



May 5, 2020

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way opposes the nomination of Justin Walker to be a judge on the U.S. Circuit Court for the D.C. Circuit. Walker is exactly the kind of partisan nominee that the framers intended the Senate to protect us from.

A Time of Pandemic. As an initial matter, the Senate should not be processing any lifetime judicial nominees when it should be focusing on helping our communities get the support and resources we need to address the COVID-19 pandemic. We are still learning the basics of how this disease works and the physical, emotional, and economic devastation it can cause. More and more Americans are dying every day—our parents, our spouses, our neighbors, our friends and colleagues—while the Senate majority, over the objections of its minority, is engaged in “business as usual” in processing such nominees. Moreover, as discussed below, a vote to confirm this particular nominee would be another act of sabotage against healthcare access for millions of people in every state.

The Unique Importance of the D.C. Circuit. The D.C. Circuit by law is the exclusive court to consider appeals concerning an array of agency health and safety protections affecting the entire country. Moreover, even when parties appealing agency decisions, congressional statutes, or presidential actions have a choice of venues, they often choose to have their cases heard by the D.C. Circuit due to its expertise in complex administrative matters.

While the Supreme Court is better known, it only hears a miniscule portion of appeals that are filed with it. As a result, when the D.C. Circuit makes a ruling, it very often is the last word on the matter.

Every facet of our lives is affected by some aspect of federal law, including healthcare, clean air and water, the rights of working people, food safety, gun violence, telecommunications, retirement savings, securities fraud, credit cards regulations, and much more. Federal actions in all these areas can be appealed to the courts, and that court is often the D.C. Circuit. That makes it a particularly important court to protect from right-wing elitists who are deeply hostile to letting the American people use a robust federal government to tackle national problems and to protect ourselves from the vast power imbalance between individuals and corporate interests.

Depriving People of Healthcare. Walker is a former clerk for then-D.C. Circuit Judge Brett Kavanaugh, and he regularly promoted Kavanaugh’s nomination to the Supreme Court on

television and in print.ⁱ The legal positions he approvingly attributed to Kavanaugh make clear the kind of judge Walker himself would be.

Walker praised Kavanaugh for his D.C. Circuit dissent in the main Affordable Care Act case as a “thorough and principled takedown of the mandate” that served as a “roadmap” for the four Supreme Court dissenters who would have struck the ACA down.ⁱⁱ At the time, Walker was a private citizen. But even after becoming a federal judge, he spoke publicly of his contempt for the ACA and for the Supreme Court ruling that upheld the individual mandate. At his investiture, while thanking then-Justice Anthony Kennedy for hiring him as a clerk, he made sure to include a condemnation of the Court’s decision upholding the ACA:

The greatest words you can hear from Justice Kennedy are “You’re hired.” And the worst words are, “The Chief Justice thinks this might be a tax.”ⁱⁱⁱ

This gratuitous editorial comment as a sitting judge stands in contrast to his claim to the Senate Judiciary Committee that it would be inappropriate for him under the canons of judicial conduct as a judicial nominee to express his opinion of that case. As his fellow Republicans continue to gin up lawsuits to destroy this landmark law, the ACA may very well be before the D.C. Circuit. No reasonable litigant or observer would think Judge Walker would put aside his intense personal bias against the law and its constitutionality.

This is particularly disturbing at a time when COVID-19 has already killed more than 70,000 people in the United States and infected over one million more.^{iv} The Centers for Disease Control has forecast 200,000 new infections and 3,000 deaths per day by June 1.^v

Shredding the Social Safety Net. As a highly visible supporter of Kavanaugh’s confirmation to the Supreme Court, Walker wrote that Kavanaugh’s “courageous and influential opinions on countless different issues—presidential power, regulatory overreach, religious liberty, the Second Amendment, and the list goes on—leave no doubt that he would be a forceful conservative justice for decades to come.”^{vi} Walker praised Kavanaugh’s opposition to Supreme Court precedents allowing Congress to delegate authority to agencies, requiring courts to defer to agency interpretations (the *Chevron* doctrine), and upholding the creation of independent agencies whose leaders cannot be fired by the president without cause.^{vii}

Essentially, Walker’s jurisprudence would undo the New Deal and undercut the constitutionality of a wide array of health and safety protections and reasonable limitations on corporate power.

Unbridled Presidential Power. Walker’s belief that the Supreme Court wrongly decided cases upholding the creation of independent agencies would not only damage the social safety net. It also reflects his legal view that the Constitution gives the president vast authority that cannot be checked by the other branches. As noted above, Walker praised then-Judge Kavanaugh’s “courageous and influential opinions” positing immense unchecked executive authority.

That includes empowering the president to use federal law enforcement agencies to go after his political opponents or anyone else who threatens his grip on power. After President Trump fired the FBI director in his effort to derail investigations into the Trump campaign's potential coordination with Russia, Walker wrote an article opposing the independence of the FBI.^{viii} At his district court hearing, Sen. Hirono asked him directly whether it is acceptable for a president to ask the FBI director to “go easy” on his political allies. Although this would be a clear abuse of presidential authority and potentially criminal obstruction of justice, Walker refused to give a substantive answer.^{ix}

Using the Federal Bench for Policy and Politics: At his public investiture this year, Judge Walker delivered what can only be considered a partisan political rant. Speaking as a federal judge at a formal occasion, Walker said of the 2018 political fight over Kavanaugh's elevation to the Supreme Court:

[Kavanaugh was] like St. Paul. Hard pressed on every side but not crushed. Perplexed but not in despair. Persecuted but not abandoned. Struck down but not destroyed.

