struck down in *Whole Woman's Health*.

LGBTQ EQUALITY

Rudofsky has given [several speeches](#) at events sponsored by Alliance Defending Freedom (ADF), an organization [that](#) “has supported the recriminalization of homosexuality in the U.S. and

criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a 'homosexual agenda' will destroy Christianity and society." The Southern Poverty Law Center (SPLC) designates ADF as a "[hate group](#)" and noted how "[s]ince the election of President Donald Trump, the ADF has become one of the most influential groups informing the administration's attack on LGBT rights."

Rudofsky defended Arkansas when two same-sex couples [sued](#) the state to require Arkansas to list the spouse of a birth mother, regardless of gender, as the second parent of their child on their birth certificate without having to go through the process of adoption or a court order. The Supreme Court ultimately [agreed](#) with the trial court that the mother's spouse should be automatically presumed as the second parent on a birth certificate. Rudofsky [drafted](#) and heavily revised briefs, argued the case in the state supreme court, and drafted guidance on how to proceed once the final decision came down. The state's [amicus brief](#) at the Supreme Court argued that "marriage to a child's biological parent does not automatically confer a protected liberty interest in a parent-child relationship," that disregarding biological differences between the sexes risks making the guarantee of equal protection superficial, and that not listing the same-sex spouse of a mother "reflects typicality."²⁹

Rudofsky also [fought](#) a city ordinance [banning](#) discrimination based on sexual orientation or gender identity, claiming the ordinance was pre-empted by state law that prevents localities from enacting such protections. Eventually, the state supreme court [ruled](#) that the city could not enforce the anti-discrimination ordinance.

In fact, on multiple occasions Rudofsky either authored or edited articles justifying LGBTQ discrimination.³⁰ As solicitor general, Rudofsky also [signed](#) an amicus brief in [*Arlene's Flowers, Inc. v. Washington*](#) advocating that a florist has the right to refuse to serve a same-sex couple. The brief included the suggestion that rather than ensuring businesses serve customers equally, the state should create a registry of business owners willing to serve same-sex couples. The brief also minimized the harm to the couple, saying they "suffered at most only a dignitary-type harm in hearing a message with which they disagreed," and claiming the couple benefited from the discrimination because of the offers they later received for free floral arrangements.³¹

It does bear noting that he previously signed two briefs by conservatives supporting same-sex marriage in [*Hollingsworth v. Perry*](#) and [*Obergefell v. Hodges*](#).

ENVIRONMENT

Like many other Trump nominees, Rudofsky has a record of hostility toward the agencies that enforce vital public health and safety protections. For example, he [claimed](#) “it has become apparent that federal government overreach – and specifically federal agency regulations that intrude into areas historically regulated only by states – is a pressing concern to most if not all states.” He [said](#), “the growing consensus is that the amount of power wielded by agencies today and how that power is wielded raise serious constitutional issues about separation of powers, checks and balances, and federalism.”

His agenda to weaken public protections for clean air and clean water is an agenda he will certainly bring with him to the federal bench. Much of Rudofsky’s environmental record follows in the footsteps of now-[disgraced](#), former-Environmental Protection Agency (EPA) Administrator Pruitt – a man whom Rudofsky worked on a statement publicly [supporting](#) as “the right person at the right time to lead the EPA.” In addition, Rudofsky [supported](#) the nomination of Jeffrey Bossert Clark to head the Environment and Natural Resources Division (ENRD) at the Department of Justice, claiming he was “the perfect choice to head the ENRD.” Rudofsky’s [endorsement](#) of Bossert “to serve as the Justice Department’s top environmental

lawyer” came despite Bossert’s record of being an outspoken denier of climate change, in addition to having a well-documented history of opposing public health and environmental protections.

I. CLIMATE CHANGE

Rudofsky [led](#) the state of Arkansas, along with several other states, in challenging the Clean Power Plan (CPP). As environmental advocates [explained](#), the CPP was projected to “cut the electric sector’s carbon pollution by 32 percent nationally” and in addition “[e]conomists believe[d] that in 2030, the Clean Power Plan could save the country \$20 billion in climate-related costs and deliver \$14 billion to \$34 billion in health benefits.” This included preventing over 90,000 asthma attacks in children.

