CONSTITUTIONAL ACCOUNTABILITY CENTER

May 28, 2020

The Honorable Lindsey Graham
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein,

The Constitutional Accountability Center (CAC) is a non-profit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

As litigators, and as defenders of the Constitution and the rule of law, CAC has a vested interest in nominations to the federal courts; there are few nominations more closely scrutinized than those to the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit hears a disproportionate number of critically important cases involving such issues as national security, environmental protections, employment discrimination, food and drug safety, separation of powers, immigration, consumer and workplace protections, and social security. It is also responsible for providing the first level of judicial review of decisions made by a wide array of administrative agencies. Its reach is felt far beyond the District of Columbia. Indeed, the D.C. Circuit affects the lives of all who live in this nation.

It is with these considerations in mind that CAC reviewed the record and testimony of Justin R. Walker, President Donald Trump's nominee to the D.C. Circuit for a seat that will become vacant in September of this year. CAC also notes the time we are in and the great challenge we currently face as a nation. The COVID-19 pandemic has wreaked, and continues to wreak, havoc on our country, killing more Americans in three months than the Vietnam War.[1] Medical systems are strained, first responders do not have enough protective gear, the economy is being tested, and above all, people are dying. The Senate must continue to do the people's work. While ensuring we have a functioning third branch of government certainly falls within that charge, we question whether this particular hearing should have been a priority at this time, given that the seat does not become vacant until September. As Senator Dick Durbin rightly noted, the Senate Judiciary Committee could instead hold hearings on the pandemic's effects on our democracy, first

[1] David Welna, *Coronavirus Has Now Killed More Americans Than Vietnam War*, NPR (April 28, 2020, 5:55 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/846701304/pandemic-death-toll-in-u-s-now-exceeds-vietnam-wars-u-s-fatalities.

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responders, and immigrants and other vulnerable communities.[2] Though we at CAC spend most of our time working in and through the courts and keenly appreciate the vital role they play in our country, we believe that it would have been appropriate to prioritize doing everything in the Committee's power to manage this health care and economic crisis, rather than filling this particular seat that will not become vacant for months and months.

As the nomination has proceeded regardless, we conducted a thorough examination of Judge Walker's record. Upon such examination, we are left with serious concerns that he has not demonstrated the fairness and an independence from both politics and the elected branches of government that is necessary to fulfill the proper role of a judge in our federal system. Furthermore, his record suggests that he will not be faithful to the Constitution's whole text, history, and values—particularly the post-Civil War amendments that pushed our nation further along the arc of progress toward fulfilling our Founding values of equality and justice—or longstanding Supreme Court precedent that ensures an effective federal government. As a result of his record and testimony at his confirmation hearing**, CAC opposes the confirmation of Justin Walker to the U.S. Court of Appeals for the D.C. Circuit and asks that his nomination not move forward for consideration by the full Senate.**

JUDGE WALKER HAS NOT QUELLED CONCERNS THAT HE IS OVERLY PARTISAN RATHER THAN AN IMPARTIAL JURIST.

The Constitution and the American people require a federal judiciary that will respect the whole text, history, and values of the Constitution, and serves as an independent check on the elected branches of government. Unfortunately, President Trump has improperly politicized this all-important process, making numerous statements about the judges he would nominate that place the reputation of his nominees into question.[3] This places an added burden on each judicial nominee to prove that their record demonstrates a respect for our constitutional values of liberty, dignity, equality, and justice for all. They must demonstrate a history of being open-minded, fair, and guided by the whole text, history, and values of the Constitution, wherever they may lead. They must convince the American people that they have the independence to serve as a check on the elected branches when they threaten to violate fundamental constitutional rights and values, ignore structural protections against corruption and self-dealing, or otherwise act in their own instead of the public's interest. In short, the nominee must be a fair-minded constitutionalist.

Judge Walker has unfortunately not carried that burden. Even at the moment of his investiture as a federal district court judge, Judge Walker chose to deliver a message to those who questioned Supreme Court Justice Brett Kavanaugh's fitness to serve on the Supreme Court—including Democratic Senators—saying, "in Kavanaugh's America, we will not surrender while you wage war on our work, our cause, our hope, or our dream."[4] To be clear, it is understandable that during Kavanaugh's Supreme Court confirmation hearings then-Professor Walker vigorously supported his mentor. But once a person puts on the judicial

[2] *Confirmation Hearing on the Nomination of Justin R. Walker to the United States Court of Appeals for the D.C. Circuit*, 116th Cong. (May 6, 2020) [hereinafter May 6 Hearings], opening statement of Sen. Durbin, *available at* https://www.judiciary.senate.gov/meetings/05/06/2020/nominations.
[3] Jeremy W. Peters, Trump's New Judicial Litmus Test: Shrinking 'the Administrative State', NY Times (March 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html.
[4] Walker Investiture, *Judge Justin Walker Investiture Part Four - Judge Walker Speech*, YouTube (March 13, 2020), https://www.youtube.com/watch?v=k5iUfudxuM8.

robe, it is inappropriate and deeply concerning to make statements more suited to an impassioned advocate than an impartial jurist.

