

ALLIANCE FOR JUSTICE REPORT

Nomination of Toby Crouse

U.S. District Court for the District of Kansas



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Alliance for Justice Report:

Toby Crouse

Introduction

On May 21, 2020, President Trump [nominated](#) Toby Crouse to serve as a judge on the United States District Court for the District of Kansas. If confirmed, Crouse would take the seat held by Carlos Murguia, a Clinton appointee who retired on April 1, 2020. Since January 2018, Crouse has served as the Solicitor General of Kansas. Crouse's record as Solicitor General paints a clear picture of a partisan warrior bent on curtailing critical rights and protections, including access to reproductive healthcare, voting rights, workers' rights, and the rights of everyday people in Kansas. 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 Crouse's confirmation.

Reproductive Rights

President Trump made clear that he will only nominate judges who pass his [litmus test](#) of [overturning](#) *Roe v. Wade*. Trump said overturning *Roe* "will happen automatically. . . because I am putting pro-life justices on the court." Crouse's record as Solicitor General clearly demonstrates that he meets this test:

- In *Anderson v. Planned Parenthood of Kansas and Mid-Missouri*, Kansas filed a petition seeking Supreme Court review of a case that argued that the state could refuse to provide Medicaid funding to Planned Parenthood, which provides a variety of critical reproductive health services to people across the country. The Tenth Circuit [disagreed](#), holding that Medicaid patients have the right to choose their care at any willing and qualified provider. The Supreme Court [declined](#) to hear the case. Crouse also filed an amicus [brief](#) in *Gee v. Planned Parenthood of Gulf Coast Inc.*, making the same argument. Again, the Supreme Court [declined](#) to hear the case, upholding a Fifth Circuit [decision](#) in favor of Planned Parenthood. Crouse's position would jeopardize low-income patients' access to potentially lifesaving services like cancer screenings and testing for sexually transmitted infections.
- In *Little Sisters of the Poor St. Peters & Paul Home v. Pennsylvania*, Kansas joined a [brief](#) arguing that the federal government acted lawfully in exempting religious objectors from a regulatory requirement that health plans include contraceptive coverage. In July 2020, the Supreme

Court [held](#) that agencies had the authority to create religious exemptions and that they did so consistent with the APA. This decision could result in as many as [125,000](#) women losing vital contraceptive care.

- In *Harris v. West Alabama Women’s Center*, Kansas joined a [brief](#) defending Alabama’s law banning physicians from performing D&E abortion procedures, which are the safest and most commonly used method of ending a pregnancy in the second trimester. The law would also subject physicians to up to two years in prison for violations and did not include exceptions for cases of rape, incest, or fetal anomaly. The Eleventh Circuit [held](#) that such methods could not be banned, and the Supreme Court [declined](#) to hear the case.
- In *Box v. Planned Parenthood of Indiana & Kentucky*, Kansas joined a [brief](#) defending Indiana’s law requiring the burial of fetal remains following an abortion. Such a requirement increases the already onerous cost of obtaining an abortion for low-income people who lack full health coverage. In addition, the brief argued in support of a law that prohibited abortions based on a disability diagnosis, race, or sex. The Supreme Court [upheld](#) the requirement of burying fetal remains but let stand the Seventh Circuit’s [ruling](#) striking down the ban on abortions based on disability diagnosis, race, or sex.
- In *Hill v. Whole Woman’s Health Alliance*, Kansas joined a [brief](#) arguing that Indiana was not required to provide Whole Woman’s Health Alliance a license to open a clinic. As of 2017, there were only six [clinics](#) providing abortions in Indiana, and 96% of counties had no clinics. The Supreme Court [declined](#) to hear the case, upholding the Seventh Circuit’s [decision](#) instructing Indiana to treat Alliance’s facility in South Bend as if it was provisionally licensed.
- In *Yost v. Planned Parenthood Southwest Ohio Region*, Kansas joined a [brief](#) urging the Supreme Court to bar attorney fee awards to reproductive health clinics who win court orders blocking state laws that are challenged in court. Such a ruling would severely limit the ability of clinics to bring meritorious challenges against unconstitutional abortion restrictions, as such litigation can be timely and expensive. The Supreme Court [declined](#) to hear the case, upholding the Sixth Circuit’s [opinion](#) that reproductive health clinics are entitled to attorneys’ fees.

