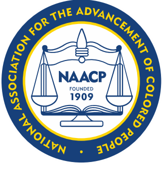

NAACP

Derrick Johnson
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March 18, 2022

The Honorable Richard Durbin
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

RE: NOMINATION OF JUDGE KETANJI BROWN JACKSON TO THE SUPREME COURT OF THE UNITED STATES

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the NAACP, our nation's oldest, largest, and most widely recognized grassroots-based civil rights organization, I strongly urge you to support the confirmation of Judge Ketanji Brown Jackson to be Associate Justice on the Supreme Court of the United States. Judge Jackson is an extraordinarily well-qualified candidate with an exceptionally diverse background. Her record as a jurist reflects an even-handed, moderate approach to the law and a strong commitment to fundamental fairness. Her addition to the Court at this moment promises to be forever etched in our nation's history and her presence on the Court will help advance our common goal of providing equal justice to all.

I. INTRODUCTION

The U.S. Supreme Court is crucial to the progress of Black Americans in the fight for equality. Our ability to participate fully in democracy and equally in social and economic life depends, in great measure, on the Court. From *Brown v. Board of Education* to *Shelby County v. Holder*, we have seen the power of the Supreme Court to both advance and undermine civil rights and equal justice under law. Each year, the Court decides critical cases involving voting rights, equal educational opportunity, fair employment and housing, criminal justice, women's rights, access to health care, immigration, consumer rights, and environmental justice. These decisions directly impact our lives and the lives of our families, communities, and generations to come.

Almost since its founding 113 years ago, the NAACP has focused on the composition of the Supreme Court to ensure it protects the civil rights of all Americans. In 1930, the NAACP opposed President Herbert Hoover's nomination of John Parker to the Supreme Court. Parker, a federal appellate judge and former gubernatorial candidate from North Carolina, believed that Black political participation was "a source of evil and danger to both races." The NAACP galvanized its fledgling chapters around the country and testified at Judge Parker's confirmation hearing. The Senate rejected the nomination.

Since that time, the NAACP has carefully considered the records of dozens of nominees to the Supreme Court and offered our honest and thoughtful assessment of their suitability to serve on the nation's highest Court. In this

process, we have both opposed and supported dozens of nominations to the Supreme Court, demanding that the Senate confirm only those nominees—regardless of the administration—who share a broad vision of justice and respect our collective advances in civil rights.

II. HISTORY-MAKING APPOINTMENT

This is a significant and solemn moment for our country. On February 25, 2022, President Biden nominated Judge Ketanji Brown Jackson to be the 116th justice on the Supreme Court. She will be the first Black woman justice ever to serve on the Court. Since 1789, 115 justices have served and all but six have been white men. President Lyndon Johnson appointed Thurgood Marshall, the first Black justice, in 1967, and President Ronald Reagan appointed the first woman, Sandra Day O'Connor, in 1981. Only two Black justices have served on the Court, Thurgood Marshall and Clarence Thomas. Justice Sonia Sotomayor is the only Latina justice ever to serve. Five women have served on the high court: Justices Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Amy Coney Barrett.

For the NAACP and its state conferences, local chapters, and members around the country, this truly is a moment to behold. A Black woman on the Supreme Court is long overdue. Judge Jackson's presence and expertise on the Court will enrich its perspective and improve its decision-making. A more representative bench will help the Court better serve the nation's broad, increasingly diverse populations who are impacted by its consequential rulings on a daily basis.

The current Court desperately needs the background, perspective, and lived experiences of Judge Jackson. More so than any time in the modern era, this Court is ideologically defined by an extremism reflected by a 6-3 majority which seeks to question and overturn settled precedent and increasingly decides major issues pursuant to a "shadow docket" (without argument or explanation). While the addition of Justice Jackson may not change the ideological balance of this Court, she will bring a powerful and unique voice to the Court that will forever change this institution. Justice Sandra Day O'Connor, the first woman justice, famously commented on Justice Marshall's profound influence on the Supreme Court:

> "Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.
>
> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth."[1]

Other Supreme Court justices have confirmed the extent of Justice Marshall's impact on the Court's deliberations. Justice Bryon White said that Justice Marshall "told us much that we did not know due to the limitations of our own experience."[2] Justice Lewis Powell observed that "a member of a previously excluded group can bring insights to the Court that the rest of its members lack."[3] And Justice William Brennan acknowledged that Justice Marshall "spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans."[4]

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[1] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev, 1217-20 (1992).
[2] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 Stan. L. Rev. 1215, 1215-16 (1992).
[3] Barbara A. Perry, *A "Representative" Supreme Court, The Impact of Race, Religion and Gender on Appointments* 137 (1991) (interviewing Justice Powell).
[4] William. J. Brennan, *A Tribute to Justice Thurgood Marshall*,105 Harv. L. Rev. 23, 25 (1991).

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The justices now sitting on the Court—no matter how extreme an ideology they may share—will undoubtedly be enriched and informed by the unique life experiences faced by Ketanji Brown Jackson as a Black woman living in America for the past fifty years.

III. PERSONAL BIOGRAPHY

Judge Ketanji Brown Jackson has a personal background that is both familiar to the NAACP and also represents a great source of pride for our community. She was born in 1970 in Washington, D.C. and raised in Miami, Florida by two public school educators who had attended historically Black colleges and universities, including North Carolina Central University. Judge Jackson's father, Johnny Brown, was a high school history teacher who returned to school to earn his law degree when Judge Jackson was young, providing her with both inspiration and her first memories of the law. He later became the chief attorney for the Miami-Dade County School Board. Her mother, Ellery Brown, was a principal of a magnet public high school in Miami. Judge Jackson herself is a product of public schools. She attended Miami Palmetto High School, where she was elected class president three times and excelled in national speech and debate competitions. Reflecting her early interest in the law, she noted in her high school yearbook her desire to "eventually have a judicial appointment."[5]

Judge Jackson has extraordinary legal credentials. She graduated magna cum laude from Harvard University in 1992 and she graduated cum laude from Harvard Law School in 1996. She served as supervising editor on the *Harvard Law Review*. She clerked for three judges at every level of the federal judiciary: Judge Patti Saris on the District of Massachusetts; Judge Bruce Selya on the First Circuit; and Supreme Court Justice Stephen Breyer, whose seat she would now fill. Over the course of her career, she worked for four prestigious law firms, located in Boston and Washington D.C. She worked for two years as a public defender, and then as assistant special counsel of the U.S Sentencing Commission and later as Vice Chair and Commissioner of the Sentencing Commission.

