AFJ NOMINEE REPORT

DAVID STRAS

U.S. Court of Appeals for the Eighth Circuit

CONTENTS

INTRODUCTION

On May 8, 2017, President Trump nominated Justice David Stras of the Minnesota Supreme Court to the Eighth Circuit Court of Appeals. Stras's nomination has the potential to make a far-right court even more ultraconservative.

For the reasons that will be outlined in this report, Alliance for Justice opposes Stras's nomination.

Stras is nominated to replace Judge Diana Murphy, who took senior status in November 2016. For 19 years (until Jane Kelly was confirmed in 2013), Judge Murphy was the only woman to *ever* sit on the Eighth Circuit, and Judge Kelly remains the lone woman on the court. Last year, Senate Republicans refused to consider the nomination of Assistant U.S. Attorney Jennifer Puhl for the Eighth Circuit, despite bipartisan support from her home-state senators and the unanimous approval of the Judiciary Committee. There are now three vacancies on the 11-member court, and President Trump has nominated white men to fill them all. Of course, lack of diversity is not sufficient reason to oppose a nomination (just as diversity alone does not compel support for a nominee), but it is vital that our judiciary better reflects the people it serves.

As a longtime member of the Minnesota legal establishment, Justice Stras will undoubtedly garner statements of support from other members of the Minnesota legal community. However, it is vital to understand that such expressions of personal friendship and regional pride do not pertain to critical factors that make an individual suitable for a lifetime appointment to the federal bench. On that score, our report finds Stras's nomination lacking.

First, the process for selecting Justice Stras was deeply problematic. In May 2016, Donald Trump as a presidential candidate announced a list of potential U.S. Supreme Court nominees, which included Stras. Trump promised that his nominee or nominees to the Supreme Court would "automatically" overturn *Roe v. Wade*.[1] Stras was ultimately not selected to fill the Supreme Court vacancy, despite support from far-right conservatives.[2]

But Stras remains a candidate-in-waiting, and President Trump decided to tap him for an Eighth Circuit vacancy. And, contrary to custom, the White House did not meaningfully consult with either home state senator, Amy Klobuchar or Al Franken, before putting Stras's name forward for the seat. As Franken's spokesperson said, "Let's be clear: The Trump administration did not meaningfully consult with Sen. Franken prior to Justice Stras' nomination… Rather than discuss how senators traditionally approached circuit court vacancies or talk about a range of potential candidates, the White House made clear its intention to nominate Justice Stras from the outset."[3]

The contrast with President Obama's customary practice could not be starker. For example, when President Obama needed to fill a Tenth Circuit vacancy in Utah—a state, like Minnesota, that had two senators of the other party sitting on the

1 Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 16, 2016), http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.
2 *See e.g.*, Scott Johnson, *A Word for David Stras (2)*, POWERLINE (Dec. 12, 2016), http://www.powerlineblog.com/archives/2016/12/a-word-for-david-stras-2.php.
3 Seung Min Kim, *Trump's judge picks snub Democrats*, POLITICO (Aug. 11, 2017), http://www.politico.com/story/2017/08/11/senate-judges-democrats-trump-241448

Judiciary Committee—he chose to nominate Carolyn McHugh: a judge who had previously been appointed to Utah's Court of Appeals by Utah's **Republican** governor. And Judge McHugh was only nominated after first being interviewed and recommended by Republican Senators Orrin Hatch and Mike Lee, not by the White House. As McHugh noted:

> In January 2013, I submitted a cover letter and resume to Senator Orrin Hatch and to Congressman Jim Matheson for a possible position on the Tenth Circuit. On January 16, 2013, I interviewed with Senator Hatch and Senator Mike Lee, and on January 30, 2013, I interviewed with Congressman Jim Matheson. **On February 4, 2013, I was notified by Senator Hatch that he and Senator Lee would be recommending me to the White House for consideration.** The following week, I was contacted by an official from the White House Counsel's Office and interviewed...[4]

Clearly, the process McHugh describes is a far cry from what occurred in Stras's case, when the White House imposed a conservative ideologue on two members of the Senate Judiciary Committee without engaging in meaningful consultation.

Not only is the process leading to Stras's nomination concerning, but Stras's record is also deeply troubling. Throughout his career, Stras has repeatedly showcased his far-right leanings. He has praised Justices Clarence Thomas (for whom he clerked), Samuel Alito and Antonin Scalia, and even wrote a law review article lauding Supreme Court Justice Pierce Butler, who was known as one of the "Four Horsemen" for striking down New Deal laws and who was so extreme he thought Social Security was unconstitutional. As a state Supreme Court justice, Stras has ruled against government transparency, ruled to limit the rights of children with disabilities, and women, and demonstrated that he is not a vigilant protector of voting rights.

