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**The Honorable James Ho**  
**Judge, U.S. Court of Appeals for the Fifth Circuit**  
**Research Summary**

**Age:** 51 (born February 27, 1973)

2018 – Present: Judge, U.S. Court of Appeals, Fifth Circuit  
2010 – 2018: Partner, Gibson, Dunn & Crutcher LLP, Dallas, Texas  
2008 – 2010: Solicitor General, Austin, Texas  
2006 – 2008: Counsel, Gibson, Dunn & Crutcher LLP, Dallas, Texas  
2005 – 2006: Law Clerk to Justice Clarence Thomas, Supreme Court of the U.S., Washington D.C.  
2003 – 2005: Chief Counsel, Senate Judiciary Subcommittee on Immigration and the Subcommittee on the Constitution, Washington D.C.  
2001 – 2003: Attorney Advisor, U.S. Department of Justice, Washington D.C.  
2001: Special Assistant to the Assistant Attorney General for Civil Rights, U.S. Department of Justice, Washington D.C.  
2000 – 2001: Associate, Gibson, Dunn & Crutcher LLP, Washington D.C.  
1999 – 2000: Law Clerk, Hon. Jerry E. Smith, U.S. Court of Appeals, Fifth Circuit  
Education: University of Chicago (J.D.) 1999; Stanford University (B.A.) 1995.

**Judicial Philosophy & Separation of Powers:**

- Judge Ho is an ardent defender of originalism and the separation of powers.
  - Ho asserted that originalism should not be controversial and that jurists ***“must not be afraid of being booed”*** as a result of issuing rulings that are unpopular with “cultural elites” and those who consider the Constitution to be “trash.”<sup>1</sup>
  - Ho has criticized “fair weather originalism,”<sup>2</sup> and said judges are not truly binding themselves to the text ***“if [they] follow it only when people like the result.”***<sup>3</sup>
  - Ho wrote about judging, ***“being an originalist is just part of the job description because being an originalist just means being faithful to whatever text you’re interpreting.”***<sup>4</sup>

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<sup>1</sup> Nate Raymond, *Trump-appointed judge defends rulings unpopular with 'cultural elites'*, REUTERS (June 7, 2022), <https://www.reuters.com/legal/government/trump-appointed-judge-defends-rulings-unpopular-with-cultural-elites-2022-06-07/> (emphasis added).

<sup>2</sup> HERITAGE FOUND., *The 2023 Joseph Story Distinguished Lecture*, YOUTUBE (Oct. 30, 2023), <https://www.youtube.com/watch?v=hCvGMl5Itjo>, at 26:40.

<sup>3</sup> HERITAGE FOUND., *The 2023 Joseph Story Distinguished Lecture*, YOUTUBE (Oct. 30, 2023), <https://www.youtube.com/watch?v=hCvGMl5Itjo>, at 26:55 (emphasis added).

<sup>4</sup> James Ho, *Pressure Is a Privilege: Judges, Umpires, and Ignoring the Booing of the Crowd*, HERITAGE FOUND. (Dec. 6, 2023), <https://www.heritage.org/courts/report/pressure-privilege-judges-umpires-and-ignoring-the-booing-the-crowd> (emphasis added).

### **Faith & the Public Square:**

- Judge Ho believes in allowing Bishops to express objection to abortion not only in belief, but also in action.
  - In a concurrence, Ho wrote, “[t]he First Amendment expressly guarantees the free exercise of religion—including the right of the bishops to express their profound objection to the *moral tragedy of abortion*, by offering free burial services for fetal remains.”<sup>5</sup>
- Ho has acknowledged the presence of religion throughout government.
  - In a dissent, he wrote, “[b]ut the whole point of the First Amendment, of course, is to privilege religion. . . . ‘*Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; “so help me God” in our courtroom oaths—these and all other references to the Almighty . . . run through our laws, our public rituals, [and] our ceremonies.*’”<sup>6</sup>

