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National Center for Law and Economic Justice

Joining with low-income people to fight for fairness

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Testimony to The Presidential Commission on the Supreme Court of the United States

National Center of Law and Economic Justice

Opening Statement

The National Center for Law and Economic Justice (NCLEJ), exists to protect the legal rights of individuals and communities with limited financial means, including low income communities of color, public benefits recipients, low income people with disabilities, and low-wage workers. NCLEJ focuses on impact litigation that will establish important principles for the protection of such individuals and communities. NCLEJ has been involved, as counsel or *amicus curiae*, in many significant cases involving the rights of low-income individuals over the more than 50 years since it was founded in 1965.

The Supreme Court has had an immense impact on the rights of the communities with whom NCLEJ works in partnership. However, too often, it is also an opaque and inaccessible institution in which the voices and experiences of marginalized communities and the unique issues they face are frequently ignored and silenced. Any reforms to the Supreme Court must prioritize these voices and experiences and seek to build a more just and transparent legal system, starting at the top.

Professional Diversity

Of the current sitting Supreme Court justices, none spent a substantial part of their pre-judicial career working as a legal aid attorney or for a nonprofit civil rights organization. Indeed, only Justice Sotomayor spent any notable time on work relating to the litigation of the rights of marginalized people—and this was as a board member at the Puerto Rican Legal Defense and Education Fund, not as an attorney on staff. Eight of the sitting justices have been lawyers for the government in various capacities.[1] Six worked stints at private law firms, often representing large corporate clients.[2] Taken as a whole, the current Court has had little professional exposure to the shortcomings in our legal system when it comes to advancing and protecting the rights of marginalized people and communities.

This problem is not limited to the Supreme Court. As of June 2020, only one federal appellate judge spent the majority of his career in legal aid, and none spent the majority of their career at a nonprofit civil rights organization.[3] Sixty five percent of federal appellate judges

[1] Chief Justice Roberts, Justice Thomas, Justice Breyer, Justice Alito, Justice Sotomayor, Justice Kagan, and Justice Gorsuch, and Justice Kavanaugh.
[2] Chief Justice Roberts, Justice Breyer, Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Barrett.

spent the majority of their careers in private practice, and the remainder spent most of their careers in government or academia. The federal appellate bench is the pool from which Supreme Court justices have been drawn for decades, meaning that unless the criteria considered when nominating Supreme Court justices is reworked, this problem will not alleviate itself.

While lawyers who have primarily represented the government and corporate clients can, of course, be just and fair-minded judges, they often lack the context to understand how our legal system functions for marginalized people. Our appellate and Supreme Court bench is made up almost entirely of lawyers who have never tried and, due to limited resources, failed, to gather sufficient facts to overcome heightened pleading standards, leaving clients who have been deeply harmed by a government actor with nowhere to turn. They do not face the real world consequences of recent restrictions on private rights of action, which leave many of our clients with legal rights in name only. Such a bench cannot adequately appreciate that while the courts have been used to advance and protect the rights of marginalized groups on many occasions, our legal system, on the whole, favors the well-resourced.

Moreover, the current preference for making judicial appointments from lawyers in government service is of specific concern for legal services organizations seeking to address governmental inaction or misconduct with regard to indigent individuals. Tens of millions of individuals and families in the United States rely on programs like the Supplemental Nutrition Assistance Program for food, Supplemental Security Income benefits for minimum basic income if someone is unable to work, subsidized housing, energy assistance for heating, and Medicaid for health care. Civil rights organizations like NCLEJ pursue benefits litigation to ensure safety net benefits are accessible to those who need them. At the same time, state program administrators are cutting costs, modernizing computer systems, and updating regulations. The nature of the claims in such litigation often hinges on weighing administrative tasks and efficiencies against the constitutional interests of benefits recipients[4] or challenging the governmental agency's interpretation of its scope of work and responsibility.[5] States are most often represented by their own Attorney General's office and deference to agency action is a recurrent theme in this type of litigation. To empanel judges who have over and over served in the capacity of attorneys general, solicitors general, or governmental agency counsel—charged with defending the position of the government and its agencies— produces a judiciary whose formative legal development is steeped in preserving the position of the government, in opposition to the individual rights of its citizens on many occasions. Rather than strongly

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[3] Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, Center for American Progress (Jun. 17, 2020), https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/.

