national partnership for women & families
Because actions speak louder than words.

STATEMENT ON THE NOMINATION OF JANICE ROGERS BROWN

The National Partnership for Women & Families opposes the nomination of Janice Rogers Brown to the D.C. Circuit Court of Appeals. Her sharply-worded opinions, writings, and speeches clearly demonstrate that her views are substantially outside the legal mainstream and lack the balance and perspective for a lifetime appointment to the D.C. Circuit. We believe that she is the wrong choice for the D.C. Circuit and we urge you to oppose her nomination.

A Record of Hostility and Opposition to Equal Justice

We believe that it is crucial to confirm judges who will be committed to equal justice for all individuals, the fair application of the law, and ensuring that our courts are free of bias. Justice Brown's documented hostility to workplace, reproductive, and civil rights undermines these core principles.

Workplace Discrimination. As a justice on the California Supreme Court, Justice Brown has authored many opinions dismissive of allegations of employment discrimination, and narrowly construed causes of action and remedies available to plaintiffs.

- In *Aguilar v. Avis Rent A Car Sys. Inc.,* 980 P.2d 846 (Cal. 1999), a group of Latino employees brought a race discrimination suit challenging the use of offensive racial epithets in the workplace. The majority of the court upheld an injunction to prohibit the use of epithets because it constituted a hostile work environment. In dissent, however, Justice Brown argued against the injunction, claiming that the right to free speech under the First Amendment protects racially discriminatory speech in the workplace – even though the majority of the court held that it created a hostile work environment violative of the California Fair Employment and Housing Act (FEHA). The analysis advanced by Justice Brown undermines important legal principles critical, in particular, to creating workplaces free of sexual harassment. She argues that, notwithstanding two Supreme Court decisions prohibiting verbal harassment in the workplace – *Meritor Savings Bank v. Vinson, 477 U.S. 57* (1986) and *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993) – the question of whether prohibiting such verbal conduct violates the First Amendment is unresolved.[1] Using this strained analysis, she effectively circumvents the mandate of *Meritor* and *Harris*, and instead favors permitting verbally harassing speech in the workplace on First Amendment grounds. Her analysis, if applied in the sexual harassment context, also could undermine the legal standard articulated in *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2292 (1998) *and Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998). In these two decisions, the Supreme Court established an affirmative defense to employer liability under Title VII in cases involving hostile environment sexual harassment allegations. To prevail using this defense, the employer must demonstrate, among other things, that it exercised "reasonable care" to prevent and correct promptly any sexually harassing behavior. *Faragher*, 118 S.Ct. at 2292.

[1] Under these cases, offensive verbal conduct of a sexual nature is sexual harassment that violates Title VII of the Civil Rights Act of 1964 if it is sufficiently severe or pervasive. *Meritor,* 477 U.S. at 66.

Justice Brown's argument that efforts to prohibit verbal harassment violate the First Amendment, however, could deter employers from complying with the *Faragher/Ellerth* mandate to work proactively to prevent such harassment. Thus, we believe that her analysis places her well outside the legal mainstream and would make it harder for employees and employers to rid the workplace of discrimination.

Justice Brown also has given short shrift to plaintiffs in employment discrimination cases by limiting the available remedies.

- In *Konig v. Fair Employment and Housing Commission,* 50 P.3d 718 (Cal. 2002), the plaintiff filed a complaint with the Department of Fair Employment and Housing alleging serious emotional distress because she had been rejected for placement in a housing unit due to discrimination. Justice Brown alone dissented from the majority's opinion awarding damages for such emotional distress. Even though a majority of the court found that the relevant law permitted the Fair Employment and Housing Commission to award such damages, Justice Brown argued that that the award of damages remains a judicial function, and thus, conferring such power upon an administrative agency would contravene "constitutional restraints." *Id.* at 765. Using this narrow analysis at the federal level, however, would limit the ability of many federal agencies to provide full remedies to plaintiffs for discriminatory conduct.

Her opinions also use rigid interpretations of the law to dismiss claims and, as a result, undermine plaintiffs' ability to invoke civil rights protection.

- In *Peatros v. Bank of Am. NT &SA,* 990 P.2d 539 (Cal. 2000), the plaintiff sued her employer for race and age discrimination under FEHA. The trial and appeals courts held that the plaintiff could not sustain such a lawsuit because it was preempted by the National Bank Act of 1864. The California Supreme Court reversed, holding that the statute was not a bar to employment discrimination actions against banking establishments. Justice Brown dissented, and would have held that an obscure law originally enacted during the Civil War should preempt state anti-discrimination laws on issues such as race and age. Justice Brown's argument, which the majority explained was incorrect and ranged "between minimal and nonexistent," was that Congress intended to give national banks the greatest latitude possible to hire and fire their chief operating officers. *Id.* at 554, 560.

