The Civil Rights Record of Judge

KETANJI BROWN JACKSON

A REPORT BY THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for Black people in the areas of criminal justice, economic justice, education, and political participation for more than 80 years. To this end, LDF is committed both to ensuring that the federal judiciary reflects the diversity of this nation and to protecting the central role the courts play in the enforcement of civil rights laws and the Constitution's guarantee of equal protection. LDF therefore plays an active role in evaluating nominees to the U.S. Supreme Court and other courts across the nation.

Because the addition of an individual justice to the Supreme Court can change its balance and dynamic in both subtle and dramatic ways, each nomination is extraordinarily important for the future of our democracy. For this reason, LDF reviews the record of Supreme Court nominees to understand their views and positions on civil rights issues and matters of racial justice. LDF seeks to determine whether prospective members of the Court demonstrate a strong commitment to preserving and furthering civil rights and advancing the progress our nation has made toward fair and equal application of the law. The purpose of LDF's review is not primarily to endorse or oppose a Supreme Court nominee, and LDF does not take a position on every nominee. Instead, LDF shares its conclusions about a nominee's record in order to contribute to the public's full understanding of a nominee's civil rights record, to inform the Senate's constitutional obligation to provide "advice and consent" on such nominations and to ensure that the Supreme Court's role in vindicating the civil rights of those who are most marginalized is fully recognized in the confirmation process.

To prepare this report on the Supreme Court nomination of D.C. Circuit Judge Ketanji Brown Jackson, LDF reviewed Judge Jackson's judicial record, including her approximately 500 written opinions and orders, as well as her non-judicial writings, speeches, and papers, with a focus on the civil rights and constitutional issues that are of greatest relevance to the communities LDF serves. This process entailed analyzing Judge Jackson's written opinions from her time on the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit that bear on issues of employment discrimination and economic justice, criminal justice, and access to the courts, as well as her votes in relevant cases in which other judges authored the decision;[1] transcripts of public hearings and meetings from her time as a Commissioner on the United States Sentencing Commission; briefs she wrote or co-wrote as a public defender and while in private practice; law review articles and other writings she authored; and public speeches she gave in a professional capacity.

[1] Judge Jackson's decisions in these areas total nearly 200 opinions and orders.

Our review of Judge Jackson's record confirms that she is eminently qualified to serve as Associate Justice of the Supreme Court and leads us to conclude that she possesses the range of legal experience, demonstrated professional excellence, integrity, and commitment to justice and fundamental fairness required of the next justice. Notwithstanding the questions we raise below about Judge Jackson's approach to decisions in some cases, particularly those involving qualified immunity and employment discrimination, LDF supports Judge Jackson's nomination and confirmation without reservation.

Background

On February 25, 2022, President Joseph R. Biden nominated Judge Jackson to fill the Supreme Court vacancy that will arise when Justice Stephen Breyer retires from active judicial service as an Associate Justice at the start of the Court's summer recess during the 2021 Term.[2] Judge Jackson's nomination is historic. If confirmed, Judge Jackson will be the first Black woman to serve on the Supreme Court in its more-than-200-year history.[3] And she will be the first-ever former public defender to serve on the Court.

A. Biographical Information

Judge Jackson was born in Washington, D.C., in 1970 to Johnny Brown, a public school teacher who later became a school board attorney, and Ellery Brown, a school principal. She was raised in Miami, Florida, where she matriculated through public schools and attended Miami Palmetto Senior High School. While in high school, Judge Jackson participated in state and regional debate circuits and was a national oratory champion. As a high school senior, Judge Jackson expressed an interest in the law, memorializing in her high school yearbook her desire to "eventually have a judicial appointment."[4]

Judge Jackson matriculated through and graduated from Harvard College *magna cum laude* in 1992. After college, she worked briefly as a staff reporter and researcher at *Time Magazine* before enrolling in Harvard Law School, where she served as Supervising Editor of the *Harvard Law Review* and graduated *cum laude* in 1996.

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[2] *See* Justice Breyer's Letter to the President, Jan. 27, 2022, available at https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf.

[3] Of the 115 Supreme Court justices who have served on the Court since 1789, all but seven have been white men. Two have been Black men (Justices Thurgood Marshall and Clarence Thomas), four have been white women (Justices Sandra Day O'Connor, Ruth Bader Ginsburg, Elena Kagan, and Amy Coney Barrett), and one has been a Latina woman (Justice Sonia Sotomayor). *See* John Gramlich, *Black women account for a small fraction of the federal judges who have served to date*, Pew Research Center, Feb. 2, 2022, https://www.pewresearch.org/fact-tank/2022/02/02/black-women-account-for-a-small-fraction-of-the-federal-judges-who-have-served-to-date/.

[4] 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.

Following her graduation, Judge Jackson clerked for Judge Patti Saris (appointed by President Bill Clinton) on the U.S. District Court for the District of Massachusetts from 1996 to 1997 and for Judge Bruce Selya (appointed by President Ronald Reagan) on the U.S. Court of Appeals for the First Circuit from 1997 to 1998. Judge Jackson then entered private practice as an associate at the law firm of Miller, Cassidy, Larroca & Lewin LLP, where she practiced defense-side general commercial litigation.

Judge Jackson clerked for Justice Breyer on the U.S. Supreme Court during the 1999 Term. Following her Supreme Court clerkship, Judge Jackson returned to private practice, first as an associate at Goodwin Proctor LLP from 2000 to 2002, where she worked on trial-stage litigation matters, and then as an associate at the Feinberg Group LLP from 2002 to 2003, where she advised corporate clients and assisted in the resolution of mass tort claims.

Judge Jackson then served as Assistant Special Counsel to the U.S. Sentencing Commission, a federal agency created by the Sentencing Reform Act of 1984 to establish and maintain a system of sentencing guidelines for the federal courts,[5] from 2003 to 2005, where her work included drafting proposed amendments to the Sentencing Guidelines Manual and developing guideline sentencing proposals in anticipation of *United States v. Booker*,[6] a Supreme Court decision that rendered the United States Sentencing Guidelines advisory, not binding on sentencing courts.

Judge Jackson served as an Assistant Federal Public Defender from 2005 to 2007 in the appeals division of the Office of the Federal Public Defender for the District of Columbia. As an Appellate Public Defender, Judge Jackson represented indigent criminal appellants in the D.C. Circuit, and she has previously described her role as providing service to people in need and promoting the constitutional values of the Sixth Amendment's due process right and right to counsel.[7]

She returned to private practice at Morrison & Foerster LLP as Of Counsel from 2007 to 2010, where she worked on appeals in state and federal appellate courts. While at Morrison & Foerster, Judge Jackson worked with former Solicitor General Drew Days, III on Supreme Court amicus briefs concerning the constitutional rights of people apprehended and detained pursuant to sweeping assertions of unreviewable executive power by the administration of President George W. Bush following the September 11, 2001, attacks. For example, Judge Jackson submitted a brief in *Al-Marri v. Spagone*,[8] a case that concerned whether Article II of the Constitution or the Authorization for Use of Military Force of 2001, a post-September 11 statute that

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[5] Pub. L. No. 98-473, 98 Stat. 1987, 2017 (codified at 28 U.S.C. § 997 (2006)).
[6] 543 U.S. 220 (2005).
[7] Ketanji Brown Jackson, "Responses to Questions for the Record from Senator Ben Sasse to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit," Senate Judiciary Committee (2022) at 460-476, *available at* https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf
[8] No. 08-368.

permitted the President to use military force against Iraq, authorized the indefinite military detention of legal immigrants seized on domestic soil who were suspected of conspiring to carry out the attacks.[9] The brief argued that it does not.[10] She also submitted a brief on behalf of former federal judges in *Boumediene v. Bush*, a Supreme Court decision that held that the Suspension Clause of Article I, Section 9—which guarantees the right of habeas corpus except for in limited circumstances—applies to persons held on Guantanamo Bay and to persons designated as enemy combatants on that territory.[11] The brief focused on the unlawfulness of using Combatant Status Review Tribunal (CSRT) panels as the arbiter of a detainee's enemy combatant status, especially where the CSRT panels relied on statements extracted by torture or other coercion to uphold the detention of individuals by the United States as enemy combatants.[12]

Judge Jackson also served as counsel for the National Association of Criminal Defense Lawyers on an amicus brief in *Bloate v. United States*,[13] a Supreme Court decision concerning the proper interpretation of a provision of the Speedy Trial Act of 1974.[14] The Court held, consistent with NACDL's brief, that the exceptions to the statute's requirement for prompt criminal trials should not be expanded to permit the indefinite detention of persons accused of crimes. Judge Jackson also served as counsel for the National Association of Federal Defenders in *Arizona v. Gant*,[15] which held that police officers are permitted to search the passenger compartment of a vehicle incident to an arrest only if it is reasonable to believe that the arrestee might access the vehicle or that the vehicle contains evidence of the offense of arrest.[16] The Court's ruling was again consistent with the arguments made in the amicus brief.

In 2009, President Obama nominated Judge Jackson to serve as a Commissioner on the United States Sentencing Commission. She was confirmed by the Senate in 2010 and served as Vice Chair and Commissioner until 2014. During her tenure, Judge Jackson proposed and reviewed amendments to federal sentencing policies, including the U.S. Sentencing Guidelines. As part of that process, Judge Jackson demonstrated a consistent concern about the fundamental fairness of the proposed amendments and the evenhanded treatment of individuals convicted of a crime.

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[9] *See* Brief of the Cato Institute, The Constitution Project, and The Rutherford Institute, as Amici Curiae in Support of Reversal, *Al-Marri v. Spagone*, No. 08-368, 2009 WL 230960 (Jan. 28, 2009).
[10] *See* Brief of the Cato Institute, *Al-Marri*, 2009 WL 230960 at *6–40.
[11] 553 U.S. 723 (2008).
[12] Brief on Behalf of Former Federal Judges as Amici Curiae in Support of Petitioners, *Boumediene v. Bush* & *Al Odah v. United States*, Nos. 06-1195 & 06-1196, 2007 WL 2441585 (Aug. 24, 2007).
[13] 559 U.S. 196 (2010).
[14] *See* Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Bloate v. United States*, No. 08-728, 2009 WL 1864008 (June 25, 2009).
[15] 556 U.S. 332 (2009).
[16] *See* Brief of the National Association of Federal Defenders as Amicus Curiae in Support of Respondent, *Arizona v. Gant*, No, 07-542, 2008 WL 2958118 (July 25, 2008).

Judge Jackson's tenure as a Commissioner was marked by a commitment to reduce the harsh impact of the federal sentencing guidelines in a number of contexts. Judge Jackson endorsed Sentencing Guidelines amendments that would expand alternatives to incarceration for drug offenders,[17] reduce prison sentences in illegal reentry cases for people who have resided in the United States for a significant amount of time,[18] permit courts to lower a person's guideline range in healthcare fraud cases where the person had limited knowledge of the scheme,[19] and address and reduce sentencing disparities created after the Supreme Court's decision in *Booker* rendered the Sentencing Guidelines advisory. Following *Booker*, sentencing data collected and published by the Sentencing Commission has consistently shown that judges tend to sentence Black male offenders to longer sentences than similarly situated white male offenders.[20]

Judge Jackson also criticized the 100-to-1 crack/powder cocaine disparity, under which the possession of 100 grams of crack was treated as equivalent to the possession of 1 gram of powder cocaine, even though the two substances are pharmacologically the same. Because Black people are disproportionately prosecuted for crack cocaine possession, the 100-to-1 regime was a source of severe racial discrimination in sentencing.[21] Judge Jackson voted in favor of temporary,[22] and later permanent,[23] Sentencing Guidelines amendments that would eliminate aspects of the guidelines that perpetuated crack-powder cocaine sentencing disparities. In her remarks following the Commission's promulgation of the permanent amendment, Judge Jackson expressed gratitude "that the Commission is committed to continuing to move toward fair and proportionate guideline sentences in regard to drug

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[17] *See* United States Sentencing Commission, Public Hearing Transcript, Mar. 17, 2010, https://www.ussc.gov/sites/default/files/Hearing_Transcript_0.pdf (last visited Mar. 3, 2022).