During his recent confirmation hearing where he was challenged directly about this statement, Judge Walker clarified that "Kavanaugh's America" is one in which the "approach to law respects separation of powers; it respects the judge's limited role in our constitutional structure; and it demonstrates fidelity to text."[5] To begin, it is concerning that Judge Walker apparently thinks that many of his fellow federal judges, including those who issue precedent he is bound to follow, do not understand the proper role of a judge in our constitutional system and are not faithful to our governing texts; it is not "Kavanaugh's America" in which our Constitution, its system of check and balances, and its guarantees of equality and justice are paramount—that is simply America.

Additionally, at the same investiture ceremony, Judge Walker said that those who agree with his legal principles "are winning but have not won. And that although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us 'terrifying' and who describe us as 'deplorable.'"[6] This was an obvious reference to Hillary Clinton, the most recent Democratic nominee for President. To make such a partisan statement as one is handed a gavel to administer justice and fair dealing is a startling and questionable choice. As Senator Chris Coons remarked, "as a sitting judge you seem to have thought it was appropriate to talk about winning a battle for the courts and . . . [t]hat does not create the sense of an unbiased approach to critical and key questions."[7]

Perhaps now more than ever, we need judges on the bench who give confidence to all who come before them—no matter their political affiliation, color, creed, gender, status, size of their bank account, and so on—that they will receive fair and impartial justice, meted out according to our laws and Constitution. Between his own statements at his investiture and the backdrop of President Trump's explicit politicization of the judiciary, Judge Walker had a heavy burden to shoulder at his D.C. Circuit confirmation hearing to assuage concerns that he is partisan rather than a fair-minded constitutionalist. Unfortunately, that burden was not carried.

JUDGE WALKER HAS NOT DEMONSTRATED A FIDELITY TO THE WHOLE CONSTITUTION'S TEXT, HISTORY, AND VALUES.

During his confirmation hearing, Judge Walker declared himself to be an originalist, stating that "a judge must look at the original meaning of text and must go where the text is and be bound by the text as well as structure, canons of construction, and relevant precedents; because it's not the job of a judge to say what he thinks the law should be . . . . It's the job of a judge to say, here's the law . . . and to then apply that law as it was written."[8]

To live up to the name, originalists—and CAC considers itself among them—must be faithful to the text, history, and values of the whole Constitution, including the many Amendments that have, over time, pushed our country further along the arc of progress. These Amendments, among other things, removed the stain

[5] May 6 Hearings, *supra* note 2, statement of Justin Walker in conversation with Sen. Feinstein.
[6] Walker Investiture, *supra* note 4.
[7] May 6 Hearings, *supra* note 2, statement of Sen. Coons.
[8] *Id.*, statement of Justin Walker in conversation with Sen. Ernst.

of slavery from our nation's charter, guaranteed equal protection of the law to all persons, guaranteed the right to vote free from discrimination based on race and gender, and eradicated the poll tax so that the right to vote does not depend on a person's economic status. CAC would celebrate having another judge on the D.C. Circuit who takes seriously this arc of progress which is written into the words of our Constitution and uses it as his or her guiding principle in deciding cases of national import—even if that nominee is not necessarily the one that we would have chosen. To determine whether Judge Walker is such a nominee, we undertook a thorough examination of his record and listened closely to his statements during his confirmation hearings.

Unfortunately, upon examination of his record, we are concerned that he may be a selective originalist who would turn a blind eye to the Constitution's text, history, and values when construing the Constitution's many broadly worded guarantees of equality and individual rights.[9]

In particular, Judge Walker's record suggests he would seek to rewrite the law to create a host of religious exemptions, even at the expense of the rights of others. His opinion in *On Fire Christian Center, Inc. v. Greg Fischer* is quite alarming.[10] In it he granted a temporary restraining order against the City of Louisville that prevented the city "from enforcing; attempting to enforce; threatening to enforce; or otherwise requiring compliance with any prohibition on drive-in church services at On Fire," so that a church could hold drive-in church services during the global COVID-19 pandemic.[11] In handling the case, Judge Walker may have committed several serious errors that raise questions about his commitment to analyzing the text and history of the Constitution when resolving constitutional questions and applying the law impartially even in—perhaps especially in—hot-button disputes.