Currently, Judge Jackson serves on the U.S. Court of Appeals for the D.C. Circuit, known as the second highest court in the land given its special jurisdiction. President Biden appointed her in June 2021. Previously, she was a trial judge for eight years for the U.S. District Court for the District of Columbia, where she was appointed by President Obama. If confirmed, she would be only one of two sitting justices (with Justice Sonia Sotomayor), to have served as a federal trial judge.

IV. LEGAL AND JUDICIAL RECORD

A. Criminal Justice

It is difficult to overstate the significance of the Supreme Court to our criminal legal system and the individuals and families it impacts on a daily basis. Criminal law and procedure makes up a significant portion of the Supreme Court's docket, and in some years, comprise a majority of all cases heard.[6] Substantively, these cases span a wide range of topics of great practical importance, including: racial profiling; fair sentencing; constitutional protections, including the right against unreasonable searches and seizures; the role of bias in jury selection and proceedings; the administration of the death penalty; and the interpretation and application of federal and state criminal statutes.

Judge Jackson's strong background working across various aspects of the criminal legal system provides her with a perspective unlike any other justice since Thurgood Marshall joined the Court in 1967. Even as a college student, Judge Jackson was focused on injustices within the criminal legal system. She wrote a senior thesis on "The Hand

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[5] Stephen F. Rosenthal, *Ketanji Brown Jackson was a hall of famer even in my high school*, CNN, Mar. 1, 2022, https://www.cnn.com/2022/03/01/opinions/ketanji-brown-jackson-classmate-yearbook-rosenthal/index.html.
[6] *See generally* Rory Little, *Annual Review of the Supreme Court's Term: Criminal Cases, American Bar Association* (2021), https://www.americanbar.org/groups/criminal_justice/resources/annual_review_ussc/.

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of Oppression: Plea Bargaining Processes and the Coercion of Criminal Defendants." Specifically, she "examine[d] guilty plea negotiations in modern criminal courts in the United States, and [] argue[d] that, as they [] operate[d at the time], plea bargaining processes [was] both coercive and unacceptable."[7] She based her analysis on "both literary research and empirical observation," including interviews and experiences at the Neighborhood Defender Service of Harlem and interviews with twenty-five judges, prosecutors, and defense attorneys in several jurisdictions.[8]

After college and law school, Jackson spent the lengthiest portion of her public legal career working with the Sentencing Commission, which examines and addresses harsh and racially disparate penalties. On a personal level, she has cited as formative the experiences of her family members in law enforcement: Her brother was a law enforcement officers in Baltimore for seven years and her uncle served as Miami's police chief. At the same time, she has a close relative who has interacted with the criminal justice system. In remarks during the White House ceremony celebrating her nomination to the Supreme Court, she spoke about another uncle who was sentenced to life in prison for a non-violent cocaine conviction.[9] She later persuaded a law firm to represent him pro bono, and President Barack Obama commuted his sentence.[10]

Importantly, Judge Jackson will be the first former public defender ever to serve on the Supreme Court. For more than two years, she served as an assistant public defender in Washington D.C. and handled appeals before the D.C. Circuit (where she now sits), on behalf of people convicted of federal crimes who could not afford counsel. For example, she argued successfully on behalf of a defendant who had been denied his right to an impartial jury.[11] She protected a defendant against infringement of his right against self-incrimination.[12] Through pro bono work at private law firms, she filed several amicus briefs on behalf of National Association of Criminal Defense Lawyers,[13] and she worked on other litigation related to the detention system at Guantanamo Bay.[14] At her Senate confirmation hearing in 2021, she told the Senate that she was "struck" by how little her clients understood about the legal process and that as a trial judge, she took "extra care" to make sure that defendants knew what was happening to them and why.[15]

Additionally, Judge Jackson's six-year tenure with the U.S. Sentencing Commission gives her a unique perspective and subject matter expertise on a critical and complex component of criminal justice system. The Sentencing Commission is a bipartisan agency created by Congress in 1984 to reduce disparities in sentencing. She served as assistant special counsel and later was appointed by President Obama to serve as Commissioner and Vice Chair. While serving on the Sentencing Commission, she made consequential decisions about the calculation and revision of the federal sentencing guidelines as they apply to a wide arrange of circumstances, including certain drug offenses. Particularly noteworthy is her work to amend sentencing guidelines to reduce disparities in penalties which

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[7] United States Senate Committee on the Judiciary, *Questionnaire for Judicial Nominees, Attachments to Question 12(a), Ketanji Brown Jackson Nominee to be Associate Justice of the Supreme Court of the United States* at 109.
[8] *Id.* at 110.
[9] Ann E. Marimow and Aaron C. Davis, *Possible Supreme Court nominee, former defender, saw impact of harsh drug sentence firsthand,* Wash. Post (Jan. 30, 2022), https://www.washingtonpost.com/politics/courts_law/ketanji-brown-jackson-uncle-prison/2022/01/30/669c5f68-8116-11ec-bf02-f9e24ccef149_story.html.
[10] Patricia Mazzei and Charlie Savage, *For Ketanji Brown Jackson, View of Criminal Justice Was Shaped by Family*, N.Y. Times, Jan. 30, 2022, https://www.nytimes.com/2022/01/30/us/politics/supreme-court-ketanji-brown-jackson.html.
[11] *United States v. Littlejohn*, No. 05-3081, 489 F.3d 1335 (D.C. Cir. 2007).
[12] *United States v. Ponds*, Nos. 03-3134, 03-3135, 454 F.3d 313 (D.C. Cir. 2006).
[13] *See, e.g.*, Amicus Brief of National Association of Criminal Defense Lawyers in Support of Petitioner, 2009 WL 1864008, in *Bloate v. United States*, 559 U.S. 196 (2010); Amicus Brief of National Association of Criminal Defense Lawyers in Support of the Defendant, 2008 WL 2958118, in *Arizona v. Gant*, 556 U.S. 332 (2009).
[14] *See* Amicus Brief on Behalf of Former Federal Judges, 2007 WL 2441585, in *Boumediene v. Bush and Al-Odah v. United States*, 553 U.S. 723 (2008); *Khiali-Gul v. Bush*, No. 1:05-cv-877 (D.D.C. 2005).
[15] *See* CSPAN, Confirmation Hearing for Judicial Nominees (Apr. 28, 2021) (circa minute 42:26), https://www.c-span.org/video/?511313-1/confirmation-hearing-judicial-nominees.

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harshly impact Black and Brown defendants, commonly known as the 100:1 ratio for crack versus cocaine offenses.[16] She participated in a unanimous decision to make retroactive a law passed by Congress, the Fair Sentencing Act of 2010, to reduce penalties for crack cocaine offenses to more closely the track penalties for powder cocaine offenses. As a result, approximately 12,000 federal prisoners were eligible for a reduction in sentence,[17] and approximately 85 percent of those eligible were Black.[18] At the time of the vote, then-Sentencing Commission Vice Chair Jackson powerfully argued:

> "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."[19]

After she joined the federal judiciary, Judge Jackson's decision-making reflected both depth and experience gained by her years working within the criminal justice system.