[18] United States Sentencing Commission Public Meeting Minutes, Apr. 13, 2010, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100413/20100413_Mnutes.pdf (last visited Mar. 3, 2022).

[19] United States Sentencing Commission Public Meeting Minutes, Apr. 6, 2010, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110406/Meeting_Minutes.pdf (last visited Mar. 3, 2022).

[20] *See, e.g.*, United States Sentencing Commission, Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis, March 2010, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf.

[21] *See* United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 13, May 2007, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

[22] United States Sentencing Commission Public Meeting Minutes, Oct. 15, 2010, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20101015/20101015_Minutes.pdf (last visited Mar. 3, 2022).

[23] United States Sentencing Commission Public Meeting Minutes, Apr. 6, 2010, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110406/Meeting_Minutes.pdf (last visited Mar. 3, 2022).

offenses,"[24] and suggested additional ways the Commission could address sentencing disparities and unduly harsh sentences in drug cases.

Immediately following Congress's passage of the Fair Sentencing Act of 2010, which prospectively reduced—but did not eliminate—the 100-to-1 crack/powder disparity, Judge Jackson advocated for retroactive application of the Commission's guideline amendments to persons who were sentenced under the previous regime.[25] Judge Jackson contended that all persons sentenced for crack cocaine offenses under the draconian 100-to-1 crack/powder scheme should have an opportunity for resentencing and release from prison.[26] During a June 30, 2011, public hearing at which the Commission voted to retroactively apply the guidelines amendments, Judge Jackson expressed the importance of retroactive application as a step toward "fundamental fairness":

> For the past 25 years, the 100:1 crack/powder disparity has cast a long and persistent shadow. It has spawned clouds of controversy and an aura of unfairness that has shrouded nearly every federal crack cocaine sentence that was handed down pursuant to that law. In my view, now that Congress has taken steps to clear the air by making significant downward adjustments to the mandatory statutory penalties for crack cocaine offenses, there is no excuse for insisting that those who are serving excessive sentences under the long-disputed and now discredited prior guideline must carry on as though none of this has happened. I believe that the Commission has no choice but to make this right. Our failure to do so would harm not only those serving sentences pursuant to the prior guideline penalty, but all who believe in equal application of the laws and the fundamental fairness of our criminal justice system. The decision we make today, which comes more than 16 years after the Commission's first report to Congress on crack cocaine, reminds me in many respects of an oft-quoted statement from the late Dr. Martin Luther King, Jr. He said: "The arc of the moral universe is long, but it bends toward justice." Today the Commission completes the arc that began with its first recognition of the inherent unfairness of the 100:1 crack/powder disparity all those years ago. I say justice demands this result.[27]

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[24] United States Sentencing Commission Public Meeting Minutes, Apr. 6, 2010, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110406/Meeting_Minutes.pdf (last visited Mar. 3, 2022).

[25] *See* United States Sentencing Commission June 30, 2011, Public Hearing, Transcript https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf (last visited (Mar. 3, 2022).

[26] United States Sentencing Commission, Public Hearing, June 1, 2011, p. 43, https://www.ussc.gov/sites/default/files/Hearing_Transcript_1.pdf (last visited Mar. 3, 2022).

[27] United States Sentencing Commission, Public Meeting Transcript, June 30, 2011, pp. 16–17, https://www.ussc.gov/sites/default/files/Meeting_Transcript_0.pdf (last visited March 3, 2022).

In 2012, President Obama nominated Judge Jackson to serve on the U.S. District Court for the District of Columbia. The Senate confirmed her via voice vote (no opposition) on March 23, 2013. Judge Jackson served on the D.C. District Court for more than eight years before President Biden nominated her to serve on the U.S. Court of Appeals for the D.C. Circuit on March 30, 2021. On June 14, 2021, the United States Senate confirmed Judge Jackson to the D.C. Circuit in a bipartisan 53-44 vote. She received her judicial confirmation to the Court of appeals on June 17, 2021.

According to her Senate Judiciary Questionnaire, Judge Jackson has been active in several civic and professional associations and committees, including the Council for Court Excellence, the Edward Bennett Williams Inn of Court, the Supreme Court Fellows Commission, the American Law Institute, the ABA Section on Administrative Law and Regulatory Practice, and the ABA Criminal Justice Section. She serves on the Board of Overseers at Harvard University, is affiliated with the Harvard Black Alumni Society, and has spoken at Black Law Students Association convenings at law schools across the country, including at the University of Chicago, Stanford University, and Harvard University.

OVERVIEW OF JUDGE JACKSON'S CIVIL RIGHTS RECORD

Judge Jackson is eminently qualified to serve on the Supreme Court. A review of her judicial record confirms that she will fairly and impartially decide critical legal issues implicating all aspects of civil rights. To be sure, some of Judge Jackson's opinions regarding qualified immunity and employment discrimination have been in our judgment overly rigid, denying the opportunity to air potentially meritorious claims in a number of cases. But the body of her judicial decisions across a range of issues demonstrates Judge Jackson's commitment to equal justice under the law for all, including those who are most marginalized.

Below, we undertake an issue-by-issue analysis of Judge Jackson's record in the substantive areas at the core of LDF's work where Judge Jackson has an extensive judicial record or where her prior work provides insight, including access to justice, criminal justice, and employment discrimination.

- **Access to Justice:** During her tenure as a district court judge, Judge Jackson was measured both in her approach to judicial intervention and her interpretation of the scope of her authority to hear plaintiffs' claims. She often acknowledged the hardships that drove plaintiffs to seek relief in Court even when she thought she was required to dismiss their claims, and she resisted interpretations of procedural standards that would impose unfair burdens on plaintiffs seeking relief. Though Judge Jackson's record in this area has been subject to scrutiny, overall, her commitment to ensuring access to the courts is apparent throughout her judicial writings.
- **Administrative Law**: Judge Jackson's administrative law record demonstrates an inclination toward deference to administrative expertise that is tempered by close attention to whether agency decision-makers have followed proper

procedures and adhered to congressional intent. Her decisions reflect particularly close scrutiny of the role of judicial decision-making within our system of government and a willingness to limit administrative discretion when agencies act in an unreasoned manner or violate clear procedural rules.

- **Criminal Justice and Capital Punishment:** As demonstrated most clearly by her compassionate release decisions during the pandemic, Judge Jackson recognizes the humanity of incarcerated people. And as a former appellate public defender, Judge Jackson has spoken about the critical need for robust public defense systems to ensure just, fair, and reliable outcomes. That insight is unique among nominees to the Court and is likely to inform her approach to the many instances where poor people are deprived of the effective assistance of counsel. As a member of the U.S. Sentencing Commission, she demonstrated a commitment to uniformity and proportionality in sentencing, including supporting the reduction of unnecessarily harsh drug-related sentences and the retroactive reduction of the crack-cocaine sentencing disparity. Her writings have demonstrated an appropriate regard for the humanity of defendants, including by questioning the power dynamics of the plea-bargaining system and supporting avenues to justice for those with post-conviction evidence of innocence. On the other hand, a number of Judge Jackson's qualified immunity decisions suggest undue deference to law enforcement alleged to have violated individuals' constitutional rights.

- **Economic Discrimination and Workers' Rights:** On issues related to economic justice, Judge Jackson's record is consistent with her overall moderate judicial outlook. Significant rulings on collective bargaining and other workplace protections demonstrate an appreciation of the powerful role that the judiciary plays in safeguarding workers' rights. And to ensure that individuals fighting discrimination in the workplace may fairly present their claims, Judge Jackson has repeatedly cautioned against dismissing employment discrimination claims in the early stages, stressing the need for discovery and the importance of ensuring that *pro se* litigants have an opportunity to vindicate their rights. However, in some cases, Judge Jackson has imposed an artificially high bar for proving employment discrimination and created undue obstacles based on restrictive readings of procedural requirements and deferential treatment of government defendants.

- **Race-Conscious Policies and Affirmative Action**: Judge Jackson has not ruled on many cases involving race-conscious policies; however, when she has been presented with challenges to the constitutionality of race-conscious decision-making, she has recognized that the government has a compelling interest in remedying race-based discrimination in accordance with well-settled Supreme Court precedent. In her non-judicial writings and in previous statements, she has acknowledged the role of bias at various stages of the criminal justice process and her own identity as a Black woman lawyer

I. Access to Justice

A crucial but sometimes overlooked part of the Supreme Court's docket involves access to justice—that is, the initial question of whether a court will even hear a plaintiff's claim. This question—whether a plaintiff will have their day in Court—is profoundly important in the civil rights context and cuts across a wide range of statutes and issue areas. Courts are entrusted to provide equal justice under the law and to ensure that civil rights laws are enforced even against powerful defendants, including the government and large corporations. Without access to courts and judicial remedies, fundamental rights cannot be vindicated and are rendered meaningless. Indeed, the right to sue is itself fundamental, as the Supreme Court has held that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."[28]

Claimants can be denied access to the courts by a variety of means, including motions to dismiss and motions for summary judgment before cases go to a jury; procedural bars, such as the requirement to exhaust all claims in an administrative forum before proceeding to Court; restrictions on the use of class actions that prevent plaintiffs from challenging systemic civil rights violations; arbitration clauses that divert claims from courts into private, confidential proceedings; and challenges to a litigant's standing to bring suit. Many of these issues involve the application of subjective standards—whether a claim is "plausible," for example—and so the views and perspectives of the judges who decide them inevitably come into play.

It is no coincidence that many of the Supreme Court's most important cases in these areas involve the claims of civil rights plaintiffs.[29] These are also areas in which, through a series of closely divided cases, the Supreme Court has done substantial harm in the last decade, including limiting the ability to bring suits as class actions and sanctioning broad use of arbitration clauses.

In addressing a federal court's baseline ability to hear plaintiffs' claims, Judge Jackson's rulings, many of which involve interpretations of the above-mentioned cases, show a consistent thread of emphasis on judicial restraint, balanced with recurring awareness of the impacts of procedural barriers to access to federal courts.

A. Motions to Dismiss and Motions for Summary Judgment

Two common ways cases are resolved before a jury trial are motions to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) and motions for summary judgment under Rule 56.[30] Motions to dismiss challenge the sufficiency of allegations in the complaint to state a claim that would entitle the plaintiff to relief. Motions for

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[28] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896–97 (1984).

[29] *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Conley v. Gibson*, 355 U.S. 41 (1957); *Hansberry v. Lee*, 311 U.S. 32 (1940).

[30] Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 56.

summary judgment are filed after the parties conduct discovery and are granted when there are no remaining factual disputes for a jury to resolve and one party is entitled to judgment as a matter of law.

1. Motions to Dismiss

Federal Rule of Civil Procedure 8 requires plaintiffs to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[31] Defendants can move to dismiss when a complaint does not comply with Rule 8. In deciding motions to dismiss, Judge Jackson has taken neither a particularly expansive nor restrictive view of the pleading requirement under Rule 8. However, Judge Jackson has consistently demonstrated an awareness of the real impact of procedural barriers on litigants and has acknowledged the difficult experiences alleged by plaintiffs, even where she ultimately ruled against them.