There are also serious questions as to his potential partisan biases. Stras wrote an amicus brief on behalf of the Republican governor of Minnesota, who later appointed him to the state supreme court, arguing for tremendously expansive power for the chief executive to unilaterally spend less money than the Democratic-controlled legislature appropriated. As a Supreme Court Justice, he then sided with the Republican-controlled legislature in a dispute with the Democratic secretary of state, putting aside his purported commitment to strict textualism to ignore a statute that explicitly gave the secretary of state the authority to set titles for ballot measures. And, he again sided with the Republican legislature in its effort to put on the ballot a measure to make it more difficult for minorities and the elderly to vote, in language that was "phrased to actively deceive and mislead."

Given the concerns about Stras's record, it is absolutely vital that he publicly be forthcoming about his views and philosophy. To date, President Trump's nominees have gone out of their way to be less than candid during the confirmation process: Neil Gorsuch simply refused to answer basic questions. As Linda Greenhouse noted, "[i]f Judge Gorsuch wasn't the least forthcoming Supreme

4 *See* Sen. Comm. on the Judiciary, 113th Cong., Carolyn McHugh: Questionnaire for Judicial Nominees (2014), https://www.judiciary.senate.gov/imo/media/doc/Carolyn-McHugh-Senate-Questionnaire-Final.pdf (emphasis added).

Court nominee ever to appear at a confirmation hearing, it's hard to imagine one who could be less forthcoming while still breathing."[5] John K. Bush, a nominee to the Sixth Circuit, gave such incomplete answers that his own hometown newspaper said he "duck[ed] questions" He went so far as to even avoid answering questions on how he would approach interpretation of the Constitution, saying "my personal views on constitutional interpretation [are] irrelevant."[6]

Senators must insist that Stras be much more forthcoming. As he himself has written, "At one point, I felt that answering such questions, especially if they pertained to potential cases before the Court, was improper. Now I am not so sure."

He continues:

> When I first started researching the federal courts about six years ago, my view was very much in line with the "Ginsburg standard" due to the ethical risks raised by a nominee who pre-commits to a particular position before being provided with briefing and a concrete case or controversy. But after reading every confirmation hearing since Justice O'Connor's and spending approximately eighteen months researching judicial appointments, my view has changed. At least one Senator has referred to the hearings as a "Kabuki dance," and others have made similar observations. Of course, the futility of questioning is mostly attributable to Senators who are unwilling to vote against a nominee who refuses to answer questions. If the "smart play" is to refuse to answer questions, then I do not blame any nominee who accedes to that strategy. After all, it is the smart political move, and it is not speculative to assume that every nominee wants to be confirmed. I do not see any valid reason why Senators cannot ask more difficult legal questions...[7]

BIOGRAPHY

Stras was born and raised in Kansas. He graduated from the University of Kansas in 1995, and later went on to earn an MBA (1999) and his law degree (1999) from the University of Kansas. Following law school, Stras clerked for Judge Melvin Brunetti (9th Cir.) and Judge Michael Luttig (4th Cir.). From 2001 to 2002, he practiced for a year at Sidley Austin Brown & Wood in Washington and then clerked for Justice Thomas on the U.S. Supreme Court.

From 2004 to 2010, Stras was on the faculty of the University of Minnesota Law School. From 2009 to 2010, Stras was also of counsel in the Minneapolis office of Faegre & Benson LLP, where he practiced in the appellate advocacy group.

In 2010, Governor Tim Pawlenty appointed Stras to the Minnesota Supreme Court. Stras's appointment generated controversy. Stras wrote an amicus brief on behalf of

5 Linda Greenhouse, *The Empty Supreme Court Confirmation Hearing*, NY TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/opinion/the-empty-supreme-court-confirmation-hearing.html?_r=0.

6 Andrew Wolfson, *Trump's judicial nominee from Louisville ducks questions about his controversial blog posts*, COURIER-JOURNAL (June 28, 2017), http://www.courier-journal.com/story/news/2017/06/28/judicial-nominee-louisville-john-k-bush-ducks-questions-controversial-blog-posts/433160001/.

7 Davis Stras, "The Sotomayor Nomination, Part I," FEDERALIST SOCIETY, July 9, 2009.

Governor Pawlenty the prior year, defending Pawlenty's use of "a seldom-used power" to "unallot," or unilaterally spend less than the Legislature appropriated.[8] One legislator called Stras's appointment political payoff for his support during the budget-cuts case.[9]

In 2012, Stras was elected to a full six-year term, defeating Judge Tim Tingelstad.[10]

LEGAL VIEWS

I. JUDICIAL PHILOSOPHY AND PERSONAL OPINIONS ABOUT SUPREME COURT JUSTICES

Stras, who like many other Trump judicial nominees is a member of the ultraconservative Federalist Society, is a deeply conservative originalist. Indeed, far-right blogs have praised Stras for his "consistent record of using a textualist/originalist approach" and emphasized that he "will not change that approach over time."[11] Analyzing a novel question before the Minnesota Supreme Court, he wrote that "we must analyze current causes of action and pleading practices in the context of the theories of relief available in, and the jurisprudence of, the 1850s [when the Minnesota Constitution was ratified]." *See* *United Prairie Bank v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49 (Minn. 2012).