In the context of compassionate release of individuals in prison, Judge Jackson granted release to several individuals and swiftly acted on such motions amid the coronavirus pandemic. For example, she granted release to a 72-year-old individual who had served 49 years, rehabilitated himself in various ways, and had deteriorating health.[20] She reasoned that "[w]hen a defendant presents extraordinary and compelling reasons for his release, the Court must reassess the applicable [sentencing] factors [] and consider all of the available evidence, including any opposition to the defendant's release . . . Greene has now served 49 years in prison, during which it appears that he has been fully reformed."[21] She adopted similar logic in other cases where she granted compassionate release for individuals with heart abnormalities and post-traumatic stress and other medical conditions related to military service.[22]

Even when she denied a motion for compassionate release, she did so carefully and with a keen appreciation for the human impact it would have. For example, early in the coronavirus pandemic (April 2020), she denied an emergency motion for release by an individual awaiting trial. While "fully acknowledg[ing] the unprecedented magnitude of the COVID-19 pandemic and the extremely serious health risks that it presents for all of us, including, and perhaps especially, those individuals who are unfortunately presently detained in federal custody," Judge Jackson concluded that "as the law currently stands, this Court is called upon to evaluate the release motion of a healthy and relatively young detainee who is in D.C. Jail mandatorily because he has pled guilty to serious and dangerous criminal

[16] *See generally*, *U.S. Sentencing Commission, The Crack Sentencing Disparity and the Road to 1:1*, https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2009/016b_Road_to_1_to_1.pdf.
[17] Brian Mann, *Crack Cocaine Case Review May Free Inmates*, NPR (Nov. 1, 2011), https://www.npr.org/2011/11/01/141904202/inmates-may-be-freed-by-crack-cocaine-case-review.
[18] Testimony of Marc Mauer before United States Sentencing Commission Regarding Proposed Amendments to the Federal Sentencing Guidelines for Drug Offenses at 5 (March 17, 2011), https://www.sentencingproject.org/wp-content/uploads/2016/01/USSC-Testimony-Mar-2011.pdf.
[19] United States Sentencing Commission, Public Meeting (June 30, 2011). notice of meeting, minutes, and transcript available at https://www.ussc.gov/policymaking/meetings-hearings/june-30-2011 at 17, video available at http://www.c-spanvideo.org/program/300289-1.
[20] *United States v. Green*, 516 F.Supp.3d 1, 28 (D.D.C 2021).
[21] *Id.*
[22] *See, e.g.*, *United States v. Dunlap*, 485 F. Supp. 3d 129 (D.D.C. 2020); *United States v. Johnson*, 464 F. Supp. 3d 22 (D.D.C. 2020).

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conduct.[23] Judge Jackson assumed that COVID-19 constituted an "exceptional reason[]" release, but noted the defendant still had to meet other conditions of release – and had the Court had already determined he posed a danger to the community (and the evidence had not changed).[24]

In *Pierce v. District of Columbia*,[25] Judge Jackson decided a noteworthy case involving individuals in prison and their rights under the Americans with Disabilities Act and Rehabilitation Act. There, the plaintiff was a profoundly deaf individual who communicated exclusively through American Sign Language who was incarcerated for several weeks in a D.C. prison. Prison staff were aware that the individual was deaf but ignored repeated requests for an interpreter and never assessed his need for accommodation during the entirety of his prison term. This left him "unable to communicate effectively with prison officials, prison doctors, his counselor, his teacher, or his fellow inmates" and denied him "an effective means of receiving or imparting information at various critical points during his period of incarceration, including medical appointments, rehabilitative classes, and meetings with prison officials." Judge Jackson noted that it was undisputed that prison employees "did *nothing*"[26] to help the plaintiff, and "[i]nstead[] figuratively shrugged and effectively sat on their hands with respect to this plainly hearing-disabled person in their custody, presumably content to rely on their own uninformed beliefs about how best to handle him and certainly failing to engage in any meaningful assessment of his needs." She found this constituted intentional discrimination on the basis of disability, in violation of the Americans with Disabilities Act and Rehabilitation Act, and granted the plaintiff summary judgment and compensatory damages.

Judge Jackson has also adjudicated several qualified immunity claims, an issue of intense interest to the NAACP as we push for accountability by law enforcement for racially-motivated violence and for excessive force against the Black community. Judge Jackson's decisions in this area are notably mixed and should form the basis for further questioning during her confirmation hearing.

In *Robinson v. Farley*, Judge Jackson denied qualified immunity for police officers who used excessive force against a man with cerebral palsy and intellectual disabilities for no apparent reason both at a bus stop and after following the man into his grandmother's home. The grandmother reiterated that the man was disabled. Nonetheless, officers "from at least 29 police vehicles" charged into the home, weapons drawn, and kicked and hit him as he cowered in the bathroom. The man was hospitalized but never charged with a crime. Judge Jackson denied qualified immunity because the officers' claim was "utterly undeveloped" and not specifically – let alone convincingly – asserted.[27]

In other cases, however, Judge Jackson has conferred qualified immunity to law enforcement, suggesting a limited view of evolving legal standards which promote accountability. In *Page v. Mancuso*, she granted qualified immunity in a case involving an officer who arrested an individual for purposely striking another man with his car, because she found the officer "conducted an appropriately thorough investigation, and the facts as she knew them would have led a reasonable officer to conclude that there was probable cause to arrest [the defendant]."[28] In *Kyle v. Bedlion*, Judge Jackson also granted qualified immunity when a woman tried to intervene in an argument between her boyfriend and police at a house party. In a subsequent altercation, police shoved the woman, who then fell into a barbeque grill and burned her arm. Although the woman did not touch the police officer, Judge Jackson determined that "shoving [her] once to effect [the boyfriend's] arrest" did not violate clearly established law.[29] We anticipate that the Senate Judiciary Community will solicit her views on these and other matters related to qualified immunity.

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[23] *United States v. Wiggins*, 2020 WL 1868891 at *8 (D.D.C 2020).
[24] *Id.* at *6-7.
[25] *Pierce v. D.C.*, 128 F. Supp. 3d 250, 253–55 (D.D.C. 2015).
[26] *Id.* at 254 (emphasis in original).
[27] *Robinson v. Farley*, 264 F.Supp.3d 154, 162-63 (D.D.C. 2017).
[28] *Page v. Mancuso*, 999 F.Supp.2d 269, 281 (D.D.C. 2013).
[29] *Kyle v. Bedlion*, 177 F.Supp.3d 380, 395 (D.D.C. 2016).

