March 30, 2022

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of our 1.5 million supporters nationwide, People For the American Way enthusiastically supports the confirmation of Judge Ketanji Brown Jackson to the United States Supreme Court. As her confirmation hearing made clear to the country, President Biden has made a truly inspired and historic choice—one that is supported by two-thirds of the American public.[i]

Judge Jackson's brilliance, her deep commitment to civil rights, and her years of experience both on and off the bench make her extremely well qualified to serve on the nation's highest court. In addition, she will bring her lived experience to a Court that has never before had a Black woman justice, sharing her perspective about day-to-day life in the United States and how the legal system affects people's rights and lives.

Judge Jackson's Background

After graduating with honors from Harvard Law School, where she had been supervising editor of the Harvard Law Review, Jackson clerked for three federal judges. That early period of her career culminated in a Supreme Court clerkship with Justice Stephen Breyer in 1999-2000. When Breyer learned in 2012 that Washington D.C. Congresswoman Eleanor Holmes Norton was considering recommending her to the White House for a district court nomination, he is reported to have enthusiastically described her as "great," "brilliant," and as having "the mix of skills and experience we need on the bench."[ii]

Jackson could have easily pursued an extremely lucrative career in private practice. What she chose to do instead was dedicate most of her career to public service, using her abilities to advance justice and fairness for all people. For instance, she worked at the Office of the Federal Public Defender from 2005-2007. As an assistant federal public defender, she represented indigent men and women in Washington D.C. who were accused of crimes but who could not afford a lawyer. She stood with them to make sure their rights were not violated by prosecutors or law enforcement.

Public defenders play a vital and underappreciated role in protecting freedom, not only of poor people accused of crime but also of all people in the United States. We have given our government the power to take people away from their homes, imprison them, and even execute them. That power is a weighty one and potentially subject to abuse. So, if our government is going to use that power against someone, it must do so in a way that complies with the

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safeguards set forth in the Bill of Rights. Those safeguards include the right to counsel in criminal cases even when the accused cannot afford a lawyer. That basic tenet of the United States Constitution is vital to protecting all of us. As she explained at her confirmation hearing, "criminal defense lawyers perform a service, and our system is exemplary throughout the world precisely because we ensure that people who are accused of crimes are treated fairly." Jackson's work representing indigent people convicted of crimes has also given her insight into how the system works in real life and can fail to serve justice. That insight will be of critical importance to a court that has never before had a former public defender on it.

Jackson also worked at the United States Sentencing Commission from 2003-2005. She returned in 2010 as a vice chair and commissioner, a position to which the Senate unanimously confirmed her. While there, she championed ending the unjust discrepancy between sentences for crack cocaine and powder cocaine, a discrepancy that had a devastating impact on Black communities. When the sentencing guidelines for crack cocaine were reduced, she supported making that reform retroactive, calling it a question of "fundamental fairness." She recognized that no federal sentencing provision is "more closely identified with unwarranted disparity and perceived systemic unfairness than the 100:1 crack/powder penalty distinction." Her statements to fellow commissioners made clear her vision of the law as a tool to advance fairness, not as a weapon to target certain vulnerable populations:

> In my view, now that Congress has taken steps to clear the air by making significant downward adjustments to the mandatory statutory penalties for crack cocaine offenses, there is no excuse for insisting that those who are serving excessive sentences under the long-disputed and now discredited prior guideline must carry on as though none of this has happened. I believe that the Commission has no choice but to make this right. Our failure to do so would harm not only those serving sentences pursuant to the prior guideline penalty, but all who believe in equal application of the laws and the fundamental fairness of our criminal justice system.
>
> The decision we make today, which comes more than 16 years after the Commission's first report to Congress on crack cocaine, reminds me in many respects of an oft-quoted statement from the late Dr. Martin Luther King, Jr. He said: 'The arc of the moral universe is long, but it bends toward justice.' Today the Commission completes the arc that began with its first recognition of the inherent unfairness of the 100:1 crack/powder disparity all those years ago. I say justice demands this result.[iii]

Jackson has taken her commitment to justice with her to the federal bench, recognizing that—as she said to Sen. Chuck Grassley when she was nominated to be a federal district judge—"courts have a role in making sure that everyday citizens have access to justice."[iv] She so impressed senators then that when her nomination came before them in 2013, they voted to confirm her unanimously. Similarly, when President Biden nominated her to the D.C. Circuit, the Senate confirmed her with bipartisan support.

Jackson's Record on the Bench

Given Jackson's background, it is no surprise that she has excelled as a judge during these past nine years. She has handled cases of extreme complexity, setting forth the parties' arguments in detail and carefully explaining her in-depth analysis. She has respected the dignity of all litigants, given fair consideration to their arguments, and adhered to the principle that courts exist to protect the rights of all, not just the powerful or the popular.