[4] *See e.g. Reynolds v. Giuliani*, 35 F.Supp. 2d 331 (S.D.N.Y. 1999) (preliminary injunction issued to prevent the benefits issuing agency in New York City from "re-engineering" the way in which food stamps, Medicaid and cash assistance were provided); *Gemmell v. Affigne*, 2016 WL 7178740 (R.I. Dist.) (class action brought to challenge failures by the Rhode Island Department of Human Services to timely process and issue Supplemental Nutrition Assistance Program benefits as a result of a failed attempt to merge new and old benefits eligibility computer systems).

[5] *See e.g. Gilliam v. United States Dept of Agriculture*, 486 F. Supp. 3d 856 (E.D.P.A.) (preliminary injunction issued in a challenge to USDA's interpretation of statutory language authorizing emergency food benefits authorized by Congress during COVID).

promoting governmental attorneys, a balanced and well-rounded judiciary should reflect varied types of legal practice to bring diversity of perspective and training to the bench.

Racial Diversity

In addition to economic and professional diversity, reform to the Court is essential to promote racial diversity to address the many pressing issues involving civil rights and racial equality. The Court now has a supermajority of conservatives who refuse to acknowledge how the legacy of slavery and ongoing practice of racism adversely shapes the lives of people of color. With the Court poised to address fundamental issues that drive racial inequality, including voting rights, employment discrimination, affirmative action, police brutality, and qualified immunity, the hyper-partisan and largely white conservative majority poses a serious threat to racial equity and equality.

People of color suffer from severe and persistent inequality that affects every facet of their lives. The resulting starkest divides are in measures of household wealth, income, and poverty: the median Black household in the U.S. earned just 61 cents for every dollar of income the median white household earned, while the median Hispanic household earned 74 cents.[6] One in three Black families have zero or negative wealth, and the median White family has 41 times more wealth than the median Black family and 22 times more wealth than the median Latino family. The poverty rate for Blacks and Hispanics is more than double that of non-Hispanic Whites; in 2019, 19% of Blacks and 16% of Hispanics lived under the poverty line, compared to 7% of whites.[7] One in six Black adults were not able to pay a utility bill or paid a bill late in the past three months.[8]

This history, including the legacy of slavery and ongoing systemic racism, have created structural barriers that have made it difficult for Black and Hispanic Americans to gain equal footing. Eight in ten Blacks with at least some college experience (81%) say they've experienced racial discrimination.[9] One in five Black borrowers are turned down for a conventional loan.[10] Further, 59% of black men say they have been unfairly stopped by the police because of their race. Black males are 2.5 times more likely to be killed by police than white males. [11] Dying at the hands of law enforcement is a leading cause of death among young Black men. [12]

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[6]Valerie Wilson, *Racial disparities in income and poverty remain largely unchanged amid strong income growth in 2019*, Economic Policy Institute (Sept. 16, 2020), https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019/

[7] Federal Safety Net, http://federalsafetynet.com/us-poverty-statistics.html

[8] *Wealth Inequality in the United States*, Inequality.org, https://inequality.org/facts/wealth-inequality/#racial-wealth-divide

[9] Monica Anderson, *For black Americans, experiences of racial discrimination vary by educations level, gender*, Pew Research Center (May 2, 2019), https://www.pewresearch.org/fact-tank/2019/05/02/for-black-americans-experiences-of-racial-discrimination-vary-by-education-level-gender/

[10] Hedwig Lee, Michael Esposito, et al, *The demographics of racial inequality in the United States*, The Brookings Institute (July 27, 2020), https://www.brookings.edu/blog/up-front/2020/07/27/the-demographics-of-racial-inequality-in-the-united-states/

[11] Hedwig Lee, Michael Esposito, et al, *The demographics of racial inequality in the United States*, The Brookings Institute (July 27, 2020), https://www.brookings.edu/blog/up-front/2020/07/27/the-demographics-of-racial-inequality-in-the-united-states/

[12] *Id*.