### **Religious Liberty:**

- Judge Ho has vehemently denounced viewpoint discrimination against conservatives on college campuses.
  - In his words, “[e]xpressing religious viewpoints gets you vilified. But claiming a right to eliminate a religious group gets you the benefit of the doubt.”<sup>7</sup>
- Ho expressed disdain for other courts’ poor decisions that limited or threatened religious liberty.
  - When the Ninth Circuit decided that a school district could fire its football coach for “praying by himself after each game,”<sup>8</sup> Ho wrote, “*So a school can force a teacher to remove her hijab before entering the classroom building, and require a lunchroom monitor to hide under the table before giving thanks for his meal.*”<sup>9</sup>
  - Ho also expressed disdain for the Tenth Circuit when it decided that officers could stop a woman from praying in the privacy of her own home. Ho said in an opinion piece, “This is a remarkable moment in our nation’s history. Over two centuries after our Founders established this great country and enshrined religious freedom

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<sup>5</sup> *Whole Woman's Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018),

<https://www.ca5.uscourts.gov/opinions/pub/18/18-50484-CV0.pdf>, at PDF p. 24 (emphasis added).

<sup>6</sup> *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1073 (5th Cir. 2020),

<https://www.ca5.uscourts.gov/opinions/pub/19/19-60293-CV1.pdf>, at PDF p. 14 (emphasis added).

<sup>7</sup> Jacqueline Thomsen, *Fifth Circuit's Ho Calls on Judges to Embrace 'Harsh Criticism'*, BLOOMBERG L. (Oct. 25, 2023), <https://news.bloomberglaw.com/us-law-week/fifth-circuits-ho-calls-on-judges-to-embrace-harsh-criticism>.

<sup>8</sup> James Ho & Kelly Shackelford, *US Courts: Can't pray at work, can't pray at home*, THE HILL (Sept. 9, 2017), <https://thehill.com/blogs/pundits-blog/civil-rights/348858-opinion-us-courts-cant-pray-at-work-cant-pray-at-home/>.

<sup>9</sup> James Ho & Kelly Shackelford, *US Courts: Can't pray at work, can't pray at home*, THE HILL (Sept. 9, 2017), <https://thehill.com/blogs/pundits-blog/civil-rights/348858-opinion-us-courts-cant-pray-at-work-cant-pray-at-home/> (emphasis added).

into our Constitution as our first liberty, government officials *and courts are now telling us we can't pray — at work, or at home.*"<sup>10</sup>

- On the bench, Ho has written both dissents and concurrences in cases regarding religious liberty, taking opportunities to submit his opinion in favor of religious liberty.
  - Judge Ho has written on free exercise, "[t]he broader scope of 'exercise'—in contrast to 'worship' and 'conscience'—indicates that, *at the time of the Founding, the public would have understood the right to 'free exercise' to extend beyond mere ritual and private belief to cover any action motivated by faith.* Consistent with that conclusion, Congress amended the draft language that later became the First Amendment. . . ." <sup>11</sup>
  - Judge Ho in dissent has declared, "[t]he Founders understood that the right to free exercise would require more than simply neutrality toward religion. Rather, *when government regulation and religious activity conflict, the right to free exercise would require that the government accommodate the religious practice, rather than the reverse.*"<sup>12</sup>

### **Sanctity of Life:**

- Ho wrote a powerful concurrence in *Dobbs* before it reached the Supreme Court.
  - Judge Ho stated in his concurrence: "The opinion issued by the district court displays an alarming disrespect for the millions of Americans who believe that *babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life.*"<sup>13</sup>
- He has labeled abortion a "moral tragedy."<sup>14</sup>
- Ho concurred in *Whole Woman's Health v. Paxton* and explained how the passage of time often reveals faulty science, noting that "[s]omeday, scientists may look back on today's *abortion debates as shocking and barbaric*—just as we look back in disbelief at those who ridiculed and ostracized proponents of handwashing and sterilizing surgical instruments to prevent disease and infection."<sup>15</sup>
- In a 2023 case involving the receipt of abortion drugs via mail (mifepristone), Judge Ho concurred with an opinion that would roll back access to the drugs.

