

November 15, 2022

*Transmitted by Email*

The Honorable Kathy Hochul  
Governor of New York  
New York State Capitol Building  
Albany, NY 12224

**Re: Prioritizing Civil Rights & Diversity in Court of Appeals Appointment**

Dear Governor Hochul:

As you prepare to consider a short list of potential nominees for Chief Judge on the New York State Court of Appeals, the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) encourages you to select a candidate whose background, experience, and record demonstrate that they will enrich the Court’s diversity, strengthen its decision-making, advance its commitment to equal justice under law, inspire public confidence in the judiciary, and defend New York’s recent progress toward becoming an equal, inclusive democracy.

The vacancy created by Chief Judge Janet DiFiore’s resignation comes at a critical time for our state and our nation. The role of a judge is among the most central to maintaining the rule of law and the preservation of our constitutional democracy. As such, it is important that individuals who serve as judges have a demonstrated commitment to fairness and to upholding the law. By appointing a candidate with a demonstrated commitment to civil rights and racial justice, you can help the public build greater confidence that the Court will consider the matters before it with fairness and impartiality, and with respect for the rights of those who are often most marginalized in our society.

This appointment is an opportunity to improve the Court’s professional diversity, which can strengthen its deliberative rigor and bolster its legitimacy. Judges with diverse backgrounds and perspectives can counteract entrenched biases, foster public trust, and improve judicial decision-making by enriching the deliberative process with a more complete spectrum of viewpoints and voices.<sup>1</sup> In the words of former U.S. Circuit Judge Harry T. Edwards, diversity on the bench “makes for better-informed discussion” and improves decision-making, because judges with different experiences and viewpoints “have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles.”<sup>2</sup> Enhancing a court’s deliberations with “a broad range of perspectives,” as Judge Edwards explained, “necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law.”<sup>3</sup>

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<sup>1</sup> Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000).

<sup>2</sup> Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Policy Rev. 325, 329 (2002).

<sup>3</sup> *Id.*

The stakes of judicial decision-making are particularly high in state courts. These courts hear 95% of all cases in the U.S. legal system and issue rulings with profound importance, including on voting rights and redistricting, abortion rights, criminal justice, gun safety measures, and more.<sup>4</sup> Yet, across the country, the highest courts in most states fail to reflect the diversity of the people whose rights they are called upon to adjudicate.<sup>5</sup> Over 80% of state high court judges are white, and nearly 60% are men.<sup>6</sup> Most states' highest courts (28 of 50) have no Black judges, and an even higher proportion have no Latino or Asian judges.<sup>7</sup> Professional diversity is severely lacking, with a disproportionate majority of judges on state high courts coming from prosecutorial or corporate backgrounds. Nationwide, 81% of state high court judges have been in private practice, but only 2% have worked at civil legal services organizations that provide free legal assistance to people who are indigent.<sup>8</sup> Over a third (39%) of state high court judges are former prosecutors, but only 7% are former public defenders.<sup>9</sup>

New York's highest court has made significant strides in racial and ethnic diversity in recent years. However, until Chief Judge DiFiore's resignation, four of seven judges on the Court were former prosecutors.<sup>10</sup> None of its sitting judges are former public defenders.<sup>11</sup> This imbalance deprives the Court's deliberations of a full spectrum of experiences, viewpoints, and perspectives and may negatively impact public perceptions of its legitimacy.<sup>12</sup> For example, without the perspective of a single former public defender, the Court is deprived of experience that, in the words of Justice Ketanji Brown Jackson, can help judges understand "that every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusation, is entitled to the assistance of counsel."<sup>13</sup> Accordingly, we urge you to take this opportunity to diversify and strengthen New

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<sup>4</sup> Marsha Mercer, *State Supreme Courts Are (Slowly) Starting to Look More Like America*, Pew Trusts (May 2, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/02/state-supreme-courts-are-slowly-starting-to-look-more-like-america>.

<sup>5</sup> *Id.*

<sup>6</sup> Amanda Powers & Alicia Bannon, *State Supreme Court Diversity – May 2022 Update*, Brennan Center for Justice (May 25, 2022), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Kyle C. Barry, Molly Bernstein & Timothy E. Bradley, *Behind the Bench: Professional Diversity & State Supreme Courts: New York*, State Law Research Initiative (2022). <https://behindthestatebench.com/states/new-york/>.

<sup>11</sup> *Id.*

<sup>12</sup> Alicia Bannon & Douglas Keith, *What Research Shows About the Importance of Supreme Court Diversity*, Brennan Center for Justice (Feb. 1, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/what-research-shows-about-importance-supreme-court-diversity>.

<sup>13</sup> Ketanji Brown Jackson, *Responses 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* 5 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf>; see also Allison P. Harris & May Sen, Working Paper, *How Judges' Professional Experience Impacts Case Outcomes: An Examination of Public Defenders and Criminal Sentencing* 3 (May 6, 2022),

York's judiciary by appointing a qualified candidate with experience in public defense, civil rights, or legal aid work.

For all these reasons, we encourage you to prioritize nominees who demonstrate a commitment to civil rights and racial justice and whose appointment will contribute meaningfully to the Court's professional, experiential, and demographic diversity.

Sincerely,

/s/ Steven Lance

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NAACP Legal Defense and Educational Fund, Inc. ("LDF")

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People ("NAACP") since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.

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<https://scholar.harvard.edu/msen/public-defenders> (discussing evidence that former public defenders "have more knowledge about how incarceration impacts defendants' lives," greater "sensitivity to the costs of incarceration," and heightened awareness of both "structural contributions to offender status" and "prosecutors' power and resources, especially compared to defendants' relative lack of power").