A typical example is *Pierce v. District of Columbia*, in which Judge Jackson demonstrated a keen insight into the injustices too often experienced by—and indignities visited upon—people who are deaf.[v] The case involved William Pierce, a deaf man who communicates by American Sign Language (ASL), which is his native language. He does not speak English words, nor does he read or write English with the fluency of someone whose first language is English. He had been sentenced to serve 60 days for assault—the time to be served in Washington's Correctional Treatment Facility rather than the D.C. Jail so that he could be helped by its domestic violence intervention program and mental health services.

But Pierce alleged that corrections officials denied him the most basic communications accommodations for his disability, including denying him an ASL interpreter. As a result, he could not effectively communicate with others or understand what officials were telling him, nor could he effectively participate in crucial anger management, mental health, or substance abuse programs. Officials even handcuffed him when his partner and his mother visited him, making it impossible for him to sign. After another prisoner attacked him, Pierce was put into solitary confinement for two weeks. He alleged that he had not understood when officials explained that "protective custody" meant solitary confinement, or that it was voluntary and he could end it at any time. He sued the District for refusing to accommodate his disability as required by the Rehabilitation Act and the American with Disabilities Act (ADA).

The case was before Judge Jackson, then a district court judge, who ruled that even under the District's version of what happened, they had failed to follow the law. When Pierce first arrived at the correctional facility, the District's employees and contractors did nothing to evaluate his need for accommodation, despite their knowledge that he had a disability.

Judge Jackson did more than simply make a dry legal observation that the laws create an affirmative obligation to accommodate people with disabilities. Instead, she explained *why* Congress made this choice: to end the harm to people with disabilities so often caused by the thoughtlessness, indifference, and "benign neglect" of others. She understood that the laws at issue are not just scraps of paper with dried ink on them. They are the living expression of the nation's commitment to stop accepting discrimination against people with disabilities as a fact of American life. As she wrote, "an entity that provides services to the public cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied..."

In another ADA case she heard as a district court judge, she recognized the legal rights of people with disabilities to seek judicial redress for unequal access to ride-sharing apps. Heidi Case, a member of the Equal Rights Center, alleged that Uber's wheelchair-accessible ride-share services were less reliable, more costly, and took longer to arrive than did standard Uber vehicles, in violation of the ADA. She knew this based on the experiences of others she knew within the disability community, as well as her own active engagement on accessibility issues in the transportation sector. The Equal Rights Center sued, but Uber claimed that the organization lacked standing because Case had not actually downloaded the app herself. Judge Jackson rejected Uber's reasoning, recognizing that the ADA does not require a person with a disability to engage in a "futile gesture" if they already know that an entity does not comply with the law's requirements.[vi]

Judge Jackson's commitment to see the humanity of all people who appear in her courtroom also shows through in the terms she uses to describe them. For instance, in immigration cases, she makes a point to include a footnote informing readers that she is using the term "non-citizens" for people born abroad rather than the term "aliens" used in the relevant federal statute.[vii] In the case of *Kiakombua v. Wolf*, she allowed several women seeking asylum to join the case with pseudonyms, recognizing that their "significant interest in maintaining anonymity at this early stage in the litigation is more than sufficient to overcome any general presumption in favor of open proceedings."[viii]

Kiakombua involved a training manual created by the federal government to teach frontline asylum officials how to determine if an asylum seeker has a credible fear of persecution or torture. The five women in this case had received negative findings and sued, claiming that the guidance within the training manual was inconsistent with congressional statutes and federal immigration regulations. After a careful analysis, Judge Jackson concluded that several provisions of the manual were "patently at odds with the credible fear screening scheme that Congress has crafted." She ordered officials to re-evaluate the women's cases using legal criteria, but she realized that more had to be done. Because the unlawful provisions "cannot be effectively severed from the remainder of the document," Judge Jackson chose "to vacate the entire Lesson Plan."[ix]

But several weeks later, she discovered that the federal government had not obeyed her order. Instead of rewriting the manual as directed, they had simply redacted portions. In a hearing, Judge Jackson forcefully rebuked the administration's counsel: "You can't just redact out the unlawful portion, the six unlawful portions ... and call that a new lesson plan."[x] Future asylum seekers can be grateful that Judge Jackson does not let government officials slough off the court's directives when people's lives are on the line.