Voting Rights

Kansas has a long history of voter suppression. Secretary of State [Kris Kobach](#), who has held the office since 2011, has implemented some of the strictest voter ID laws in the country, worked to purge thousands of registered voters from Kansas’ voter rolls, and led President Trump’s Voter Fraud taskforce. While he was still in private practice, Crouse defended Kobach in a case challenging his redistricting plan for the state. Once he became Solicitor General, Crouse

continued to support restrictive laws that threatened the right to vote in Kansas and other states:

- In [Fish v. Schwab](#), Crouse represented Kansas, arguing in favor of a state law requiring residents to show proof of citizenship before registering to vote. The court found the law unconstitutional, due in part to evidence showing that nearly 30,000 citizens had been blocked from voting because of the requirement. Crouse argued that the [voter suppression](#) was due to improper implementation of the law, rather than the law itself.
- In [Scarnati v. Agre](#), a case in which several Pennsylvania residents brought a suit alleging the state's electoral maps unfairly gave Pennsylvania Republicans an advantage, Kansas joined a [brief](#) in support of the defendants. This redistricting strategy, known as political gerrymandering, allows a state legislature to carve out districts in a way that dilutes the votes of the opposing party and undermines the fairness of elections. The Supreme Court [dismissed](#) the case as moot, upholding the Third Circuit's [ruling](#) to dismiss the claims. The Supreme Court later [ruled](#) in [Rucho v. Common Cause](#) that federal courts do not have the authority to hear cases challenging political gerrymandering.

Immigration

As Solicitor General, Crouse demonstrated his commitment to advancing the Trump administration's anti-immigrant agenda:

- In [DHS v. Regents of University of California](#), Kansas joined a [brief](#) supporting a Trump Administration policy rescinding DACA, which would have made more than [700,000](#) DREAMERS, undocumented immigrants who arrived at a young age, eligible for deportation and unable to access education and work visas. The Supreme Court [held](#) that the decision to rescind DACA was arbitrary and capricious and ruled against the Trump Administration in a 5–4 decision.
- In [Trump v. Hawaii](#), Kansas joined a [brief](#) supporting Trump's travel ban, also referred to as his "[Muslim ban](#)," a series of executive actions that banned travel into the United States from seven majority-Muslim nations. After a series of legal battles, and three revisions to the Executive Order, the Supreme Court ultimately [upheld](#) Trump's travel ban.
- In [Department of Commerce v. US District Court for SDNY](#), Kansas joined a [brief](#) defending the Trump Administration's efforts to include a citizenship question on the 2020 census, which, if successful, would have led to the [undercount](#) of 6 million Hispanic Americans. The Supreme Court [rejected](#) the rule, holding that the Trump Administration's explanation for the question was "contrived."

Gun Safety Laws

While Crouse was Solicitor General, Kansas joined many briefs in support of challenges to gun safety laws in other states:

- Crouse filed an [amicus brief](#) in *Kettler v. United States*, asking the court to vastly expand the meaning of the Second Amendment to include the right to possess unregistered firearm silencers. Silencers can put law enforcement and the public at greater risk because they suppress the sound of gunfire. The Supreme Court [declined](#) to hear the case, leaving in place the Tenth Circuit [ruling](#) that laws requiring gun silencers and other accessories to be registered do not violate the Second Amendment.
- In *Pena v. Horan*, Kansas joined a [brief](#) brought by a number of conservative states arguing that California's Unsafe Handgun Act, which requires that all new models of semi-automatic handguns stamp the handgun's serial number in two locations on each round of ammunition, violates the Second Amendment. The Ninth Circuit [disagreed](#), finding that the requirement does not burden conduct protected by the Second Amendment, and the Supreme Court [declined](#) to hear the case. Had Crouse's position prevailed, it would have undermined law enforcement's ability to investigate and prevent gun crimes, further threatening public safety.
- In [New York State Rifle and Pistol Assn v. City of New York](#), [Malpasso v. Pallozi](#), [Rogers v. Grewal](#), and [Culp v. Raoul](#), Kansas joined briefs opposing gun safety laws in other states that limit the right to carry firearms outside the home. This position threatens the ability of states and localities to protect its residents from gun violence. The Supreme Court declined to hear all but *New York State Rifle and Pistol Association*, which it ultimately [dismissed](#) as moot because the law had been repealed.