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B. Labor Law

Each term, the Supreme Court handles a variety of cases about labor law that impact the rights of unions, union members, and the wages and workplace conditions of millions of Americans. This is of critical importance to Black workers who are remain more likely to be unionized,[30] and for union membership, which has helped close racial wealth gaps.[31]

Significantly, the very first opinion authored by Judge Jackson on the D.C. Circuit was a ruling vindicating the rights of unions. In *AFL-CIO v. Federal Labor Relations Authority*,[32] she ruled that a federal agency overseeing labor-management relations, which was dominated by Trump appointees, had unlawfully narrowed policy about when management had a "duty to bargain" with unions, calling it "unreasoned and unreasonable." The dispute involved the Federal Labor Relations Authority (FLRA), which for approximately thirty-five years had taken the position that federal law requires collective bargaining over any workplace changes that have more than a de minimis effect on working conditions. But in September 2020, the FLRA issued a short policy statement (without soliciting public comment), changing the longstanding threshold to require collective bargaining only when there was a "substantial impact on a condition of employment." The American Federation of Government Employees, AFL-CIO, and other unions challenged the new policy in court. Ruling for a unanimous, three-judge panel, Judge Jackson vacated the FLRA's policy on the grounds that its decision was not sufficiently reasoned and therefore was "arbitrary and capricious" under the Administrative Procedure Act. Judge Jackson carefully analyzed the FLRA's "cursory" policy statement (which had attempted to justify the policy change) and found it was inconsistent, contradictory with cited authority, misleading, and insufficiently explained.

As a district court judge, Judge Jackson issued another important labor ruling, again reversing the Trump Administration's efforts to hinder collective bargaining. In *American Federation of Government Employees v. Trump*,[33] Judge Jackson addressed three executive orders that President Trump had issued, which attempted to clamp down on and regulate the collective bargaining process (on behalf of federal employees in public sector unions). The American Federation of Government Employees and sixteen other unions challenged the orders and argued that they conflicted with the Federal Service Labor-Management Relations Statute and infringed upon the constitutional rights of federal employees. Judge Jackson held that the Trump Administration's orders were contrary to law in several respects: They violated the First Amendment and the right to freedom of association (in attempting to limit the union activities of federal employees). They conflicted with Congress' intent behind the Federal Service Labor-Management Relations Statute in "many" respects. Certain parts of the orders would "dramatically curtail the scope of [employees'] bargaining power because agencies and union will no longer negotiate over a host of issues." Other provisions of the orders would impede the prospect of good faith negotiations and effectively "eviscerate[] the statutory right of employees to have an opportunity to discuss certain matters." In summary, Judge Jackson declared the bulk of the Trump Administration's orders to be invalid and ordered the President's staff not to implement or give effect to them. In 2019, the D.C. Circuit, reversed and vacated on the more limited, jurisdictional grounds.[34]

[30] Bureau of Labor and Statistics, *Union Members 2021* (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf.
[31] Aurelia Glass et al., *Unions Help Increase Wealth for All and Close Racial Wealth Gaps*, Center for American Progress (Sept. 6, 2021), https://www.americanprogress.org/article/unions-help-increase-wealth-close-racial-wealth-gaps/.
[32] *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 25 F.4th 1 (D.C. Cir. 2022).
[33] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 378 (D.D.C. 2018*), rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).
[34] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 752 (D.C. Cir. 2019).

C. Employment Discrimination Law

In almost six decades since the passage of Title VII of the Civil Rights Act of 1964, the Supreme Court has played a pivotal role in defining the scope of equal opportunity in employment, which can lift families out of poverty and help close the racial wealth gap. In a seminal ruling early in the Act's history, *Griggs v. Duke Power Co.*,[35] the Court interpreted Title VII to ban not only intentional discrimination but also practices that had a discriminatory impact on workers of color. That ruling—which has since been extended to almost every other area of civil rights—is considered only second to *Brown v. Board of Education* in its significance and impact on civil rights jurisprudence. At the same time, the Supreme Court, on far too many occasions, has issued unduly narrow interpretations of the Title VII, such as in *Ledbetter v. Goodyear Tire & Rubber Co.*,[36] precipitating action by Congress to overturn the decision. Given that employment discrimination cases are regularly on the Court's docket, the Senate's review of Judge Jackson's record in this area is extremely worthwhile and a topic for close examination.

During her eight-year tenure on the U.S. District Court for the District of Columbia, Judge Jackson has ruled on dozens of employment discrimination cases, at all stages of litigation. Given the location and jurisdiction of the court, many of these cases involving claims by federal employees against government agencies. Her record in this civil rights area is decidedly mixed. She has hesitated to grant motions to dismiss claims in recognition of the importance of discovery in proving discrimination claims. Yet, on occasion, she has adopted overly restrictive interpretations of procedural rules and legal standards that have foreclosed the ability of victims of discrimination to proceed to trial.

In some notable instances, she has denied motions to dismiss and permitted the plaintiff to pursue discovery to prove their claims. For example, in *Barber v. D.C. Government*,[37] a Black administrative law judge alleged violations of Title VII and the District of Columbia Human Rights Act based on her failure to receive promotions, retaliation for complaining about race discrimination in the assignment of complex cases, and ultimately her termination after eleven years. Judge Jackson ruled that most of the claims should move forward, noting that it was the obligation of the court to "construe the complaint liberally at the motion to dismiss stage."[38] In *Alma v. Bowser*,[39] Judge Jackson similarly denied the government's motion to dismiss the plaintiff's claim of retaliation after successfully bringing a sex discrimination case against his department.

In *Willis* v. *Gray,*[40] Judge Jackson addressed a long-running discrimination lawsuit on behalf of a former biology teacher in the D.C. Public School system under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act. The teacher, who was African American and 51 years old (with twenty years of teaching experience), was notified that his position would be eliminated as part of a district-wide "reduction in force" (RIF). Judge Jackson noted that the RIF was "quite contentious" because the D.C. Public School system had hired over 900 teachers who were under the age of 40 and new to the profession. At the crux of the case was whether the RIF was a pretext for firing this particular teacher on the basis of age and race. While noting that teacher's complaint was not a "model of clarity" and certain claims were precluded from litigation, Judge Jackson nevertheless "conclude[d] that [the teacher's] claim that [his principal] unlawfully decided to include him in the RIF, in particular, because of age-based and race-based discrimination can proceed."[41]

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[35] 401 U.S. 424 (1971).
[36] 550 U.S. 618 (2007).
[37] 394 F. Supp. 49 (D.D.C. 2019).
[38] *Id.* at 158.
[39] 159 F. Supp. 3d 1 (D.D.C. 2016).
[40] *Willis v. Gray*, No. 14-CV-1746 (KBJ), 2020 WL 805659 (D.D.C. Feb. 18, 2020) (unpublished).
[41] *Id.* at *9.