As explained by Josh Blackman, Cato Scholar and Associate Professor of Law at the South Texas College of Law Houston, Judge Walker "made numerous, unforced errors" in his ruling.[12] Judge Walker wrote a lengthy decision with 86 footnotes in just short of 24 hours without having the benefit of hearing the views of the City of Louisville. Had he provided the City with an opportunity to respond to the allegations in the complaint, he would have learned that the City had not even issued an order and thus there was nothing to enforce.[13] In other words, Judge Walker issued an advisory opinion that barred Louisville from taking an action it had no intention of taking, which means there was no real case or controversy. Such action exceeds the powers of the federal courts under Article III of the Constitution. Unfortunately, during the confirmation hearing, Judge Walker did not accept that this was a mistake and an overreach of his duties.[14]

Further, instead of simply addressing the question presented in the case, Judge Walker chose to express his views on a number of religious freedom cases that were not before him. He described the birth control

[9] David H. Gans, *Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?*, Constitutional Accountability Center (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/Supreme-Court-Nominee-Brett-Kavanaugh-Will-He-Respect-The-Whole-Constitution.pdf.
[10] *On Fire Christian Ctr., Inc. v. Fischer,* No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).
[11] *Id*. at *1.
[12] Josh Blackman, *Courts Should Not Decide Issues that Are Not There*, The Volokh Conspiracy (Apr. 12, 2020 2:35 PM), https://bit.ly/2YAL4P1.
[13] Defs.' Mot. to Dissolve TRO and Resp. in Opp'n to Pls. Mot. for Prelim. Inj. at 2, 9-10, *On Fire Christian Ctr., Inc. v. Fischer,* No. 3:20-CV-264-JRW (W.D. Ky. Apr. 13, 2020).
[14] May 6 Hearings, *supra* note 2, statement of Justin Walker in conversation with Sen. Graham.

benefit in the Affordable Care Act as "forc[ing] religious business owners to buy pharmaceuticals they consider abortion inducing."[15] Additionally, he characterized the regulation that exempts religiously-affiliated nonprofit employers with religious objections from providing insurance coverage for contraception to their employees after filling out a form to request the exemption as "conscript[ing] nuns to provide birth control."[16] He described the Department of Justice's argument that the First Amendment did not preclude the application of the Americans with Disabilities Act to a woman who taught secular subjects at a religious school as "prohibit[ing] a church from choosing its own minister."[17] And he portrayed the enforcement of a state law that prohibits businesses from discriminating against LGBTQ+ customers as "discrimination toward people of faith."[18] Collectively, this suggests that he has already prejudged matters that might be before him one day on the D.C. Circuit and believes that it is appropriate to use a judicial order to opine on matters that are not before his court.

Once Judge Walker turned to the relief sought by the plaintiffs—ignoring the fact that the City of Louisville had not issued an order and thus did not intend to enforce anything—he could have ruled in their favor relying entirely on Kentucky's Religious Freedom Restoration Act. However, Judge Walker chose to rest his argument on the Free Exercise Clause of the First Amendment. As Blackman noted, "Constitutional questions should generally be avoided. But here, they were addressed head-on."[19] This is yet another troublesome indicator that Judge Walker is willing to overreach his limited judicial duties in order to opine on hot-button issues.

Additionally, he suggested that the Mayor of Louisville had "criminalized the communal celebration of Easter" by discouraging large social gathering, including at churches, to prevent the transmission of the COVID-19 virus.[20] But neutrally worded stay-at-home orders can be constitutionally applied to religious services, particularly given that such gatherings pose high risks of transmitting the virus. The First Amendment does not mandate giving religious groups special treatment, exempting them from public health measures necessary to address the spread of a deadly virus. Judge Walker's opinion, unfortunately, sends the message that, even in the greatest public health crisis of our lifetime, religious entities are a law unto themselves. This lack of balance is troubling. Further, the opinion's claim that religious groups are being targeted for discriminatory treatment is hard to credit.

The Senate Judiciary Committee must take care not to advance a nominee who appears predisposed to weaponize the First Amendment on behalf of people of a particular faith and ignore the protections that neutrally worded public health rules provide to all of us. Judge Walker might bring these problematic views of the scope of the First Amendment to religious freedom cases that come before the D.C. Circuit.

[15] *On Fire Christian Ctr.,* at *3 *[Note: The ACA requires no such *purchase* by employers; additionally, contraceptives are not abortifacients].
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] Blackman, *supra* note 12.
[20] *On Fire Christian Ctr.*, at *1.

JUDGE WALKER'S ACADEMIC RECORD RAISES CONCERNS THAT HE WILL REWRITE CONSTITUTIONAL PRINCIPLES TO UNDERMINE THE FEDERAL GOVERNMENT'S ABILITY TO GOVERN EFFECTIVELY.