For example, in *Miller v. D.C. Water & Sewer Authority*,[32] Judge Jackson dismissed the claims of Black community members whose homes were damaged by sewage leakage based primarily on a procedural deficiency-related the requirements of the environmental statutes they invoked. Judge Jackson's opinion included the alternative ruling that even absent the procedural deficiency in the plaintiffs' complaint, the complaint failed to plausibly allege race discrimination because "[t]he only allegation in the complaint that has anything whatsoever to do with the Plaintiffs' claim of discrimination on the basis of race is the mere fact that the Plaintiffs themselves are uniformly African American."[33] However, in underscoring that dismissal without prejudice was well justified, she acknowledged that the plaintiffs had "suffered tremendously,"[34] and noted that they could effectively regroup and pursue their claims according to the required procedures.[35]

In *Edwards v. United States*,[36] Judge Jackson dismissed a *pro se* plaintiff's complaint as procedurally barred under the Federal Employees' Compensation Act (FECA), a federal statute that requires the United States to pay for a federal employee's on-the-job injury. While Judge Jackson held that FECA unequivocally precluded judicial review of the claims at issue—and that such preclusion had legitimate justification[37]—she contextualized this ruling within both the requisite lenience due a *pro se* plaintiff at the motion to dismiss stage[38] and the recognition

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[31] Fed. R. Civ. P. 8(a)(2).
[32] No. 17-CV-0840, 2018 WL 4762261, at *1 (D.D.C. Oct. 2, 2018), *aff'd*, 790 F. App'x 218 (D.C. Cir. 2019).
[33] *Id.* at *14.
[34] *Id.* at *15.
[35] *Id.*
[36] No. 18-CV-2560, 2020 WL 2800605, at *7 (D.D.C. May 29, 2020).
[37] *Id.* at 2 ("[T]his limitation on the Court's authority is for good reason . . . [the statute] provides an administrative appeals process, of which [the plaintiff] has already availed herself.").
[38] *Id.* at *15–16.

that the plaintiff unquestionably had been injured by the defendant and "had suffered greatly."[39]

In *Brown v. Government of D.C.*,[40] the plaintiffs, each of whom had been arrested for panhandling offenses, challenged the District of Columbia's Panhandling Control Act for violating the First Amendment. After granting the plaintiffs multiple opportunities to amend their complaint over the course of more than three years, Judge Jackson found that the plaintiffs had plausibly alleged a First Amendment claim and denied the District's motion to dismiss the complaint, noting that by attempting to litigate the underlying merits of the plaintiffs' claims on a motion to dismiss, the District "ask[ed] too much too early in the process of this litigation."[41]

2. Motions for Summary Judgment

Judge Jackson has taken a moderate approach to summary judgment dismissals, as is evident from two cases implicating the issue of separation of powers. In *American Federation of Government Employees, AFL-CIO v. Trump*,[42] Judge Jackson ruled that her Court had jurisdiction to hear a union's challenges to the Trump administration's executive orders attempting to regulate collective bargaining for federal employees under the Federal Service Labor-Management Relations Statute. On the parties' cross-motions for summary judgment, Judge Jackson ruled that although the President has authority to issue executive orders that impact federal labor relations, there was "no dispute that the President does not have the constitutional authority to override Congress's policy choices."[43] Ultimately, Judge Jackson enjoined Executive agency officials from enforcing the challenged provisions of the President's executive orders. Her ruling was reversed on appeal, with the Court of Appeals finding that the district court lacked subject matter jurisdiction and that the unions were required to pursue administrative review followed by judicial review in the appellate Court.[44]

On the other hand, in addressing the parties' cross-motions for summary judgment in *Center for Biological Diversity v. McAleenan*,[45] Judge Jackson granted federal defendants' motion for summary judgment in a challenge to their waiver of environmental laws to speed the construction of a border wall. Judge Jackson reasoned that "Congress has unambiguously precluded all non-constitutional legal challenges to the exercise of the DHS Secretary's waiver authority" based on the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[46] Judge

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[39] *Id.* at *21, 23.
[40] 390 F. Supp. 3d 114 (D.D.C. 2019).
[41] *Id.* at 126, 128. *See also Millet v. Yellen*, No. 19-cv-1244 (KBJ), 2021 WL 6841638, *1 (D.D.C. Mar. 23, 2021) (permitting pro se plaintiff a third opportunity to file an amended complaint that complies with the Federal Rule of Civil Procedure).
[42] 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd*, 929 F.3d 748 (D.C. Cir. 2019).
[43] *Id.* at 395.
[44] 929 F.3d 748, 754 (D.C. Cir. 2019).
[45] 404 F. Supp. 3d 218 (D.D.C. 2019), *cert. denied*, No. 19-975, 141 S. Ct. 158 (June 29, 2020).
[46] *Id.* at 225.

Jackson held that the plaintiffs' constitutional challenges to IIRIRA could not proceed either, relying on the reasoning of a "persuasive" prior district court decision holding that the statute was in line with constitutional separation-of-powers requirements.[47]

Outside the separation-of-powers context, Judge Jackson's record on summary judgment dismissals remains mixed. She has often properly reiterated that summary judgment is only appropriate where there are no disputes of material fact and the law compels judgment for the party seeking summary judgment even when all the facts are viewed in the other party's favor,[48] and she has ensured that *pro se* plaintiffs are aware of their obligations under the Federal Rules at the summary judgment stage.[49] But Judge Jackson has dismissed cases at the summary judgment stage for various reasons,[50] and sometimes for reasons the D.C. Circuit has, upon review, held were erroneous. For example, in *Whiteru v. Washington Metropolitan Area Transit Authority*,[51] a man died of grievous injuries after falling while intoxicated in a D.C. Metro Station and not receiving any aid for more than four days.[52] His parents sued WMATA for negligence.[53] WMATA moved for summary judgment on the theory that the decedent was contributorily negligent for his own injuries and death because he was intoxicated at the time he fell, and thus WMATA was legally not responsible for his death.[54] The plaintiffs disagreed and emphasized that common carriers like train stations have a special relationship with their passengers and a higher duty of care to them.[55] Judge Jackson agreed with WMATA. She stated that contributory negligence, which completely bars recovery for plaintiffs even when they were only slightly at fault for their own injuries, "may well be antiquated and harsh," but "it is the law of the District of Columbia."[56] Based on that interpretation of the law, Judge Jackson dismissed the suit, concluding that the decedent's fall was caused by his own intoxication, that the decedent was thus contributorily negligent for his injuries and death, and that the special relationship between common carriers and their passengers did not compel a different result. On review, the D.C. Circuit disagreed and held that the suit was erroneously dismissed.[57] The D.C. Circuit held that the

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[47] *Id.*

[48] *See, e.g., Pollard, et al. v. District of Columbia et al.*, 12-CV-1010 (KBJ), 191 F. Supp. 3d 58 (D.D.C. 2016).

[49] *See, e.g.*, *Donato v. Exec. Office for the United States*, No. 16-0632 (KBJ), 2019 WL 11274578 (D.D.C. Aug. 30, 2019).

[50] *See, e.g.*, *Keister v. AARP Benefits Committee, et al.*, 410 F. Supp. 3d 244 (D.D.C. 2019) (granting former employer's motions for summary judgment dismissing plaintiff's right to pursue disability benefits after plaintiff signed general release, where plaintiff alleged that employer's representatives' fraudulent misrepresentations induced his entering into the release agreement).

[51] 480 F.Supp.3d 185 (D.D.C. Aug. 14, 2020), rev'd and remanded, *Whiteru v. Washington Metropolitan Area Transit Authority*, -- F.4th ----, 2022 WL 414140 (D.C. Cir. Feb. 11, 2022).

[52] *Id.* at 190.

[53] *Id.*

[54] *Id.* at 188.

[55] *Id.* at 190.

[56] *Id.* at 198.

[57] *Whiteru v. Washington Metropolitan Area Transit Authority*, -- F.4th ----, 2022 WL 414140 (D.C. Cir. Feb. 11, 2022).

District of Columbia "unambiguously" recognizes a special relationship between common carriers and passengers that is not broken simply because a person's negligence contributed to their injury:

> [A] common carrier cannot evade liability for negligence if it knows or has reason to know that a passenger is injured, breaches its duty to render aid to the injured passenger, and the passenger's original injuries are aggravated as a result . . . even if the passenger's own negligence caused his initial injuries.[58]

The D.C. Circuit also held that there remained disputed facts about whether a WMATA employee's failure to conduct regular station inspections may have aggravated the decedent's injuries and caused his death.[59] The Court sent the case back to the district court for further consideration.

In sum, the foregoing cases demonstrate that Judge Jackson's overall approach to resolving motions to dismiss and motions for summary judgment is one of moderation and often characterized by respect for litigants, especially pro se plaintiffs, though not without error.

B. Standing

The Supreme Court has concluded that the reference to "Cases" and "Controversies" in Article III of the Constitution establishes a jurisdictional requirement of "standing" that plaintiffs must satisfy before having their claims heard.[60] The Court says that this "justiciability" requirement "helps differentiate those disputes which are appropriately resolved through the judicial process from policy disputes that are appropriately addressed by the elected branches" by limiting judicial review to instances when the plaintiff can show a concrete injury caused by the defendant that a judicial ruling can correct.[61] In practice, however, this requirement has often worked to deny relief to civil rights and other public interest plaintiffs, regardless of whether their claim is meritorious.[62]

In her most notable decisions involving questions of standing, Judge Jackson has issued rulings that have left the courthouse doors open for novel legal challenges. For example, Judge Jackson's ruling in *Committee on the Judiciary, U.S. House of Representatives v. McGahn*,[63] evidenced her principled view on separation of powers and, more specifically, the limits of executive power. Judge Jackson ruled in favor of the House Judiciary Committee's effort to subpoena former White House Counsel

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[58] Id. at 191.
[59] *Id.* at *3–4.
[60] *See Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011).
[61] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
[62] *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (employing standing to deny parents of Black children the ability to bring a class-action challenging the IRS's failure to deny tax benefits to racially discriminatory private schools).
[63] 415 F. Supp. 3d 148 (D.D.C. 2019), *rev'd*, 973 F.3d 121 (D.C. Cir. 2020).

Donald McGahn, who was instructed by President Trump not to testify, in connection with the Committee's investigation into Russia's interference with the 2016 election and Special Counsel Robert S. Mueller III's findings concerning potential obstruction of justice by then-President Trump. The Department of Justice (DOJ) argued that a federal court's exercise of subject-matter jurisdiction over the Judiciary Committee's claim constituted an overstep of judicial power. In rejecting the DOJ's argument, Judge Jackson emphasized that federal courts have a "constitutional duty" to review subpoena-enforcement actions regardless of who brings the claim,[64] and noted, "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings."[65] After reviewing in detail Congress' investigative and subpoena power under Article I, Judge Jackson ruled that McGahn—and any other presidential aide—must appear before the Judiciary Committee to provide testimony in response to a valid subpoena, recognizing that executive privilege could still be invoked where appropriate.[66] Despite these significant concerns about executive overreach that informed Judge Jackson's opinion, the Court of Appeals reversed. In its view, the Judiciary Committee lacked a cause of action to enforce the subpoena,[67] and Congress had failed to "first enact[] a statute authorizing such a suit."[68]

In *Equal Rights Center v. Uber Technologies Inc.*,[69] Judge Jackson rejected Uber's argument that the Equal Rights Center lacked standing to sue the company for disability discrimination on behalf of its members—an argument which would have required Judge Jackson to adopt a restrictive view of the requisite Article III injury under the Americans with Disability Act. Instead, Judge Jackson held that the plaintiff established associational standing by showing that at least one member would have used Uber's app but for their knowledge of the lack of wheelchair accessibility in Uber's services.[70] Judge Jackson likewise rejected Uber's argument that as a technology company, it is not a public transportation company subject to liability under the ADA or the D.C. Human Rights Act.[71]

C. Class Actions & Forced Arbitration Clauses

As noted above, over time, the Supreme Court has substantially narrowed access to justice in key, highly fractured rulings concerning the use of class actions and arbitration clauses. Those rulings include *Wal-Mart Stores, Inc. v. Dukes*, a 5-4 decision that weakened the class action device and raised the bar for civil rights plaintiffs to pursue claims of widespread discrimination. The Roberts Court has also endorsed a broad view of the Federal Arbitration Act, a law that corporations have used essentially to opt-out of the civil justice system and force claims into private

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[64] *Id.* at 180–81.
[65] *Id.* at 213.
[66] *Id.* at 155.
[67] 973 F.3d 121, 125 (D.C. Cir. 2020).
[68] *Id.* at 126.
[69] 525 F. Supp. 3d 62 (D.D.C. 2021).
[70] *Id.* at 81.
[71] *Id.* at 80–82.

arbitration proceedings that often lack procedural mechanisms necessary to address widespread illegal conduct. In both *AT&T v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, the Court allowed corporate defendants to dismantle class actions and force claims into individual arbitration proceedings that all agreed were "a fool's errand" because the recovery in an individual case would be too small. In light of these cases, corporations have included arbitration clauses in the fine print of standard employee and consumer agreements to avoid lawsuits of all kinds, including those alleging racial discrimination.

