

REPORT ON
THE NOMINATION OF
ELENA KAGAN
TO THE SUPREME COURT
OF THE UNITED STATES



NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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INTRODUCTION

On May 10, 2010, President Barack Obama nominated Elena Kagan to become the 112th Justice on the United States Supreme Court. Kagan has had an extraordinary legal career, marked by notable “firsts” – the first female dean of Harvard Law School and the first female Solicitor General. Her nomination to the Supreme Court is also historic. If confirmed, Kagan would be the fourth woman confirmed to the Court since Sandra Day O’Connor became the first almost three decades ago. More remarkably, Kagan would join the two female justices currently on the Court, making the Court one-third female for the first time ever. Kagan would be the youngest member of the Court and the first justice born in the 1960s. She would be the first Solicitor General confirmed to the Court since 1967 when Thurgood Marshall, who had previously served as the first Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF), was appointed.

Importantly, Elena Kagan would replace Justice John Paul Stevens, who occupied this seat on the Court for thirty-five years. When Justice Stevens announced his retirement, LDF described him as “a stalwart in his protection of civil rights and civil liberties.” Appointed by President Gerald Ford in 1975, Stevens’ role on the Supreme Court evolved over time. For example, he expressed skepticism about race-conscious university admissions policies in *Regents of the University of California v. Bakke*,¹ but he ended up strongly supporting diversity in higher education in *Grutter v. Bollinger*.² Justice Stevens attributed the shift to the Court’s own evolution, noting that during his tenure each justice who retired was replaced by one with more conservative views.³ Since he announced his retirement, Justice Stevens has been properly lionized as a strong force for protecting ordinary Americans against powerful interests. But he will also be known in history for his ability to forge consensus to safeguard civil rights despite an increasingly conservative Court. He used his influence and intellect to garner majority decisions in many groundbreaking areas. As the *New York Times* aptly editorialized, “The quality of his voice and his persuasive power raise the bar to a high level for his successor.”⁴

Individual justices joining the Supreme Court can change its dynamic in both subtle and dramatic ways. Each nomination is therefore extraordinarily important to the future of our country. For this reason, it is LDF’s practice to review the record of nominees in order to ascertain their views and positions on civil rights issues. We seek to determine whether prospective members of the Court possess the strong commitment to preserving and furthering the progress our nation has made in civil rights that is essential to achieving justice. We share our conclusions because we think it is critical for the Senate to exercise its constitutional role to “advise and consent” with full knowledge of a nominee’s civil rights record.

LDF has conducted a comprehensive review of Kagan’s views and actions on civil rights issues. Kagan’s record does not contain judicial opinions addressing civil rights issues nor are such issues a major subject of her academic writings or speeches.

¹ 438 U.S. 265 (1978).

² 539 U.S. 306 (2003).

³ Robert Barnes, *For Liberals, Replacing the Irreplaceable Justice*, WASH. POST, Apr. 11, 2010, at A1.

⁴ Editorial, *Searching for Elena Kagan*, N.Y. TIMES, May 11, 2010, at A22.

Accordingly, our review focused on the work she performed and views she expressed during her career as law clerk, private practitioner, White House adviser, law professor, dean, and Solicitor General. We are keenly aware, however, that opinions expressed and positions taken are not always those of the individual but are often constrained by institutional role. This is particularly so in the roles of Solicitor General and White House advisor. The Solicitor General is the government's lawyer in the Supreme Court. Positions advocated by the Solicitor General reflect the considered view of the government as an institution and of a particular administration – not necessarily those of the individual holding the office. Similarly, White House advisors often are called upon to give policy advice that best advances an administration's priorities in light of what is then seen as possible. Again, this advice may not be the same as the individual's conclusion about what the law requires or what would be optimal policy.

The nature and extent of Elena Kagan's record on civil rights emphasizes the need for the Senate to explore fully her views in all jurisprudential areas affecting equal opportunity and racial justice during the confirmation hearings. As Kagan herself has suggested, confirmation hearings should serve "as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct."⁵ This should be the case with all nominations; it is particularly so here.

Notwithstanding some concerns detailed in this report, LDF supports Elena Kagan's nomination to be the next Associate Justice of the Supreme Court. Our review of her record leads us to conclude that she has the professional credentials, respect for the institutional roles of all three branches of federal government, intellect and independence of mind, ability to build consensus, and commitment to justice required of one who would serve in this critical role.

GENERAL BACKGROUND

Elena Kagan is a nominee with an impeccable legal biography. She received a B.A. *summa cum laude* from Princeton University in 1981, a M. Phil. from Oxford University in 1983, and a J.D. *magna cum laude* from Harvard Law School in 1986. She clerked for two deeply respected jurists and champions of civil rights – Judge Abner Mikva on the U.S. Court of Appeals for the District of Columbia Circuit and Justice Thurgood Marshall on the Supreme Court. From 1989 to 1991, she was an associate at Williams & Connolly in Washington, D.C. She joined the faculty at the University of Chicago Law School and became a tenured professor. In 1993, she served as special counsel to the Senate Judiciary Committee, and from 1995 until 1999, she worked at the highest levels of the White House during the Clinton Presidency. In July 1999, she became a visiting law professor at Harvard Law School, received tenure and then served as dean for six years. In 2009, she became the nation's first female Solicitor General.