Throughout history, the Supreme Court played a direct and central role in the conditions that created systemic racial inequality. Using starkly racist terms, an all-white Supreme Court upheld slavery,[13] segregation,[14] bans on interracial marriage[15] and immigration,[16] and Japanese Internment.[17] While the court eventually prohibited de jure segregation in *Brown v. Board of Education*,[18] and other arenas,[19] its commitment to addressing racial inequality soon waned with shifting ideological commitments of the justices, resulting in the Court creating heavy, and often insurmountable barriers to challenge racial discrimination and inequality. The Court has erected evidentiary burdens and procedural rules that make it harder, and in some cases impossible, for people of color to challenge discrimination and disparate impact in federally funded programs,[20] housing, [21] employment,[22] voting rights,[23] the death penalty,[24] and police stops and racial profiling.[25]

Much of the Court's retrenchment on racial equality is due to the adoption of a misguided "color blind" ideology which denies the salience of racist history and current systems of discrimination. This colorblind ideology relies on the belief that when government considers race – even programs designed to redress racial inequality — it violates the constitution. Relying on this ideology, the Court has protected white plaintiffs and social and economic dominance by striking down programs designed to level the playing field and lessen the historic and ongoing harms in areas including school segregation,[26] employment discrimination,[27] and government contracts.[28] The Court's adherence to this philosophy has undermined racial justice and threatens to diminish or even end programs essential to racial equality: voting rights, affirmative action, affordable housing, and criminal justice.

For example, in *Utah v. Strieff*[29] Justice Sotomayor, the only woman of color to serve on the U.S. Supreme Court, issued a blistering dissent highlighting the importance of having diverse

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[13] *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (finding Black people "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States" that a "perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery")
[14] *Plessy v. Ferguson*, 163 U.S. 537 (1896); Lum v. Rice, 275 U.S. 78 (1927).
[15] *Pace v. Alabama*, 106 U.S. 583 (1883).
[16] *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).
[17] *Korematsu v. United States*, 323 U.S. 214 (1944).
[18] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[19] *Boynton v. Virginia,* 364 U.S. 454 (1960) (transportation); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (disenfranchisement); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage).
[20] *Alexander v. Sandoval*, 532 U.S. 275 (2001).
[21] *Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977).
[22] *Washington v. Davis*, 426 U.S. 229 (1976); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)*; Ricci v. DeStefano*, 557 U.S. 557 (2009).
[23] *Shelby County v. Holder*, 570 U.S. 529 (2013).
[24] *McCleskey v. Kemp*, 481 U.S. 279 (1987).
[25] *Whren v. United States*, 517 U.S. 806 (1996).
[26] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).
[27] *Ricci v. DeStefano*, 557 U.S. 557 (2009).
[28] *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).
[29] *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

perspectives on the bench. The Court held that if a police officer illegally stops an individual without reasonable suspicion and discovers an arrest warrant for that individual, then the previously illegal stop is legitimized and any evidence seized during the stop can be used in court. This decision was a setback for the Fourth Amendment right against unreasonable search and seizure. Justice Sotomayor argued that it was an example of how the Court gives police too much discretionary authority over the communities they serve, and particularly people of color, who are disproportionately targeted by these stops. Justice Sotomayor warned that the ruling tells those Americans that they "are not … citizen[s] of a democracy but the subject[s] of a carceral state, just waiting to be catalogued."[30] Justice Sotomayor observed that "unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name," including trauma and post-traumatic stress.[31] She stated that "the countless people who are routinely targeted by police … are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[32]

With the country facing glaring, material racial inequalities that the pandemic has again laid bare, the Court's lack of diversity and highly partisan majority has significant ramifications for the rights and lives of people of color as the Court considers critical issues affecting their lives -- from qualified immunity to affirmative action. The absence of judicial diversity limits the perspectives available to inform critical judicial deliberations; people of color and women bring unique understandings to issues such as criminal justice, immigration, affirmative action, and reproductive rights and health. Without a diverse judiciary, the Court is limited in the experience it brings to scrutinizing public and private action that systematically disadvantages vulnerable social groups, and is less likely to consider the social context in which race-based policies emerge. Without these critical understandings, judicial outcomes will continue to replicate and entrench the practices that keep racial minorities in an economically and socially disadvantaged position. According to studies of federal courts, when a female justice or a justice of color sits on a panel, their male or white colleagues are more likely to side with plaintiffs in civil rights cases.[33]

Racial diversity also adds significant value to the judiciary and positions the Court by increasing its legitimacy. For parties to a case and the public more generally, the Court's legitimacy is strengthened when decision-makers share characteristics with them. According to a study by the Brennan Center based on 60 years of data, the Judges who preside over the nation's courts generally continue to be overwhelmingly white and male.[34] The integrity and public legitimacy of our entire judicial system is undermined if the judges making crucial decisions about the law don't reflect the diversity of the communities affected.