- In *Richards v. Ch2M Hill, Inc.,* 29 P.3d 175 (Cal. 2001), the California Supreme Court ruled that a plaintiff could file a discrimination lawsuit based on a series of requests to her employer seeking reasonable accommodations to deal with her multiple sclerosis. The court found that these requests, occurring both within and outside the prescribed statutory period, together constituted a "continuing violation" for which the employer could be liable. Justice Brown dissented, arguing for a much narrower interpretation of the continuing violation theory, and that it was unfair to hold employers responsible for their ongoing behavior without providing notice of the employee's intent to sue. Instead, she urged a much more onerous burden for plaintiffs – namely, that victims should be required to file a lawsuit for *each* individual wrongful act, and that each discriminatory act should be considered separately and subject to the statute of limitations. This more extreme standard advanced by Justice Brown, if adopted, would have eviscerated the continuing violation theory, a doctrine accepted by many courts in their adjudication of employment discrimination cases. Moreover, her standard would have made it harder

for plaintiffs to bring their discrimination claims, by requiring them to file multiple lawsuits in certain situations, or precluding them from filing lawsuits altogether.

Reproductive Rights and Access to Contraception. Justice Brown's statements and legal decisions reflect a rigidly held personal policy preference regarding fundamental rights that ultimately would erode rights of critical importance to women, including reproductive rights. She opposes much of the substantive due process/fundamental rights jurisprudence that has been used to establish the right of privacy essential to constitutional reproductive rights analysis. Such opposition would limit the ability of many women to vindicate their privacy rights in court. While Justice Brown has only issued one opinion dealing with the issue of abortion, *American Academy of Pediatrics v. Lungren,* 16 Cal.4th 307 (Cal. 1997), a case involving the constitutionality of a California law requiring minors to obtain a parent's permission to obtain an abortion, her opinion raises serious concerns about her commitment to women's reproductive rights and her ability to adhere to legal precedent.

- In *Lungren,* Justice Brown dissented to the majority's ruling that the statute at issue violated a minor's right to privacy guaranteed by the state constitution. Instead, she argued that the court's "conclusion that in the abortion context…an unemancipated minor's privacy interest are coextensive with those of an adult is indefensible."[2] Disregarding the privacy clause contained in the California Constitution, she asserted that the federal Constitution restricts the privacy protections that may be provided by a state constitution. In doing so, her opinion conflicted with widely accepted precedent that states *can* provide *greater* protection for rights such as privacy. In the case of minors, Justice Brown would deny states the right to provide these additional privacy protections. She further argued in favor of an overly narrow standard to uphold the parental consent law in question on constitutional grounds. Specifically, she stated that law should be upheld because it was not shown to be unconstitutional "under any and all circumstances."[3] However, contrary to Justice Brown's opinion, Supreme Court decisions have made clear that the unconstitutionality of restrictive abortion laws can be established where *many* – but not all – of their applications are unconstitutional.[4]

Justice Brown's analysis in the *Lungren* case illustrates a results-oriented approach to decision-making that recognizes the "fundamental rights" of parents but not those of young women seeking abortions. Her analysis also raises serious questions about whether she would apply the law faithfully, or to seek to advance her agenda to curtail reproductive rights and other fundamental freedoms critical to women.

<u>*Access to Contraception*</u>. In addition to approving limits on abortion, Justice Brown's recent dissent in *Catholic Charities of Sacramento, Inc. v. Superior Court,* 85 P.3d 67 (Cal. 2004), indicates her hostility toward efforts to ensure women's access to reliable contraception, a necessity for many women.

- Justice Brown was the lone dissenter in *Catholic Charities of Sacramento, Inc. v. Superior Court,* a precedent-setting decision in which the California Supreme Court ruled that a charitable organization must offer birth-control coverage to its employees under

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[2] *Lungren,* 16 Cal.4th at 432 (Brown, J. dissenting).
[3] *Id.*
[4] *See Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

California's Women's Contraception Equity Act ("WCEA"). Even though Justice Brown agreed that women are entitled to be "treated fairly and equitably and to be free from discrimination on the basis of gender,"[5] she alone concluded that the anti-discrimination interest was outweighed by religious freedom interests. In reaching her conclusion, Justice Brown scoffed at the majority's reliance on the WCEA's narrow exemption for religious employers, explaining that women of childbearing age to whom contraceptive coverage is a major concern are not prevented from finding "more congenial employment."[6]

Justice Brown's dissent reflects views that could endanger women's rights to equal treatment under the law, especially where non-religious organizations attempt to use religion to deny women access to health care that they are legally entitled to receive.

Civil Rights and Equal Protection Principles. Justice Brown's speeches reveal her skepticism about equal protection principles, stating that America has become "a nation of whiners," entrenched in a "culture of victimization." She derisively proclaims that our political leaders are "handing out new rights like lollipops in the dentist's office," and have "become so comfortable with the language of discrimination and equal protection, the words have lost all real meaning." To her, such "concepts are simply empty vessels which can be filled with any content and still elicit a powerful emotional response."[7] Proclaiming that judges "constitutionaliz[e] everything possible, finding rights which are nowhere mentioned in the Constitution," she noted that these judges "take a few words which are in the Constitution like 'due process' and 'equal protection' and "imbu[e] them with elaborate and highly implausible etymologies…"[8] Although Justice Brown does not make clear who "the whiners" are, or what "new rights" she finds problematic, what becomes clear is her overall attitude of hostility towards a range of protections that ensure fair treatment.