Kagan would bring a set of unique skills and talent to the Court. Because every sitting justice has served as a federal appeals court judge, Kagan's diverse perspective is a

⁵ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995).

positive attribute. Requiring prior judicial experience in all nominees to the Supreme Court is only a recent trend.⁶ History has shown that judicial experience is not a prerequisite for distinguished service on the Court. Of the 111 Supreme Court justices, 40 had no prior judicial experience, including two of the past four chief justices – William Rehnquist and Earl Warren. Some of the most powerful figures on the Court arrived through other professional avenues, including John Marshall, Joseph Story, Robert Jackson, Louis Brandeis, Felix Frankfurter and William O. Douglas. Indeed, the court that decided *Brown v. Board of Education* had only one member (Sherman Minton) who had previously served as a judge.⁷ We appreciate the view of Senate Judiciary Committee Chairman Patrick Leahy who stated in regard to Kagan’s nomination, that he was “glad to see somebody from outside the judicial monastery” nominated.⁸ That sentiment was shared by Justice Antonin Scalia who said, “I am happy to see that this latest nominee is not a federal judge – and not a judge at all.”⁹

Kagan’s biography reveals that she has spent the past two decades immersed in legal theory and application of the law.¹⁰ She began her legal career clerking for Judge Abner Mikva, who thought so highly of Kagan that he later hired her when he became President Clinton’s White House Counsel. Kagan next served as a law clerk to Justice Thurgood Marshall, who founded LDF in 1940. Kagan has called Marshall “the most important – and probably the greatest – lawyer of the 20th century.”¹¹

Kagan’s scholarship as a law professor was primarily in the First Amendment area. She authored articles including comprehensive analyses of the Supreme Court’s ruling in a cross-burning case, *R.A.V. v. City of St. Paul*.¹² Her teaching at the University of Chicago included classes in constitutional law, labor law, and civil procedure. At Harvard, she focused on constitutional and administrative law. While a law professor, she authored a book review of Yale Law Professor Stephen Carter’s *The Confirmation Mess*, in which she critiqued the judicial confirmation process and suggested that vigorous questioning by the Senate regarding a nominee’s judicial philosophy is critically necessary.¹³ As a law professor, Kagan joined letters supporting two of President George W. Bush’s judicial nominees: Michael McConnell, who was confirmed to but

⁶ The last non-jurists were appointed in 1971, when President Richard Nixon nominated Lewis Powell, a private practitioner, and William Rehnquist, Assistant Attorney General in the Office of Legal Counsel at the Justice Department.

⁷ See Nina Totenberg, *Should Kagan’s Lack of Judicial Experience Matter?*, NPR, May 12, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=126764692>.

⁸ James Rowley & Laura Litvan, *Republicans Plan to Question Kagan’s Experience as Judge, Courtroom Lawyer*, BLOOMBERG, May 11, 2010, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aAx50dwKgGuU>.

⁹ Robert Barnes, *Scalia Glad to Have Nominee Who Isn’t a Judge*, WASH. POST, May 27, 2010, at A8.

¹⁰ Andrew Cohen, *Supreme Court Choice Perfectly Positioned for Confirmation*, POLITICS DAILY, May 9, 2010, available at <http://www.politicsdaily.com/2010/05/09/elena-kagan-supreme-court-nominee-confirmation>.

¹¹ Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

¹² See Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873 (1993); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29 (1992).

¹³ Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995).

subsequently resigned from the Tenth Circuit, and Peter Keisler, who was not confirmed to the Fourth Circuit.¹⁴

Kagan spent four years working on legal and policy matters in the White House under President William Clinton. From 1995 to 1996, she was Associate Counsel to the President, and from 1997 to 1999, she was Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (DPC). In the Counsel's office, she served primarily as a lawyer for the policy councils and legislative office. At the DPC, she developed and implemented policy in a number of areas, including tobacco legislation, welfare reform and civil rights, as part of President Clinton's Race Initiative.¹⁵ As commentators have noted, this background provides Kagan with a different perspective on the bench: "firsthand experience in the White House amid the bureaucratic and political constraints in government."¹⁶ Numerous materials from this period have been released from the archives at the Clinton Library. For purposes of our review, it is often difficult to distinguish Kagan's personal opinions from those of the Administration for which she worked. Thus, while her work on civil rights issues during this period is interesting, there is a question concerning what it reveals about her own views on the myriad problems in achieving justice for all Americans.

In January 2009, President Obama nominated Kagan to serve as Solicitor General. Referred to as the Tenth Justice, the Solicitor General represents the federal government in the Supreme Court and oversees all appellate litigation in which the United States is a party. The caseload of the Solicitor General's office is approximately two-thirds civil and one-third criminal.¹⁷ During her tenure, Kagan argued six cases before the Court, including *Citizens United v. FCC*, a pivotal case on political participation that was her first oral argument. Because the Solicitor General is the institutional representative of the government in the Supreme Court and generally defends government actions, it is again difficult to know whether the positions that Kagan has taken as Solicitor General can be attributed to her personally.