A review of Judge Jackson's most notable decisions involving class actions and forced arbitration clauses shows that she strictly adheres to procedural law, even where the resulting outcome creates barriers for plaintiff-employees seeking to litigate claims against their employers.

In *Ross v. Lockheed Martin Corp.*,[72] Black current and former employees of Lockheed Martin Corporation brought a putative class action challenging Lockheed's performance appraisal system as racially discriminatory under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 (Section 1981). The plaintiffs moved for preliminary class certification under Federal Rule of Civil Procedure 23(a), which, among other prerequisites, requires that a class of plaintiffs' claims stem from common questions of law or fact. Relying on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), which altered the analysis lower courts must undertake when considering whether Rule 23's commonality requirement is satisfied, Judge Jackson denied the plaintiffs' motion. She reasoned that under the proposed class, it was impossible to determine whether the class's claims stemmed from common questions of law or fact because "the proposed class definition does not contain any objective criteria that permit identification of the particular African-American employees who allegedly suffered concrete injury as a result of Lockheed Martin's performance appraisal system."[73] Judge Jackson also concluded that, even if the suit could be certified as a class action, a proposed settlement on behalf of the plaintiff class had not been shown to be fair and reasonable to putative members of the class, as the proposed settlement would require them to broadly waive other potential claims of racial discrimination against the defendant.[74]

Approximately three years later, following the plaintiffs' filing of a second amended complaint with additional details supporting their Title VII class claims, Judge Jackson found that it was "entirely implausible to infer that Plaintiffs' proposed 5,000-member class has suffered a common injury [and] likewise implausible to conclude that any such common injury could be redressed for each member of the class through a single remedy." *Josey v. Lockheed Martin Corp.*[75]

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[72] 267 F. Supp. 3d 174 (D.D.C. 2017).
[73] *Id.* at 186.
[74] *See id.* at 202-04.
[75] No. 16-cv-2508, 2020 WL 4192566, at *11 (July 21, 2020).

Stating that the plaintiffs effectively sought "to relax the plausibility requirement in the context of Rule 23 to the point where discovery becomes presumptive upon the filing of a class complaint,"[76] Judge Jackson also denied their request for pre-certification discovery.

In *Osvatics v. Lyft, Inc.*,[77] Judge Jackson ruled against a Lyft driver who sought to bring a class action against Lyft and asserted that her arbitration agreement with Lyft was unenforceable. The plaintiff alleged that Lyft violated D.C. law by failing to provide drivers with paid sick leave.[78] Lyft moved to compel arbitration pursuant to the Federal Arbitration Act (FAA) and its driver terms of service, which includes a provision requiring individual arbitration of disputes.[79] The plaintiff argued that the arbitration agreement was unenforceable on several grounds, including that Lyft drivers fall under the FAA provision exempting workers engaged in interstate commerce.[80]

In accordance with the majority of courts considering the question, Judge Jackson found that Lyft drivers are not engaged in interstate commerce within the meaning of the FAA because they provide services that are primarily intrastate and thus did not fall under the FAA provision exempting workers engaged in interstate commerce.[81] In so ruling, Judge Jackson cited the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*,[82] for the proposition that the FAA "leaves no place for the exercise of discretion by a district court" and thus compelled this outcome.[83]

Overall, Judge Jackson's access to justice decisions reveal a judicial philosophy that recognizes the value and importance of access to the courts and demonstrate her willingness to allow plaintiffs who adequately plead actual injury to proceed with prosecuting their claims. However, she also is careful to assess each case individually rather than impose a blanket approach, resulting in decisions that often, but not always, permit access to the courts.

II. Administrative Law

Administrative agencies play a key role in achieving the goals set forth in congressionally enacted legislation. Congress regularly calls upon agencies to apply their substantive expertise on a broad range of critical topics—including education, environmental protection, worker safety, consumer protection, and public health—in order to implement broad statutory principles and policies. Agency guidance is also crucial to the full enforcement of many civil rights statutes, including Title IX, the Fair Housing Act, and the Americans with Disabilities Act, among others. In our

[76] *Id.*
[77] 535 F. Supp. 3d 1 (D.D.C. 2021).
[78] *Id.* at 4.
[79] *Id.*
[80] *Id.* at 9–10.
[81] *Id.* at 16–20.
[82] 470 U.S. 213, 218 (1985).
[83] *Id.* at 20–21.

complex society, it would be impossible to implement congressional mandates with fidelity in the absence of agency expertise. Despite this reality, several members of the Supreme Court have expressed hostility to administrative decision-making. As such, recognition of the value of agency expertise is an important asset for any new justice on the Court.

Judge Jackson would bring to the Supreme Court a balanced perspective on the role of agencies within our system of government. Her judicial record reflects some deference to administrative decision-making tempered by a consistent unwillingness to allow agencies to avoid reasonable judicial review. In *Mackinac Tribe v. Jewell*, for example, Judge Jackson addressed a claim brought against the Secretary of the Department of the Interior by a Native American Tribe seeking to obtain the legal status of a recognized tribe under the authority of an 1855 treaty.[84] The Department moved to dismiss the claim, arguing that the claim was barred both by sovereign immunity and by the Tribe's failure to exhaust the administrative process for federal tribal recognition established by Congress in 1978.[85] While Judge Jackson ultimately found that the Tribe's failure to pursue the established administrative process prevented it from pursuing its claim,[86] she rejected the Department's attempt to evade review of its actions through its assertion of sovereign immunity.[87] In making this determination, Judge Jackson found that the Administrative Procedure Act's waiver of sovereign immunity applied to the Department's actions, even though the Tribe had not itself advanced this argument.[88]

Judge Jackson's administrative law decisions also reflect, at times, a more limited view of the judiciary's role. For example, in *Mobarez v. Kerry*, a group of U.S. citizens and permanent residents sued the Secretaries of the Department of Defense and the Department of State, alleging that their failure to evacuate them and their relatives from Yemen amidst the ongoing civil unrest in the region violated the Administrative Procedure Act.[89] Looking to D.C. Circuit precedent and the Supreme Court's guidance in *Baker v. Carr*,[90] Judge Jackson held that the political question doctrine—which prevents the judiciary from substituting its judgment for that of the Executive in the absence of judicially manageable standards to guide the Court's analysis—barred her from considering the plaintiffs' claims.[91] Acknowledging that the "mere fact that a case touches upon foreign relations does not render a claim nonjusticiable," Judge Jackson concluded that the plaintiffs' claims would require the

[84] *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 130 (D.D.C. 2015), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016).
[85] *Id.* at 130–33.
[86] *Id.* at 143–45.
[87] *Id.* at 139–43.
[88] *Id.* at 141–43.
[89] *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 86 (D.D.C. 2016).
[90] 369 U.S. 186 (1962).
[91] *Id.* at 92–100.

Court to exercise policy judgment with respect to a "complex military operation" that goes beyond the Court's competence.[92]

In *Las Americas Immigrant Advocacy Center v. Wolf*, Judge Jackson considered a challenge to two new Department of Homeland Security (DHS) guidance documents mandating that asylum seekers awaiting review be detained in facilities run by Customs and Border Patrol (CBP) rather than those run by Immigration and Customs Enforcement (ICE).[93] Because CPB facilities are intended for short-term stays, they do not permit in-person visits—including from attorneys—and provide only limited opportunities for detainees to use phones.[94] The plaintiffs argued, among other things, that this policy change violated detainees' statutory right to "consult with a person of [their] choosing," including an attorney, "prior to the [credible fear] interview."[95] While Judge Jackson rejected the government's claim that the Immigration and Nationality Act (INA) precluded judicial review of the guidance documents,[96] she nevertheless granted summary judgment in the government's favor, finding that the relevant INA provisions were ambiguous at best on the scope of the right to consult with an attorney.[97]

Yet, Judge Jackson has recognized the judiciary's role in restraining administrative discretion when she deems agency action to be clearly unreasoned or procedurally flawed. One illustrative example is *Policy and Research LLC v. Department of Health and Human Services*, a suit by grantees against the Department of Health and Human Services (HHS) claiming that the agency's unreasoned decision to terminate their funding under a federal program was arbitrary and capricious.[98] Pursuant to Congress' Teen Pregnancy Prevention Program (TPPP), the plaintiffs had received five-year funding awards from 2015-2020, which the program provided would be made in annual funding installments.[99] In 2018, HHS informed the plaintiffs that it would not provide plaintiffs with funding after 2018, providing no explanation for the decision.[100] HHS argued that its decision to "withhold" funding was fully within its discretion and therefore unreviewable.[101] Judge Jackson rejected HHS's "clever, but wrong" attempt to evade review, finding that HHS regulations for the termination of grants provided clear standards for judicial review, thus making the agency action squarely reviewable under D.C. Circuit precedent.[102] She concluded that HHS' attempt to "shoehorn" its action into the "unregulated and unreviewable exercise of agency discretion" defied the agency's

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[92] *Id.* at 93–94.
[93] *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 8–9 (D.D.C. 2020).
[94] *Id.* at 14–16.
[95] *Id.* at 27.
[96] *Id.* at 19–23.
[97] *Id.* at 26–29.
[98] 313 F. Supp. 3d 62, 67 (D.D.C. 2018).
[99] *Id.* at 69–70.
[100] *Id.* at 70.
[101] *Id.* at 78–79.
[102] *Id.* at 76–78.

past practice, the realities of scientific research, the plain language of the regulations, and the law.[103]

Likewise, in *Friedler v. General Services Administration*, Judge Jackson granted the motion for summary judgment of a plaintiff who sued the General Services Administration (GSA) after he was barred from all federal contracting for four years.[104] The plaintiff argued that because the GSA did not provide him with notice of the grounds for his debarment and an opportunity to respond, the GSA's action violated the Administrative Procedure Act. Judge Jackson agreed: Looking to precedent indicating that the agency's interpretation of particular federal disbarment procedures called for reduced deference,[105] Judge Jackson concluded that GSA's failure to provide notice denied the plaintiff key procedural protections required by federal regulation.[106]

III. Criminal Justice

LDF has long advocated for a fair and unbiased criminal legal system, as well as accountability for law enforcement who engage in abusive and unconstitutional conduct. And we continue to advocate for a system that acknowledges the humanity of every person regardless of their alleged or actual crimes.

As demonstrated by her compassionate release decisions during the pandemic, her work as an Assistant Federal Public Defender, on the Sentencing Commission, and in private practice, and her writings over the years, Judge Jackson recognizes the humanity of incarcerated people. Judge Jackson's decisions on sentencing and qualified immunity, a court-created doctrine that shields law enforcement and other public officials from being held civilly liable for constitutional violations, are more mixed.

The following are representative decisions from Judge Jackson's eight years as a district court judge, along with excerpts from her non-judicial experience and writings. Her criminal justice record as a D.C. Circuit judge is too limited to provide meaningful insight.

A. Sentencing and Treatment of Incarcerated People

Judge Jackson has approached sentencing (and resentencing) decisions holistically, recognizing that retribution is one of only several factors to consider in fashioning the appropriate sentence. In this context, Judge Jackson's service on the United States Sentencing Commission is apparent—she has a thorough understanding of what criminal statutes and the Federal Sentencing Guidelines require and permit judges to do.

