The Nomination of The Honorable Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States

U.S. Senate Committee on the Judiciary

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Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee,

Thank you for the opportunity to testify today. It is an honor to appear before this committee to discuss the nomination of Judge Ketanji Brown Jackson to the Supreme Court. As the hearings have so far demonstrated, Judge Jackson has a wealth of experience leading to her current nomination and is well-respected by colleagues and this body. I am grateful for the opportunity to participate in this body's serious and substantial consideration of a nomination to serve on the nation's highest Court, and appreciate the chance to reflect in my testimony on the constitutional doctrines applicable to the role of the Supreme Court within our constitutional republic.

As a legal academic who teaches and writes in the areas of constitutional law, separation of powers, federal courts, and legal interpretation, my testimony will focus on judicial philosophy and the role of Article III judges within the federal constitutional framework. My testimony will also describe the interpretive methodologies for discerning constitutional and statutory meaning in a manner that is most consistent with constitutional structure and text.

As the discussion during these hearings has highlighted, the U.S. Constitution is the crown jewel of our representative republic. Its ratification

over 1787 and 1788 constituted an historic moment, when a collection of state conventions came together to assent to the document's governing authority—submitting aspects of each state's authority to the governance of a newly created federal government separated into three branches.

As its preamble states, the Constitution was "ordain[ed]" by "the People of the United States" to "establish Justice" and form a more "perfect Union" than previously existed. The state conventions' ratification of the text of the document gave the Constitution its legal authority to stand as governing, binding law. The Constitution secures justice, and protects individual and collective rights, principally through a set of structural mechanisms. As testimony and questioning in this hearing and numerous previous Supreme Court nomination hearings have underscored, those structural mechanisms include the horizontal structure of federal power separated across three distinct branches and the vertical structural protection known as federalism under which power is divided between the federal government and the states.

The federalist structure is perhaps the primary protection of the two, in that it lays the foundational threshold groundwork for the enumerated, limited nature of the powers that any branch of the federal government may exercise. The Constitution does not empower the federal government to enact just any law, in any form. Rather, the federal government lacks affirmative authority to take actions not authorized by the text of the Constitution, and Article I sets forth limited enumerated powers, vesting only those legislative powers "herein granted" in that Article to the policymaking body of the United States Congress.[1] States retain general police powers not allocated to the federal government through the Constitution. And States retain the ability to exercise power within shared areas of authority, not prohibited by U.S. Article I section 10,[2] so long as the federal government has not used its authority to preempt state law under the Supremacy Clause.[3]

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[1] *See* U.S. CONST. art. I, § 1.

[2] *Id.* art. I, § 10 (prohibiting the States from entering treaties, coining money, and enacting laws that impair contractual obligations, among a number of other prohibitions).

[3] *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in

In addition to the enumerated limits on the federal government's subject-matter authority over the people and the States described in Article I,[4] the Constitution's procedural and inherent structural limits are critical safeguards working hand in glove with the federalist structure. The powers of the federal government are limited not just in substance by the Article I enumeration of limited subject matters for federal policy, but also by form and process.[5]

The Constitution divides power across three separate branches, principally based on the character of the power—legislative, executive, or judicial. That separation of power is a critical safeguard of individual liberty.[6] The constitutional structure intentionally makes federal action difficult and cumbersome, serving as a brake on the federal government's ability to regulate the people even within its enumerated areas of authority.[7] One's understanding, and interpretation, of the proper role of these structural safeguards is a critical component of one's understanding of the order of our constitutional republic and the role of each of the three federal branches within it.

Further, one's understanding of the proper scope of each branch's power directly impacts one's understanding of the role of Article III judges within the constitutional framework, as well as one's methodology for interpreting the constitutional text and structure and statutes enacted pursuant to it. In addition to the substantive contours of federal regulatory power enumerated in section 8 of Article I, Article I, section 7 imposes

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every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[4] *See id.* art. I, § 8.

[5] *See, e.g.*, *id.* art. I, § 7 (prescribing very particular and burdensome procedures for enacting legislation); art. V (imposing rigorous procedural requirements for the constitutional amendment process that involve either supermajorities of both houses of Congress or supermajorities of states).

[6] *See, e.g.*, THE FEDERALIST No. 51 (Madison) ("describing "that separate and distinct exercise of the different powers of government" as "to a certain extent . . . admitted on all hands to be essential to the preservation of liberty").

[7] *See generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

procedural limitations.[8] As every American schoolchild learns, section 7 enables the creation of new federal domestic law only if a majority of both houses of Congress and the President agree or two thirds of the legislative houses override a presidential veto.[9] Just as the Constitution's Article VII ratification requirements prescribed the procedure that would transform constitutional text into governing law,[10] Article I, section 7 prescribes the process that upon completion gives governing effect to statutory text.