From March 19, 2009, when she was confirmed as Solicitor General, to May 14, 2010, when she was nominated to the Supreme Court, Elena Kagan was counsel of record on numerous Supreme Court briefs filed on behalf of the federal government. These Supreme Court briefs can be grouped into two categories. First, there are merits briefs filed after the Supreme Court grants certiorari and agrees to hear oral argument in a case. Kagan signed 29 merits briefs in cases where the government was a party and 37 amicus briefs supporting a particular side in cases where the government was not a party. Second, there are certiorari briefs that urge the Court to grant or deny review. At the certiorari stage, Solicitor General Kagan signed 17 petitions for certiorari, requesting the Supreme Court take a case in which the government was a party, and approximately 700 briefs responding to petitions for certiorari filed by other parties. Also at the certiorari stage, she filed 24 briefs in response to an invitation from the Court to express the government's

¹⁴ Responses by Elena Kagan to Senate Judiciary Committee Questionnaire (May 18, 2010), at 13 [hereinafter QUESTIONNAIRE RESPONSES].

¹⁵ Questionnaire Responses at 71.

¹⁶ Alec MacGillis, *Kagan Would Bring Rare Perspective to Bench*, WASH. POST., May 14, 2010, at A2.

¹⁷ QUESTIONNAIRE RESPONSES at 71.

view on whether to grant a petition for certiorari filed by another party. The Solicitor General's briefs at the certiorari stage are extremely influential. According to a recent study, the Court is 37 times more likely to grant a petition after it calls for the views of the Solicitor General. And the justices follow the recommendation of the Solicitor General to grant or deny a case roughly 80% of the time.¹⁸

Another significant aspect of the work of the Solicitor General's Office is determining the position of the government in the appellate courts. All government attorneys must obtain approval from the Solicitor General in order to file an appeal or even to submit an amicus brief in an appellate court.¹⁹

THE CLINTON ADMINISTRATION'S RACE INITIATIVE

During her legal career, there appears to be only one period when Elena Kagan focused directly and intensively on racial justice issues. In 1997-98, she was part of the DPC team in the Clinton Administration that developed and implemented the one-year project to examine the state of race relations, known as: One America in the 21st Century: The President's Initiative on Race.²⁰ Because this was the time when Kagan appears to have spent sustained professional effort addressing issues of race, we set forth below her involvement in some detail. Our discussion is based upon the documents released by the Clinton Library.

Kagan and Assistant to the President for Domestic Policy and Director of the Domestic Policy Council Bruce Reed initially opposed the idea of a commission format for the Race Initiative for a variety of reasons including that it could cede control over large aspects of the domestic agenda.²¹ Instead, they proposed a major multi-day conference on racial issues, a series of town halls led by the President on race-related issues and a policy development process producing a wide range of actions and proposals. They thought this alternative would "make[] the President central to a second-term effort on racial issues, at the same time as it combines intellectual rigor with an action orientation."²² Rejecting this alternative, President Clinton assembled a seven person advisory board, headed by the preeminent historian, John Hope Franklin. The board's tasks were to: engage diverse communities and industries; foster dialogue on race; study critical substantive areas in which racial disparities were significant, such as education, economic opportunity and housing; better understand the causes of racial tension; and recommend concrete and creative policies to address these critical problems.²³

¹⁸ Marcia Coyle, *Study Shows SG's Influence in Certs Granted*, NAT'L L.J., June 16, 2009.

¹⁹ An appendix to Kagan's Senate Judiciary Committee Questionnaire contains a list of all such actions taken by the Solicitor General's Office during her tenure.

²⁰ *One America: About The Initiative*, available at <http://clinton4.nara.gov/Initiatives/OneAmerica/about.html> (last visited June 23, 2010).

²¹ Memorandum from Elena Kagan & Bruce Reed to Erskine Bowles & Sylvia Mathews (Mar. 20, 1997) (on file in DPC Box 038, Folder 011 – Race Commission [2]).

²² *Id.*

²³ See *One America: Overview*, available at <http://clinton4.nara.gov/Initiatives/OneAmerica/overview.html> (last visited June 23, 2010). All Cabinet agencies also joined in the effort to identify specific ways to address the issue of race relations. *Id.*

Kagan worked with the staff of the Race Initiative and its advisory board. She appears to have been most engaged in developing policy initiatives. Specifically, she helped to coordinate workgroups established by the DPC to develop both administrative and legislative policies in four subject areas: economic and community empowerment, education, administration of justice, and health and family. In July 1997, she and Bruce Reed described the policy development process to President Clinton as follows:

Our goals are (1) to help provide a status report on race relations and racial disparities to inform policy development; (2) to assess and communicate the impact of this Administration's prior initiatives – involving economic growth, education, crime and so forth – on race relations and the status of racial minorities; and (3) to build on this Administration's accomplishments and agenda with new initiatives to announce in the coming year and longer-term policies to incorporate in the final Presidential report. We have a strong base from which to work, and we will attempt to ensure that the policy measures accompanying the Race Initiative will grow out of everything this Administration has done already. Throughout, we will focus on solutions that reflect the common values of the American people (e.g. equal opportunity and shared responsibility), and respond to their common aspirations (e.g., safe streets, good schools, and affordable housing).²⁴