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[103] *Id.* at 84.
[104] 271 F.Supp.3d 40, 42–43 (D.D.C. 2017).
[105] *Id.* at 52–53.
[106] *Id.* 60–62.

Judge Jackson has adhered closely to the post-*United States v. Booker*[107] command that federal judges have a duty to consider the applicable guidelines range and "impose a sentence that is . . . *not greater than necessary* to comply with the purposes of punishment as 18 U.S.C § 3553(a) requires."[108] She has been faithful to § 3553(a)'s mandate that judges consider "the history and characteristics of the defendant" and each person's rehabilitative potential.[109] Applying those principles, Judge Jackson has on more than one occasion granted motions for compassionate release under the authority and discretion extended to federal judges under the First Step Act of 2018.[110] And she has done so for especially vulnerable people.

In *United States v. Greene*,[111] Judge Jackson granted compassionate release to LaVance Greene, a 72-year-old incarcerated man who had served nearly 50 years in prison for killing a prison guard in a botched attempt to help his half-brother escape from a furlough.[112] Acknowledging the seriousness of the crime and the fact that Mr. Greene had not exhausted his administrative remedies, Judge Jackson proceeded to consider the equities after determining that exhaustion would have been "futile" because "it is the BOP's long-held position that D.C. Code offenders who have been sentenced in federal court—like Greene—are categorically ineligible for relief."[113]

On the merits, Judge Jackson determined that Mr. Greene's age, serious physical ailments, and the length of time he had been in prison militated in favor of compassionate release because his "continued incarceration would be greater than necessary to comply with the purposes of punishment identified in [§] 3553(a)."[114] With the § 3553(a) factors firmly in mind, Judge Jackson reduced Mr. Greene's sentence to time served:

> When a defendant presents extraordinary and compelling reasons for his release, the Court must reassess the applicable factors in [§] 3553(a) 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.[115]

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[107] 543 U.S. 220 (2005).
[108] *Response to Question for the Record from Senator Dick Durbin, Chair, Senate Judiciary Committee to Judge Ketanji Brown Jackson, Nominee to the United States Court of Appeals for the D.C. Circuit*, at 9 https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf (last visited Feb. 28, 2021) (emphasis added).
[109] 18 U.S.C §§ 3553(a)(1), (a)(2)(D).
[110] *See* 18 U.S.C. § 3582.
[111] No. 71-CR-1913 (KBJ), 516 F. Supp. 3d 1 (D.D.C. 2021).
[112] *Id.* at 4-5, 10-12.
[113] *Id.* at 18.
[114] *Id.* at 28.
[115] *Id.*

Using similar reasoning, Judge Jackson reached the same result in *United States v. Dunlap*.[116] In that case, D'Angelo Dunlap filed a motion seeking compassionate release from prison because of significant comorbidities—including "an abnormality of [his] heart's aortic arch branch"—that placed him at a higher risk of complications from COVID-19.[117] In applying the § 3553(a) factors, Judge Jackson found that Mr. Dunlap committed the underlying crimes to fuel a drug addiction and that those crimes "did not specifically threaten violence."[118] She also concluded that he "has made significant strides toward rehabilitating himself" and "under the circumstances presented here, his continued incarceration is not necessary to promote the purposes of punishment in light of the [§] 3553(a) factors and the Sentencing Commission's stated policy concerns."[119]

Similarly, in *United States v. Johnson*,[120] Judge Jackson granted compassionate release to Morrison Johnson, "an honorably discharged veteran with no prior criminal history who completed two tours in Afghanistan and has since been diagnosed with post-traumatic stress disorder and other mental and physical conditions."[121] Although Judge Jackson had previously sentenced Mr. Johnson, she did "not envision requiring Johnson to serve the sentence while incurring a great and unforeseen risk of severe illness or death brought upon by a global pandemic."[122] For Judge Jackson, the global health crisis required a "reexamination of the section 3553(a) factors," which made it "clear to the Court that continued detention would now be greater than necessary to comply with the purposes of punishment."[123]

It bears underscoring that in both *Johnson* and *Dunlap*, Judge Jackson responded expeditiously to their emergency motions for compassionate release in cases where a slow decision for two medically vulnerable people would effectively amount to no decision at all. Mr. Johnson filed his motion on April 21, 2020, and Judge Jackson held a hearing on April 27, 2020. Two days later, she issued an order granting compassionate release.[124] And in *Dunlap*, Judge Jackson granted Mr. Dunlap's motion nine days after his hearing.[125] The urgency and outcome of Judge Jackson's compassionate release decisions signal that an incarcerated person's conditions of confinement matter to her.

That important proposition was expressed in a somewhat different context in *Pierce v. District of Columbia.*[126] In *Pierce*, William Pierce, a deaf man who communicated through sign language, filed suit against the District of Columbia

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[116] No. 17-CR-207 (KBJ), 485 F. Supp. 3d 129 (D.D.C. 2020).
[117] *Id.* at 129.
[118] *Id.* at 134.
[119] *Id.* at 135.
[120] No. 15-CR-125 (KBJ), 464 F. Supp. 3d 22 (D.D.C. 2020).
[121] *Id.* at 26.
[122] *Id.* at 42 (citations omitted).
[123] *Id.*
[124] *Id.* at 26.
[125] *See United States v. Dunlap*, 17-CR-00207, Dkt. Entry No. 42.
[126] No. 13-CV-0134 (KBJ), 128 F. Supp. 3d 250 (D.D.C. 2015).

alleging discrimination and retaliation in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act.[127] During his incarceration, Mr. Pierce had requested an interpreter but had been forced to communicate only through lip-reading and written notes.[128]

After both Mr. Pierce and the District moved for summary judgment, Judge Jackson found in favor of Mr. Pierce because "the District violated Section 504 and Title II as a matter of law when it failed to evaluate Pierce's need for accommodation at the time he was taken into custody."[129] Further, "because the District's failure to evaluate Pierce's needs amounted to deliberate indifference to Pierce's rights and the District's obligations under Section 504 and Title II, the District's conduct constituted intentional discrimination, and thus, Pierce is entitled to compensatory damages for the mental, emotional, and physical injuries he sustained."[130] The overriding essence of the decision was clear: although "[i]ncarceration inherently involves the relinquishment of many privileges," incarcerated people retain important rights, "including protections against disability discrimination."[131]

Of course, like many federal judges, Judge Jackson's record includes many decisions that are not favorable to criminal defendants. Her record is not exceptional in that regard. What is notable is that Judge Jackson has expressed concern when a scrupulous application of the law produces an outcome that she believes does not comport with justice, which further demonstrates her consistent concern with ensuring a fair and rational criminal legal system. In *Young v. United States*,[132] for example, Judge Jackson sentenced Mr. Young to a mandatory minimum sentence of 20 years imprisonment for possessing a heroin mixture exceeding two kilograms despite her stated misgivings.[133] Notably, at sentencing, Judge Jackson expressed concern that the prosecution had chosen to file a notice of prior conviction, which triggered the mandatory minimum, and noted that she would have otherwise imposed a lesser sentence:[134]

> What has troubled the Court about the government's decision to file such a notice in this case is that, compared to many of the other drug-related defendants that I see, Mr. Young really does not have much of a criminal history. In this regard, my concerns relate to unwarranted sentencing disparities, which is a factor under [18 U.S.C. § 3553(a)], and I note that the prosecution's only basis for filing the 851 notice in this case is a single prior conviction for possession with intent to distribute

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[127] *Id.* at 253-54.
[128] *Id.*
[129] *Id.* at 267.
[130] *Id.*
[131] *Id.* at 253.
[132] 18-CV-3048, 943 F.3d 460 (D.C. 2019).
[133] *Id.*
[134] Brief for Appellee, 17-CR-00083 (KBJ), 2019 WL 2615364, at *5.

> cocaine which occurred in 1994, 24 years ago when you were only 22 years old.[135]

Judge Jackson also remarked that "this prior conviction is so old that it does not even generate criminal history points under the federal sentencing guidelines. And yet, somehow, the government found it appropriate to rely on this clearly stale conviction when it filed the 851 notice in this case."[136]

Judge Jackson then imposed the sentence that she was "legally required to impose."[137] This case is an example of Judge Jackson faithfully executing her duties as a district court judge, which led to an outcome with which she expressly disagreed.

Judge Jackson's non-judicial experience and writings confirm a commitment to fairness and a recognition of the humanity of people who come into the criminal legal system's orbit. As noted above, while a member of the U.S. Sentencing Commission, Judge Jackson spoke out strongly about the inequity of the crack-cocaine sentencing disparity and took action to reduce its impact.[138] She also supported the 2014 "drug minus two" Sentencing Guidelines amendment that reduced penalties for drug offenses and voted to make these reduced sentences retroactive.[139] Judge Jackson has also (as a Harvard undergraduate student) questioned the power dynamics of an "oppressive" and "coercive" plea-bargaining system[140] and recognized the value of forgiveness in law and society.[141] In 2001, after Congress made "successive habeas petitions" more difficult to pursue through the federal courts, Judge Jackson suggested that the Supreme Court reconsider its procedural approach to "original" habeas writs to ensure that those who are able to present new evidence of innocence retain a viable avenue to be heard.[142]

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[135] Brief for Appellant, 2019 WL 2354777, at *9.
[136] *Id.*
[137] *Id.*
[138] *Supra*, notes 17-27.
[139] United States Sentencing Commission Public Meeting Minutes, Apr. 10, 2014, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140410/meeting-minutes.pdf (last visited Mar. 12, 2022); United States Sentencing Commission Public Meeting Minutes, July 18, 2014, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140718/meeting-minutes.pdf (last visited Mar. 12, 2022).
[140] Ketanji Brown Jackson, "The Hand of Oppression: Plea Bargaining Processes and the Coercion of Criminal Defendants" (March 1992) (senior thesis on file with the Harvard College Archives) at 118, available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (pp 104-254).
[141] Ketanji Brown Jackson, "Judging a Book: Jackson Reviews 'When Should Law Forgive?'," Law 360 (September 24, 2019), available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (p 2).
[142] Ketanji Brown Jackson, "Supreme Court as Gatekeeper: Screening Petitions for 'Original' Writs of Habeas Corpus in the Wake of the A.E.D.P.A." (November 2001), available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (pp 1474-85).

B. Policing

1. Qualified Immunity and Excessive Force

LDF has a longstanding concern about the propriety of the doctrine of qualified immunity, which is a court-created doctrine that regularly denies redress to deserving civil rights plaintiffs and insulates government officials from the consequences of their unconstitutional behavior. LDF's recent advocacy in this area includes successfully representing plaintiffs in direct appeals, including *T.R. v. Lamar County Board of Education*, 2022 WL 336343 (11th Cir. February 4, 2022); *Ferguson v. McDonough*, 13 F.4th 574 (7th Cir. 2021), *Vette v. Sanders*, 989 F.3d 1154 (10th Cir. 2021), and filing amicus briefs in other cases, including *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam).

Judge Jackson's approach to applying qualified immunity has in some cases been inconsistent with what LDF believes both the evolving standards of the law and justice command. Although she has correctly acknowledged that a plaintiff need not identify a prior case with identical facts to demonstrate that an officer's actions are prohibited by clearly established law, Judge Jackson has granted qualified immunity to law enforcement where the application of general legal principles arguably should have led to a denial of qualified immunity under evolving legal standards. In some of those cases, Judge Jackson's assessment of the facts indicated that she favored the defendants' more stringent reading of the doctrine. Nevertheless, unlike many judges, she does not apply the doctrine reflexively.