Stras has also lauded the most conservative justices on the U.S. Supreme Court. Stras has praised Justice Thomas as a legal "mentor."[12] He has said of Justice Scalia, "In many ways, I feel like I grew up with Justice Scalia...I was profoundly impacted by that court of, sort of, the early to mid-1990s, and the jurisprudence, the sort of post-Warren court jurisprudence that came out, of which Scalia was a tremendous part." He added, "I really grew up with a steady diet of Justice Scalia, and I'm better for it."[13] And Stras praised Justice Alito's confirmation, noting that it was a "note of seeming optimism" that Justice Alito, with "a clearly delineated, solidly conservative judicial philosophy could get confirmed."[14]

Stras's praise of originalism, a theory of jurisprudence that rejects key holdings over the past century, and ultraconservative justices that have consistently ruled to eliminate or narrow legal protections for minorities, women, LGBTQ Americans, workers and consumers, raises questions about his commitment to properly apply key court decisions that have preserved essential constitutional rights.

Stras does not limit his praise of conservative Supreme Court justices to modern times. Indeed, he wrote a law

8 *See* Dave Orrick, *New Order in the Court: Pawlenty Elevates Associate Justice Lorie Skjerven Gildea to Minnesota Chief Justice and Selects an Academic*, ST. PAUL PIONEER PRESS (May 14, 2010) 2010 WLNR 10229595; Eric Black, *Pawlenty's Supreme Court Picks Raise Sticky and Embarrassing Issues*, MINN POST (May 14, 2010); Barbara Jones, *New Minnesota Chief Hailed: Gildea is Smart, Articulate - and Conservative*, MINNESOTA LAWYER (May 17, 2010).

9 *See* Jones, *supra* note 8.

10 *Minnesota Judicial Elections*, 2012 BALLOTPEDIA, https://ballotpedia.org/Minnesota_judicial_elections,_2012 (last visited Jan. 11, 2017).

11 *Supra*, note 2.

12 David Orrick, *New Supreme Court Chief Justice Lorie Gildea Says She'll Fight Against Partisan Judicial Elections and for Better Court Funding*, TWINCITIES.COM (July 12, 2010, 11:01 P.M.). http://www.twincities.com/2010/07/12/new-supreme-court-chief-justice-lorie-gildea-says-shell-fight-against-partisan-judicial-elections-and-for-better-court-funding/.

13 David Stras, *Roundtable: Areas of Constitutional Doctrine Transformed*, FEDERALIST SOCIETY (Nov. 24, 2016), http://www.fed-soc.org/multimedia/detail/roundtable-areas-of-constitutional-doctrine-transformed-event-audiovideo.

14 *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008) (reviewing Benjamin Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times (2006) and Jan Crawford Greenburg, Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court (2007)).

review article praising Justice Pierce Butler, who was known as one of the "Four Horsemen" for striking down New Deal laws. Stras titled his piece on the late justice, "Pierce Butler: A Supreme Technician."[15] In the article, Stras writes that "few have noted" that Butler was one to "embrace robust notions of personal liberty and private property."[16]

Butler, according to one scholar, "struck a reactionary pose in celebrated cases in order to retain the good graces of the conservative sponsors to whom they owed their positions and whose social amenities they continued to enjoy."[17] He authored or joined a number of opinions striking down New Deal programs, including voiding health and labor regulations on the coal industry, *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), ruling that a minimum wage law was unconstitutional, *Morehead v. New York*, 298 U.S. 587 (1936), and being one of only two justices who would have struck down Social Security. *Helvering v. Davis*, 301 U.S. 619 (1937).