In November 1997, Kagan and Reed updated these themes for President Clinton:

We believe the central focus of the race initiative should be a race-neutral opportunity agenda that reflects these common values and aspirations. Of course, there is still a need for strong civil rights enforcement, narrowly tailored affirmative action programs, and certain other targeted initiatives.... But the best hope for improving race relations and reducing racial disparities over the long term is a set of policies that expand opportunity across race lines, and in doing so, force the recognition of shared interests. These policies – for example, education opportunity zones, university-school mentoring programs, housing vouchers, and community policing and prosecuting initiatives – address the concerns of working people of all races, at the same time as they provide special benefits to racial minorities.

We think you should state explicitly throughout the year that this kind of agenda is the best way to achieve racial progress – to reduce racial inequalities and bridge racial divides. Expanding opportunity for all Americans has been the clear mission of your Presidency, and it should be the clear mission of your race initiative.²⁵

²⁴ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002 – Race – Race Initiative Policy: General [2]).

²⁵ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Nov. 11, 1997) (on file in DPC Box 041, Folder 003 – Race – Race Initiative-General [1]). Kagan's notes from a meeting with President Clinton

Kagan chaired the Race Initiative's Administration of Justice group, which included a significant civil rights enforcement component.²⁶ She communicated with agencies about policies and proposals and then assisted in securing funding. In August 1997, she hosted a large meeting with civil rights enforcement agencies and requested they prepare reports describing their structure, fiscal status, programmatic priorities and new funding initiatives that could be pursued as a part of the Initiative.²⁷ Subsequently, several good proposals were developed and successfully implemented across the agencies.

Kagan also worked on many different matters as part of the Race Initiative. In 1996, Department of Agriculture Secretary Dan Glickman established a civil rights structure to investigate complaints of discrimination regarding program participants and employees; the final report set forth 92 recommendations. When Representative Eva Clayton (D-NC) asked the White House to support legislation pertaining to the recommendations, Kagan wrote to an aide: "Please review carefully. We have to plug USDA into our process, and see if we can glean some good ideas from what they've done. (We also have to find out what's happening on this legislation.) Reading this made me think that one of the things we should be working towards is our [Executive Order] addressing discrimination and civil rights enforcement in agencies generally."²⁸ Kagan also worked with the Department of Health and Human Services to identify policies and budgetary issues relating to the Initiative's focus on racial disparities in health and health care access.²⁹ And, Kagan promoted service projects as part of the Race Initiative.³⁰

At the end of the year, Kagan was part of a discussion regarding the Initiative's final report. The documents reflect significant debate about the form of the report, the policies to include, and how bold the vision and ideas should be, although it is difficult to discern Kagan's positions on these issues.³¹ Ultimately, the President's report was never

on the next day summarized the President's comments as: "have to find things that cut across racial lines – what unites us/what common interests." Notes from Meeting with President Clinton (Nov. 12, 1997) (on file in DPC Box 041, Folder 003 – Race – Race Initiative-General [1]).

²⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002 – Race – Race Initiative Policy: General [2]).

²⁷ Memorandum from Tom Freedman et al. to Elena Kagan (Oct. 5, 1997) (on file in DPC Box 041, Folder 013 – Race – Race Initiative Policy – Civil Rights Enforcement [3]).

²⁸ Memorandum from John Hilley & Andy Blocker to Erskine Bowles (July 23, 1997) (on file in DPC Box 051, Folder 007 – Race – Race Initiative Policy: Rural Issues/USDA [1]).

²⁹ Memorandum from Chris Jennings & Sarah Bianchi to Bill Corr (Oct. 3, 1997) (on file in DPC Box 051, Folder 003 – Race – Race Initiative Policy: Health).

³⁰ After receiving a memorandum about engaging the Corporation for National Service and Americorps, she responded, "Good Stuff." Memorandum to Elena Kagan (author and date redacted) (on file in DPC Box 051, Folder 009 – Race – Race Initiative Policy: Service). In response to a suggestion about service learning opportunities for students, Kagan wrote: "I like the idea of making this connection (service learning to race or, more broadly, service to race). What do – or should – we have going on in the service/ed world that we can transform into a race initiative proposal or event?" Memorandum from Susan Anderson to Judith Winston (Oct. 14, 1997) (on file in DPC Box 051, Folder 009 – Race – Race Initiative Policy: Service).

³¹ See Documents on file in DPC Box 054, Folder 008 – Race Initiative Report and Hard Questions [2]).

published. The advisory board released a report entitled, *One America in the 21st Century: Forging a New Future*, presenting its recommendations to President Clinton.³²

POLITICAL PARTICIPATION

The Supreme Court has long played and continues to play a central role in helping secure the rights of African-American voters. Ongoing voting discrimination, even in the wake of the historic 2008 election of our nation's first African-American president, threatens to undermine democratic principles expressed in the Fourteenth and Fifteenth Amendments of the U.S. Constitution.