In addition, racial diversity on the bench has been shown to more positively affect decision-making more generally. Research has shown that diversity enriches judicial

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[30] *Utah v. Strieff*, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting).
[31] *Id*. at 2069..
[32] *Id*. at 2071 (*citing* Lani Guinier & Gerald Torres, The Miner's Canary 274–283 (2002).
[33] Alicia Bannon and Laila Robbins, *The Nation's Top State Courts Face a Crisis of Legitimacy*, THE NEW YORK TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/opinion/states-courts-diversity.html
[34] Laila Robbins, *State Supreme Courts Are Overwhelmingly White and Male*, The Brennan Center (Nov. 2, 2018), https://www.brennancenter.org/our-work/analysis-opinion/state-supreme-courts-are-overwhelmingly-white-and-male

deliberations. While the ethnicity of judges does not alter the quality of their legal reasoning, diversity provides better jurisprudence because broader perspectives can be brought to bear on the real-world issues facing judges in complex cases. When only certain points of view and racial demographics are represented and dominant, the Court is less able to develop an appropriate legal jurisprudence for an increasingly diverse country.

The Court, and American court system, are facing a crisis of diversity and hyper-partisanship that risks more flawed and erroneous decision-making that moves the country even deeper into racial inequality. At all levels of the judiciary, Judges do not look like the people they serve, and former President Donald Trump has made the problem worse by appointing an overwhelmingly white and male group of judges. The underlying racial inequalities and issues within our nation's justice system are inextricably tied to the lack of equitable racial representation within our legal and judicial institutions. As the country changes and grows, so must the Court in order to represent the richness of the American experience and to effectively understand and correctly resolve legal issues involving racial discrimination and inequality.

Conflicts of Interest

While 28 U.S.C. § 455 requires that "any justice…shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and lists some specific circumstances in which recusal is required, the circumstances in which recusal is appropriate remain unclear and unenforceable. The ABA Code of Judicial Conduct is a source of additional guidance, but it is not binding upon Supreme Court justices. While litigants can make a motion requesting that a justice recuse themself, there is no right to appeal the justice's decision, and decisions are typically quite brief. If parties ultimately find themselves arguing in front of an obviously biased Supreme Court justice, they have no recourse at all. The result of this lack of clarity, transparency, and accountability is that recusals happen inconsistently. Unclear and unenforceable recusal standards have been a source of controversy throughout the history of this country,[35] but some recent examples are demonstrative of the problem.

Justice Thomas' wife is a conservative political operative, and she has worked on and spoken on various issues that the Supreme Court has or will consider, including the Affordable Care Act, immigrant rights, and the rights of transgender people.[36] While it is Ginny Thomas' right as a private citizen to work and speak on whatever issues she chooses, Justice Thomas has ignored calls for his recusal due to his wife's political activities on multiple occasions. Even more galling, Justice Barrett has ignored calls to recuse herself from a case argued this term involving the financial records of an advocacy group that spent at least $1 million in support of

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[35] *See* McFarland, Luke, *Is Anyone Listening? The Duty to Sit Still Matters Because the Justices Say it Does*, 24 Geo. J. Legal Ethics 677, 678-80 (2011) (summarizing recusal controversies).

[36] Kimberly Strawbridge Robison, *Justice Thomas Unlikely to Rcuse After Spouse's Trump Meeting*, Bloomberg Law (Jan. 29, 2019), https://news.bloomberglaw.com/us-law-week/justice-thomas-unlikely-to-recuse-after-spouses-trump-meeting; Debra Cassens Weiss, *Email reportedly sent by Justice Thomas' wife could raise recusal issues*, ABA Journal (Feb. 16, 2017), https://www.abajournal.com/news/article/email_reportedly_sent_by_justice_thomas_wife_could_raise_recusal_issues; Felicia Sonmez, *House Democrats say Justice Thomas should recuse himself in health-care* case, The Washington Post (Feb. 9, 2011), http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html.

her own confirmation less than one year ago.[37] These refusals to recuse in spite of clear conflicts of interest create the appearance that the Court is biased, and that the justices need not live by the same rules as everyone else.