Rudofsky [called](#) the CPP “a blatant act of commandeering” and criticized its efforts to reduce carbon dioxide emissions. The conservative majority on the Supreme Court stayed the rule and the issue was made largely irrelevant when, in 2019, Trump’s EPA [killed](#) the CPP and [replaced](#) it with a much weaker plan.

II. CLEAN AIR

In [Michigan v. EPA](#), states challenged the EPA’s authority pursuant to the Clean Air Act to regulate power plants when “appropriate and necessary.”³² They argued the Act was unreasonably interpreted when the EPA didn’t consider cost in its regulation. As environmental advocates [explained](#), a rule

within the Act was estimated to “eliminate the emissions of thousands of tons of fine particulate matter emissions, along with power plants’ emissions of mercury, lead, and other hazardous air pollutants.” In doing so, data showed it would have prevented: “up to 11,000 premature deaths from respiratory and cardiovascular illness; 3,100 emergency room visits for children with asthma; more than 250,000 fewer cases of respiratory symptoms and asthma exacerbation in children; and 4,700 non-fatal heart attacks.”

The Supreme Court, in a 5-4 decision, [agreed](#) with the states, and remanded the case to the D.C. Circuit. After the Supreme Court decided that the EPA must consider costs before imposing regulations, the D.C. Circuit on [remand](#) chose to keep in place prior EPA regulations imposed on power plants in order to “allow the agency to expeditiously cure the defect identified” by the Supreme Court.³³ Accordingly, the states, including Arkansas – represented by Rudofsky – [sued again](#), arguing that a reviewing court may not leave an unlawful rule in place. Rudofsky sought to have the Clean Air Act regulations at issue – emissions standards over toxic air pollutants produced by power plants – struck down. Arkansas’ [petition](#) to the Supreme Court was [denied](#).

In addition, Rudofsky [represented](#) Arkansas in opposing the [National Ambient Air Quality Standard for Ozone](#) (NAAQS).

He also listed in his Senate Judiciary Committee questionnaire among his “most significant legal activities” his representation of the “Alliance of Automobile Manufacturers, the National Automobile Dealers Association and individual dealerships. . . challenging certain states’ motor vehicle greenhouse gas standards as preempted by the Clean Air Act and the Energy Policy Conservation Act.”³⁴

III. CHEMICALS AND TOXINS

Rudofsky [supported](#) the Trump Administration’s delay in implementing the Chemical Disaster Rule. As environmental advocates [explained](#), the rule was introduced after a deadly chemical fire at a plant in Texas. They detailed how “Obama’s new rule laid out in more detail what specific information the companies should share with first responders who would need to know exactly the kind of special equipment required for putting out chemical fires.” Additionally, “it required the most dangerous industrial sectors, including chemical manufacturers and refineries, to do an assessment of safer alternatives and technologies in order to reduce the risk of an explosion.”

Despite these safety benefits, Rudofsky and his colleagues – intervening on behalf of [disgraced](#) then-EPA Administrator Pruitt – [argued](#) the required safety measures would put financial burdens on corporate polluters. In 2018, the U.S. Court of Appeals for the District of Columbia [ruled](#) against Rudofsky,

holding that the Trump Administration's "EPA's action was arbitrary and capricious" and the delay would be vacated.³⁵

IV. CLEAN WATER

As solicitor general, Rudofsky also [worked](#) with several states to roll back environmental protections aimed at curtailing pollution from mining into streams and waterways.

In 2016, the Obama Administration [finalized](#) the "stream protection rule," which was implemented to "better protect water supplies, surface water and groundwater quality, streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations." In defense of big oil corporations' interests, Rudofsky joined other states to [challenge](#) the rule in January 2017. The challenge later proved to be largely irrelevant when the Trump Administration [overturned](#) the rule the following month.

This was not the first time Rudofsky supported coal mining profits at the expense of clean water and environmental protections. In September 2009, Rudofsky wrote an article for the Federalist Society [titled](#) "Mountaintop Coal Mining: A Permitting Process in Flux," where he provided arguments against efforts to make coal mining more environmentally sound.