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Importantly, Judge Jackson has acknowledged that discovery is particularly necessary in employment cases where plaintiffs must prove claims under the burden-shifting paradigm of anti-discrimination law. In *Ross v. United States Capitol Police*,[42] she noted that a police officer who alleged he was forced to retire due to his race and in retaliation for participating in a class action lawsuit by Black employees "must be allowed to proceed to discovery." She noted: "[T]his Court considers it especially problematic to permit acceleration to summary judgment at the pre-discovery stage in *employment discrimination cases*, because plaintiffs with such claims ordinarily must marshal the kinds of evidence that one usually can only gather during the discovery phase in order to carry that their burden of establishing that the legitimate reasons the defendant has proffered are, in fact, pretextual, and that the real reason for the adverse employment action is a prohibited one."[43]

In other instances, however, Judge Jackson has been quick to grant summary judgment in cases more suitable for resolution by a jury as factfinder. In *Snowden v. Zinkle*,[44] Judge Jackson granted summary judgment although the plaintiff had introduced evidence of multiple inconsistencies regarding his employer's reasons for demotion and termination. In *Sledge v. District of Columbia*,[45] Judge Jackson granted summary judgment against a Black police officer on his race discrimination, retaliation, and hostile environment claims. She held that the plaintiff's allegations that this supervisor had humiliated him during two group meetings was not sufficiently severe and pervasive enough to constitute a hostile environment and because the plaintiff failed to offer evidence that "screaming was objectively humiliating."[46] In *Johnson v. Perez*,[47] Judge Jackson concluded that the allegedly unlawful conduct did not rise to the level of a hostile work environment and that, although a triable issue existed regarding whether the stated reason for termination was pretextual, the claim did not support race discrimination. She also characterized the Black plaintiff's testimony as "self-serving." While the D.C. Circuit affirmed her decision, it clarified that "a successful showing of pretext, without more" can be sufficient to support an inference of discrimination. The court also noted that "there is no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion.…To the extent the testimony of a witness who is also a party may be impaired by party self-interest, it is ordinarily the role of the jury—not the court on summary judgment—to discount it accordingly."[48]

Judge Jackson has issued some rulings adverse to plaintiffs that reflect an overly restrictive interpretation of procedural requirements, which can thwart full and effective enforcement of fair employment laws. In *Crawford v. Duke*,[49] the D.C. Circuit unanimously reversed Judge Jackson's dismissal of a race discrimination case against the Department of Homeland Security. The case centered on whether the plaintiff had satisfied the requirements under Title VII regarding agency procedures and deadlines before filing suit in federal court – which is known as exhausting one's administrative remedies. The specific issue was whether documents attached to an official complaint form are incorporated as part of the complaint. The EEO complaint form stated that employees "may . . . attach extra sheets" to identify and explicate the claims asserted in "[d]escrib[ing] the action taken against [them] that [they] believe was discriminatory[.]" Accordingly, the employee attached several documents to his complaint, including a three-page summary detailing other discriminatory incidents, a performance review, and other files. But Judge Jackson granted summary judgment in favor of the Department on the grounds that the employee had failed to exhaust his administrative remedies because he "did not specifically reference" the attached documents. Judge Jackson concluded "information revealed only in exhibits attached to an EEO complaint" is not considered "incorporated into the final complaint" for purposes of the exhaustion requirement.

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[42] 195 F. Supp. 3d 180 (D.D.C. 2016).
[43] *Id.* at 193-194 (emphasis in original).
[44] 506 F. Supp. 3d 18 (D.D.C. 2020).
[45] 63 F. Supp. 3d 1 (D.D.C. 2016).
[46] *Id.* at 25.
[47] 66 F. Supp. 3d 30 (D.D.C. 2014).
[48] *Johnson v. Perez*, 823 F.3d 701, 710 (D.C. Cir. 2016).
[49] *Crawford v. Duke*, 867 F. 3d 103 (D.C. Cir. 2017).

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The D.C. Circuit unanimously reversed, indicating that Judge Jackson's "starting premise – that information contained in attachments to a formal EEO complaint cannot support exhaustion – was incorrect."[50] The Court stated that "[a]ttachments to a formal EEO complaint are an integral part of the complaint and can independently identify claims for resolution regardless of whether the attachment is also referenced in the body of the complaint itself." The Court noted that the circuit's case law and that of other circuits "have treated attachments to an EEOC complaint as part of the complaint and a basis for articulating claims.[51]

In *Sourgoutsis v. United States Capitol Police*,[52] Judge Jackson adopted an unduly narrow construction of Title VII's enforcement remedies to deny an award of attorney's fees to counsel for a victim of sex discrimination. The fee shifting statute applicable to civil rights claims allows victims of discrimination to secure counsel and vindicate their rights. This case involved a former police officer who sued the U.S. Capital Police (USCP) alleging discrimination and retaliation in violation of Title VII. After trial, the jury determined that sex was a motivating factor in USCP's decision to fire her, but that USCP would have fired her anyway (in light of other disciplinary infractions). This is known as a "same-action" or "mixed motive" case. Under Title VII, a court "may" award attorney's fees and cost in this type of situation where the plaintiff establishes an unlawful motivating factor—meaning that intentional sex discrimination was proven and included in the decision-making process—but that the defendant proved it would have taken the same action in the absence of the impermissible motive. The plaintiff's attorneys moved for USCP to cover attorney's fees and costs.

Judge Jackson denied the motion. Noting that the D.C. Circuit had not yet weighed in on this issue, she evaluated what other circuits had done and chose to adopt a multi-factor approach that differentiates between cases that merit a fee award and those that do not, which was first adopted by the Fourth Circuit in a 1996 decision, *Sheppard v. Riverview Nursing Center, Inc.*,[53] and now followed by several circuits. Judge Jackson rejected a more expansive approach by the Tenth Circuit in *Gudenkauf v. Stauffer Communications, Inc.*,[54] which held there was a presumption in favor of a fee award because it was consistent with Title VII's remedial purpose and often the only redress available, given that other remedies such as damages, backpay and reinstatement are foreclosed in same-action cases.

Finally, Judge Jackson's narrow interpretation of procedural rules has created barriers for employees seeking to vindicate their rights as a class, as evidenced in her two opinions in *Ross v. Lockheed Martin Corp.* This case was filed on behalf of over 5,000 Black salaried employees who alleged that Lockheed applied a companywide performance evaluation system without appropriate safeguards against bias which resulted in Black workers being systemically disadvantaged in compensation and promotional opportunities. Early in the litigation, the parties extensively negotiated a comprehensive settlement in which Lockheed agreed to make fundamental changes in its performance evaluation and promotion systems and to pay $22.8 million.