The vesting of legislative authority in Congress and executive authority in the president, followed by Article III's vesting of the "judicial Power" in the U.S. Supreme Court and inferior courts as established by Congress, provides the framework for the federal division of authority.[11] Within that structure, of course, the component front and center for purposes of this confirmation process is the vesting of judicial power in the federal judiciary. That authority under Article III extends only to the power to resolve "Cases" arising under the Constitution, federal laws, and treaties made under them, and certain categories of "Controversies."[12] As the discussion during this hearing and constitutional principles like the political question doctrine demonstrate, that power constrains a judge to application of the text and the rule of law—not shifting policy preferences, cultural norms, or penumbras or extensions emanating from governing text.[13]

The Article III limited authorization to resolve concrete cases and disputes ensures that the Article III judge is not charged with general responsibility to decide questions of national policy or the power to offer advisory opinions on legal questions.[14] Particularly when deciding cases

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[8] *See* U.S. CONST. art. I, § 7, cls. 1, 2, & 3.

[9] *See id.* art. I, § 7, cl. 2.

[10] *See id.* art. VII (providing that the Constitution's ratification by nine state conventions "shall be sufficient for the Establishment of the Constitution between the States so ratifying the Same").

[11] *See id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1 (vesting clauses).

[12] *See id.* art. III, § 2.

[13] *Cf.* THE FEDERALIST No. 78 (Hamilton) ("[T]he judiciary, from the nature of its functions will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").

[14] *Muskrat v. United States*, 219 U.S. 346 (1911).

arising under federal "Laws" and the "Constitution,"[15] the Article III judge must faithfully apply the text of those laws consistent with fidelity to the Constitution.[16] As Article III judges receive life tenure and therefore are not directly accountable back to the electoral will of "the People,"[17] members of the Article III judiciary are not empowered to make new laws governing the electorate. The limited power to decide "cases" or "controversies" also suggests caution in a judge's imposition of remedies. Remedies such as national injunctions have questionable provenance because their use can facilitate a broad national impact on policy pitting a single federal judge against the will of Congress and the President in enacted law, rather than addressing just the legal dispute and harm to parties immediately at issue before the judge in a given case.[18]

Moreover, the Constitution gives Congress the power to fashion the structure and jurisdiction of the Article III judiciary.[19] That power includes within it the authority to decide whether to create lower federal courts, the number and size of the courts, their jurisdiction, and limitations on remedies that such courts may provide. Congress may even strip courts of jurisdiction over certain kinds of disputes—it does not need to provide federal courts with the full scope of their possible jurisdiction under Article III.

Those limits suggest a federal structure within which a judge's role is to neutrally apply the rule of law, within the confines of the authority given to the Article III judiciary by Congress subject to the Constitution. An Article III nominee's judicial philosophy should reflect deep awareness of these limits and the scope of Article III authority. That philosophy in turn should acutely impact a jurist's interpretive methodology—both in cases involving constitutional interpretation and interpretation of statutory text and structure.

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[15] *See* U.S. CONST. art. III, § 2.

[16] *See id.* art. VI, cl. 3 (Oaths Clause).

[17] *Compare id.* art. I §§ 2–3 (election of Senators and Representatives) *and id.* art. II § 1 (election of the President), *with id.* art. III § 1 (judicial tenure and salary protection).

[18] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

[19] U.S. CONST. art. I, § 8 (authorizing Congress "[t]o constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (vesting judicial power in the Supreme Court and in "such inferior Courts as the Congress may from time to time ordain and establish").

As a number of Supreme Court nominees before this body have previously testified, the interpretive methodologies most consistent with the constitutional role of a judge are originalism in constitutional interpretation and textualism in statutory interpretation.[20] Those methodologies, generally understood, essentially seek to identify the ordinary meaning of the relevant legal text at the time that it became governing law.[21]

Originalism, as applied through the methodology of original public meaning at the time of ratification, is consistent with constitutional provisions such as the Article VII provision that the Constitution would become governing law "between the States" as of its "Ratification" by "the Conventions of nine States."[22] Judges and other federal officials must take a constitutionally required oath to "be bound" by "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof."[23] It is those laws that have supreme effect, and judges are to resolve cases in accordance with them.[24] Finally, the Constitution provides for a finely grained amendment process, with substantially challenging procedural hurdles. Two thirds of both houses of Congress must propose an amendment or must call a convention for proposing amendments upon the application of two-thirds of state legislatures. Then three fourths of States must ratify the amendment for it to take effect.[25] Such a specification cannot be overcome by jurists' developing sense of cultural norms and important individual liberty needs, apart from constitutional text. Original public meaning's commitment to identifying the meaning of constitutional or amendment text at the time it is given effect is consistent with interpretive methodologies relying on the

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[20] *See, e.g.*, Testimony of Amy Coney Barrett, Brett M. Kavanaugh, Neil M. Gorsuch to be associate justices of the Supreme Court (Senate Judiciary Committee (2020, 2018, & 2017 respectively).