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<sup>10</sup> James Ho & Kelly Shackelford, *US Courts: Can't pray at work, can't pray at home*, THE HILL (Sept. 9, 2017), <https://thehill.com/blogs/pundits-blog/civil-rights/348858-opinion-us-courts-cant-pray-at-work-cant-pray-at-home/> (emphasis added).

<sup>11</sup> *Horvath v. City of Leander*, 946 F.3d 787, 796 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/18/18-51011-CV0.pdf>, at PDF p. 13 (emphasis added).

<sup>12</sup> *Horvath v. City of Leander*, 946 F.3d 787, 797 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/18/18-51011-CV0.pdf>, at PDF p. 14 (emphasis added).

<sup>13</sup> *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 278 (5th Cir. 2019), <https://www.ca5.uscourts.gov/opinions/pub/18/18-60868-CV0.pdf>, at PDF p. 17 (emphasis added).

<sup>14</sup> *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018), <https://cases.justia.com/federal/appellate-courts/ca5/18-50484/18-50484-2018-07-15.pdf?ts=1531742430>, at PDF p. 24 (emphasis added).

<sup>15</sup> *Whole Woman's Health v. Paxton*, 10 F.4th 430, 470 (5th Cir. 2021), <https://www.ca5.uscourts.gov/opinions/pub/17/17-51060-CV4.pdf>, at PDF p. 65 (emphasis added).

- Ho stated, “Unborn babies are a source of profound joy for those who view them. Expectant parents eagerly share ultrasound photos with loved ones. Friends and family cheer at the sight of an unborn child. Doctors delight in working with their unborn patients—and experience an aesthetic injury when they are aborted.”<sup>16</sup>
- Additionally, **Ho adopted the most pro-life position on the Fifth Circuit panel** and concurred and dissented in part to argue that the FDA’s *initial* approval of mifepristone should be *vacated altogether*.<sup>17</sup>

### **LGBT Issues:**

- Ho defended a Texas ban on same-sex marriage as the Texas solicitor general.
  - As Solicitor General, Ho a brief filed on behalf of Texas *In re J.B.*, a case involving a law banning Texas Courts from exercising jurisdiction in same-sex divorce cases.<sup>18</sup>
  - According to a question posed by Senator Feinstein, in his brief, Ho stated, “[t]he naturally procreative *relationship between a man and a woman is uniquely deserving of special societal support and protection*, both to encourage responsible procreation and to increase the likelihood that children will be raised by a mother and a father in the context of stable, long-term relationships.”<sup>19</sup>
    - However, the brief also noted that “an individual may enter into any number of worthwhile and life-affirming relationships” outside of “the naturally procreative relationship between a man and a woman.”<sup>20</sup>
- Judge Ho concurred in *Wittmer v. Phillips 66 Co.*, finding that an employer’s hiring process did **not** discriminate against transgender individuals and that the individual seeking employment was legitimately denied because of a discrepancy in his/her background check.

<sup>16</sup> *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 259 (5<sup>th</sup> Cir. 2023), [https://storage.courtlistener.com/recap/gov.uscourts.ca5.213145/gov.uscourts.ca5.213145.543.1\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.ca5.213145/gov.uscourts.ca5.213145.543.1_1.pdf), at PDF p. 68.

<sup>17</sup> *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5<sup>th</sup> Cir. 2023), [https://storage.courtlistener.com/recap/gov.uscourts.ca5.213145/gov.uscourts.ca5.213145.543.1\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.ca5.213145/gov.uscourts.ca5.213145.543.1_1.pdf), at PDF p. 64. 93. See also Alice Miranda Ollstein, *Abortion pill ruling sets up Supreme Court showdown*, POLITICO (Aug. 16, 2023), <https://www.politico.com/news/2023/08/16/abortion-pill-restrictions-00111499> (explaining that Ho “wanted to go even further than rolling back access to the drug. He agreed with the most extreme position of the challengers that the FDA’s original approval should be stripped altogether, a move that would take the drug off the market entirely.”)

<sup>18</sup> Questions from Senator Feinstein Question #2, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 3.