Judge Jackson refused to approve the proposed class settlement for two principal reasons.[55] First, she narrowly interpreted the Supreme Court's problematic ruling in *Wal-Mart Stores, Inc. v. Dukes*,[56] which significantly restricted the circumstances for certifying a class action. Judge Jackson determined that Lockheed's performance evaluation system did not necessarily harm "all class members in the same way," and therefore failed the

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[50] 867 F.3d at 107.
[51] *Id.* at 107 (emphasis added) (collecting citations from to two controlling D.C. Circuit decisions as well as decisions from the 10th, 4th, 6th, and 1st Circuits).
[52] *Sourgoutsis v. United States Capitol Police*, 2021 WL 3053388 (D.C.C. July 20, 2021).
[53] *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Circ. 1996).
[54] *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1085 (10th Cir. 1998).
[55] 267 F. Supp. 174 (D.D.C. 2017).
[56] 564 U.S. 338 (2011).

"commonality" test for class actions. She applied the *Wal-Mart* ruling in an overly stringent manner although other courts have taken a more pragmatic approach suitable to litigating racial discrimination claims, holding that if the same criteria or processes are applied to employees, then a performance system may be challenged. Second, Judge Jackson determined that the proposed settlement included a broad release of other potential claims of racial discrimination, but she failed to accurately describe the release and did not acknowledge plaintiffs' argument that a discriminatory evaluation system necessarily infected other employment decisions. Although she identified problems with the settlement, she declined to inform the parties of the manner in which to modify the settlement in order to obtain court approval, as federal judges often do.

After Judge Jackson rejected the settlement, the Black workers filed an amended complaint in order to litigate their class claims of discrimination. They sought discovery—documents, data and testimony—that would further show how Lockheed's discriminatory performance evaluation system limited promotional and other employment opportunities. But Judge Jackson denied all class discovery by ruling that there was no "plausible" way that the employees could meet the class action standard since they could not establish that they had suffered a common injury or that any such common injury could be redressed through a single remedy.[57] Thus, the plaintiff class was denied any opportunity to prove their claims.

D. Discrimination in Government Contracting

While serving on the district court, Judge Jackson addressed an important question about the lawfulness of programs designed to provide federal contracting opportunities for socially and economically disadvantaged businesses. In *Rothe Development v. Department of Defense*,[58] Judge Jackson considered a facial constitutional challenge to a Small Business Act program that benefits "socially and economically disadvantaged small business concerns." Congress created the Section 8(a) program in 1978 to extend government contracting opportunities to small business owners discriminated against or excluded because of their experience of racial or ethnic prejudice.

A company called Rothe Development, which was not eligible to participate in the program, claimed that the program was a racial classification in violation of the Equal Protection Clause of the U.S. Constitution. The relevant federal regulations define "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." It also creates a "rebuttable presumption" that members of particular groups, for example Black Americans, Hispanic Americans, are Native Americans, are "socially disadvantaged."

Judge Jackson upheld the program as constitutional, applying the highest level of constitutional analysis, known as "strict scrutiny." She explained that the "government ha[d] articulated an established compelling interest for the program—namely, remedying 'race-based discrimination and its effects," and had convincing evidence that "furthering this interest requires race-based remedial action—specifically, evidence regarding discrimination in government contracting...." Judge Jackson ruled that the 8(a) program was narrowly tailored along "six dimensions" and analyzed some of the Supreme Court's precedents about affirmative action, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003), in rejecting or correcting the plaintiff's articulation of the constitutional law.

The D.C. Circuit affirmed in a 2-1 decision because it found that the program was not a racial classification and thus only had to satisfy the lowest level of constitutional scrutiny, known as rational basis review. While the D.C. Circuit noted that the implementing regulation "does contain a racial classification in the form of a presumption [for certain group]," the statute itself did not.[59] Rather the statute "speaks of individual victims of discrimination.

[57] No. 16-cv-2508, 2020 WL 4192566 (July 21, 2020).
[58] *Rothe Dev., Inc. v. Dep 't of Def*, 107 F. Supp. 3d 183 (D.D.C. 2015), *aff'd sub nom. Rothe Dev., Inc. v. US. Dep't of Def*, 836 F.3d 57 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (2017).
[59] 836 F.3d at 62.

On its face, [the statute] envisions an individual-based approach that focuses on experience rather than on a group characteristic…. [T]his is not a provision in which 'the race, not the person dictates the category.'"[60] This analysis was based partly on the limited nature of the Rothe Corporation's original complaint and certain concessions that their lawyer made at oral argument. Therefore, the D.C. Circuit concluded, "we apply rational-basis review, which the statute readily survives."[61] Rothe Corporation appealed to the Supreme Court, which denied the petition.

E. Reproductive Rights

The Supreme Court is pivotal to the rights of women and their access to reproductive health care. This term, the Court will decide a critical case about the future of those rights. In *Dobbs v. Jackson Women's Health Organization*, the Court is considering the most direct challenge to *Roe v. Wade* in decades. The State of Mississippi has asked the Court to uphold a state law banning abortion after 15 weeks and to overturn *Roe* and defy 50 years of precedent. Such a ruling would have devastating consequences, particularly on women of color who would be disproportionately denied access to safe and affordable abortion services.[62] Although a new justice would not participate in the decision (which is already pending), this Court's willingness to review this long-settled constitutional issue makes it imperative that a new justice possess a deep respect for precedent as well as the history of women's struggle to make their own reproductive decisions.

As a lawyer, Judge Jackson participated in at least one matter involving an element of reproductive rights. She co-authored an amicus brief on behalf of the Women's Bar Association and a number of other signatories in a 2001 case in the U.S. Court of Appeals for the First Circuit about the regulation of "buffer zones" around reproductive health care facilities.[63]

As a district court judge, Judge Jackson had a limited record on reproductive rights. She considered three cases involving meaningful access to contraception. The first two involved challenges in 2018 to the Trump Administration's decisions to terminate pregnancy prevention funding. In *Policy and Research, LLC v. U.S. Department of Health and Human Services*,[64] Judge Jackson held that the Department of Health and Human Services (HHS) unlawfully terminated federal Teen Pregnancy Prevention Program (TPPP) grant funding to several centers and public health campaigns. The Administration tried to claim its decision was unreviewable by any federal court because it had withheld funding (under a vaguely defined grant policy), not "terminated" the grant. Judge Jackson rejected that argument and granted summary judgment, explaining that "[b]ecause HHS terminated plaintiffs' grant funding within the meaning of the HHS regulations without any explanation and in contravention of its own regulations, HHS's action easily qualifies as an arbitrary and capricious act under the [Administrative Procedure Act]."[65] She wrote: "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."[66]

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[60] *Id.* at 64.
[61] *Id.* at 63.
[62] Brief for Amici The Lawyers' Committee for Civil Rights Under Law, The Leadership Conference for Civil and Human Rights and 16 Civil Rights Organizations in Support of Respondents, *Dobbs v. Whole Women's Health et al.* (No. 19-139) https://www.lawyerscommittee.org/wp-content/uploads/2021/09/DobbsvJWH-Amicus-FINAL.pdf.
[63] Brief in Support of Defendants-Appellants by Amici Curiae Women's Bar Association of Massachusetts et al., *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001).
[64] 313 F. Supp. 3d 62 (D.D.C. 2018).
[65] *Id.* at 68.
[66] *Id.* at 67.