The Voting Rights Act is widely regarded as our nation's most important and successful federal civil rights law. It contains important provisions that have helped provide minority voters greater access to the political process. Most notably, the preemptive role of the Section 5 preclearance provision has helped block discriminatory changes to voting procedures in those parts of the country where the problems have proven particularly stubborn and intractable. In 2006, Congress conducted extensive hearings to determine whether Section 5 and other expiring provisions of the Act remain necessary. After careful study, Section 5 was reauthorized in 2006 by a vote of 390-33 in the House and 98-0 in the Senate. Since that time, Section 5 has come under attack. In *Northwest Austin Municipal Utility District v. Holder*,³³ a small utility district's constitutional challenge to Section 5 was heard by the Supreme Court during its 2008 Term. Kagan assumed the role of Solicitor General shortly after the Department of Justice (DOJ) filed its responsive pleadings in the case. Nevertheless, her leadership role at that time reflects a commitment to staunch defense of the important preclearance provision.

The only voting rights case in which Kagan was involved during her tenure as Solicitor General was *United States v. Euclid City School Board*, where the United States brought a successful challenge under Section 2 of the Voting Rights Act against the Euclid City, Ohio's school board's at-large method of election. As a remedy for the violation, the federal district court held that the board's limited voting proposal, which would permit voters to vote for fewer candidates than the number of seats that were open, was an appropriate remedy.³⁴ In fashioning this remedy, the court carefully considered a number of factors including that "[m]inority voters in Euclid have historically turned out to vote at only a fraction of the rate of non-minorities, in part due to the longstanding absence of a meaningful opportunity to participate in the political process." DOJ appealed the court's remedial order. Instead of limited voting, DOJ sought single member districts – a remedy that has routinely been ordered in many, though not all, cases finding Section 2 violations. Several months later, however, DOJ reversed course and, with approval from one of Kagan's deputies, moved to voluntarily dismiss its appeal and the court granted that motion.³⁵ While DOJ's reasoning for dismissing the appeal is not available, it could be interpreted as a willingness to consider and analyze remedies for voting

³² Advisory Board of the President's Initiative on Race, *One America in the 21st Century: Forging a New Future*, September 1998, available at <http://clinton2.nara.gov/Initiatives/OneAmerica/PIR.pdf>.

³³ 129 S. Ct. 2504 (2009).

³⁴ *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009).

³⁵ See Order, available at <http://electionlawblog.org/archives/Order%20Dismissing%20Appeal-1.pdf>.

discrimination on a case by case basis. Indeed, there is no “one-size fits all” approach to resolving problems of ongoing discrimination in our political process.

The Supreme Court also has a vital role to play in ensuring that our political process remains open, fair and accessible. This term the Court issued a 5-4 ruling in *Citizens United v. Federal Election Commission* overruling long-standing precedents and invalidating state and federal laws that prevent corporations from using general treasury funds for political spending or otherwise regulating corporate independent electioneering expenditures.³⁶ Kagan’s first of her six oral arguments was her determined but ultimately unsuccessful defense of federal campaign finance laws. This ruling is a recent example of the Court’s over-reaching to reject Congress’ reasoned, considered judgment, based on extensive deliberations, about how to regulate the political process. Civil rights advocates, including former LDF attorney Judith Browne-Dianis, have commented that the decision “ushers in a new, unprecedented era of direct corporate wealth influence in our elections” that “will have a particularly devastating impact on communities of color, which lack comparable resources with which to fund competing ads. This disparity is due, in large measure, to the lingering negative effects that racial discrimination has had in the distribution of property in the United States.”³⁷ As Congress and states consider responses to the *Citizens United* ruling, it is important for the Court to give due deference to those efforts that seek to limit the over-reaching of the ruling.

ECONOMIC JUSTICE

A. Employment Discrimination

Each year, the Supreme Court decides pivotal cases affecting workers’ rights to be protected from race and other forms of discrimination. Recently, the Court has severely restricted the ability of discrimination victims to seek relief under the fair employment laws. For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*,³⁸ the Court held that a pay discrimination claim was untimely because the employee failed to complain at the time of the pay decision, rather than when she learned of it years later; Congress overturned the decision, and this became the first bill President Obama signed into law. While the judiciary’s faithful application of civil rights laws in employment and housing should always be a goal, the recent economic crisis – where minorities have been adversely impacted in unemployment³⁹ and foreclosures⁴⁰ – has highlighted the importance of equal treatment under the law in the economic arena.

³⁶ 130 S. Ct. 876 (2010).

³⁷ *Defining the Future of Campaign Finance in an Age of Supreme Court Activism, Hearing Before the House Committee on Administration, United States House of Representatives*, 111th Cong., 1st Sess. (Feb 3, 2010) (Testimony of Judith Browne-Dianis, Co-Director, Advancement Project) at 2.

³⁸ 550 U.S. 618 (2007).

³⁹ Unemployment is at 15.5% among African Americans, nearly double that among whites. Bureau of Labor Statistics, *The Employment Situation—May 2010*, at 1.

⁴⁰ Renae Merle, *Minorities Hit Harder by Foreclosure Crisis*, WASH. POST., June 19, 2010, at A12 (noting that African Americans and Latinos were more than 70 percent more likely than whites to lose homes to foreclosure between 2007 and 2009).