[21] *See, e.g.*, Antonin Scalia, *Originalism: the Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989); Gregory E. Maggs, WHICH ORIGINAL MEANING OF THE CONSTITUTION MATTERS TO JUSTICE THOMAS?," 4 N.Y.U. J. OF LAW & LIBERTY 494 (2009).

[22] U.S. CONST. art. VII. *See also generally* Statement of Lawrence B. Solum, Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States (2017).

[23] *See* U.S. CONST. art. VI, cl. 3.

[24] *See id.* art. III, § 2.

[25] *See id.* art. V.

fixed and unchanging meaning of this text until such time as it is amended under Article V.

That said, the Constitution does not principally impose substantive subject-matter limits on "the People." It does not freeze general cultural or family values at a particular point in time—it principally provides a set of procedural constraints, governing how the political, policymaking bodies of Congress and the President are to create policy consistent with the limited enumerations of federal power, with states and "the People" themselves operating in the background. The principal limits in the Constitution are the limits on the federal government even to act in the first place, rather than provision of continuously expanding or enumerated individual rights—a phrase that does not appear in the text of the original Constitution itself or the first ten amendments, which frequently speak in terms of the rights of "the people" as a body.[26] Political actors must follow the procedural constraints imposed by the Constitution, but the Constitution leaves room for enacted federal statutes to adapt and reflect changing societal needs. More fundamentally, the limited character of federal power was always meant to operate against the backdrop of state government and the ability of we "the People" to maintain liberty and enjoy core nongovernmental, critical components of society such as the family and religious institutions.

The statutory interpretive methodology of textualism similarly maintains consistency with these constitutional principles. Just as Article VII procedures give authority to the constitutional text, Article I, section 7 procedures indicate that statutes have governing effect once they are enacted by Congress and the President. Therefore, the text of those enacted laws—the publicly understood text as of the time of its enactment—governs the proper interpretation of those laws.[27]

In contrast to the judicial philosophies of originalism and textualism, President Biden has previously indicated intention to select judicial nominees with an expansive view of legal text and commitment to the idea of a living

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[26] *See, e.g.*, *id.* amends. i, ii, iv, ix. *See also* AKHIL REED AMAR, THE BILL OF RIGHTS 111–12 (1998). *Cf.* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (interpreting the Ninth Amendment according to its text).

[27] *See* U.S. CONST. art I, § 7. *See also, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (book review).

Constitution. Supreme Court Justice Stephen Breyer, a well-respected public servant and jurist, similarly has espoused interpretive theories at odds with textualism and originalism. His work on interpretive methodology, *Active Liberty*,[28] suggests a more flexible approach to interpreting legal text, that would give room for public participation and adaptation over time.

In testimony and statements, Judge Jackson, like prior nominees representing a range of views and jurisprudential approaches,[29] has articulated general support for originalism and textualism. But adherence to these methodologies as traditionally practiced hinges on their proper, neutral, and exclusive application. And when asked directly about judicial philosophy, at the very start of these hearings, Judge Jackson declined to identify express commitment to a particular judicial philosophy. Judge Jackson instead focused generally on a multistep interpretive methodology that highlighted the steps she would take in considering a case, including reading the parties' briefs, examining the facts, and maintaining an open mind. But Judge Jackson did not situate her approach within specific discussion of the structural constitutional provisions limiting the role of a judge. And she did not explain her understanding of the specific source of the constitutional limitations on the Article III judicial role. Hesitance to commit to a particular judicial philosophy could leave flexibility for incorporation of various interpretive approaches during Supreme Court service, in line with precedent or legislative history for which Judge Jackson has also expressed support.

In addition, Judge Jackson's explanation of her interpretive methodology during the hearings incorporates reliance on extratextual sources like intent and congressional purpose in statutory interpretation to a greater degree than other textually committed jurists like the late Justice Scalia and Justice Thomas.[30] Although reliance on congressionally enacted purpose statements embedded in statutory text of course would be

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[28] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006).

[29] *See, e.g.*, Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes (Nov. 17, 2015) ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

[30] *See, e.g.*, SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 27.

appropriate, reliance on extratextual perceived intent or on a judge's own discernment of underlying legislative purpose could lead to a more flexible approach than textualism as traditionally practiced by jurists such as Justice Thomas, the late Justice Scalia, and the most recent prior Supreme Court nominees like Justices Barrett and Kavanaugh.