Judge Jackson also showcased her commitment to the nation's constitutional values and protections in *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, a high-profile case involving former White House Counsel Don McGahn.[xi] In 2019, then-President

Trump ordered his former staffer to defy a subpoena and not appear before a House Judiciary Committee hearing investigating Russia's interference into the 2016 presidential election and the Special Counsel's findings concerning potential obstruction of justice by Trump. After three months of failed negotiations, the committee went to court and sought an injunction ordering McGahn to obey the subpoena.

The Trump administration and McGahn argued that the court lacked jurisdiction to hear the case because it involved a conflict between the two political branches. Judge Jackson rejected this contention, citing the foundational case of *Marbury v. Madison*. She wrote that the court has jurisdiction because the Judiciary Committee's claim presented a legal question, and it is "emphatically" the role of the Judiciary to say what the law is. She recognized that it advances, not subverts, separation of powers concerns for the court to hear the case, since "it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny."

On the merits of the case, Judge Jackson rejected McGahn's and the Trump administration's argument that senior executive branch officials have absolute immunity from testifying. Recognizing the danger of unaccountable executive authority, she wrote that "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings." She ruled that McGahn would have to appear and assert any claims of privilege to the committee in response to particular questions. Any such claims could then be litigated on their merits.[xii]

The *McGahn* case was not the only time Judge Jackson heeded the call to remind those in power that we live in a society governed by the rule of law. For instance, she authored an opinion for a unanimous D.C. Circuit panel restoring federal employees' right to negotiate and bargain with the government concerning all non-trivial changes to working conditions. Without seeking public comment, the Federal Labor Relations Authority (FLRA) significantly changed rules that had been in effect for 35 years. It issued a policy statement of only four pages adopting a position the FLRA had previously rejected, significantly expanding management's ability to change working conditions without engaging in collective bargaining. The American Federation of Government Employees (AFGE) sued. In a carefully reasoned opinion, Judge Jackson wrote that the agency's "cursory" policy statement had not provided adequate explanation or factual basis for its dramatic reversal in policy, as the law requires.[xiii]

Similarly, in *Policy & Research, LLC v. HHS*, she considered a challenge to the Trump administration's decision to terminate teen pregnancy prevention grant funding to a number of organizations without explanation.[xiv] Judge Jackson called it "striking" that the Department of Health and Human Services "*provided no explanation whatsoever* for its decision." Because HHS had failed to follow its own rules on funding, she ruled they had acted contrary to law. She opened the case with a clear statement of principle emphasizing that a presidential administration cannot simply ignore the law: "As far as the Administrative Procedures Act … is concerned, this much is clear: a federal agency that changes course abruptly without a well-reasoned explanation

for its decision or that acts contrary to its own regulations is subject to having a federal court vacate its action as arbitrary and capricious." When officials deem themselves above the law, it is important to have justices on the Supreme Court like Jackson to protect our nation.

The courtroom also plays a vital role in protecting the American people from abuse of power by law enforcement officials. In one case before her in the district court, three law enforcement officials arrested Anthony Michael Patterson, an Occupy Wall Street protester, simply for cursing.[xv] At the police station, one of the arresting officers even admitted to Patterson that "profanity is protected under freedom of speech, but when you use profanity it causes a hostile environment for the police." Ultimately, they dropped the charges, and Patterson later sued the police officers for the wrongful arrest. Judge Jackson rejected the officers' claim that they had qualified immunity, stating the case plainly: "A police officer is unquestionably on notice that arresting a speaker solely based on the content of his speech and without probable cause to believe that he has committed a crime is a violation of the First Amendment."

Judge Jackson has also made clear that she respects constitutional precedents recognizing the ability of the American people to use our government to impose reasonable limits on the power of corporations. In 2013, she rejected an effort by business interests to constitutionalize their opposition to ordinary commercial business disclosure requirements by framing them as impermissible "compelled speech." At issue was a federal regulation strengthening the country-of-origin labeling on certain meats. After carefully considering the parties' arguments and the relevant precedents, Judge Jackson upheld the regulations, and her judgment was affirmed on appeal.[xvi]

Wide Bipartisan Support

Because of her brilliance, experience, and consistent fairness as a judge, Judge Jackson has garnered support across the ideological spectrum. For instance, former D.C. Circuit Judge Thomas Griffith, a nominee of President George W. Bush, has written:

> Judge Jackson has a demonstrated record of excellence, and I believe, based upon her work as a trial judge when I served on the Court of Appeals, that she will adjudicate based on the facts and the law and not as a partisan. …
>
> Judge Jackson and I occasionally differed on the best outcome of a given case. And in one important case involving the former President, I was one of two judges on a three-judge panel who voted to overturn her decision. However, I have always respected her careful approach, extraordinary judicial understanding, and collegial manner, three indispensable traits for success as a Justice on the Supreme Court.