Affirmative Action. Justice Brown has been particularly vehement in her hostility to affirmative action. In *Hi-Voltage Wire Works, Inc. v. City of San Jose,* one of her most well-known decisions, her legal analysis reveals an overall skepticism and lack of sensitivity to the importance of affirmative action as a remedy for systemic discriminatory practices.

③ In *Hi-Voltage Wire Works, Justice* Brown wrote a majority opinion which struck down a program established by the City of San Jose to encourage public works projects participation by minority and women business enterprises. Although she could have limited the decision to the interpretation of the State Constitution as amended by Proposition 209, Justice Brown used the case to disparage past judicial decisions upholding federal race- and gender-based affirmative action programs under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the U.S. Constitution. In support of her decision to strike down defendant's affirmative action program, Justice Brown discusses antimiscegenation statutes and initiatives that allowed landowners the right to discriminate in the rental or sale of their property – refusing to distinguish between permissible affirmative action programs, and explicitly discriminatory statutes and initiatives meant to preserve segregation and racial inequality. In his concurring

[5] 85 P.3d at 98.
[6] *Id.* at 105.
[7] *1996 Law Day Speech,* Speech before Sacramento County Bar Association (May 1, 1996), at 8, 6-7.
[8] *The History of the World – Part 3,912,* November 21, 1997, Speech given at the Institute of Legislative Practice at McGeorge School of Law.

> opinion, Justice George criticizes Justice Brown for making "no meaningful distinction" between "discriminatory racial policies that were proposed for the clear purpose of preserving racial segregation and race conscious affirmative action programs whose purpose is to break down or eliminate discrimination." *See* 12 P.3d at 1095. Justice George also noted that the majority opinion written by Justice Brown strays far from American mainstream thought, representing "a serious distortion of history" and "does a grave disservice to the sincerely held views of a significant segment of our populace." *Id.*

Justice Brown's opinion in *Hi-Voltage Wire Works* demonstrates a palpable antagonism towards affirmative action programs that have been crucial to the success of women and minorities in education, business, and employment settings, and her appointment to the D.C. Circuit Court of Appeals could have a devastating impact on expanding equal opportunity for all.

The Unique Importance of the D.C. Circuit and Justice Brown's Anti-Government Views

Justice Brown's nomination is particularly troubling given the unique importance of the D.C. Circuit and the implications of her extreme views and ideology. Her speeches and statements exhibit a hostility towards government that raises serious questions about how she would adjudicate cases involving the government, how it operates, and who receives its services. Approximately three-fourths of the D.C. Circuit's caseload involves reviewing the actions of federal agencies or officers,[9] which is a quarter of *all* federal agency decisions – far more than any other circuit.[10] Because the Supreme Court reviews such a small number of cases, the D.C. Circuit effectively has the final word on many administrative law and federal agency actions. The court thus plays a crucial role in determining how federal agencies conduct business.

Justice Brown's record is replete with inflammatory rhetoric regarding her disdain for the government and those who utilize its services. She has described "Big Government" as a "goody bag to solve our private problems."[11] She likens reliance on government programs to slavery and drug addiction: "Most of us no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens."[12] She has been outspoken and clear about her conservative anti-government ideology and agenda, raising questions about whether she can decide a case fairly where the government is a party, and whether she will protect the rights of citizens. In one speech, she asserts:

> "Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets, unapologetic exappropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of

[9] Jeffrey Brandon Morris, CALMLY TO POISE THE SCALES OF JUSTICE 284 (2001).
[10] Susan Low Bloch and Ruth Bader Ginsberg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia,* 90 GEO.L.J. 549, 575 (2002).
[11] *Hyphenasia: The Mercy Killing of the American Dream,* Speech at Claremont-McKenna College (Sept. 16, 1999), at 4.
[12] *A Whiter Shade of Pale:* Sense and Nonsense – The Pursuit of Perfection in Law and Politics (April 20, 2000), Speech given before the Federalist Society at the University of Chicago Law School.

> civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible."[13]

Janice Rogers Brown's aggressive advocacy questioning the role of government is disconcerting in light of the unique role of the D.C. Circuit, and her attitudes raise serious questions about her ability to adhere to the rule of law.

Conclusion

Janice Rogers Brown's extreme views and her resistance to faithfully applying accepted legal principles demonstrates that she is ill-suited for an appointment to the District of Columbia Court of Appeals. Because the U.S. Court of Appeals handles thousands of cases per year on issues that affect women, minorities, and others in our nation, it is crucial for the Senate Judiciary Committee to carefully consider each of President Bush's nominees. We believe that Janice Rogers Brown is not the right choice for the D.C. Circuit. We call upon the Senate Judiciary Committee to reject Janice Rogers Brown's nomination to the D.C. Circuit Court of Appeals.

[13] *Supra* note 12.