Early in her career, Elena Kagan authored a student law review note on class actions in employment discrimination cases under Title VII of the Civil Rights Act of 1964. In the note, *Certifying Classes and Subclasses in Title VII Suits*, she addressed the impact of the Supreme Court’s decision in *General Telephone Co. v. Falcon*,⁴¹ which restricted across-the-board class actions in Title VII cases. Kagan identified a tension between permitting broad Title VII class actions, which promote effective relief for victims of discrimination, and the goal of ensuring that all class members have adequate representation for their varying interests.⁴² Kagan proposed that courts rely on subclassification schemes in order to protect fully the interests of absent class members.⁴³

Kagan worked on several employment discrimination issues as a Clinton Administration official. When a proposal arose to allow the Equal Employment Opportunity Commission (EEOC) to use paired testers to detect discriminatory treatment, her notes from a meeting reflect that, while testing was “simple in housing,” it would be “obviously controversial – especially in employment where there is more subjective evaluation.”⁴⁴ In another instance, she indicated she was “not keen on the paired testing proposal” across agencies, because she believed it would encourage opposition to it as an enforcement tool.⁴⁵ However, under her leadership, her office went to considerable lengths to preserve the use of employment testing generally when faced with a proposed appropriations restriction.⁴⁶ Finally, significant components of President Clinton’s Race Initiative included: securing a large increase for the EEOC budget to expand its alternative dispute resolution program and reduce the backlog of private complaints;⁴⁷ and overhauling procedures for federal sector cases.⁴⁸

As Solicitor General, Kagan participated in a number of fair employment cases at the Supreme Court and appellate court levels. Here, we highlight several key cases, beginning with Kagan’s amicus briefs at the certiorari and merits stage in *Lewis v. City of Chicago*. In *Lewis*, LDF, along with co-counsel, represented a class of African-American applicants for firefighter jobs in Chicago. The issue for the Supreme Court was whether or not the job applicants filed their claims of discrimination within the time frame required by Title VII. A federal district court found that Chicago violated Title VII’s disparate-impact provision when it hired more than 1,000 firefighters between 1996 and 2002 using the results of a test in a manner that unjustifiably excluded qualified African-American applicants. Although the City knew this from the outset, it used the test results for the next six years to hire eleven disproportionately white firefighter classes.

⁴¹ 457 U.S. 147 (1982).

⁴² Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 625-33 (1986).

⁴³ *Id.* at 635-39.

⁴⁴ Notes from Civil Rights Enforcement Meeting with EEOC (Oct. 21, 1997) (on file in DPC Box 041, Folder 009 – Race – Race Initiative Policy: Civil Rights – Federal Employees [4]).

⁴⁵ E-mail from Julie Fernandes to Elena Kagan & Bruce Reed (June 1, 1998) (on file in DPC Box 051, Folder 001 – Race – Race Initiative Policy: General [1]).

⁴⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 2, 1998) (on file in WHORM Box 002, Folder 015).

⁴⁷ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Oct. 23, 1998) (on file in WHORM Box 002, Folder 030).

⁴⁸ Letter from Ellen Vargyas to Elena Kagan (Sept. 26, 1997) (on file in DPC Box 041, Folder 006 – Race – Race Initiative Policy: Civil Rights – Federal Employees [1]).

The City did not appeal the federal district court's finding that the City's hiring practice was discriminatory. Instead, the City tried to escape liability by arguing that the plaintiffs' claims were barred because they were not filed within the statutorily mandated 300-day period after the City first announced its hiring plan. Vindicating LDF's arguments, the Supreme Court ruled unanimously, in an opinion authored by Justice Scalia, that the City discriminated each and every time it used a hiring practice that arbitrarily blocked qualified minority applicants from employment.⁴⁹ While the Supreme Court was considering whether to grant certiorari, it called for the views of the Solicitor General. In response, Kagan signed a brief supporting LDF's position.⁵⁰ After the Supreme Court granted certiorari, the Solicitor General's office reasserted the same position in a merits amicus brief⁵¹ and at oral argument, where Kagan's Deputy Neal Katyal shared argument time with LDF Director-Counsel John Payton.

As in *Lewis*, the Supreme Court called for the Solicitor General's views when considering whether to grant certiorari in another employment discrimination case: *Staub v. Proctor Hospital*.⁵² A jury found that Vincent Staub's service as a U.S. Army reservist was a motivating factor in his termination in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵³ But the Seventh Circuit set aside the jury's verdict because the individuals who had manifested a discriminatory animus against Staub were not the ultimate decisionmakers. In the government's amicus brief, Kagan argued that the Seventh Circuit's statutory interpretation of USERRA was excessively narrow. Siding with Staub, Kagan took the position that an employer is liable whenever anti-military animus is a motivating factor for an adverse employment action. Kagan further recommended that the petition for a writ of certiorari be granted, and the Court agreed. Oral argument will be scheduled for fall 2010.⁵⁴ *Staub* could have broad implications because the same issue of the scope of subordinate liability has arisen under Title VII and other federal anti-discrimination statutes.