For example, in *Robinson v. Farley*,[143] a case dealing with particularly troubling police misconduct, Judge Jackson denied defendants' motion to dismiss on qualified immunity grounds. According to the complaint, plaintiff Michael Robinson, a young man with cerebral palsy and intellectual disabilities, was trailed to his grandmother's apartment (where he lived) by a Prince George's County police officer he had encountered at a bus stop. The officer confronted Mr. Robinson, confirmed his identity and disability, and continued to follow him. The officer then struck Mr. Robinson, who retreated to his grandmother's apartment. Shortly thereafter, regional police officers "from at least 29 police vehicles" responded to the scene, charged into the apartment, and attacked him.[144] Mr. Robinson, who was not prosecuted for any crime, was injured, hospitalized, and detained overnight. He brought excessive force, unlawful entry, and false arrest claims against law enforcement agencies in D.C. and Prince George's County.[145]

In allowing Mr. Robinson's case to proceed, Judge Jackson rejected defendants' argument that the complaint was vague, noting that defendants "proffered no authority for the odd proposition that a complaint that alleges false arrest and other police officer misconduct must specifically link the complained-of conduct to

[143] 15-CV-0803 (KBJ), 264 F. Supp. 3d 154 (D.D.C. 2017).
[144] *Id.* at 155.
[145] *Id.* at 156.

particular police officers (presumably by name) in order to survive a motion to dismiss."[146] She went on to opine that "this Court cannot fathom how such could possibly be the state of the law . . . it is impossible to imagine that a complaint involving the allegedly wrongful conduct of a number of police officers could ever contain the specificity that defendants here say is required."[147] Judge Jackson found that the complaint provided "ample specificity" and "the necessary factual allegations," and brushed aside defendants' "fleeting" qualified immunity defense.[148]

In other cases—with similarly sympathetic plaintiffs—Judge Jackson has granted qualified immunity to members of law enforcement. In *Kyle v. Bedlion*,[149] Shalonya Kyle sued Sergeant Bedlion and four other D.C. officers after Sergeant Bedlion "shoved" her into a hot barbecue grill at a cookout, causing her to sustain a second-degree burn on her arm.[150] The officers had been responding to a noise complaint when a confrontation between Ms. Kyle's boyfriend and several officers ensued. When Ms. Kyle attempted to "defuse the brewing altercation," Sergeant Bedlion grabbed her arm, pushed her into the grill, and ordered another officer to arrest her.[151]

In granting Sergeant Bedlion qualified immunity on an excessive force claim, Judge Jackson recognized that Ms. Kyle need not identify a specific case with facts that mirrored her own, but held that "in this instance," because Judge Jackson did not believe that Sergeant Bedlion "meant" to shove Ms. Kyle into the hot grill, "the governing standards do not clearly dictate the outcome when applied to these facts."[152] Judge Jackson also held that the officers were entitled to qualified immunity on Ms. Kyle's false arrest claim, concluding that a reasonable officer could have interpreted Ms. Kyle's conduct as violating D.C.'s assault on a police officer statute, even though she was trying to deescalate the argument between her boyfriend and the officers.[153] Especially given the posture of summary judgment, where the facts were to be viewed in the light most favorable to Ms. Kyle, there is a strong argument that Judge Jackson should have allowed the excessive force and false arrest claims to proceed to trial.

In *Page v. Manusco*,[154] Judge Jackson again recognized that the facts at the summary judgment stage must be viewed in the plaintiff's favor but granted qualified

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[146] *Id.* at 160.
[147] *Id.*
[148] *Id.* at 162.
[149] 12-CV-1572 (KBJ), 177 F. Supp. 3d 380 (D.D.C. 2016)
[150] *Id.* at 384–86.
[151] *Id.*
[152] *Id.* at 395.
[153] *Id.* at 396–99. Notably, and as Judge Jackson pointed out, Ms. Kyle had been acquitted of the assault after her criminal later.
[154] 12-CV-1606, 999 F. Supp. 2d 269 (D.D.C. 2013).

immunity to an officer who falsely arrested a crime victim.[155] According to the complaint, plaintiff Dale Page was assaulted by two men, and "while he was on his cellphone reporting the assault to a 911 dispatcher, [one of the men] drove towards him, striking him with the car."[156] Mr. Page "flew into the windshield, flipped over the roof, and landed on the street behind the trunk of the car."[157] As Mr. Page lay unconscious—and despite there being witnesses who had seen what happened—the officer who arrived at the scene arrested him for "misdemeanor destruction of property" relating to "the windshield that *hit him*."[158] While Mr. Page insisted that the officer had an obligation to investigate further, Judge Jackson disagreed and found that a reasonable officer could have found probable cause to arrest Mr. Page, explaining that "the law is such that Page ultimately gains little from suggesting that Officer Mancuso should have waited for him to be revived and to make a statement prior the arrest."[159]

Judge Jackson rejected another false arrest claim in *Smith v. United States of America, et al*,[160] a suit brought by plaintiff Ronald Smith, who had been working as a driver for the federal government. After Mr. Smith dropped off passengers near the United States Capitol complex, defendant Corey Rogers, an officer with the United States Capitol Police, "chastised" him for stopping at that location.[161] When Mr. Rodgers turned away from the car, a video captured Mr. Smith "looping around and pulling away aggressively" and "the passenger side of Smith's car was close to Rodgers when the car passed by."[162] Mr. Smith was arrested and charged with assault on a police officer and assault with a deadly weapon (the "deadly weapon" being his car), but those charges were later dropped by federal prosecutors.[163]

After reviewing defendants' motion for summary judgment, Judge Jackson concluded that "the events depicted in the video . . . leave no doubt that a reasonable police officer would have believed that Smith had committed the crimes of assault on a police officer and assault with a deadly weapon."[164] But as Judge Jackson acknowledged, the video did not depict "the exact speed at which Smith passe[d] Rogers" or "precisely how close Smith came to striking [him]."[165] If those facts were indeed construed in a light favorable to Mr. Smith, they arguably did not support a finding of probable cause for his arrest. Since Judge Jackson found that the video footage established probable cause, she found that the plaintiffs' false arrest,

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[155] With respect to the Count that was relevant to the defense of qualified immunity, the Court converted defendants' motion to dismiss, filed under Rule 12(b)(6), into a motion for summary judgment. *See id.* at 276.
[156] *Id.* at 273.
[157] *Id.*
[158] *Id.* (emphasis added).
[159] *Id a*t 281.
[160] No. 12-CV-1679 (KBJ), 121 F. Supp. 3d 112 (D.D.C. 2015).
[161] *Id.* at 114–16.
[162] *Id.*
[163] *Id.* at 116.
[164] *Id.* at 120.
[165] *Id.* at 120–21.

malicious prosecution, and *Bivens* claims could not stand and did not address the defendants' qualified immunity defense in depth.[166]

These decisions concern us. We look forward to learning more about Judge Jackson's views on the evolution of the doctrine of qualified immunity; and, moving forward, we hope that the Supreme Court will recognize the need for qualified immunity jurisprudence to evolve, such that it does not undermine accountability for government officials in cases of serious constitutions violations.

2. Capital Punishment

Since its founding, LDF has played a prominent role in challenging the constitutionality of the death penalty and its discriminatory application against African Americans. For example, LDF litigated *Furman v. Georgia*,[167] the 1972 case in which the Supreme Court declared the death penalty unconstitutional because it was applied in an arbitrary and capricious manner that often involved racial bias against Black defendants, leading to the only federal moratorium on the death penalty in our country's history. LDF also litigated *McCleskey v Kemp*,[168] which challenged racial discrimination in the administration of the death penalty after a comprehensive study concluded that race was a highly predictive factor in determining sentencing outcomes. In 2017, in a 6-2 decision (with Chief Justice Roberts writing the majority opinion), LDF secured a victory in the Supreme Court on behalf of a client who was sentenced to death after his own lawyer introduced "expert" testimony that he was more likely to commit criminal acts of violence in the future because he is Black.[169]

Given LDF's extensive work in this area, a candidate's record with regard to capital punishment has been of central importance in our assessment of their nomination. Although Judge Jackson has not been called upon to issue a judicial decision in any capital case, her tenure as an appellate defender and her public remarks, as noted below, inspire confidence that she would recognize that "death is different,"[170] and carefully assess whether the adjudicatory process was fair, rational, and reliable.

A critical part of that determination is whether people on death row have received the effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution. That question comprises a significant share of the Supreme Court's death penalty docket and often arises from jurisdictions that have no public defense infrastructure.[171] During her confirmation

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[166] *Id.* at 126.
[167] 408 U.S. 238 (1972).
[168] 481 U.S. 279 (1987).
[169] *Buck v. Davis*, 580 U.S. _ (2017).
[170] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).
[171] *See, e.g., Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Hinton v. Alabama*, 571 U.S. 263 (2014); *Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCullum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374

to the U.S. Court of Appeals, Judge Jackson wrote that having a robust public defense system "incentivizes the government to investigate accusations thoroughly and to protect the rights of the accused."[172] She went on to explain that effective representation is critical because it "reduces the threat of arbitrary or unfounded deprivations of individual liberty."[173] Confirming a justice who believes deeply in the right to effective representation is essential to reviewing the legitimacy of capital convictions and death sentences, which disproportionately affect poor Black people who cannot afford to hire a lawyer.[174]

Judge Jackson has also displayed concern about the ability of persons facing the death penalty to receive adequate opportunity to assert their innocence when new evidence emerges post-conviction. As noted above, in 2001, Judge Jackson argued that the Supreme Court should liberalize its use of "original" writs of habeas corpus.[175] She framed this argument in response to the 2000 execution of a Texas man who was put to death without due consideration of compelling new evidence of innocence despite his having filed several unsuccessful habeas petitions.[176]

IV. Economic Discrimination and Workers' Rights

Judge Jackson has displayed moderation in ruling on economic justice-related issues. Overall, her record is consistent with her reputation as an evenhanded and meticulous jurist[177] and demonstrates a deep understanding of the significance of the judiciary in determining the extent of workplace protections for employees. On more than one occasion, Judge Jackson has ruled in favor of employees attempting to exercise their rights under the National Labor Relations Act to organize and bargain collectively. She has also shown sympathy toward *pro se* litigants and expressed a preference for allowing employment cases to proceed to discovery, citing the importance of access to employers' files to prove pretext.

In other cases, however, Judge Jackson has dismissed employees' claims based on her perception of the high burden discrimination claims place on plaintiffs. Often, in these less favorable decisions, an apparent desire to closely follow procedural rules results in barriers to justice. Judge Jackson has come under pointed criticism by

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(2005); *Florida v. Nixon*, 543 U.S. 175 (2004); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Bell v. Cone*, 535 U.S. 685 (2002)

[172] *Response to Question from the Record*, supra note 4 at 65 (of PDF).

[173] *Id.*

[174] *See, e.g.,* Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/death-penalty-representation (last visited Mar. 2, 2022) ("Defendants are much less likely to be sentenced to death when they are represented by qualified lawyers who are provided sufficient time and resources to present a strong defense.").

[175] *Supra*, note 149.

[176] *Id.*

[177] *See e.g.,* Ariane de Vogue, *Another Top Conservative Lawyer Backs Jackson as White House Pushes her Supreme Court Nomination,* CNN (March 1, 2022), https://www.cnn.com/2022/03/01/politics/ketanji-brown-jackson-nomination/index.html.

former litigants for her decision-making in some of these cases.[178] At other times, and consistent with the judiciary's essential role in vindicating the civil rights of employees, Judge Jackson has allowed litigants to proceed with employment discrimination claims despite procedural hurdles.

A. Workers' Rights and Economic Justice

In many ways, Judge Jackson's judicial record demonstrates awareness of the economic disparities that persist in the United States as well as the importance of protecting the rights of workers in an unequal world. In August of 2021, shortly after her appointment to the U.S. Court of Appeals for the D.C. Circuit, Judge Jackson voted to uphold President Biden's eviction moratorium,[179] a moratorium designed to keep renters in their homes during a global pandemic that has disproportionately impacted Black people.[180]

Even more recently, in *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*,[181] Judge Jackson authored an opinion for a unanimous three-judge panel on the D.C. Circuit safeguarding the bargaining rights of public-sector labor unions. As she noted in her decision, "by statute, certain federal employers are required to engage in collective bargaining with their employees' representatives whenever there is a management-initiated change to the 'conditions of employment affecting such employees.'"[182] In September of 2020, however, the Federal Labor Relations Authority ("FLRA") adopted a new threshold for triggering collective bargaining requirements: When a "workplace change has a 'substantial impact on a condition of employment.'" After a detailed review of the "cursory policy statement," Judge Jackson held that the decision to adopt a substantial-impact standard was arbitrary and capricious in violation of the Administrative Procedure Act.