It is challenging to definitively discern or predict a jurist's future methodological approach on the Supreme Court on the basis of service on a federal district court, where the judge is significantly bound by circuit court and Supreme Court precedent. That said, Judge Jackson's description of her methodological approach suggests divergence from originalism and textualism as traditionally applied and during the hearings on her nomination to serve on the Supreme Court, Judge Jackson has expressly declined to label her approach to judging as falling within a particular philosophical framework. The approach embedded within certain lower-court decisions further suggests that the Judge's application of constitutional and statutory methodology would differ significantly from the approach of previously committed textualist and originalist jurists. The nominee's record before the Senate does not demonstrate that those methodologies would be applied as traditionally understood, which includes the implementation of originalism and textualism as exclusive interpretive methods—not just one of multiple approaches alongside heavy reliance on (even incorrect) precedent, legislative history, and general purpose.

For example, in a significant case involving executive privilege and a former White House counsel,[31] Judge Jackson's opinion reflected a view of separation of powers that is inconsistent with the constitutional framework. She concluded that she had the judicial authority to review a political dispute between Congress and the Executive Branch over whether a White House Counsel is entitled to absolute immunity for testimony related to advice he provided to the President. The D.C. Circuit panel reviewing the case concluded, in contrast to Judge Jackson's estimation, that Congress had not enacted a law providing a cause of action permitting judicial review of the claim in the case.[32] The D.C. Circuit declined to infer an implied cause of

[31] *See Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019).

[32] *See Committee on the Judiciary v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).

action as outside its proper judicial role.[33] Judge Jackson had instead concluded that the court could infer a relevant cause of action from the Constitution itself.[34] In addition, in statutory interpretation, Judge Jackson has at times moved past text to focus on her construction of likely relevant congressional policy or to give weight to legislative history.[35] The committed textualists on the Supreme Court have generally avoided reliance on legislative history as an especially significant source of statutory meaning.

In addition, in *Make the Road New York v. McAleenan*, Judge Jackson's district court opinion did not rely on a critical threshold portion of the relevant statute.[36] Judge Jackson's opinion finds unlawful the then-Acting Secretary of the Department of Homeland Security's (DHS's) expansion of expedited removal for individuals accused of unlawfully entering the country, despite express statutory instruction that alterations in expedited removal policy are within the sole discretion of the Executive Branch.[37] In addition, Judge Jackson went further and concluded that DHS likely needed to use notice-and-comment rulemaking to address expedited removal—when repeated past practice had been for DHS to change expedited removal policies via just a policy notice. Judge Jackson's ruling was inconsistent with that repeated past practice and appeared to conflate judicial review under the Administrative Procedure Act[38] with the statutory provisions specifically

[33] *See id.* at 123 ("[W]e should not ignore Congress's carefully drafted limitations on its authority to sue to enforce a subpoena.").

[34] *See McGahn*, 415 F. Supp. 3d at 193–95. *But see* U.S. CONST. art. I, § 8 (authorizing Congress to establish inferior tribunals, a power that also has been interpreted to include the power to create causes of action).

[35] *See, e.g.*, *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 45 (D.D.C. 2021) (focusing on purpose and considering legislative history as an appropriate lens for understanding congressional intent); *Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375 (D.D.C. 2016) (evaluating legislative history among other sources).

[36] *See generally* 405 F. Supp. 3d 1 (2019).

[37] *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (authorizing the application of expedited removal to "any or all aliens" within certain categories and providing that "[s]uch designation shall be in the sole and unreviewable discretion" of executive officials and "may be modified at any time").

[38] *See* 5 U.S.C. § 706.

applicable to expedited removal policy in the immigration context. The circuit court reversed Judge Jackson's opinion.[39]

During the hearings, Judge Jackson's testimony itself at times has suggested tension with originalist and textualist methodology as traditionally applied or has avoided in-depth reliance on those methodologies. For example, Judge Jackson has stated that she would interpret the meaning of the constitutional text at the time of the Founding without specifying whether the relevant point is the time of the drafting of the Constitution, preconstitutional history, the point of ratification, or a combination of those events and without explaining the reasoning for selecting the Founding as the relevant interpretive period. In addition, Judge Jackson's statements indicated willingness to extend beyond constitutional text in the evaluation of individual rights described as within the "substantive due process" clause of the Fourteenth Amendment.[40]

Based on the evidence from the body of work presented to the Committee and statements during the hearing, there is a lack of evidence suggesting commitment to exclusive reliance on originalism and textualism as those interpretive methodologies are traditionally applied. Senators who understand originalism and textualism as the constitutionally appropriate methods for discerning legal meaning, and who are committed to voting on nominees on the basis of judicial philosophy, could conclude there is reason to oppose the nomination here.

[39] *See Make the Road New York v. Wolf*, 952 F.3d 612 (D.C. Cir. 2020).

[40] *Contra* U.S. CONST. amend. xiv § 1 (referring just to the protection against the deprivation of "life, liberty, or property without due process of law").