Additionally, during his time in private practice, Rudofsky was a member of the legal team representing British Petroleum

(BP) following the Deepwater Horizon catastrophe.³⁶

V. THREATS TO ANIMALS AND HABITATS

During his time as solicitor general, Rudofsky's office [opposed](#) the [Endangered Species Act's](#) ("ESA") critical habitat designation. As environmental advocates [explained](#), "[c]ritical habitat designations are an essential tool in the Endangered Species Act (ESA) toolbox," as "[t]hey are the primary mechanism Congress created to accomplish the goal of the act."

IMMIGRATION

During Rudofsky's tenure as solicitor general, the Attorney General of Arkansas signed on to briefs opposing protections for immigrants, including [U.S. v. Texas](#), which involved the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parental Accountability (DAPA) program. After the Fifth Circuit ruled in favor of Texas, Arkansas [joined](#) Texas's brief opposing Supreme Court review, arguing that "respondents seek to protect their citizens from economic discrimination in favor of DAPA recipients[.]"³⁷ The [brief](#) also 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."³⁸ The

Supreme Court ultimately [upheld](#) the nationwide injunction.

Rudofsky also signed an [amicus brief](#) in *County of Santa Clara v. Trump*, supporting Trump's attacks on immigrants by [specifically](#) preventing local governments from issuing measures to protect immigrant communities.

EDUCATION

At a time when many Trump judicial nominees [refuse to affirm](#) the correctness of *Brown v. Board of Education*, it is notable that Rudofsky fought against protecting the right to equal educational opportunities.

As Arkansas solicitor general, Rudofsky represented the Arkansas Department of Education in a suit brought by parents and community members of Little Rock, alleging that the department implemented a variety of policies that furthered racial discrimination in Little Rock schools. The parents claimed that Arkansas [provided](#) better funding and resources for schools with large white student populations,³⁹ [increased](#) the number of charter schools to primarily benefit white students in affluent neighborhoods,⁴⁰ [dismissed](#) black school board members,⁴¹ and [has](#) "a racially motivated policy, custom, or practice of disciplining black students more harshly or differently than white students."⁴² The district court [held](#) that despite all of the facts presented, the plaintiffs did not show

that the state was "partly motivated by racial animus or were otherwise constitutionally impermissible," and the court granted the motion to dismiss.⁴³

One author, writing in the [Atlantic](#), characterized and provided context for the case by explaining Little Rock's long history of racial segregation in schools and housing:

Today, those who oppose integration are still fighting it, but in less overt ways. They have moved to outlying areas to get away from lower-income, black families and have prevented those families from following them. They've built new schools and established charters in these majority-white areas so that white children don't have [to] attend lower-performing majority-black schools. And they've made sure that the people who are trying to push back against these actions don't have power in the district.

What's stunning about today's methods of avoiding integration is that they are, by and large, legal, but they nevertheless leave black students stuck in schools that are separate and unequal.

In a 2000 [article](#) titled "Validating Vouchers: Privatization Is the Last, Best Hope for Public Education Reform," Rudofsky penned his support for George W. Bush's platform regarding school vouchers.

VOTING RIGHTS

Rudofsky [represented](#) the state when an Arkansas resident [challenged](#) the state's law mandating that voters must present a valid ID, or otherwise cast a provisional ballot (with strict and onerous provisions to then get the provisional ballot to count). The law was [upheld](#) by the Arkansas Supreme Court, with the dissent noting that "[r]equiring a voter to show a photo identification card at a polling place is simply not part of the voter registration process." Rudofsky defended the law despite the fact that it was passed to skirt the state supreme court's [previous](#) ruling which held that requiring a photo ID at the polls was an unconstitutional barrier to the right to vote.

Rudofsky has a history of advancing false and dangerous narratives surrounding voting rights. As deputy general counsel for Mitt Romney's 2012 presidential run, he wrote a [letter](#) to Virginia's attorney general and board of elections chairman seeking to investigate and invalidate recent voter registrations. In an article discussing concerns about nationwide injunctions, Rudofsky also [cautioned](#) how those types of injunctions could impact cases regarding "redistricting cases, voter ID cases, and discrimination cases."

RACIAL JUSTICE

Rudofsky has also voiced his [opposition](#) to affirmative action. In responding to critiques leveled against him for being "racist" and "foolish," Rudofsky claimed his "arguments held that affirmative action perpetuates and maintains a system of racial stereotyping: individuals are lumped into categories arbitrarily based upon nothing but their race. This serves to undermine the fight against racism which supporters of affirmative action allege to so vehemently oppose."