In two cases, Solicitor General Kagan filed briefs successfully advocating that the Court should deny review of certiorari petitions which sought to limit enforcement of Title VII safeguards against workplace discrimination. First, in *Federal Express Corporation v. EEOC*, Tyrone Merritt claimed, *inter alia*, that the cognitive ability exam that FedEx required as a criteria for promotion had an unjustifiably adverse impact on African-American and Latino employees. As a prerequisite to a Title VII lawsuit, an employee must provide the EEOC an opportunity to investigate by filing a discrimination charge, which Merritt did in November 2004. Almost a year later, the EEOC indicated that it intended to continue its investigation, but it granted Merritt the right to initiate his own suit against FedEx. When the EEOC subsequently subpoenaed records from FedEx, the company refused to comply. A federal district court and the Ninth Circuit rebuffed FedEx's challenge to the EEOC's subpoenas, and in her response to FedEx's petition for

⁴⁹ *Lewis v. City of Chicago*, No. 08-974, ___ S. Ct. ___, 2010 WL 2025206 (May 24, 2010).

⁵⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *Lewis v. City of Chicago* (No. 08-974), 2009 WL 4271311.

⁵¹ Brief for the United States as Amicus Curiae, *Lewis v. City of Chicago* (No. 08-974), 2009 WL 3155376.

⁵² Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.* (No. 09-400), 2010 WL 942803.

⁵³ 38 U.S.C. 4301 *et seq.* (1996).

⁵⁴ *Staub v. Proctor Hosp.*, 130 S. Ct. 2089.

certiorari, the Solicitor General defended the EEOC's authority.⁵⁵ The Supreme Court denied review.⁵⁶ Second, in *Office of Alaska Governor v. EEOC*, the Solicitor General urged the Court to deny review of Alaska's claim that the Eleventh Amendment immunized the state from a lawsuit to redress sexual harassment and retaliation alleged by two former state employees. The Solicitor General defended the Ninth Circuit's en banc interlocutory ruling that the Government Employee Rights Act of 1991, which extended the protections of Title VII to certain high-level state employees who had been previously excluded from coverage, was a valid exercise of Congress's power to enforce the Fourteenth Amendment.⁵⁷ The Supreme Court denied review.⁵⁸

In contrast, in *Browning v. United States*, the Solicitor General's Office did not act to support the EEOC's consistent approach to jury instructions in discrimination cases. Henrietta Browning, an Internal Revenue Service employee, alleged that she was demoted because of her race and in retaliation for having complained about discrimination. At trial, she relied on evidence that the defendants' explanations for the demotion were untrue. Nevertheless, the district court refused her request to instruct the jury that it could infer the existence of a discriminatory motive from the falsity of a defendant's explanation of its action — an inference that the Supreme Court had previously ruled permissible.⁵⁹ The Solicitor General's brief in opposition to certiorari set forth several reasons why this case was not a good vehicle to address the split among the federal courts of appeals on this issue.⁶⁰ In reply, Browning pointed out significant inconsistencies between the government's rationales and the positions the EEOC had taken in prior cases,⁶¹ but the Supreme Court denied certiorari.⁶² This may well be a case where the Solicitor General's role as attorney for the government had an impact on the position that it advocated. Kagan also signed several other briefs in opposition to petitions for certiorari in which federal government employees unsuccessfully sought Supreme Court review of adverse decisions on discrimination claims.⁶³

Solicitor General Kagan also authorized an appeal to the Second Circuit in *United States v. New York City Board of Education* on grounds that could make it more difficult to obtain meaningful remedies for entrenched workplace discrimination. In 1996, the Clinton Administration's Justice Department filed suit alleging that the New York City

⁵⁵ Brief for Respondent in Opposition, *Federal Express Corp. v. EEOC* (No. 08-1500), 2009 WL 3199656.

⁵⁶ *Federal Express Corp. v. EEOC*, 130 S. Ct. 574 (2009).

⁵⁷ Brief for Respondents in Opposition, *Office of Alaska Governor v. EEOC* (No. 09-384), 2009 WL 4624133.

⁵⁸ *Office of Alaska Governor v. EEOC*, 130 S. Ct. 1054 (2010).

⁵⁹ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

⁶⁰ Brief for Secretary of Treasury in Opposition, *Browning v. United States* (No. 09-583), 2010 WL 984118.

⁶¹ Reply Brief for Petitioner, *Browning v. United States* (No. 09-583), 2010 WL 1256460.

⁶² *Browning v. United States*, 130 S. Ct. 2090 (2010).

⁶³ See, e.g., *Allmond v. Akal Sec., Inc.*, 130 S. Ct. 1139 (2010); Brief for Federal Respondent in Opposition, *Allmond v. Akal Sec., Inc.* (No. 09-379), 2009 WL 4953023; *Schramm v. LaHood*, 130 S. Ct. 2090 (2010); Brief for Respondent in Opposition, *Schramm v. LaHood* (No. 09-440), 2010 WL 984114; *Stoyanov v. Mabus*, 130 S. Ct. 57 (2009); Brief for Respondents in Opposition, *Stoyanov v. Mabus* (No. 08-1238), 2009 WL 1604423; *Marquardt v. Sebelius*, 130 S.Ct. 361 (2009); Brief for Respondent in Opposition, *Marquardt v. Sebelius* (No. 08-1048), 2009 WL 1763594; *Adam v. Salazar*, 130 S. Ct. 52 (2009); Brief for Respondent in Opposition, *Adam v. Salazar* (No. 08-1097), 2009 WL 1541669.