Two dozen high-profile conservative lawyers, including several serving in previous Republican administrations, have called for this to be "a moment of consensus around a truly excellent person." In an open letter, they have written:

> While some of us might differ concerning particular positions she has taken as a judge, we are united in our view that she is exceptionally well-qualified, given her breadth of experience, demonstrated ability, and personal attributes of intellect and character. Indeed, we think that her confirmation on a consensus basis would strengthen the Court and the nation in important ways.

At a time when political agreement seems rare, it is telling that Democrats and Republicans alike are united in support of Judge Jackson's elevation to the Supreme Court. Such unusual bipartisan agreement is warranted for an unusually talented and qualified nominee who has been rated Unanimously Well Qualified by the American Bar Association.[xvii]

Her nomination is also inspiring a new generation. At her hearing, she movingly told the Judiciary Committee about the notes, letters, and photos she's received from little girls around the country since her nomination. Senators have an opportunity to be part of that exciting future.

Conclusion

Judge Ketanji Brown Jackson is a brilliant jurist with a demonstrated record of commitment to the legal rights and dignity of all people. With her skills and experience, she is exactly the kind of person we need on our Supreme Court to protect our democracy and our rights.

Sincerely,

Marge Baker
Executive Vice President

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[i] "New Marquette Law School Poll National Survey Finds Two-Thirds of Public Support Confirming Ketanji Brown Jackson as a Supreme Court Justice," Marquette Law School Poll, March 30, 2022, https://law.marquette.edu/poll/2022/03/30/marquette-law-school-supreme-court-poll-march-2022.
[ii] District court nomination of Ketanji Brown Jackson, December 12, 2012, https://www.judiciary.senate.gov/meetings/judicial-nominations-2012-12-12, time 0:29:25.
[iii] United States Sentencing Commission, Transcript of Public Meeting of June 30, 2011, https://web.archive.org/web/20110725020445/https://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110630/Meeting_Transcript.pdf, p. 13.
[iv] Response of Ketanji B. Jackson to the Written Questions of Senator Chuck Grassley, published in "Confirmation Hearings on Federal Appointments, 112th Congress, Second Session," Senate Judiciary Committee, S. Hrg. 112-4, Pt. 9, p. 771.
[v] *Pierce v. District of Columbia*, 128 F. Supp. 3d 250 (D.D.C. 2015).
[vi] *Equal Rights Center v. Uber Technologies*, 525 F. Supp. 3d 62 (D.D.C. 2021).

[vii] E.g., *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), reversed and remanded 962 F.3d 612 (D.C. Cir. 2020) (addressing the Trump administration's dramatic expansion in the categories of non-citizens subjected to expedited removal from the country without any hearing or review before immigration judges).
[viii] *Kiakombua v. Wolf*, 498 F. Supp. 3d 1 (D.D.C. 2020), appeal dismissed 2021 U.S. App. LEXIS 25479 (D.C. Cir., July 19, 2021).
[ix] *Id*.
[x] "US used 'unlawful' Trump administration guide to rule on asylum," Al Jazeera, Dec. 5, 2020, https://www.aljazeera.com/news/2020/12/5/us-used-unlawful-trump-administration-guide-asylum-claims-court-transcript-shows.
[xi] *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019).
[xii] On appeal, after a divided panel of the D.C. Circuit ruled that the committee had lacked standing under the Constitution to go to court to enforce its subpoena, the full circuit quickly issued an *en banc* order vacating the panel on that issue and ultimately upheld Judge Jackson's ruling that the committee had standing to sue. 968 F.3d 755 (D.C. Cir. 2020). Before the *en banc* court could address the substantive portions of Judge Jackson's opinion, the parties settled the case.
[xiii] *AFGE v. FLRA*, Nos. 20-1396, Consolidated with 20-1397, 20-1404, 2022 U.S. App. LEXIS 2834 (D.C. Cir. Feb. 1, 2022).
[xiv] *Policy & Research, LLC v. U.S. Department of Health and Human Services*, 313 F. Supp. 3d 62 (D.D.C. 2018). *See also Healthy Futures of Texas v. HHS*, 315 F. Supp. 3d 339 (D.D.C. 2018).
[xv] *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013).
[xvi] *American Meat Institute v. U.S. Department of Agriculture*, 968 F. Supp. 2d 38 (D.D.C. 2013).
[xvii] Letter from the American Bar Association rating Judge Jackson Unanimously Well Qualified, https://www.judiciary.senate.gov/imo/media/doc/ABA SCFJ Rating Letter - Judge Ketanji Brown Jackson 2022.03.18.pdf.