Meanwhile, Stras's remarks about Justice Sonia Sotomayor, the first Latina to ever serve on the Supreme Court, are quite different and equally revealing. Stras writes that "Obama could have done much better [when he nominated her], but he also could have done worse (for instance, by nominating a politician with little to no legal experience)."[18] Referring to Sotomayor's opinion in *Ricci v. DeStefano* 530 F.3d 87 (2nd Cir. 2008), he also claimed that "if all I had was this opinion from her record, I would say that this is not a judge that understands the role of the judiciary."[19]

At the same Federalist Society Debate Forum at which he made the preceding remarks, Stras went even further when he concurred with other participants' views of the Sotomayor confirmation. Participant Wendy Long, an attorney and former Republican nominee for the Senate in New York, "claimed the Sotomayor hearings were indeed a disgrace, on the part of the nominee and many Senators." Long added, "I suspect that Judge Sotomayor did misrepresent, under oath, not just her own theoretical views about the enterprise of judging, but also more concrete matters," and she criticized "her embarrassingly reductionist articulation of her supposed philosophy of judicial restraint."[20] Matthew J. Franck of the conservative Witherspoon Institute claimed "she came across as, at best, a dull mediocrity who believes in mechanical jurisprudence, or an accomplished prevaricator."[21]

Stras then chimed in: "it is sufficient to say that I agree completely with Wendy and Matt."[22] He later added, "Judge Sotomayor's testimony was often stilted and wooden," and claimed that "her answers were often uninspiring and even misleading at times."[23]

Using standards applied in the past by Republicans, Stras's comments regarding Sotomayor alone should be disqualifying. As Mike Lee said about Goodwin Liu,

15 *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695 (2009). Stras has emphasized that he is especially proud of this article. *See* Rochelle Olson, *New Justice and Chief Sided with Governor's Solo-Handed Budget Cuts, the DFL Pointed Out*, STAR TRIBUNE (May 14, 2010).
16 *Id.*
17 Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560-61 (1997).
18 *The Sotomayor Nomination, Part II*, THE FEDERALIST SOCIETY (Jul. 13, 2009), *available at* http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-ii
19 To his slight credit, Stras does caveat this claim warning that one cannot make broad generalizations based on one case. *Id.*
20 Wendy Long, *The Sotomayor Nomination, Part III*, THE FEDERALIST SOCIETY (Jul. 13, 2009), *available at* http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-iii.
21 Matthew Franck, *The Sotomayor Nomination, Part III*, THE FEDERALIST SOCIETY (Jul. 13, 2009), *available at* http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-iii.
22 David Stras, *The Sotomayor Nomination, Part III*, THE FEDERALIST SOCIETY (Jul. 13, 2009), *available at* http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-iii.
23 *Id.*

who had questioned whether Justice Alito would apply the law in a "mechanical way abstracted from human experience"[24] and would turn a blind eye to discrimination: "[Liu's] comments about Justice Alito were offensive...because they were a misleading and unwarranted personal attack on a dedicated public servant."[25] Texas Senator John Cornyn remarked that Liu's comments "raise some serious questions about whether [Liu has] the sort of temperament and the ability to set aside...strongly held academic and scholarly views..."[26]

Stras was also deeply critical of Justice Kennedy's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008) for, in his view, eviscerating the political question doctrine. He wrote "Justice Kennedy's discussion of the political question doctrine is such a doctrinal mess that the Court will be forced to deal with it at some point."[27] Stras then speculated that other justices in the majority were only "willing to go along with Justice Kennedy's analysis, despite its incoherence, in order to keep him in the majority."[28]

This comment is not just a critique of Justice Kennedy's legal reasoning skills,[29] but also of all the justices who joined Justice Kennedy's opinion (Justices Breyer, Ginsburg, Stevens, and Souter). He is questioning their integrity and claiming that they knowingly signed on to a legally dubious opinion to get the result they wanted.

24 157 Cong. Rec. 7465, 7484 (2011).
25 Matt Canham, *Lee cites Alito criticism in voting against judicial nomination*, The Salt Lake Tribune (May 19, 2011), http://archive.sltrib.com/story.php?ref=/sltrib/politics/51848534-90/liu-ali-to-lee-judicial.html.csp.
26 *Nomination hearing on U.S. Circuit and U.S. District Judges Before the S. Comm. on the Judiciary*, 112th Cong., S. Hrg. 112-158 (2011) (questions of Sen. John Cornyn, Member, S. Comm. on the Judiciary).
27 David Stras, Comment to "The Decline of the Political Question Doctrine," Balkanization (Dec. 29, 2008 at 11:15 PM), https://balkin.blogspot.com/2008/12/decline-of-political-question-doctrine.html.
28 *Id.*
29 This is becoming a trend of President Trump's judicial nominees. *See e.g.*, "Damien Schiff," Alliance for Justice, https://www.afj.org/our-work/nominees/damien-m-schiff.

Finally, in a law review article, Stras argued that "the [Supreme] Court's own ventures into contentious areas of social policy—such as school integration, abortion, and homosexual rights," have "raised the stakes of confirmation battles even higher."[30] It is deeply disturbing that he would give the impression desegregation and the rights of women and LGBTQ Americans are simply issues of "social policy," that the court should not have "venture[d] into," rather than critical constitutional rights.[31]

NOTABLE LEGAL DECISIONS

I. VOTING RIGHTS

Stras joined an opinion in *League of Women Voters v. Ritchie*, 819 N.W.2d 636 (Minn. 2012) rejecting challenges to a ballot question —which, as Justice Alan Page noted, was "phrased to actively deceive and mislead" —seeking to amend the state constitution to require a photo ID for voting. *Id.* at 657 (Page, J., dissenting).