SEXUAL ASSAULT

Rudofsky signed an [amicus brief](#) supporting the state of Arkansas in a Title IX case, in which Arkansas [claimed](#) the Constitution prevents the state from being sued for money damages under Title IX. If that were true, students would no longer be able to sue their school for money damages when the school mishandles their sexual assault claims.

The case, [Fryberger v. University of Arkansas](#), involved a former student who said the university mishandled her sexual assault case. The university [found](#) Fryberger's assailant guilty and said it would expel him; the assailant did not contest his

guilt, but argued the sanction would damage his athletic career. The university then told Fryberger her assailant would not be expelled until after graduation, and she withdrew from school. After Fryberger sued, the school claimed sovereign immunity to avoid paying her damages. On behalf of the state, the Arkansas attorney general's office [cited](#) concerns about "taxpayer dollars" (but not their students' safety and wellbeing) for their reasoning in the case. They argued that the potential consequence of not deterring schools from violating Title IX is "grossly overstated" because students could report to the police or complain to the U.S. Department of Education. But as supporters of Fryberger noted, the Department of Education "cannot award monetary damages" which "survivors sometimes need for medical and mental health bills, as well as other costs."

After a federal district court denied their motion to dismiss, the university [appealed](#) to the Eighth Circuit, which affirmed the district court's denial to dismiss the Title IX claims on sovereign immunity grounds.

WORKERS' RIGHTS

During Rudofsky's time as solicitor general, Arkansas [sued](#) to stop the Obama Administration's overtime rule, which would have made about [four million](#) workers

eligible for overtime pay. After a federal judge issued a nationwide injunction preventing the rule from going into effect, Rudofsky [hailed](#) the decision as "welcome news for. . . employees."

When an employee of a state college sued the school for violating state overtime provisions, Rudofsky helped write the brief for the state arguing that the state's sovereign immunity barred the complaint. The state supreme court [agreed, reversing](#) the lower court. In Rudofsky's [own words](#), "[T]his decision sent shock waves through the state judiciary, the state legislature, and the state bar." This has led to [confusion](#) and paved the way for future abuses by the state, without accountability – the state supreme court has already [ruled](#) a second time that legislators cannot create a right for residents to sue the state.

Rudofsky also supported the state's efforts opposing the Obama Administration's [Persuader Advice Exemption Rule](#), which [Arkansas](#) "le[d] the fight against" by [suing](#) the United States Department of Labor. The [rule](#) would have forced businesses to reveal information to the government about third-party labor relations consultants hired to help the company prevent workers from unionizing. An [op-ed](#) that Rudofsky worked on claimed that this rule to increase transparency for workers was just the Department of Labor "putting the interests of labor unions before the common good."

CONSUMERS' RIGHTS

Rudofsky worked on a 2016 [article](#) titled “The CFPB’s unconstitutional power grab,” which examined the D.C. Circuit’s decision in [PHH Corporation v. CFPB](#). The decision, written by then-judge Brett Kavanaugh, [held](#) in part that the [statute](#) creating the CFPB was unconstitutional as it related to the President’s lack of authority to fire the single-director except for “inefficiency, neglect of duty, or malfeasance in office.”

However, in January 2018, the D.C. Circuit reheard the claim *en banc* and [held](#), “[b]ecause we see no constitutional defect in Congress’s choice to bestow on the CFPB Director protection against removal except for ‘inefficiency, neglect of duty, or malfeasance in office,’ we sustain it.” The court recognized Congress’s intent in protecting consumers following the 2008 financial crisis and concluded that “[n]o relevant consideration gives us reason to doubt the constitutionality of the independent CFPB’s single-member structure. Congress made constitutionally permissible institutional design choices for the CFPB with which courts should hesitate to interfere.”

The CFPB serves a vital role in protecting consumers and Rudofsky’s labeling of the

actions of this agency as an “unconstitutional power grab” raises serious concerns.

CRIMINAL JUSTICE

Rudofsky [joined](#) prison payphone providers in challenging a Federal Communications Commission (FCC) [rule](#) capping rates on phone calls from prisons, which can reach as high as \$10 per minute. This rule was [overturned](#) during the Trump Administration and Trump’s new FCC Chair refused to defend the rule.