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In *Healthy Futures of Texas v U.S. Department of Health and Human Services*,[67] she ruled for another set of grantees of the Teen Pregnancy Prevention Program who filed a class action lawsuit after HHS shortened the duration of their grants. She rejected the government's arguments that the lawsuit had been unreasonably delayed, ruled that the legal claims were "indistinguishable" from *Policy and Research* case (above),[68] and concluded that HHS's action were arbitrary and capricious under the Administrative Procedure Act.[69] Notably, Judge Jackson later certified the matter to proceed as a class action.[70]

In *Barron Industries v. Burwell*, Judge Jackson applied the Supreme Court's then-recent ruling in *Burwell v. Hobby Lobby Stores, Inc.* in addressing a similar challenge to the contraceptive coverage requirement in the Affordable Care Act. [71] In a short (two-page) ruling, Judge Jackson granted an injuncting stopping the federal government from applying any provisions of the contraceptive coverage requirement that "that require plaintiff Barron Industries, Inc. to provide its employees with health coverage for contraceptive methods, sterilization procedures, and related patient education and counseling to which plaintiffs object on religious grounds."[72]

F. Separation of Powers

Sitting on a federal court in Washington D.C. provided Judge Jackson the opportunity to rule on at least two major cases involving the separation of powers.

First, *Committee on the Judiciary v. McGahn*[73] was a high-profile dispute between the House of Representatives and the Trump Administration, where Judge Jackson ruled that former counsel Donald McGahn must comply with a subpoena in connection with the House's impeachment investigation. As part of a Congressional investigation into Russia's interference in the 2016 election and. President Trump's potential obstruction of justice, the House Judiciary Committee issued a subpoena to White House Counsel, Donald F. McGahn. President Trump instructed McGahn to decline to appear and litigation ensued. The Department of Justice (representing McGahn) argued that senior aides to the President are absolutely immune from being compelled to testify before Congress (when the President orders them not to) and that the District Court did not have jurisdiction to hear a dispute between Congress and the Executive in the first place (due to separation of powers concerns).

Judge Jackson rejected the Trump Administration's arguments. First, she held that the Administration's theory of "unreviewable absolute testimonial immunity" and "unassailable Executive branch authority" was "baseless." Invoking constitutional history and the Federalist Papers, Judge Jackson why Congress has a "constitutionally vested responsibility to conduct investigations of suspected abuses of power within the government." Finally, she held that the court had jurisdiction because "it is 'emphatically' the role of the Judiciary to say what the law is…." Therefore, McGahn was not entitled to absolute immunity. In one particularly powerful passage, Judge Jackson

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[67] 315 F. Supp. 3d 339 (D.D.C. 2018).
[68] *Id.* at 341 (D.D.C. 2018).
[69] *Id.* at 348.
[70] *Healthy Futures of Tex. v. Dep 't of Health & Hum. Servs.*, 326 F.R.D. 1 (D.D.C. 2018).
[71] *Barron Industries Inc., et al. v. Burwell et al.,* 1:13-cv-01330-KBJ, Injunction and Judgment (D.D.C., Oct. 27, 2014).
[72] *Id.* at 1.
[73] *Comm. on Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded sub nom. Comm. on Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted, opinion vacated sub nom. United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), *and on reh'g en banc sub nom. Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), *and aff'd in part, remanded in part sub nom. Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), *and rev'd and remanded sub nom. Comm. on Judiciary of United States House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), *reh'g en banc granted, judgment vacated* (Oct. 15, 2020).

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stressed that "[t]he primary takeaway from the past 250 years of recorded American history is that Presidents are not kings…. Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States."[74] The case went up on appeal, with the D.C. Circuit affirming *en banc*, and ultimately reached a settlement whereby McGahn testified before Congress.

Second, in *Trump v. Thompson*, joined a unanimous opinion of the D.C. Circuit, rejecting former President Trump's effort to withhold key documents related to the January 6th attack on the U.S. Capital (by claiming executive privilege).[75] While acknowledging that executive privilege is critical to the Presidency (but qualified in various respects), the court held that "President [Biden] and the Legislative Branch have shown a national interest in and pressing need for the prompt disclosure of these documents."[76] By contrast, "[t]o allow the privilege of a no-longer-sitting President to prevail over Congress's need to investigate a violent attack on its home and its constitutional operations would 'gravely impair the basic function of the' legislature."[77] The Supreme Court denied Trump's application to stay that decision on an 8-1 vote.

G. Access to Transportation

Federal laws guard against discrimination in places of public accommodation, including full and equal access to public transportation services. These critical legal protections impact how millions of Americans commute every day and participate equally in economic life.

Judge Jackson has one particularly bold and noteworthy decision permitting people with disabilities to sue for discrimination in transportation services. In *Equal Rights Center v. Uber*, Judge Jackson applied the Americans with Disabilities Act (ADA) and D.C. Human Rights Act (DCHRA) to the use of ride-sharing services.[78] Specifically, the Equal Rights Center claimed that Uber's excluded users in wheelchairs by offering them slower, more expensive, and less reliable services than other users. Uber sought to dismiss the lawsuit altogether for a number of reasons, but Judge Jackson held that the ADA and DCHRA plausibly applied to transportation services like Uber. Moreover, she rejected Uber's "narrow" reading of the statutes and their argument that it was a mere "conduit" between passengers and users. Instead, she distinguished Uber from a "conduit" on a number of grounds:

> "By contrast, Uber's drivers are part of the Uber workforce, and they operate within a market that Uber itself created; Uber drivers do not exist independent of Uber's app, and this Court is hard-pressed to imagine how Uber drivers could continue to operate without the Uber app (or a competitor's service). Uber also controls the pricing of its drivers' services, and it allegedly asserts far more control over its drivers than any traditional brokering service has over the relevant service providers. Thus, based on the allegations in ERC's complaint, Uber is much more than a mere "conduit" between riders and drivers."[79]

As a result, Judge Jackson denied Uber's motion to dismiss.