<sup>19</sup> Questions from Senator Feinstein Question #2, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 3 (emphasis added).

<sup>20</sup> Questions from Senator Feinstein Question #2(a), S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 3.

- In concurrence, Ho asserted that “Title VII of the *1964 Civil Rights Act prohibits sex discrimination—not sexual orientation or transgender discrimination*.”<sup>21</sup>
- In a commonsense opinion, Judge Ho wrote that “[a] state does *not* inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate.”<sup>22</sup>
  - In his opinion, Judge Ho correctly referred to the inmate according to his biological sex rather than a professed gender identity.<sup>23</sup>

### **Faith & Worldview:**

- Ho was born in Taipei, Taiwan.<sup>24</sup>
- Ho has been described as a “devout Christian.”<sup>25</sup>
- Ho is a naturalized U.S. citizen who believes that what unites us as Americans is a shared love of freedom.
- Ho has argued that the “legal institution of marriage is about biology, not bigotry.”<sup>26</sup>
- In the 1990s, Ho was a legislative aide for California State Senator Quentin L. Kopp, a member of the Independent Party.<sup>27</sup> In 2004, Ho was a speaker for Asian Pacific Americans for Bush-Cheney at the Republican National Convention.<sup>28</sup> In 2008, Ho served as an adviser to Republican Pete Olson’s congressional campaign.<sup>29</sup> Olson was the leader of 20 Republican lawmakers who called for the impeachment of Obama administration Attorney General Eric Holder.<sup>30</sup>
- Judge Ho was also on the Board of Directors of “Ted Cruz for Senate” from 2011 to the time of his Senate Questionnaire responses in 2017.<sup>31</sup>
- In October 2023, Ho interviewed with the Washington Examiner concerning his refusal to hire law clerks from elite schools such as Yale and Stanford because the cancel culture at those schools is “antithetical to America.”<sup>32</sup>

<sup>21</sup> *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019), <https://www.ca5.uscourts.gov/opinions/pub/18/18-20251-CV0.pdf>, at PDF p. 9 (emphasis added).

<sup>22</sup> *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019), <https://cases.justia.com/federal/appellate-courts/ca5/16-51148/16-51148-2019-03-29.pdf?ts=1553902215>, at PDF p. 1 (emphasis added).

<sup>23</sup> *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), <https://cases.justia.com/federal/appellate-courts/ca5/16-51148/16-51148-2019-03-29.pdf?ts=1553902215>, at PDF p. 3.

<sup>24</sup> *James C. Ho*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/ho-james-c>.

<sup>25</sup> Michael Hall, *Is James Ho Too Brash for Even Trump to Make Him a Supreme Court Justice?*, TEX. MONTHLY (Sept. 2024), <https://www.texasmonthly.com/news-politics/james-ho-supreme-court/>.

<sup>26</sup> Questions from Senator Whitehouse Question #7, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 20.

<sup>27</sup> S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/James%20Ho%20SJQ.pdf>, at PDF p. 3.

<sup>28</sup> S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/James%20Ho%20SJQ.pdf>, at PDF p. 56.

<sup>29</sup> S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/James%20Ho%20SJQ.pdf>, at PDF p. 56.

<sup>30</sup> Mario Trujillo, *Twenty House Republicans Call for Holder Impeachment*, THE HILL (Nov. 14, 2013), <https://thehill.com/blogs/blog-briefing-room/news/190219-gop-members-seek-to-impeach-holder/>.

<sup>31</sup> S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/James%20Ho%20SJQ.pdf>, at PDF p. 9.

<sup>32</sup> Breccan F. Thies, *Judge James Ho warns college campuses have become a danger to American ideals*, WASH. EXAM’R (Oct. 27, 2023), <https://www.washingtonexaminer.com/news/2582200/judge-james-ho-warns-college-campuses-have-become-a-danger-to-american-ideals/>.