Because in Brett Kavanaugh's America, we will not surrender while you wage war on our work or our cause or our hope or our dream.^x

Inflammatory invective such as this from a sitting federal judge corrupts the judiciary and erodes its legitimacy in the eyes of the American people. Elevating Walker to the D.C. Circuit would only serve to magnify the damage already done and cement the impression that Republican judges are Republicans first and judges second.

Walker made this clear in an April 2020 case called *On Fire Christian Center. v. Fischer*.^{xi} The plaintiff sought an emergency temporary restraining order against Louisville Mayor Greg Fischer. On Fire Christian Center told the court—incorrectly—that the mayor had banned drive-in Easter services as a measure to combat COVID-19, an order the church argued violated its religious liberty. In fact, as city officials had already made clear in public statements, they did not intend to shut down drive-in services. Instead, they urged people not to hold them in the interest of public health. Officials also planned to hand out written material to worshipers to warn them on the health risks, and to facilitate contact tracing in case of infection by recording the license plates of those in attendance.^{xii}

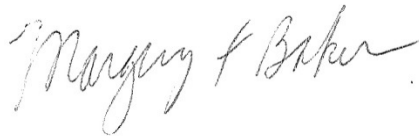
But Walker did not wait for the city to file a formal response. Instead, he issued the requested TRO. Especially since city officials had already made public statements making clear they were not taking the actions alleged in the petition, Walker could have given it a chance to respond to the church's petition. But he chose instead to act precipitously, weighing in on an issue fraught with political implications.

Walker has also strongly suggested that constitutional interpretations are correct when they align with his personal policy preference for smaller government. An example was his praise for the

Supreme Court's ruling in *DeShaney v. Winnebago County*, in which the Court ruled that the Due Process Clause does not require the state to protect people from the actions of private actors. He agreed with the holding not because it was consistent with the text, meaning, purpose, or history of the Fourteenth Amendment, but because it "ensure[d] that the federal courts will not be among the many other accelerants on the size of local, state, and federal government."^{xiii} Similarly, the basis of his criticism of the argument that the Equal Protection Clause requires governments to spend as much on public education in impoverished areas as it does in wealthy ones was that it would "require each state to raise taxes by billions of dollars."^{xiv}

Conclusion: Justin Walker's record shows that he would approach constitutional interpretation with an agenda, and it is an agenda he shares with Brett Kavanaugh and so many other Trump judicial nominees: to serve the interests of the wealthy and powerful rather than protect the rights of every American. The Senate should reject his nomination to the D.C. Circuit.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ E.g., "Law Professor: Judge Kavanaugh Has Backbone of Iron," Fox News, July 8, 2018, <http://video.foxnews.com/v/5806728724001>.

ⁱⁱ Justin Walker, "Brett Kavanaugh Said Obamacare Was Unprecedented And Unlawful," The Federalist, July 3, 2018, <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful>.

ⁱⁱⁱ Judge Justin Walker Investiture Part 4 - Judge Walker Speech, <https://www.youtube.com/watch?v=k5iUfudxuM8>, at 2:05.

^{iv} "Coronavirus in the U.S.: Latest Map and Case Count," <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updated May 4, 2020).

^v "Draft report predicts covid-19 cases will reach 200,000 a day by June 1," The Washington Post, May 4, 2020, https://www.washingtonpost.com/health/government-report-predicts-covid-19-cases-will-reach-200000-a-day-by-june-1/2020/05/04/02fe743e-8e27-11ea-a9c0-73b93422d691_story.html.

^{vi} Justin Walker, "Brett Kavanaugh Said Obamacare Was Unprecedented And Unlawful," The Federalist, July 3, 2018, <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful>.

^{vii} Justin Walker, "The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable," University of Louisville Law, Legal Studies Research Paper Series, Paper No. 2019-01, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID33367176_code844181.pdf?abstractid=3332672&mirid=1&type=2.

^{viii} Justin Walker, "FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military," 86 George Washington Law Review 1011, July 2018, <https://www.gwlr.org/wp-content/uploads/2018/09/86-Geo.-Wash.-L.-Rev.-1011.pdf>.

^{ix} Confirmation hearing for Justin Walker, Senate Judiciary Committee, July 31, 2019, <https://www.judiciary.senate.gov/meetings/07/31/2019/nominations>.

^x Walker Investiture at 2:45.

^{xi} *On Fire Christian Center v. Fischer*, No. 3:20-CV-264-JRW, 2020 U.S. Dist. Lexis 65924 (W.D. Ky. Apr. 11, 2020).

^{xii} Mark Joseph Stern, “The Trump Bench: Justin Walker,” Slate, April 13, 2020, <https://slate.com/news-and-politics/2020/04/trump-bench-justin-walker.html>.

^{xiii} Justin Walker, “Less Liberty? (rough draft/outline),” for discussion at April 13, 2019 Symposium at Richmond Law School, posted online at <https://afj.org/wp-content/uploads/2019/07/Less-Liberty.pdf>.

^{xiv} *Id.*