The Minnesota Legislature passed a voter ID law in 2011, but Governor Mark Dayton vetoed it. The legislature tried to bypass the governor by putting a constitutional amendment to the voters. The language of the ballot question read: "Photo

30 *Supra*, note 14 at 1034.
31 *Id.* at 1034.

Identification Required for Voting" and "Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters?" *Id.* at 640-641.

The League of Women Voters and other groups sued, claiming that the ballot question did not accurately describe the proposed amendment. Though the proposed amendment would have made four substantive changes to election law, the question only described two. The question misstated the language of the actual amendment. Specifically, the question says voters would be required to present a photo ID. But the amendment itself specified that it must be a government-issued photo ID, a much more limited category. The League of Women Voters argued that the discrepancies between the language of the proposed amendment and the ballot question in a number of areas made the ballot question unconstitutionally misleading.

Justice Stras joined the court's majority upholding the ballot question. The court held the legislature was given deference, and though the court "acknowledge[d] that the ballot question, as framed by the Legislature, d[id] not use the same words used in the amendment itself, nor does it list all of the proposed effects," none of the issues raised rendered the misleading question unconstitutional. *Id.* at 651. The decision concedes that "[t]hese failures may be criticized, and it may indeed have been wiser for the Legislature to include the entire amendment on the ballot itself." *Id.* at 651. But the court said it had a "limited role" and deferred to the legislature even though a fundamental right under the U.S. Constitution was at issue. *Id.* at 651.

The dissent noted the many ways in which the ballot question differed from the actual constitutional amendment, and in doing so emphasized that "the court's superficial analysis of the ballot question fails to do justice to our jurisprudence or to our role as a court." *Id.* at 657 (Page, J., dissenting). Justice Page pointed out "[t]his is not a case in which the ballot question was simply 'not phrased in the best or fairest terms,'" but instead"[t]his is a case in which the words of the ballot question were phrased to actively deceive and mislead." The dissent continued:

> A ballot question that so materially and deliberately misstates the language of the proposed amendment to which it relates is nothing more than a bait and switch. The plain language of the text of the proposed amendment passed by the Legislature differs markedly and materially from the proposed amendment the Legislature's ballot question describes.

Id. at 657. Justice Paul Anderson added that the Legislature proposed an "inaccurate, misleading, and deceptive question on the November ballot." *Id.* at 690 (Anderson, J., dissenting). And, "the unfortunate result of the Legislature's actions, as affirmed by the majority, is the implementation of a process to amend Minnesota's Constitution which deprives Minnesotans of their constitutional right to knowingly consent to a constitutional amendment." *Id.* at 666 (Anderson, J., dissenting).

II. BALLOT MEASURES

In *Limmer v. Ritchie*, 819 N.W.2d 622 (2012), Republican members of the Minnesota Legislature sought an order requiring Minnesota Secretary of State Mark Ritchie, a Democrat, to use the titles designated by the Minnesota Legislature for the voter ID ballot question (described above) and a referendum put on the ballot by the Republican controlled legislature seeking to prohibit marriage equality in the state.

Under Minnesota law, the Secretary of State has the authority to "provide an appropriate title for each question printed on the [constitutional amendment] ballot." Id. at 624. Secretary of State Ritchie decided to use the power to make the titles of both referenda less deceptive. He amended the title of the Voter ID ballot question from "Photo Identification Required for Voting," which had been provided by the legislature, to "Changes to In-Person & Absentee Voting & Voter Registration; Provisional Ballots." Id. at 625. And, for the same sex marriage ballot question, the legislature chose as a title "Recognition of Marriage Solely Between One Man and One Woman." Secretary of State Ritchie changed the title to "Limiting the statue of marriage to opposite sex couples." Id. at 625.

In both cases, ignoring the explicit text of the statute giving the Secretary of State the authority to set the title for each question, Stras (a purported textualist) sided with the Republican legislature in holding that the deceptive titles provided by the legislature must be used. The majority reasoned that because the Constitution vests in the Legislature the power to propose constitutional amendments, it has the right to choose the title (even a deceptive one).

Justices Page and Anderson, dissenting, noted the statute was clear that the Secretary of State is required to "provide an appropriate title." Minn. Stat. § 204D.15, subd. 1 (2010). As Justice Anderson noted,

> The Legislature asks us to expand its limited role. Contrary to the plain language...that the Secretary of State is to 'provide' an 'appropriate title,' the Legislature would have us read into the statute an additional requirement that the Secretary is to provide a title only if the legislature has not already done so. But, such a requirement cannot be found in the plain language of [the statute], or of any other statute, or the Constitution. Thus the power the Legislature seeks to assert can only come from reading between the lines of the limited powers assigned to the Legislature.