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[74] *Id.* at 213.
[75] *Trump v. Thompson,* 20 F.4th 10 (D.C. Cir. 2021), *cert. denied,* No. 21-932, 2022 WL 516395 (U.S. Feb. 22, 2022).
[76] *Id.* at 48-49.
[77] *Id.* at 37.
[78] *Equal Rights Ctr. v. Uber Techs., Inc.*, 17-cv-1272, 2021 WL 981011 (D.D.C. March 15, 2021).
[79] *Id.* at 84-85.

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H. Immigration Law

The equitable interpretation and application of immigration law is a matter of importance for NAACP, including because about 10% of the Black population are immigrants.[80] While most immigration law is administered by immigration judges and federal officials, the Supreme Court periodically plays a critical role in deciding major dispute and circuit splits. For example, in *NAACP v. Trump*, consolidated with *Dept. of Homeland Security v. Regents of Univ. of Calif.*, the Court held that the Trump Administration's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious under the Administrative Procedure Act.[81] The decision allowed children of immigrants, many of whom are from the African Diaspora, to remain the country and continue to contribute to society.[82]

Judge Jackson has three notable decisions in the immigration realm. First, *Make the Road New York v. McAleenan*[83] involved the Trump Administration's new policy that would have immediately and drastically accelerated deportations for immigrants anywhere in the United States. Previously, the Department of Homeland Security had "authorized expedited removal with respect to undocumented non-citizens who arrived in the United States by land only if such persons were encountered near the border and had been in the country for no longer than 14 days."[84] Immigration groups sought to freeze the new policy and Judge Jackson agreed, granting a nationwide injunction and issuing a meticulous, 126-page opinion. Specifically, she found that the Trump Administration policy was "arbitrary and capricious" and ignored the impact on "settled undocumented noncitizens and their communities."[85] Additionally, she explained that "[t]here is no question in this Court's mind that an agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact real people and not take such real life circumstances into account."[86] The D.C. Circuit reversed and remanded on the grounds that aspects of the case were not subject to judicial review under the Administrative Procedure Act.[87]

Second, another decision which Judge Jackson calls one of her most significant, *Kiakombua v. Wolf*,[88] involved asylum seekers who have a credible fear of prosecution or torture in their country of origin. The Trump Administration created a new "Lesson Plan" for federal immigration officers that essentially directed them to make negative determinations based on discretionary factors and effectively increased the evidentiary burden on asylum seekers in order to pass a credible fear screening.[89] A group of asylum seekers challenged the "Lesson Plan" and Judge Jackson ruled in their favor. Specifically, Judge Jackson held that the "Lesson Plan" violated federal immigration law and regulations, conflated relevant legal standards, and was based on an unreasonable interpretation of the asylum process. As a result, she held that the "Lesson Plan" was so unlawful that it must be vacated in its entirety and that the plaintiffs were entitled to new determinations as to their "credible fear."[90]

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[80] Christine Tamir and Monica Anderson, *One-in-Ten Black People Living in the U.S. Are Immigrants*, Pew Research Center (Jan. 20, 2022), https://www.pewresearch.org/race-ethnicity/2022/01/20/one-in-ten-black-people-living-in-the-u-s-are-immigrants/.
[81] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).
[82] NAACP, *NAACP Applauds Supreme Court Victory in* NAACP v. Trump (June 18, 2020), https://naacp.org/articles/naacp-applauds-supreme-court-victory-naacp-v-trump.
[83] *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), *rev'd and remanded sub nom. Make The Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).
[84] *Id.* at 10.
[85] *Id.* at 11.
[86] *Id.* at 55.
[87] *Make The Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).
[88] *Kiakombua v. Wolf*, ---F. Supp. 3d---, 2020 WL 6392824 (D.D.C. Oct. 31, 2020).
[89] *Id.* at 37.
[90] *Id.* at 59.

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Third, in a case brought after *Kiakombua*, the Department of Homeland Security issued two memos related to credible fear that interviews, among other things, established that such interviews and proceedings take place in a facility run by U.S. Customs and Border Protection (CBP), rather than in facilities run by U.S. Immigration and Customs Enforcement (ICE) – as was previously the practice.[91] Judge Jackson noted that the Court was "cognizant of the hardships that certain noncitizens who arrive at the southern border seeking asylum face."[92] But she ruled in favor of the government, because "Congress has [] given considerable discretion to DHS to implement the expedited removal process,"[93] federal law was "silent" and "at most, ambiguous" on the topic, and DHS' policies were reasonable and entitled to deference."[94]

V. CONFIRMED BY SENATE THREE TIMES

Importantly, Judge Jackson has already been confirmed by the Senate three times with bipartisan support. The first two votes—for Commissioner on the Sentencing Commission and for the U.S. District Court for the District of Columbia—were voice votes, meaning there was no objection. On June 14, 2021, she was confirmed to the D.C. Circuit by a vote of 53 to 44, with three Republicans voting to confirm her, including Senator Lindsey Graham of South Carolina, Senator Susan Collins of Maine, and Senator Lisa Murkowski of Alaska.

Judge Jackson has sterling credentials and extraordinary qualifications to serve on the Supreme Court. The Senate should treat Judge Jackson with respect and dignity throughout the confirmation process, including during her confirmation hearing which begins Monday, March 21.

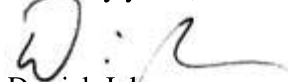
VI. CONCLUSION

Sixty-six years ago, President Lyndon Johnson appointed the first Black woman to the federal judiciary, Judge Constance Baker Motley. Just one year later, President Johnson appointed the first Black justice, Thurgood Marshall, to the Supreme Court. These appointments forever changed the face of our judiciary and the trajectory of the country.

Now, in 2022, President Biden has nominated Judge Ketanji Brown Jackson to the Supreme Court. When confirmed, she will be the first Black woman justice in the 232-year history of the Court. This appointment is truly centuries in the making. Judge Jackson is the ideal candidate for this moment and this Court. Her exceptional legal and judicial credentials, her deep expertise within the criminal legal system, and her steadfast commitment to fairness and equal justice will change the Court for the better and help restore its place as the guardian of civil rights and liberties. The NAACP strongly urges each and every senator to endorse her nomination and be recorded on the right side of history.

Thank you for considering the NAACP's strong support of the nomination of Judge Ketanji Brown Jackson.

Sincerely yours,



Derrick Johnson,
President and CEO

cc: Members of the Senate Judiciary Committee

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91 *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 9 (D.D.C. 2020).
92 *Id.* at 39.
93 *Id.* at 40.
94 *Id.* at 29.

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