- Ho noted that “Christians should expect to be criticized,”<sup>33</sup> and read from 1 Peter 4, which states, among other things: “rejoice, in as much as you participate in the sufferings of Christ, so that you may be overjoyed when His glory is revealed. If you are insulted because of the name of Christ, you are blessed.”<sup>34</sup>

### **Second Amendment:**

- Ho understands that the Second Amendment is the “ultimate guarantor” of all other liberties and has criticized judges for treating it as a “second-class” right.<sup>35</sup>
  - While serving as the Solicitor General of Texas, Ho wrote an amicus brief in *McDonald v. Chicago* on behalf of 38 states challenging Chicago’s ban on handguns. In this brief, Ho wrote: “***the right to keep and bear arms [is] the ultimate guarantor of all the other liberties*** enjoyed by Americans.”<sup>36</sup>

### **Educational Opportunity:**

- Ho seems to have some conflicting views surrounding race and education.
  - Ho was lead counsel for appellees in *Fisher v. Univ. of Tex.* defending affirmative action at UT Austin.<sup>37</sup> The brief Ho authored, signed onto by then-Attorney General Greg Abbott, argued that “The [race-based admissions] policy is necessary because, prior to 2005, UT did not have a sufficiently diverse student body—including a critical mass of underrepresented minorities.”<sup>38</sup>
  - Judge Ho wrote a concurring opinion in *Smith v. Sch. Bd. of Concordia* in the Fifth Circuit and argued about affirmative action policies, “No matter how well-intentioned the policy may be, injury is a mathematical certainty, because educational admissions is a zero-sum game: ***When a school offers admission based on a student's race, it denies admission based on a student's race. For every person you ‘help’ due to race, you necessarily hurt another person due to race.*** And only by speaking plainly do we ensure fidelity to the Constitution.”<sup>39</sup>
  - Ho has argued that granting preference based on race can create a harmful stigma

<sup>33</sup> HERITAGE FOUND., *The 2023 Joseph Story Distinguished Lecture*, YOUTUBE (Oct. 30, 2023), <https://www.youtube.com/watch?v=hCvGMl5Itjo>, at 35:53.

<sup>34</sup> HERITAGE FOUND., *The 2023 Joseph Story Distinguished Lecture*, YOUTUBE (Oct. 30, 2023), <https://www.youtube.com/watch?v=hCvGMl5Itjo>, at 35:53.

<sup>35</sup> Emma Platoff, *Trump-appointed judges are shifting the country’s most politically conservative circuit court further to the right*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>.

<sup>36</sup> Questions from Senator Feinstein Question #3, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 4 (emphasis added).

<sup>37</sup> Brief Supporting the Appellees, *Fisher v. Tex.*, 556 F. Supp. 2d 603 (W.D. Tex. 2008), [https://tarlton.law.utexas.edu/ld.php?content\\_id=19666503](https://tarlton.law.utexas.edu/ld.php?content_id=19666503), at PDF p. 67.

<sup>38</sup> Brief Supporting the Appellees, *Fisher v. Tex.*, 556 F. Supp. 2d 603 (W.D. Tex. 2008), [https://tarlton.law.utexas.edu/ld.php?content\\_id=19666503](https://tarlton.law.utexas.edu/ld.php?content_id=19666503), at PDF p. 24.

<sup>39</sup> *Smith v. Sch. Bd. of Concordia Par.*, 906 F.3d 327, 339 (5th Cir. 2018), <https://www.ca5.uscourts.gov/opinions/pub/17/17-30548-CV0.pdf>, at PDF p. 18 (emphasis added).

for those who benefit from them, and that *racial “[p]references are counterproductive and dilute the message of nondiscrimination that antidiscrimination is supposed to send.”*<sup>40</sup>

- Some of Judge Ho’s views on racial policy and color blindness seem to contradict how he previously viewed race when it came to school admissions. In a concurring opinion, Judge Ho wrote, “*Prohibiting racial discrimination means we must be blind to race. Disparate impact theory requires the opposite. . . .*”<sup>41</sup> This may be viewed as contradictory to the argument Ho made in *Fisher*.
- Judge Ho dissented from denial of rehearing en banc in a case that struck down Texas’ Reader Act, aimed at preventing sexually explicit books from entering schools by requiring book vendors with sales to public schools to rate each book in its inventory based on sexual content.<sup>42</sup>