Similarly, in *American Federation of Government Employees v. Trump*,[183] Judge Jackson, then a judge on the District Court, barred the Trump administration from restricting the collective bargaining power of federal workers' unions. There, the President had issued a series of executive orders, which, taken together, would narrow negotiated grievance procedures, reduce official time activities, and prohibit

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[178] *See, e.g.*, Greg Garrison, *Alabama's first Black federal judge tells Biden: Don't appoint Ketanji Brown Jackson to Supreme Court*, AL.com, Feb. 14, 2022 (covering letter in which U.W. Clemon, a retired federal judge and the first Black judge in Alabama, expressed that if Judge Jackson is appointed to the Supreme Court, "simple justice and equality in the workplace will be sacrificed").
[179] *Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs.,* No. 1:20-CV-03377-DLF, 2021 WL 3721431 at *1 (D.C. Cir. Aug. 20, 2021).
[180] *See e.g.,* Lindsay M. Monte & Daniel J. Perez Lopez, *How the Pandemic Affected Black and White Households,* U.S. CENSUS BUREAU, ECONOMIC & HOUSING STATISTICS DIV., (July 21, 2021), https://www.census.gov/library/stories/2021/07/how-pandemic-affected-black-and-white-households.html.
[181] 25 F.4th 1 (D.C. Cir. 2022).
[182] *Id.* (citing Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7103(a)(12)).
[183] *318 F. Supp. 3d 370 (D.D.C. 2018), rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).

collective bargaining over otherwise permissible matters. As Judge Jackson noted, the effect of these orders was to "dramatically decrease the scope of the right to bargain collectively, because, in the [Federal Service Labor-Management Relations Act ("FSLMRS")], Congress clearly intended for agencies and unions to engage in a broad and meaningful negotiation over nearly every 'condition of employment.'"[184] While the D.C. Circuit ultimately reversed on jurisdictional grounds,[185] this opinion would have offered a powerful shield for federal workers declaring that "the President has overstepped his bounds" by "impermissibly infring[ing] upon the right to collective bargaining[.]"[186]

B. Employment Discrimination

As a district court judge, Judge Jackson heard numerous claims from individual employees alleging discrimination under Title VII and Section 1981. Employment discrimination suits have long played an essential role in integrating the country and limiting workplace discrimination based on race, gender, national origin, and other protected characteristics.[187] Indeed, employment discrimination cases account for a significant share of civil rights cases before the Supreme Court through both U.S. Equal Opportunity Employment Commission ("EEOC") enforcement and suits between private parties.[188] While these cases tend to be fact-intensive and highly individualized, the sampling below attempts to illustrate the tension between Judge Jackson's commitment to ensuring access to justice and her at times overly restrictive readings of legal standards and procedural rules.

On several occasions, Judge Jackson has expressed reluctance to dismiss employment discrimination claims at the early stages of litigation. In *Barber v. D.C. Government*,[189] for example, Judge Jackson stressed the duty of the Court to "construe the complaint liberally at the motion-to-dismiss stage,"[190] noting that *factual* disputes . . . are not appropriately considered at the motion-to-dismiss stage

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[184] *Id.* at 394–395.

[185] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) ("We reverse because the district court lacked subject matter jurisdiction. The unions must pursue their claims through the scheme established by the Statute, which provides for administrative review by the FLRA followed by judicial review in the courts of appeals.")

[186] *Trump, 318 F. Supp. 3d* at 394.

[187] *See, e.g., Int'l Union v. Johnson Controls, Inc.,* 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[188] In fiscal year 2020 alone, the EEOC received more than 67,000 charges of discrimination; of those charges, 22,064 (or 32.7%) involved allegations of racial discrimination. *See* U.S. Equal Emp't Opportunity Comm'n, Charge Statistics FY 1997 through FY 2020 (last accessed on March 2, 2022), http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[189] 394 F. Supp. 3d 49 (D.D.C. 2019) (denying defendants' motion to dismiss in part, allowing workplace discrimination claims under Title VII and the D.C. Human Rights Act as well as a whistleblower claim under the D.C. Whistleblower Protection Act to proceed).

[190] *Id.* at 58.

of a case."[191] In *Barber,* the plaintiff—an administrative law judge who was terminated after eleven years of service—alleged that she, and fellow Black judges, had been passed over for promotions in favor of less-qualified white colleagues and that on one occasion, this non-selection "violated an established plan" for promotions in alphabetical order.[192] The plaintiff further alleged that she was retaliated against for making "an internal complaint about racial discrimination in the assignment of complex cases"[193] by being denied multiple opportunities for advancement and, ultimately, being fired from her job. Judge Jackson determined, in relevant part, that these allegations were sufficient to support claims of employment discrimination and retaliation under the District of Columbia Human Rights Act as well as Title VII—allowing the former employee to continue her fight for justice.

Acknowledging imbalances in access to information, Judge Jackson has repeatedly emphasized the importance of permitting discovery to ensure that individuals fighting discrimination in the workplace are provided a fair opportunity to present their claims. In *Tyson v. Brennan*[194]—in which a *pro se* plaintiff alleged religious discrimination under Title VII—Judge Jackson expressly affirmed her preference of allowing employment cases to proceed to discovery before entertaining dispositive motions, writing: "[I]t is this court's long-held view that pre-discovery motions for summary judgment in situations such as this one—*i.e.*, motions that seek summary judgment before the plaintiff has had the chance to gather and submit evidence related to the challenged employment decision—are seldom appropriate."[195]

Likewise, in *Ross v. United States Capitol Police*,[196] Judge Jackson further clarified the need for discovery when faced with the special challenges of demonstrating pretext. In *Ross,* the plaintiff alleged that the United States Capitol Police "forced him to retire and otherwise subjected him to unfavorable treatment due to his race and in retaliation for his prior engagement in protected activity"—namely, his participation in a "longstanding" class-action lawsuit, alleging discrimination against Black employees.[197] Judge Jackson determined that the former employee "must be allowed to proceed to discovery"[198] on his claims of race discrimination and retaliation under the Congressional Accountability Act of 1995, based on his forced retirement, "as is this court's ordinary practice."[199] In so holding, Judge Jackson noted that granting summary judgment at the pre-discovery stage is "especially problematic" in employment discrimination cases, where plaintiffs "ordinarily must marshal the kinds of evidence that one usually can only gather

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[191] *Id.* at 61 (rejecting, *inter alia*, defendants' premature dispute that the plaintiffs' allegations failed to demonstrate requisite causation).
[192] *Id.*
[193] *Id.* at 59.
[194] 306 F. Supp. 3d 365 (D.D.C. 2017).
[195] *Id.* at 371–72.
[196] 195 F. Supp. 3d 180 (D.D.C. 2016).
[197] *Id.* at 187–188.
[198] *Id.* at 188.
[199] *Id.* at 195.

during the discovery phase in order to carry out 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."[200]

Consistent with her broader judicial record, Judge Jackson has also demonstrated particular regard for *pro se* plaintiffs in this space.[201] For example, in *Tyson v. Brennan*, Judge Jackson noted the "considerable leeway" afforded to *pro se* plaintiffs, before finding that the plaintiff's allegations were sufficient to state a Title VII claim for religious discrimination, based in part on a plant manager allegedly telling the plaintiff to turn down his gospel music but not making similar requests of employees playing secular music.[202] This mindfulness echoes Judge Jackson's reputation for fairness as well as her commitment to ensuring equal access to justice, more generally. During her confirmation hearings in 2021, for example, Judge Jackson expressed that as a public defender, she saw firsthand how difficult the court process can be to navigate and, as a result, she has taken care as a trial judge to "speak directly to [criminal defendants]" because "I want them to know what is going on."[203]

In other cases, however, Judge Jackson has ruled against plaintiffs in cases where the record evidence was close or the law favored sustaining plaintiffs' claims. Her decisions denying class action certification and pre-certification discovery in *Lockheed Martin*, and requiring arbitration in *Lyft*, are discussed above. Post-discovery, Judge Jackson has also denied relief at summary judgment in a number of cases, thereby preventing a jury from considering plaintiffs' claims.

In one such case, *Johnson v. Perez*,[204] Judge Jackson determined that allegations that the plaintiff and other Black employees had been subjected to poor attitudes and treatment did not rise above "the ordinary tribulations of the workplace."[205] Here, the plaintiff alleged that, on multiple occasions, he had been called stupid, yelled at, and demeaned in a way that his white colleagues were not. He further described an incident in which his immediate supervisor—who had lodged complaints about the quality of his work—bemoaned how "lazy" Black soldiers had

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[200] *Id.* at 193–94.

[201] *See, e.g., Horsey v. United States Dep't of State*, 170 F. Supp. 3d 256 (D.D.C. 2016) (Judge Jackson dismissing, on a motion to dismiss, a Black State Department employee's pro se Title VII action alleging that the Department subjected him to a hostile work environment, discriminated against him by referring him to psychological counseling, and retaliated against him by revoking his security clearance and suspending him indefinitely because of his refusal to submit to counseling, but permitting him to replead his hostile work environment and discrimination claims to comply with the Federal Rules of Civil Procedure).

[202] 306 F. Supp. 3d 365, 371 (2017).

[203] Ariana de Vogue, *Ketanji Brown Jackson: The Personal and Legal Record of the Supreme Court Nominee,* CNN (February 25, 2022), https://www.cnn.com/2022/02/02/politics/ketanji-brown-jackson-profile/index.html.

[204] 66 F. Supp. 3d 30 (D.D.C. 2014).

[205] *Id.* at 45.

been when he was deployed overseas alongside them.[206] Discounting this evidence as "self-serving testimony,"[207] Judge Jackson granted the defendant's motion for summary judgment, holding that the plaintiff had not alleged sufficiently severe or pervasive conduct to support a hostile work environment claim under Title VII and that, although there was a triable issue regarding whether the stated reason for the firing was pretextual, the claim could not proceed without a showing that this reason was a pretext for race discrimination. On appeal, the D.C. Circuit affirmed, but clarified that "a successful showing of pretext, without more"[208] *can* be adequate to support an inference of racial discrimination and that "there is no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination."[209]

In *Sledge v. District of Columbia*,[210] Judge Jackson dismissed a Black police officer's equal protection and Title VII claims for race discrimination, retaliation, and hostile work environment. In so doing, Judge Jackson declined to sustain the plaintiff's discrimination claim on the basis of his allegation that the defendant's "stated rationale for taking adverse action against him was entirely false and, accordingly, was pretext for discrimination."[211] Judge Jackson also held that the plaintiff's allegations that his supervisor humiliated him during two group meetings were not severe and pervasive enough to qualify as a hostile work environment because the abuse did not continue beyond those two meetings and because the plaintiff did not offer evidence that the "screaming was objectively humiliating."[212]

It is worth noting that several of Judge Jackson's less favorable decisions appear to result from an exceedingly cautious analysis and narrow interpretation of procedural rules. In *Crawford v. Johnson,*[213] Judge Jackson determined that a Title VII claim was not properly exhausted where the relevant allegations were raised only in attachments to plaintiff's Equal Employment Opportunity ("EEO") complaint and not in the text of the complaint itself. The D.C. Circuit disagreed with this narrow interpretation, writing, "[t]he district court's starting premise—that information contained in attachments to a formal EEO complaint cannot support exhaustion—was incorrect," and observing that the circuit's case law and that of other circuits have consistently treated attachments to an EEO complaint "as part of the complaint itself and as a basis for articulating claims."[214]

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[206] *Id.* at 42.
[207] *Id.* at 39.
[208] *Johnson v. Perez*, 823 F.3d 701, 710 (D.C. Cir. 2016).
[209] *Id.*
[210] 63 F. Supp. 3d 1 (D.D.C. 2014).
[211] *Id.* at 15–16.
[212] *Id.* at 25.
[213] 166 F. Supp. 3d 1 (D.D.C. 2016).
[214] *Crawford v. Duke*, 867 F.3d 103, 107 (D.C. Cir. 2017).