During his time as a law professor, Judge Walker urged upending settled principles of administrative law, even though those principles are embedded in Supreme Court precedent and are consistent with constitutional text, history, and values. A lower court judge must follow Supreme Court precedent, but Judge Walker's academic writings suggest he wants to radically change settled doctrines in cases involving administrative action—something he would be well-positioned to do from a seat on the D.C. Circuit. He has expressed hostility toward the decades-old *Chevron* doctrine, which has long been a cornerstone of administrative law and central to the federal government's ability to regulate big businesses and protect consumers, the environment, workers, and others.[21] *Chevron* deference provides that courts will defer to an agency's interpretation of a statute when the "statute is silent or ambiguous with respect to the specific issue" so long as "the agency's answer is based on a permissible construction of the statute."[22] In his academic work, he has also expressed hostility[23] toward *Humphrey's Executor*, a 1935 Supreme Court decision that safeguards the creation of independent federal agencies that enjoy some degree of independence from the President.[24]

Together, *Chevron* and *Humphrey's Executor* laid the legal groundwork to permit federal agencies to help protect civil rights, the environment, health care, labor, workplace safety, education, consumer rights, and more. However, then-Professor Walker argued that the Supreme Court should overturn the precedent set in *Chevron* and *Humphrey's Executor* because they provide, in his view, excessive deference and delegation to federal agencies, and shield "policy making from democratic accountability by putting it in the keep of unelected regulators who do not answer to voters and sometimes do not even answer to the President."[25] He claimed that "by traveling from *Schechter* to *Chevron*, the Supreme Court has profoundly undermined the democratic accountability central to the Constitution's conception of self- government."[26] He criticized the fact that "for every page of law passed by the people we elect, there are 100 pages of laws promulgated by people we didn't elect" and that "Supreme Court jurisprudence enabled this state of affairs."[27] Judge Walker also predicted and praised Justice Kavanaugh leading the way in limiting these critical Supreme Court decisions, noting Professor Jonathan Adler's words: "In Brett Kavanaugh, President Trump may not have found a justice to 'deconstruct the administrative state' – in Steve Bannon's formulation – but he has found one who will help bring it to heel."[28] During his own confirmation hearing, he claimed that his law review article on *Chevron* and *Humphrey's Executor* were "predictions about where the Supreme Court might go in the future based on some of the things the Supreme Court had done in the past."[29] However, it is clear to anyone who reads it that the purpose of the article is to provide a roadmap for overturning *Chevron* and *Humphrey's Executor*, and Judge Walker did not distance himself from those views during his hearing.[30]

[21] Justin Walker, *The Kavanaugh Court and the 'Schechter-to-Chevron' Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 94 Indiana L. J. 1, (2020).
[22] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).
[23] Walker, *supra* note 21.
[24] *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).
[25] Walker, *supra* note 21, at 2.
[26] *Id*. at 55.
[27] *Id*.
[28] *Id*. at 56.
[29] May 6 Hearings, *supra* note 2, statement of Justin Walker in conversation with Sen. Grassley.
[30] Walker, *supra* note 21, at pts I-IV.

Professor Walker painted a picture of administrative agencies as an unchecked fourth branch of government not countenanced by the Framers, claiming that current Supreme Court precedents "shield[] policy making from democratic accountability by putting it in the keep of unelected regulators who do not answer to voters and sometimes do not even answer to the President."[31] But history shows that the Framers knew that the President would need to rely on subordinates to ensure the energetic enforcement of the laws. The idea that administrative agencies can exercise delegated power to enforce a statute they administer—so long as they act in a manner consistent with the statute—has a rich history. As Justice Antonin Scalia observed, "[a]gencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power.'"[32]

Conclusion

Should Judge Walker be confirmed to a lifetime appointment on the D.C. Circuit, we sincerely hope that our concerns about him will prove to be wrong. If he is confirmed, we at CAC will present to Judge Walker the best originalist arguments, rooted in the text, history, and values of the Constitution, in support of constitutional rights, liberties, and structural protections that help make our nation more free, fair, and equal for all. For the history of our whole Constitution is one of progress over time, increased democratic participation, and the constant quest to make equality and justice a reality for all persons in this country. True and faithful originalists recognize this progressive arc and apply it to the constitutional questions before them. Should he be confirmed, we hope Judge Walker will do the same. Unfortunately, with the information before us at this point, we cannot be sure that Judge Walker will faithfully apply the whole Constitution to preserve our fundamental rights and constitutional freedoms without bias or agenda. Therefore, CAC must oppose his confirmation to the D.C. Circuit. We ask that his nomination not advance from the Judiciary Committee to be considered by the full Senate.

If you have any questions or would like any additional information, please contact Kristine Kippins, Constitutional Accountability Center's Director of Policy, at kristine@theusconstitution.org or (202) 296-6889 x313.

Respectfully,

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[31] *Id*.
[32] *City of Arlington, Tx. v. FCC,* 569 U.S. 290, 305 n.4 (2013).