### **Administrative State:**

- Judge Ho has highlighted the danger of granting power to those in unelected positions.
  - Ho authored a dissent that reads, “*The right to vote means nothing if we abandon our constitutional commitments and allow the real work of lawmaking to be exercised by private interests colluding with agency bureaucrats, rather than by elected officials accountable to the American voter.*”<sup>43</sup>

### **History of Commitment to the Causes:**

- Ho has been an active member of the Federalist Society for 26 years and has held 10 different leadership positions within the organization.<sup>44</sup>
- Ho was also a dedicated volunteer attorney for First Liberty Institute and donated thousands of pro bono hours.<sup>45</sup>

### **Government Overreach:**

- Ho has opposed big government and written judicial opinions reflecting this view.

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<sup>40</sup> Questions from Senator Feinstein Question #5, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf>, at PDF p. 5 (emphasis added).

<sup>41</sup> *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 648 (5th Cir. 2021), <https://www.ca5.uscourts.gov/opinions/pub/20/20-40027-CV0.pdf>, at PDF p. 23 (emphasis added).

<sup>42</sup> See Brittanie Shey, *Appeals court denies rehearing Texas’ controversial book rating law*, CHRON (Apr. 17, 2024), <https://www.chron.com/culture/article/texas-book-ban-law-19408916.php>.

<sup>43</sup> *Tex. v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021), <https://www.ca5.uscourts.gov/opinions/pub/18/18-10545-CV2.pdf>, at PDF p. 6 (emphasis added).

<sup>44</sup> *Nomination of James Ho to the U.S. Court of Appeals for the Fifth Circuit – Serious Concerns*, LEADERSHIP CONF. ON CIVIL & HUMAN RIGHTS, <https://civilrights.org/resource/nomination-james-ho-u-s-court-appeals-fifth-circuit-serious-concerns/#>.

<sup>45</sup> *First Liberty Volunteer Attorney Appointed as Federal Appeals Judge*, FIRST LIBERTY (Dec. 16, 2017), <https://firstliberty.org/news/confirmed-first-liberty-volunteer-attorney-appointed-as-federal-appeals-judge/>.

- Dissenting after the Fifth Circuit upheld a city's campaign donation limit, Judge Ho argued that “if you don’t like big money in politics, then *you should oppose big government in our lives*.”<sup>46</sup> Ho also opined: “If there is too much money in politics, it’s because there’s *too much government*.”<sup>47</sup> According to Judge Ho, the large flow of money into politics is “the inevitable result of a *government that would be unrecognizable to our Founders*.”<sup>48</sup>
- Ho defends First Amendment rights, including when they conflict with public school teacher’s plans.
  - While Judge Ho did not sit on the panel that heard *Oliver v. Arnold* (a case in which a student sued a teacher who compelled her to transcribe the Pledge of Allegiance as part of a lesson), he commented on the case: “It’s well established that students in public schools are not required to recite the Pledge of Allegiance. *Barnette...stands not just for the narrow proposition that you can’t be forced to recite the Pledge of Allegiance, it stands for the broader proposition that you really can’t be forced to endorse any political viewpoint that you don’t wish to agree with. . . . [W]hat teachers cannot do, and what Barnette quite clearly establishes, is that you can’t force students to endorse a political viewpoint*.”<sup>49</sup>
- Judge Ho has supported religious objections to vaccine mandates, including mandates for the COVID-19 vaccine.
  - In a pre-pandemic case, Judge Ho defended a firefighter who objected to the flu and DTAP vaccines in a concurrence/dissent. Ho said, “For it is far from clear that the city’s vaccination policy is a ‘neutral law of general applicability.’ . . . *If the city does permit exemptions to the vaccine policy, then the policy is not neutral or generally applicable*. See *Lukumi*, 508 U.S. at 546.”<sup>50</sup> Ho also stated, “*The right to free exercise means that government cannot force citizens to choose between one’s faith and one’s livelihood, absent a compelling reason*.”<sup>51</sup>

<sup>46</sup> Emma Platoff, *Trump-appointed judges are shifting the country’s most politically conservative circuit court further to the right*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>; See also *Zimmerman v. City of Austin, Texas*, 888 F.3d 163, 170 (5th Cir. 2018), <https://www.ca5.uscourts.gov/opinions/pub/16/16-51366-CV1.pdf#page=3>, at PDF p. 13 (emphasis added).