Rudofsky also filed two briefs arguing that minors sentenced to life imprisonment without possibility of parole as juveniles should continue to serve for life without eligibility for parole, despite [precedent](#) and [state law](#) that suggested otherwise.⁴⁴ In one of these [cases](#), the state supreme court held that the defendant was entitled to resentencing.

DEATH PENALTY

During his tenure as solicitor general, Rudofsky also defended the death penalty. In a video, Rudofsky [said](#) he is “probably pro-

death penalty, but . . . I very strongly believe it's constitutional."⁴⁵

In 2017 alone, Rudofsky filed at least 12 briefs before the Supreme Court to oppose stays of execution for Arkansas inmates facing the death penalty,⁴⁶ including a case in which nine incarcerated people on death row challenged the state's decision to execute eight people in eleven days. Four of the nine Supreme Court Justices would have granted a stay of execution due to a variety of [concerns](#), including whether "the State's compressed execution schedule constitutes cruel and unusual punishment." Furthermore, Rudofsky [fought](#) to withhold information about the drug cocktail to be used for a prisoner's execution and [defended](#) the state against [claims](#) from a pharmaceutical company that did not want their drugs used in executions, alleging that state officials improperly obtained their drugs to use in lethal injections. That case was eventually [dismissed](#) after the drugs were used in executions or expired.

CAMPAIGN FINANCE

Rudofsky [claimed](#) that "I think \$5 billion is a pretty reasonable amount of money to spend in a conversation with the American public about who should be the leader of the free world," refuting the idea that when it comes to elections, the idea of money as

"free speech" is dangerous. He argued that "[t]hese are signs of a functioning democratic republic, and are the physical embodiment of the First Amendment."

CONCLUSION

Throughout his career, Lee Rudofsky has shown his dedication to serving partisan interests at the expense of civil rights and public safety. Moreover, he has shown hostility to reproductive rights, LGBTQ equality, the environment, criminal justice, and education. He has opposed the existence of independent agencies and advocated for ideologically extreme positions. For these reasons, Alliance for Justice strongly opposes his confirmation to a lifetime seat on the federal bench.

ENDNOTES

- 1 Sen. Comm. on the Judiciary, 116th Cong., Lee Philip Rudofsky Questionnaire for Judicial Nominees, 1, available at: <https://afj.org/wp-content/uploads/2019/07/Rudofsky-Senate-Questionnaire.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 *Id.*
- 4 Sen. Comm. on the Judiciary, 116th Cong., Lee Philip Rudofsky Questionnaire for Judicial Nominees, 2, available at: <https://afj.org/wp-content/uploads/2019/07/Rudofsky-Senate-Questionnaire.pdf>.
- 5 *Id.* at 3.
- 6 *Id.* at 2.
- 7 *Id.* at 29.
- 8 *Id.* at 29-30.
- 9 *Id.* at 2.
- 10 *Id.*
- 11 *Id.* at 1-3.
- 12 *Id.* at 12-13.
- 13 *Id.* at 31.
- 14 *Id.* at 6-8.
- 15 *Id.* at 13-15.
- 16 There are a number of articles that Rudofsky lists in his SJQ Section 12(a) (which asks nominees to include “the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published materials you have *written or edited*” [emphasis added]). Several of the articles Rudofsky lists in this section include articles with Attorney General Leslie Rutledge listed as the author. For the purposes of this report, we will describe these as articles Rudofsky “worked on” or that he “authored or edited.”
- 17 Lee Rudofsky, Podcast Speaker, “The Texas Abortion Case in the Supreme Court: *Whole Woman’s Health v. Hellerstedt* Oral Argument Preview,” The Federalist Society, March 1, 2016, Recording at (12:04), available at <https://fedsoc.org/commentary/podcasts/the-texas-abortion-case-in-the-supreme-court-whole-woman-s-health-v-hellerstedt-oral-argument-preview-podcast>.
- 18 [*Planned Parenthood Ark. & E. Okla. v. Selig*](#), 2015 U.S. Dist. LEXIS 146466, 43-44 ([*E.D. Ark., Oct. 2, 2015*](#)).
- 19 *Id.* at 4-5.
- 20 [*Edwards v. Beck*](#), 8 F. Supp. 3d 1091, 1097 (E.D. Ark., Mar. 14, 2014).
- 21 [*Petition for Writ of Certiorari*](#) at 6, [*Beck v. Edwards*](#), No. 15-448 (2015).
- 22 *Id.* at 1.
- 23 *Id.* at 6.
- 24 *Id.* at 20.
- 25 *Id.* at 21.
- 26 [*Whole Woman’s Health v. Hellerstedt*](#), 136 S. Ct. 2292, 2300 (2016).
- 27 [*Brief of Respondents in Opposition*](#) at 20, [*Planned Parenthood of Ark. & E. Okla. v. Jegley*](#), 2018 U.S. LEXIS 3332.
- 28 *Id.*
- 29 [*Brief of Respondents in Opposition*](#) at 22, [*Paven v. Smith*](#), No. 16-992 (2017).
- 30 Leslie Rutledge, [*Protecting the Rights of Conscience*](#), Daily Rec. (Ark.), Aug. 8, 2016; Leslie Rutledge, [*Religious conscience must be protected*](#), Nw Ark. Gazette, July 1, 2018.
- 31 [*Amici Curiae Brief in Support of Petitioners*](#) at 4 & 16, [*Arlene’s Flowers, Inc. v. Washington*](#), No. 17-108.
- 32 [*Michigan v. EPA*](#), 135 S. Ct. 2699, 2704 (2015).