Id. at 632. Page further added, "[u]nder the court's view, a majority of the Legislature could propose a constitutional amendment to say, reinstate prohibition, propose a title 'Eliminating the Personal Income Tax,' the Secretary of State would be obliged to put the Legislature's title on the ballot, and under the standard the court announces today, this court could do nothing to prevent it." *Id.* at 633.

Stras is a self-described textualist. It is remarkable that he so easily put aside his commitment to textualism when it conflicted with the ideological goals of the Republican Legislature.

In the end, Minnesotans defeated both referenda.

III. DISABILITY RIGHTS

Stras joined an opinion in *A.A.A. v. Minn. Dep't of Human Servs.*, 832 N.W.2d 816 (Minn. 2013) limiting the benefits of a nine-year-old boy with a severe disability.

According to court documents, A.A.A. is "severely autistic and suffers from epilepsy, chronic seizures, sleep disturbances, and behavioral difficulties," and "[h]e is non-verbal, does not respond to oral instructions, and needs 24-hour supervision." *Id.* at 825 (Anderson, J., dissenting). Moreover, "A.A.A. has to be physically moved away from dangerous situations and will try to run away if someone is not holding his hand. A.A.A. ran away 20 times over a two-month period." *Id.* at 825 (Anderson, J., dissenting).

In addition, A.A.A. was found to have

> [C]ognitive deficits and behavior problems in general due to severe autism, mental retardation, and associated developmental delay. A.A.A. is completely nonverbal, has a very limited safety awareness, is resistive to care, and, on a daily basis, requires constant supervision to ensure his own and others' safety. He requires hands-on assistance and/or cuing and constant supervision to complete most activities of daily living. He is easily frustrated and quick to engage in aggressive or otherwise inappropriate behaviors, including hitting his parents.

Id. at 826. Also, "because A.A.A. does not respond to verbal commands, direct physical contact must continuously be maintained in order to cue him and to constantly maintain supervision of him when he is walking." *Id.* at 826 (Anderson, J., dissenting).

Under Minnesota law, individuals with disabilities are entitled to state assistance to help pay for medical care – Personal Care Assistance (PCA) services. A multi-factor test determines the numbers of hours or minutes of care to which an individual is entitled.

An administrative law judge and trial court judge concluded that A.A.A. was entitled to 450 minutes per day of PCA services. However, the state awarded A.A.A. only 390 minutes per day of PCA services because, since he was able to walk, the state said he was not dependent "in mobility." The Minnesota Supreme Court, including Stras, agreed, holding that the state's decision was "reasonable and supported by the plain meaning of the statute." *Id.* at 822.

Justice Anderson dissented. He criticized the majority's narrow reading of "dependency in mobility." *Id.* at 828 (Anderson, J., dissenting). He wrote, "the statute does not require A.A.A. to be physically incapable of performing a task in order to be dependent....It is sufficient if A.A.A. needs either hands-on assistance or cuing and constant supervision to complete the task." *Id.* at 829 (Anderson, J., dissenting) (internal citation omitted). And here, Anderson noted, A.A.A. "requires continuous direct contact when walking in public. When moving from place to place he must be supervised....In essence, A.A.A. must be continuously cued and constantly

supervised, which is exactly what the statute requires to qualify for authorized PCA services." *Id.* at 829-830 (Anderson, J., dissenting).

Anderson added, "it is one thing for an individual to need physical assistance moving from place to place – for example, in a wheelchair. But the required supervisions are potentially more intense when the need is related to behavioral or cognitive issues. A.A.A. must be watched and his hand constantly held or he may run away with potentially devastating consequences." *Id.* at 830 (Anderson, J., dissenting). He concluded, "there has been too much parsing of the separate meaning of particular words, such that the plain meaning and overall concept of the statutory scheme has been lost. In the case before us, we must look at [the statute] as a whole. When we do look at the statute as a whole, A.A.A. is entitled to the relief he seeks." *Id.* at 831 (Anderson, J., dissenting).

IV. GOVERNMENT TRANSPARENCY

In a case involving public transportation safety issues, Stras wrote for the court (3-2) against government transparency, saying the public may be denied access to St. Paul Metro transit videos. *KSTP-TV v. Metro. Council*, 884 N.W.2d 342 (Minn. 2016).

The case stemmed from two incidents on public buses: one that resulted in an accident and another that occurred when a bus driver and cyclist confronted one another. KSTP-TV sued to obtain the video footage, but the government refused to hand over the video. In his opinion for the majority, Stras sided with the transit authority. *Id.* at 343.