<sup>47</sup> Emma Platoff, *Trump-appointed judges are shifting the country’s most politically conservative circuit court further to the right*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>. See also *Zimmerman v. City of Austin, Tex.*, 888 F.3d 163 (5th Cir. 2018), <https://www.ca5.uscourts.gov/opinions/pub/16/16-51366-CV1.pdf#page=3>, at PDF p. 13 (emphasis added).

<sup>48</sup> Emma Platoff, *Trump-appointed judges are shifting the country’s most politically conservative circuit court further to the right*, TEX. TRIB. (Aug. 30, 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>. See also *Zimmerman v. City of Austin, Tex.*, 888 F.3d 163 (5th Cir. 2018), <https://www.ca5.uscourts.gov/opinions/pub/16/16-51366-CV1.pdf#page=3>, at PDF p. 13 (emphasis added).

<sup>49</sup> BECH-LOUGHLIN FIRST AMEND. CTR., *Judicial Perspectives on the First Amendment*, YOUTUBE (Apr. 5, 2022), <https://www.youtube.com/watch?v=EJu2oJQkAOE&t=2752s&themeRefresh=1>, at 20:11 (emphasis added).

<sup>50</sup> *Horvath v. City of Leander*, 946 F.3d 787, 798–99 (5th Cir. 2020), as revised (Jan. 13, 2020), <https://www.ca5.uscourts.gov/opinions/pub/18/18-51011-CV0.pdf>, at PDF p. 18 (emphasis added).

<sup>51</sup> *Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/18/18-51011-CV0.pdf>, at PDF p. 19 (emphasis added).



- In his dissent in *Sambrano v. United Airlines*, a case involving United Airlines' COVID-19 vaccine mandate for all employees, Judge Ho wrote, "Forcing individuals to choose between their faith and their livelihood imposes an obvious and substantial burden on religion. Make no mistake: *Vaccine mandates like the one United [Airlines] is attempting to impose here present a crisis of conscience for many people of faith.*"<sup>52</sup> Judge Ho also wrote, "*It is difficult to imagine how a crisis of conscience, whether instigated by government or industry, could be remedied by an award of monetary damages. Take this case: The person who acquiesces to United's mandate despite his faith doesn't lose any pay. But he will have to wrestle with self-doubt—questioning whether he has lived up to the calling of his faith. Likewise, the person who refuses must also wrestle with self-doubt—questioning whether his faith has hurt his family, and whether living up to his commitments was worth sacrificing the interests of his loved ones.*"<sup>53</sup>

### **Immigration:**

- In a 2006 article, Ho compared today's illegal immigrants to Mayflower passengers, saying: "Birthright citizenship is guaranteed by the Fourteenth Amendment. *That birthright is protected no less for children of undocumented persons than for descendants of Mayflower passengers.*"<sup>54</sup>
- In a 2015 Heritage Foundation speech, Ho was adamant that birthright citizenship is constitutional, regardless of the constitutional interpretation mechanism deployed.
  - He declared, "*I do believe that I can convince each and every one of you that birthright citizenship is a part of the constitution . . . I sincerely don't think it's a close call. Every traditional tool of legal interpretation and constitutional analysis points in exactly the same direction...the text of the constitution . . . congressional history, Supreme Court precedent, and executive branch interpretation . . . and they all point us in the same direction, which is that birthright citizenship applies to everyone who is born in the United States, and subject to the laws of the United States, that is everyone who is required to follow the laws of the United States.*"<sup>55</sup>

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<sup>52</sup> See *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841 (5th Cir. 2021), <https://cases.justia.com/federal/appellate-courts/ca5/21-11159/21-11159-2021-12-13.pdf?ts=1639447214>, at PDF p. 5 (emphasis added).