Labor

- As Special Assistant Attorney General for Kansas, Crouse submitted an [amicus brief](#) in *Home Care Association of America v. Weil*, arguing that U.S. Department of Labor regulations making home care workers eligible for overtime pay and the federal minimum wage were constitutionally impermissible. The D.C. Circuit [upheld](#) the regulations, thereby protecting the wages of a workforce of over two million people and ensuring a [higher quality of care](#) for consumers.

Criminal Justice

- In private practice, Crouse represented a Sheriff's office against allegations of constitutional and ADA violations related to use of excessive force. Crouse argued that the police shooting of an unarmed man who was suffering from depression and bipolar disorder and had attempted suicide the night before — 29 times — was not a violation of a constitutional right and was reasonable under the circumstances. He is also currently representing a sheriff against civil rights claims in a case in which sheriff shot and killed a suspected car burglar following a traffic chase. The district court rejected the Sheriff's Eleventh Amendment immunity defense and the Tenth Circuit affirmed.
- As Solicitor General, Crouse [represented](#) the state in *Kansas v. Glover*, a Fourth Amendment challenge that went all the way to the Supreme Court. Crouse argued that a police officer did not violate the Fourth Amendment when he initiated an investigative traffic stop after learning that a vehicle's registered owner had a revoked driver's license. The Supreme Court [upheld](#) the stop over the dissent of Justice Sotomayor, who wrote that the ruling "ignores key foundations of our reasonable-suspicion jurisprudence and impermissibly and unnecessarily reduces the State's burden of proof."
- Crouse also [represented](#) the state before the Supreme Court in *Kahler v. Kansas*. There, Crouse argued that Fourteenth Amendment Due Process does not require a state to accept the insanity defense. The Supreme Court [sided](#) with Kansas over the dissent of Justice Breyer, who wrote that the ruling "eliminated the core of a defense that has existed for centuries" and overturned "legal principle[s] so rooted in the traditions and conscience of our people as to be ranked as fundamental."
- Under Crouse's leadership, Kansas also joined briefs in [Ramos v. Louisiana](#) (arguing that the Sixth Amendment does not require a unanimous jury verdict to convict a defendant of a serious offense, as incorporated against the states); [Skipper v. Byrd](#) (arguing that a Sixth Amendment right to effective assistance of counsel does not include the right to a plea offer that was never made); and [Ohio v. Ford](#) (arguing that the test for whether someone is "intellectually disabled" for purposes of the Eighth Amendment are unclear and that this unclear doctrine impinges on state sovereignty).

Environment

During Crouse's tenure as Solicitor General, Kansas has joined multiple briefs challenging the Clean Water Act, the Endangered Species Act, and other environmental regulations:

- In *Kinder Morgan Energy Partners v. Upstate Forever* and *County of Maui, Hawaii v. Hawaii Wildlife Fund*, Kansas joined [briefs](#) that sought to narrow the protections of the Clean Water Act (CWA). Both cases involved pollutants that had migrated from groundwater and soil into nearby streams and ocean water, threatening the health and safety of surrounding communities. The brief joined by Kansas argued that the CWA did not prohibit this form of pollution discharge. The Supreme Court [disagreed](#) with this argument, holding that a point source included “functional equivalent of a direct discharge” into navigable waters.
- In *Weyerhaeuser Company v. United States Fish and Wildlife Service*, Kansas joined a [brief](#) arguing that the Fifth Circuit’s understanding of what constitutes “critical habitat” under the Endangered Species Act was overly broad. The brief argued against protecting land that is necessary to support species that are facing extinction on the grounds that doing so “almost always results in a lost economic opportunity.” The Supreme Court [overruled](#) the Fifth Circuit’s interpretation.
- In *Montana & Wyoming v. Washington*, Kansas joined a [brief](#) arguing that Washington’s law blocking a permit for a port facility to export coal from Montana and Wyoming is discriminatory and a violation of the commerce clause. The petition is currently [pending](#) at the Supreme Court.