Similarly, in *Njang v. Whitestone Group, Inc.*,[215]—a case involving troubling allegations of race discrimination—Judge Jackson dismissed plaintiffs' claims under Section 1981 as time-barred, based on a six-month limitations period embedded within the employment contract that each plaintiff had signed. In *Njang,* Judge Jackson held that six months is a "reasonable limitations period" for Section 1981 claims, which do not require exhaustion of administrative remedies.[216] Here again, Judge Jackson displayed a tendency to closely follow procedural law, even where ambiguities could reasonably be solved in a manner increasing access to the courts. On the other hand, as explained further below, Judge Jackson did allow the Title VII claim to proceed, allowing one plaintiff, Njang, a pathway to seek justice.

Judge Jackson has also displayed substantial deference to government defendants, at times shielding federal employers from liability. In one such case—*Tapp v. Washington Metropolitan Area Transit Authority*[217]—after terminating an employee of over twenty-five years, the Washington Metropolitan Area Transit Authority (WMATA) publicly posted "be on the look-out" flyers featuring his photograph in every metro station, creating the false impression that he had committed a crime.[218] In a motion for judgment on the pleadings, WMATA claimed immunity from common law tort claims, and the Court agreed, allowing the agency to hide behind the shield of sovereign immunity—a legal doctrine that protects the government from liability. "Sovereign immunity can be abridged by statute," and the agency's establishing charter did include a waiver for torts "committed in the conduct of any proprietary function."[219] Nevertheless, Judge Jackson determined that the posting of the flyer was "an exercise of discretion grounded in social, economic, or political goals,"—specifically, safety considerations—and therefore a governmental function for which the agency was entitled to immunity.[220]

Similarly, in *Martin v. EEOC*,[221] a teacher alleged that the Employment Opportunity Commission made errors in handling his claims where the investigation "looked only at his claim of racial discrimination, while failing to consider an additional claim of gender discrimination."[222] Judge Jackson dismissed his claims against the federal agency, determining that mandamus relief was not available since "the scope of an EEOC investigation is wholly within the [agency's discretion.]"[223]

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[215] 187 F. Supp. 3d 172 (D.D.C. 2016).
[216] *Id.* at 178–179.
[217] 306 F. Supp. 3d 383 (D.D.C. 2016) (holding also that Plaintiff could not assert a constitutionally protected property interest in his employment and therefore could not establish a Due Process violation, and that WMATA could not be held subject to Section 1983 as an interstate agency).
[218] *Id.* at 388.
[219] *Id.*
[220] *Id.* at 398.
[221] 19 F. Supp. 3d 291 (D.D.C. 2014).
[222] *Id.* at 297.
[223] *Id.* at 304.

On the other hand, in one recent decision, *Youssef v. Embassy of United Arab Emirates,*[224] Judge Jackson allowed an age discrimination claim to proceed over the defendants' claims that the embassy is shielded by both immunity under the Foreign Sovereign Immunities Act and the federal enclave doctrine, which exempts certain federal lands from state law regulations, such as the D.C. Human Rights Act.[225] Following a careful analysis of the plaintiff's job responsibilities, Judge Jackson concluded that the plaintiff was not fairly characterized as a "civil servant" and that her claims thus fell under an exception to the Foreign Sovereign Immunities Act that abrogates a foreign state's immunity when acting in a commercial capacity.[226] Judge Jackson likewise rejected the defendants' invocation of the federal enclave doctrine, noting that the doctrine is "inapplicable to those local statutes that the District of Columbia Council has enacted pursuant to its congressionally delegated authority."[227]

Where she perceives the judiciary as having the authority to do so, Judge Jackson will often allow employees the opportunity to present *some* portion of their case to the jury—or at least proceed to discovery. In *Tapp v. Washington Metro. Area Transit Auth.,* Judge Jackson permitted a gender discrimination claim under Title VII to proceed to determine whether administrative remedies had been properly exhausted, noting that a complaint is not required to "anticipate affirmative defenses which might be raised by a defendant."[228] And in *Martin v. EEOC*, after dismissing claims against the EEOC, Judge Jackson transferred the plaintiff's remaining claims—alleging employment discrimination and retaliation under Title VII—to the proper venue in the interests of justice.[229]

Likewise, in *Njang v. Whitestone Group, Inc.*,[230] where plaintiff Sebastian Njang, who was born in Cameroon, alleged discrimination on the basis of his national origin and race in violation of Title VII, Judge Jackson determined that "a six-month limitation is unreasonable for Title VII claims"[231] given the "expansive and intricate exhaustion requirement."[232] Judge Jackson further *sua sponte* ordered supplemental briefing on the "cat's paw" theory of liability—a theory not presented in the filings—allowing Njang the opportunity to demonstrate liability on the grounds that his manager, motivated by discriminatory intent, influenced an otherwise unbiased decision-maker to take an adverse employment action against him.[233]

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[224] No. 17-CV-2638 (KBJ), 2021 WL 3722742 at *1 (D.D.C. Aug. 23, 2021).
[225] *Id.* at *1.
[226] *Id.* at *6, 8–10.
[227] *Id.* at *5, 11.
[228] *Tapp,* 306 F. Supp. 3d at 398 (internal citations omitted).
[229] *Martin,* 19 F. Supp. 3d at 307.
[230] 187 F. Supp. 3d 172 (D.D.C. 2016)
[231] *Id.* at 177.
[232] *Id.* at 180.
[233] "Neither party here has recognized that Njang's claim follows a cat's paw structure, much less spoken to the question of whether and to what extent *Egan* precludes Title VII claims involving the

Similarly, in *Rae v. Children's National*,[234] while Judge Jackson agreed that the plaintiff did not put forth enough record evidence to sustain his claims, she noted that the magistrate judge applied an impermissibly high standard for wrongful termination under the D.C. Human Rights Law, requiring that the unlawful reason for termination be the *sole* reason as opposed to predominate one. In so holding, Judge Jackson highlighted the importance of providing a pathway for at-will employees to litigate their claims, citing D.C. Circuit precedent for the proposition that the exception "should not be read in a manner that makes it impossible to recognize any additional public policy exceptions to the at-will doctrine that may warrant recognition."[235]

In sum, Judge Jackson's record on economic justice cases is mixed. Judge Jackson's record of permitting plaintiffs to proceed to discovery is cause for encouragement. But Judge Jackson has also imposed a high bar for proving employment discrimination and created obstacles based on restrictive readings of procedural requirements and deferential treatment of government defendants. The weight of these cases merits attention. While we do not agree with all critiques of Judge Jackson's record in this area, we are nevertheless concerned by an approach that, at times, seems too rigid or that dismisses credible allegations and proof of troubling and discriminatory workplace conduct.

V. Race-Conscious Policies and Affirmative Action

Since its 1978 decision in *University of the Regents of California v. Bakke*, the Supreme Court has consistently held that the Constitution permits race-conscious decision-making in order to promote diversity and to remedy specific instances of racial discrimination.[236] As recently as 2016, the Supreme Court has upheld thoughtful race-conscious admissions programs against constitutional attack,[237] and with good reason: Race-conscious policymaking remains a key tool for the achievement of meaningful racial equality. Yet, race-consciousness continues to face attacks from opponents who mischaracterize awareness of structural racial inequality as discriminatory. In the face of these attacks, the Supreme Court has shown an increasing willingness to roll back over forty years of clear precedent affirming the legality of race-conscious decision-making. Now more than ever, it is

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revocation of a security clearance in which the challenge to the employee's termination is premised on a cat's paw theory. In addition, and perhaps even more fundamentally, having not recognized the potential applicability of *Staub*, the parties here have not evaluated or addressed the question of whether the established facts in the instant record are sufficient to demonstrate the elements of a *Staub* claim." *Id.* at 187–88.

[234] No. 15-CV-0736 (KBJ), 2020 WL 7693612 at *8 (D.D.C. Dec. 28, 2020).

[235] *Id.* at *8.

[236] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 305–15 (1978) (explaining that diversity and remedying the effects of specific instances of racial discrimination constitute compelling interests justifying the consideration of race).

[237] *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2215 (2016).

essential that new justices on the Supreme Court arrive with a clear understanding of the value and constitutionality of race consciousness.

While Judge Jackson has not had occasion to rule on many cases implicating race-conscious policies, when presented with the issue, she has recognized that remedying race-based discrimination is a compelling government interest and upheld race-conscious policies against constitutional attack. In *Rothe Development, Inc. v. Department of Defense*, a Texas computer-services corporation sued the Department of Defense and the Small Business Administration. The plaintiff argued that Section 8(a) of the Small Business Act, which permits the government to make preferential contract awards to "socially disadvantaged individuals," prevented it from bidding on DOD contracts based on race in violation of the Fifth Amendment's Equal Protection Clause, and that the program is an unconstitutional delegation of authority to the Small Business Administration to make or enact racial classifications.[238] The SBA defines "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."[239] Relying on a 2012 district court opinion that decided the same issue,[240] Judge Jackson held that Section 8(a) does not violate equal protection under the Fifth Amendment.[241] She affirmed that the government demonstrated a compelling interest in the program given the need to remedy race-based discrimination and its effects, and the government also showed that the program was narrowly tailored to further this compelling interest; alternative race-neutral remedies proved unsuccessful, and the program was flexible and neither under- nor over-inclusive.[242]

Further, in her non-judicial public comments and writings, Judge Jackson has demonstrated sensitivity to the role of race in American society. She has also demonstrated a willingness to engage in data analysis to uncover the various ways that bias can permeate the criminal justice system—from arrest rates to prosecutorial decisions through the sentencing process.[243] In addition, she has embraced her identity as a Black woman lawyer and the legacy of the Black women civil rights advocates who made her present life possible.[244]

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[238] 107 F. Supp. 3d 183, 191 (D.D.C. 2015).
[239] *Id.* at 189 (citing 15 U.S.C. § 637(a)(5)).
[240] *See DynaLantic Corp. v. United States Dep't of Def.*, 885 F. Supp. 2d 237 (D.D.C. 2012).
[241] *Rothe Dev.*, 107 F. Supp. 3d at 206–11.
[242] *Id.*
[243] *See e.g.,* Ketanji Brown Jackson, Guest Lecture for On Race, Racism, and American Law (April 10, 2017), available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (pp 847-868).
[244] *See e.g.,* Ketanji Brown Jackson, "Courage, Purpose, Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond," University of Michigan Law School MLK Day Lecture (January 20, 2020), available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (pp

Conclusion

There is no question that Judge Jackson has the background and qualifications fitting of a Supreme Court justice. Her wide-ranging professional background and years of service as a federal judge have equipped her with the judgment and perspective to further the ideals of equal justice under the law and to give full meaning to our nation's civil rights laws and have showcased her collegiality and ability to build consensus on important issues. A thorough review of Judge Jackson's record, and specifically her judicial opinions, confirms that she has the judicial temperament to give all plaintiffs their full and fair day in Court, and her special attention to pro se litigants is particularly encouraging.

On balance, Judge Jackson has demonstrated an unwavering commitment to fundamental fairness for all that is sorely needed on the Court. For this reason, we support the confirmation of Judge Ketanji Brown Jackson to the Supreme Court without reservation.

596-688); Ketanji Brown Jackson, "Remarks for the Empowering Women of Color Sixth Annual Constance Baker Motley Gala," Columbia Law School (March 12, 2021), available at https://www.judiciary.senate.gov/imo/media/doc/Jackson%20SJQ%20Attachments%20Final.pdf (pp 551-555).