Justice David Lillehaug's dissent blasted Stras's opinion, writing that Stras "misread" Minnesota law and "has the effect of throwing under the bus two of our important democratic values: transparency and accountability." *Id.* at 351 (Lillehaug, J., dissenting).

V. HOLDING INSURANCE COMPANIES AND EMPLOYERS ACCOUNTABLE

Stras has dissented in several notable cases that fall into this category, ruling against plaintiffs who sought to use the justice system to recover full damages for wrongs they suffered.

The first case, *Sleiter v. Am. Family Mut. Ins. Co.*, 868 N.W.2d 21 (Minn. 2015), concerned a tragic school bus accident. In a dissent, Stras sided with an insurance company over an injured child who had brought suit seeking to recover damages.

The suit arose when an errant driver slammed into a school bus, killing four children and injuring 14. Total damages were assessed at more than $5.3 million – more than five times the amount of insurance coverage carried by the bus company and the other driver. After the accident victims divided up the available pot, Cody Sleiter, who suffered extensive damage to his right leg, hip and lower back, was only able to recover $36,144, even though he had $140,000 in damages. So Sleiter sought additional benefits—$65,456—under his family's underinsured motorist (UIM) auto insurance coverage, which insured the Sleiter family and contained UIM coverage limits of $100,000 per person.

But that insurer, American Family, rejected the claim. American Family claimed that under Minnesota law, UIM is only available where "the limit of liability…on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle." *Id.* at 23. And, here, American Family claimed, Sleiter's damages of $140,000 did not exceed the $1 million in UIM coverage available under the school bus company's policy (even though that amount had to be split among all those injured on the bus). *Id.* at 23.

The family sued and the trial court sided with the insurance company. But the Minnesota Supreme Court reversed. The court held that "the coverage available from the UIM proceeds [in the policy held by the school bus company] was inadequate to fully compensate all the injured passengers." *Id.* at 26. Therefore, the full $1 million in UIM coverage carried by the bus company could not be considered "coverage available" to any one victim. *Id.* at 22. As a result, the court ruled, "in accidents involving a large number of injured passengers, Sleiter's reading of 'coverage available' [the portion available only to him] is the more natural reading because it is more consistent with the legislative purpose of preventing injured passengers from being undercompensated." *Id.* at 26. The court added, "American Family's interpretation leaves victims insufficiently compensated for their injuries and unable to access the coverage limits they purchased." *Id.* at 28.

Stras dissented. He argued the text of the statute was clear and that Sleiter's family's coverage limit of $100,000 did not "exceed the limit of liability of the coverage available." *Id.* at 28. As a result, Stras would have held, Sleiter would not have been entitled to recover excess UIM benefits from American Family.

Peterson v. Minnesota, 892 N.W.2d 824 (Minn. 2017), is also relevant. There, Scott Peterson worked as a police officer for the City of Minneapolis from 1987 to 2012. In October 2011, he was transferred from the Violent Offender Task Force to another unit. Peterson, who was 54 years old, filed a complaint with the City claiming that the transfer was because of age discrimination. In January 2013 – over a year after his initial complaint – the City concluded the transfer was not because of age discrimination. Peterson sued, and the City argued that his suit should be dismissed because the statute of limitations for discrimination claims was only one year.

The Minnesota Supreme Court held that internal human resources investigations toll the statute of limitations for employment discrimination claims. The period is tolled "during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process." *Id.* at 827. The court held that an employee's internal human resources complaint and employer's investigation constituted a voluntary dispute resolution and tolled the statute. In the case itself, the employer's investigation itself took more than one year (explaining why the suit was not filed within the one-year limit). *Id.* at 826.

Stras joined a dissent arguing that a complaint process was not a "dispute resolution" under the statute. He would

have dismissed the case, ending Officer Peterson's chance for a day in court before he was even able to present his case to a jury. *Id.* at 834 (Stras, J., dissenting).

VI. SEXUAL ASSAULT

Stras dissented from a decision by the Supreme Court in *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011) to grant trial judges the discretion to allow expert-opinion evidence about rape-victim behavior to rebut a defense that sexual conduct was consensual.

In the case, a woman accused Nathan Obeta of raping her in a car. She waited about three hours to report the allegation, and a sexual assault exam did not find that she had any serious injuries. *Id.* at 283.

Expert witnesses testified that a lack of detectable injuries and a delay in reporting are common in rape cases, and a jury convicted Obeta. The Minnesota Court of Appeals then awarded Obeta a new trial on the grounds that such expert testimony should not be allowed.