<sup>53</sup> See *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 842 (5th Cir. 2021), <https://cases.justia.com/federal/appellate-courts/ca5/21-11159/21-11159-2021-12-13.pdf?ts=1639447214>, at PDF p. 7-8 (emphasis added).

<sup>54</sup> James C. Ho, *Defining "American" Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2d 367, 368 (2006), <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Ho-DefiningAmerican.pdf>, at PDF p. 3 (emphasis added). See also James C. Ho, *Born in the U.S.A.: Does that Guarantee Citizenship? 14th Amendment Says So*, DES MOINES REG. (Sept. 16, 2007), <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Ho-BornintheUSA.pdf>.

<sup>55</sup> HERITAGE FOUND., *Does the Fourteenth Amendment Require Birthright Citizenship?*, YOUTUBE (Oct. 16, 2015), <https://www.youtube.com/watch?v=wZGzbVrvoy4>, at 9:10 (emphasis added).

- However, in a November 11, 2024 interview with Josh Blackman, Ho discussed birthright citizenship in the context of invasion.
  - Ho distinguished between “invaders” and others: “[A]nyone who reads my prior writings on these topics should see a direct connection between birthright citizenship and invasion. Birthright citizenship is supported by various Supreme Court opinions, both unanimous and separate opinions involving Justices Scalia, Thomas, Alito, and others. ***But birthright citizenship obviously doesn't apply in case of war or invasion. No one to my knowledge has ever argued that the children of invading aliens are entitled to birthright citizenship. And I can't imagine what the legal argument for that would be.***”<sup>56</sup>
- Some posit that Ho ought to distinguish his 2006 statement that the “children of undocumented persons” are entitled to birthright citizenship from his 2024 statement that “the children of invading aliens” are not.
- In August 2023, Judge Ho cast the sole vote to reconsider a ruling allowing Texas to continue granting illegal immigrants the right to pay lower tuition at public universities than out-of-state students.
  - Ho wrote: “[A] sovereign isn’t a sovereign if it can’t control its borders. Congress has enacted a number of restrictions to govern entry into our country. Our national objectives are undercut when states encourage illegal entry into the United States. That’s precisely what’s at issue here. Congress enacted § 1623(a) to forbid states from treating U.S. citizens less favorably than illegal aliens when it comes to postsecondary education benefits. Yet that’s exactly what Texas law does.”<sup>57</sup>
- In *U.S. v. Abbott*, Judge Ho concurred and dissented in part with a decision that allowed Governor Abbott to maintain buoys in the Rio Grande River intended to stifle illegal crossings. Judge Ho agreed that Texas’ activities should be permitted but reached that result on a different basis. Ho’s opinion focused on state sovereignty and the classification of the illegal crossings issue as an “invasion.”<sup>58</sup>

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<sup>56</sup> Josh Blackman, *An Interview with Judge James C. Ho*, VOLOKH CONSPIRACY (Nov. 11, 2024), <https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho/> (emphasis added).

<sup>57</sup> *Young Conservatives of Tex. Found. v. Smatresk*, No. 22-40225 (5th Cir. 2023), <https://cases.justia.com/federal/appellate-courts/ca5/22-40225/22-40225-2023-08-14.pdf?ts=1692055850>, at PDF p. 15 (emphasis added).

<sup>58</sup> *U.S. v. Abbott*, No. 23-50632 (5th Cir. 2024), <https://i2i.org/wp-content/uploads/US-v.-Abbott.pdf>, at PDF p. 38. See also Michael D. Berry, *A Win for Texas in U.S. v. Abbott: Examining the States’ Power to Defend Their Borders*, FED SOC’Y (Aug. 12, 2024), <https://fedsoc.org/commentary/fedsoc-blog/a-win-for-texas-in-u-s-v-abbott-examining-the-states-power-to-defend-their-borders>