LGBTQ Rights

- During Crouse’s tenure as Solicitor General, Kansas joined a [brief](#) in *Arlene’s Flowers Inc. v. Washington*. The brief argued that a florist could deny services to a same-sex couple in direct violation of the state’s nondiscrimination law that includes “sexual orientation” as a protected category. The case is currently [pending](#) before the Supreme Court.

Native Americans

- As Solicitor General, Crouse filed an [amicus brief](#) in support of Oklahoma in *McGirt v. Oklahoma*, challenging the sovereignty of the Muscogee (Creek) Nation over land in Oklahoma that had been given to the tribe by Congress pursuant to a Treaty in 1833. Oklahoma claimed that recognizing tribal criminal jurisdiction would risk the overturning of decades of criminal convictions obtained by the state, despite [evidence](#) showing only a small number of those convicted would be eligible for appeal. The Supreme Court [upheld](#) the sovereignty of the tribes over reservation land, pointing out that only Congress has the power to disestablish a reservation, and it has not done so.

- In *Carpenter v. Murphy*, Crouse authored a [brief](#) arguing that the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma do not constitute an “Indian reservation” anymore. In a per curiam decision following *McGirt*, the Supreme Court [ruled](#) that the reservations were never disestablished and remain Native American country.
- Under Crouse’s leadership, Kansas also joined briefs in [Herrera v. Wyoming](#) (arguing against the Crow Tribe’s rights under an 1868 treaty, which involved the right to hunt off their reservation on unoccupied lands); and [Washington State Dept of Licensing v. Cougar Den, Inc.](#) (arguing against the Yakama Nation rights under an 1855 treaty, which prohibited Washington from taxing a Yakama trucking company for using state highways to transport fuel to the Yakama Nation). The Supreme Court ruled against Crouse’s position and in favor of tribal rights in [both cases](#).

Education

- In *Espinoza v. Montana Dept of Revenue*, Kansas joined a [brief](#) arguing that Montana’s law that allows funding for education but not for religious schools is discriminatory under the Religion Clauses or Equal Protection Clause. In June 2020, the Supreme Court [ruled](#) in the law’s favor. The decision effectively [overturns](#) 37 states’ constitutions prohibiting state funding to sectarian institutions, undermines the Constitution’s Establishment Clause, and further endangers public school funding.
- As Solicitor General, Crouse represented Kansas in a [funding dispute](#) with state public school officials who alleged that the legislature and governor had failed to allot appropriate funds to low-income school districts. After nine years of budget negotiations in the state legislature, the Kansas Supreme Court [approved](#) a funding proposal for the 2019–2020 academic year, while retaining jurisdiction over the case to ensure the state does not revert to inadequate funding in the future. The ruling reversed a 2009 school funding scheme which was passed in response to the Great Recession and addressed [budget shortfalls](#) at the expense of at least four low-income districts.

Undermining Public Protections

- In *Seila Law v. Consumer Financial Protection Bureau* (CFPB), Kansas joined a [brief](#) arguing that the structure of the CFPB, an independent agency headed by a single director who cannot be removed at will, is unconstitutional. The state also joined a similar [brief](#) in *All American Check Cashing v. CFPB*, which again argued that the structure of the CFPB was unconstitutional and that a challenger subject to an

enforcement by the agency is entitled to relief. In June 2020, the Supreme Court [ruled](#) that the President must be able to remove the head of the agency. This position clears the way for the president to fire the head of the CFPB for any reason, including political differences, which threatens the safety and the rights of the consumers and investors that the agency is designed to protect.

- In *Kisor v. Wilkie*, Kansas joined a [brief](#) arguing that courts should not give deference to an agency's reading of its own regulations, essentially overruling *Auer* deference for a veteran with PTSD who had been denied care from the Department of Veterans Affairs. The Supreme Court [disagreed](#), ruling that courts should defer to an agency's reasonable interpretation of ambiguous statutes. In joining the brief, Crouse made clear his desire to tie the hands of agencies that Congress has recognized as having the knowledge and experience to enforce critical laws, safeguard public protections, and ensure the health and safety of the public.

Conclusion

Toby Crouse's record as Solicitor General of Kansas illustrates his extreme partisan bias when it comes to a broad swath of important issues. His hyper-partisan approach to the law demonstrates that he is not fit to serve a lifetime appointment to the federal bench. Alliance for Justice strongly opposes his nomination.