ENDNOTES

- 33 [Brief for the Respondents in Opposition](#) at 4, *Michigan v. EPA*, No. 15-1152 (2016).
- 34 Sen. Comm. on the Judiciary, 116th Cong., Lee Philip Rudofsky Questionnaire for Judicial Nominees, 50, available at: <https://afj.org/wp-content/uploads/2019/07/Rudofsky-Senate-Questionnaire.pdf>.
- 35 *Air All. Houston v. EPA*, 2018 U.S. App. LEXIS 23202, 5 (D.C. Cir., Aug. 17, 2018).
- 36 Sen. Comm. on the Judiciary, 116th Cong., Lee Philip Rudofsky Questionnaire for Judicial Nominees, 31, available at: <https://afj.org/wp-content/uploads/2019/07/Rudofsky-Senate-Questionnaire.pdf>.
- 37 [Brief in Opposition](#) at 18, *U.S. v. Texas*, No. 15-674 (2015).
- 38 [Brief for the State Respondents](#) at 27, *U.S. v. Texas*, No. 15-674 (2015).
- 39 *Doe v. Ark. Dep't of Educ.*, 2016 U.S. Dist. LEXIS 135265, 8 (E.D. Ark., Sept. 28, 2016).
- 40 *Id.* at 3-4 (E.D. Ark., Sept. 28, 2016) (“And there’s no real question about disproportionate effect: more than 65% of LRSD students are black; a majority of the dissolved Board was black; and the students at the growing charter schools in Little Rock are (to generalize) whiter and wealthier than LRSD’s students.”).
- 41 *Id.* at 3.
- 42 *Doe v. Key*, 2017 U.S. Dist. LEXIS 105029, 3 (E.D. Ark., July 7, 2017).
- 43 *Doe v. Ark. Dep't of Educ.*, 2016 U.S. Dist. LEXIS 135265, 30-31 (E.D. Ark., Sept. 28, 2016).
- 44 [Petition for a Writ of Certiorari](#), *Kelley v. Gordon*, No. 15-741; [Brief in Opposition](#), *Bell v. Arkansas*, No. 17-6749 (2018).
- 45 Lee Rudofsky, Panel Presenter, “Recent Death Penalty Litigation in Arkansas,” Eighth Circuit Chief Judges Conference, Aug. 3, 2017, Recording at (4:44), available at <https://afj.org/wp-content/uploads/2019/07/Death-penalty-video-1.mp4>.
- 46 Sen. Comm. on the Judiciary, 116th Cong., Lee Philip Rudofsky Questionnaire for Judicial Nominees, 32-33, available at: <https://afj.org/wp-content/uploads/2019/07/Rudofsky-Senate-Questionnaire.pdf>.