Clear explanations of why a justice have or have not chosen to recuse themselves would be an improvement upon the status quo, but would not entirely solve the problem. There are circumstances in which justices gave clear explanations of their logic for failing to recuse, but those explanations are still based on nothing other than their own personal understanding of quite vague recusal standards, and their own personal understanding of the relevant facts.[38] At the very least, more detailed and clear recusal standards are required.

Term Limits

The rights of millions are currently determined by who happens to be president when a Supreme Court justice dies or retires. This undermines the legitimacy of our legal system. It is impossible for any marginalized group to know what their rights will be, and whether their rights will be enforceable, in the near future. This problem is most recently demonstrated by widespread fears that it is only a matter of time before abortion rights and LGBTQ rights are seriously curtailed by oncoming Supreme Court decisions.[39] These fears are not due to legitimate, jurisprudential questions—rather, they are the direct result of former President Trump's appointment of three different justices, swinging the Court drastically to the right.

The opportunity to change the Court and overturn various civil and human rights victories won since the middle of the 20th century has been a central political priority of the right wing of American politics for decades.[40] At the same time, justices sit on the bench for far longer than they used to, giving the party that holds the White House and the Senate when a sitting justice retires or dies the opportunity to inflict their own priorities on the country for decades to come. This encourages the sort of bad faith gamesmanship exemplified by Senator McConnell's blocking of Merrick Garland's confirmation and the subsequent appointment of Justice Gorsuch by President Trump. Lifetime appointments, in the political climate in which we have lived for

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[37] Nina Totenberg, *Democrats Ask Justice Barrett To Recuse In Case Involving Nonprofit Donor Privacy*, NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/989595589/democrats-ask-justice-barrett-to-recuse-in-case-involving-nonprofit-donor-privac

[38] Stempel, Jeffrey W., *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BFLR 813, 851-63 (2009) (discussing criticism of Justice Rehnquist's refusal to recuse himself in *Laird v. Tatum*); *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 514 U.S. 913 (2004) (Justice Scalia holding that his personal friendship with a party did not merit his own recusal).

[39] *See, e.g.*, Amy Davidson Sorkin, *The unique dangers of the Supreme Court's decision to hear a Mississippi abortion case*, The New Yorker (May 30, 2021), https://www.newyorker.com/magazine/2021/06/07/the-unique-dangers-of-the-supreme-courts-decision-to-hear-a-mississippi-abortion-case; David Von Drehle, *Opinion: Does the Supreme Court rule, or do its members? We're about to find out*, The Washington Post (May 18, 2021), https://www.washingtonpost.com/opinions/2021/05/18/nature-of-supreme-court-defined-mississippi-abortion-case/; Tucker Higgins, *Supreme Court will soon release a potentially pivotal decision for LGBT rights*, CNBC (May 31, 2021), https://www.cnbc.com/2021/05/31/supreme-court-decision-in-major-lgbt-rights-case-seen-as-bellwether.html; James Esseks, *Opinion: The next big case on LGBTQ rights is already before the Supreme Court*, The Washington Post (Oct. 9, 2020), https://www.washingtonpost.com/opinions/2020/10/09/next-big-case-lgbtq-rights-is-already-before-supreme-court/

[40] *See* Teles, Steven M., The Rise of the Conservative Legal Movement (2008).

the past forty years, incentivize the politicization of the selection and appointment of Supreme Court justices.

One possible solution to this problem is term limits for Supreme Court justices. There are a variety of proposals for what term limits could look like, but the general principle has support from legal minds across the ideological spectrum,[41] including Chief Justice Roberts and Justice Breyer.[42] Regular, staggered term limits would allow for stability on the Court and predictability regarding length of term and how many justices any given president would appoint.

The National Center for Law and Economic Justice extends its appreciation for this commission's evaluation of reform of the Supreme Court and our thanks for the opportunity to submit testimony.

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[41] Kalvis Golde, *Experts tout proposals for Supreme Court term limits*, SCOTUSblog (Aug. 4, 2020), https://www.scotusblog.com/2020/08/experts-tout-proposals-for-supreme-court-term-limits/; Calabresi, Steven G. & Lindgren, James, *Term Limits for the Supreme Court: Life Tenue Reconsidered*, 29 Harv. J.L. & Pub. Pol'y 769 (2006).

[42] Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, Center for American Progress (Aug. 3, 2020); https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/