During the new trial, the judge denied prosecutors' request to put similar experts on the stand during Obeta's second trial. The prosecutors appealed the judge's ruling to the state Supreme Court, which ruled in favor of allowing the expert testimony. According to the court, "[t]his record demonstrates that many jurors may wrongly believe that most sexual-assault victims will forcefully resist their assailant, suffer severe physical injuries—including vaginal injuries—and immediately report the attack. But social science contradicts these misconceptions about how victims actually respond to sexual assault." Id. at 293.

The Court further determined that at the time, only two states – Minnesota and Pennsylvania – categorically prohibited expert testimony regarding typical counterintuitive behaviors by adult victims of sexual assault and that such testimony "may be helpful to the jury in evaluating the evidence in a particular case." *Id.* at 293-4. The court then held that "in a criminal sexual conduct case in which the defendant argues that the sexual conduct was consensual, the district court has discretion to admit expert-opinion evidence" on rape-victim behaviors. *Id.* at 294.

As the Star Tribune noted, "Decision could ease way to rape conviction; Minnesota Supreme Court allows experts to explain confusing behavior by some victims."[32]

Stras dissented and argued the court lacked jurisdiction to hear the case. The majority held that the court had jurisdiction because it had "inherent authority to hear an appeal in the interests of justice," based on the Minnesota Constitution, and "inherent judicial authority to regulate and supervise the rules that govern the admission of evidence in the lower courts," according to prior case law. *Id.* at 286-287. Stras argued that rules of appellate jurisdiction over pretrial orders required the State to show that the "district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial," and that the State failed to meet its burden to show such critical impact. *Id.* at 295 (Stras, J., dissenting) (internal quotation omitted).

32 Abby Simmons, *Decision could ease way to rape conviction*, STAR TRIBUNE (Mar. 24, 2011), http://www.startribune.com/decision-could-ease-way-to-rape-conviction/118625969/.

His far more narrow view of the court's jurisdiction would have had a significant impact on victims in all sexual assault cases in Minnesota where the defendant claims the sexual conduct was consensual.

VII. OTHER CRIMINAL MATTERS

In *State v. Fawcett*, 884 N.W.2d 380 (2016), the defendant drove through a red light and collided with another car. Responding officers applied for a search warrant because they had "formed the belief that…Fawcett was…under the influence of alcohol" because "Fawcett admitted to responding officers that she had two or three drinks just prior to the crash, she smelled of an alcoholic beverage[,] and it was apparent to officers on-scene that she had been drinking." *Id.* at 388. The judge issued a warrant that allowed a "blood sample to be taken from [Fawcett]" and forwarded "to an approved lab for testing." *Id.* at 388. Ultimately, although Fawcett was found to have no alcohol in her blood, traces of marijuana were found in her blood following additional testing for controlled substances. *Id.* at 388. The majority found that the facts officers alleged provided probable cause to test Fawcett's blood for controlled substances, and that the warrant was sufficiently particular, so such evidence of controlled substances should not be suppressed. *Id.* at 386–88.

Stras dissented, stating the facts specific to alcohol did not support testing Fawcett's blood for controlled substances. *Id.* at 390 (Stras, J., dissenting). He accused the majority of "unnaturally stretching the concept of probable cause." *Id.* at 391 (Stras, J., dissenting).

In *State v. Bernard*, 859 N.W.2d 762 (2015), Stras, dissenting, argued that a Minnesota statute criminalizing the refusal to take a chemical test to measure blood alcohol concentration ("test refusal statute") was unconstitutional as applied to the defendant. He argued that the warrantless chemical test would not fall under the search-incident-to-arrest exception to the warrant requirement, and that the majority's holding "nullifies the warrant requirement in nearly every drunk-driving case." *Id.* at 767 (Page and Stras, JJ., dissenting).

The case was combined with several others. In *Birchfield v. North Dakota*, 136 S. Ct. 2160, the U.S. Supreme Court affirmed the Minnesota Supreme Court majority opinion.

CONCLUSION

The nomination of David Stras to the Eighth Circuit is problematic. His name came to prominence because he was singled out by the Heritage Foundation and Federalist Society as a potential Supreme Court nominee (presumably passing an anti-abortion litmus test), and he was chosen for a seat on the Court of Appeals without meaningful consultation with either of his home state senators.

His record is also concerning. He has lauded Justices Scalia, Thomas, and Alito—the Supreme Court's most conservative Justices—calling into question his commitment to critical constitutional rights, including protections for women, LGBTQ Americans, workers, and consumers. On the Minnesota Supreme Court, he has

shown little interest in protecting voting rights, ensuring access to the courts, promoting government transparency, protecting women, or guaranteeing that children with disabilities get the care they need.

For the foregoing reasons, Alliance for Justice opposes the nomination of David Stras to the United States Court of Appeals for the Eighth Circuit.