Board of Education had unjustifiably and disproportionately excluded African Americans, Latinos, Asian Americans, and women from permanent positions as school custodians. A 1999 settlement provided job benefits to minorities and women that they would have received but for the City's illegal practices. The settlement's lawfulness was then challenged by a group of white custodians. After President George W. Bush's appointees took over, the Justice Department proposed revisions to the settlement that threatened to dramatically reduce the remedies it had previously negotiated. At the request of minorities and women who received job benefits pursuant to the settlement, LDF and the ACLU Women's Rights Project intervened. A federal district court upheld key aspects of the settlement. Rather than revive the Clinton Administration's approach to the case, however, Kagan approved a legal strategy for appealing to the Second Circuit that could limit the ability of public employers to implement race-conscious measures to settle discrimination lawsuits.⁶⁴ Oral argument was held earlier this year; a decision is pending.

While working for the Clinton Administration, Kagan had occasion to address the issue of whether Title VII permits employers to take race into account in employment decisions in order to further objectives other than remedying discrimination. In *Piscataway Township Board of Education v. Taxman*, a white teacher challenged a New Jersey school district's decision to retain an African-American teacher who was deemed equally qualified, for the purpose of ensuring educational benefits of a diverse teaching force. The Third Circuit struck down the district's action on the broad ground that Title VII precludes *all* non-remedial, race-conscious employment decisions.⁶⁵ When the school district petitioned the Supreme Court to review the case, the Clinton Administration filed a brief (at the invitation of the Court) characterizing the Third Circuit's ruling as "seriously flawed," but recommending against granting certiorari because deficiencies in the record would make the case an inappropriate one to decide the broad question.⁶⁶

After the Court granted certiorari, the Administration filed another brief in which it argued that, contrary to the Third Circuit's decision, Title VII does not bar race-conscious actions by a public employer that are narrowly tailored to further a compelling, non-remedial interest.⁶⁷ Nevertheless, the Administration urged the Court to affirm the judgment in favor of the white teacher on the "'narrow ground that the Board failed to offer or defend an adequate justification for this particular race-based layoff decision.'"⁶⁸ The brief argued that the Supreme Court therefore did not need to and should not rule on the broader legal question. Kagan approved of this course of action, noting that it was "exactly the right position – as a legal matter, as a policy matter, and as a political matter."⁶⁹ LDF filed a brief that also criticized the Third Circuit's "sweeping, rigid, and

⁶⁴ Brief for the United States as Appellee-Cross-Appellant, *United States v. N.Y. City Bd. of Educ.* (No. 08-5171), available at http://www.justice.gov/crt/briefs/nyc_boe_brief.pdf.

⁶⁵ 91 F.3d 1547 (3d Cir. 1996) (en banc).

⁶⁶ Brief for the United States as Amicus Curiae, *Piscataway Twp. Bd. of Educ. v. Taxman* (No. 96-679), 1997 WL 33561365.

⁶⁷ See Brief for the United States as Amicus Curiae Supporting Affirmance, *Piscataway Twp. Bd. of Educ. v. Taxman* (No. 96-679), 1997 WL 523854 at *8-*9, *19-*29.

⁶⁸ Memorandum from Walter Dellinger to the Attorney General (July 29, 1997) (on file in DPC Box 038, Folder 002 – Race – Affirmative Action).

⁶⁹ *Id.* (notes in margin).

unprecedented constructions of Title VII.”⁷⁰ But, unlike the United States, LDF additionally urged that the factual record was inadequate to support even a narrower disposition and suggested the Court remand the case “to the district court for the development of a proper record, the entry of findings on the factual issues, and the determination of any necessary legal questions on an appropriately narrow basis.”⁷¹ Ultimately, the parties reached a settlement prior to the scheduled oral argument, and the writ of certiorari was dismissed by the Supreme Court.⁷²

B. Housing and Lending Discrimination

Working with President Clinton’s DPC, Kagan gained exposure to federal efforts to promote fair housing and fair lending. In reviewing the Department of Housing and Urban Development’s (HUD’s) announcement of upcoming fair housing enforcement efforts in 1997, she commented, “I suspect discrimination is nowhere more prevalent than in the housing area.”⁷³ Indeed, one of the DPC’s primary achievements in civil rights enforcement during that period was to increase the federal budget to support a nationwide paired testing program by HUD to detect housing discrimination.⁷⁴ Kagan also worked on efforts to expand the Community Reinvestment Act to apply to credit unions and thus impose on credit unions an affirmative obligation to meet the financial needs of persons of modest means.⁷⁵ She supported an effort by the Federal Reserve Bank to modify federal regulations to permit lenders to collect information about the race and gender of applicants for non-mortgage credit.⁷⁶

While Kagan was Solicitor General, her office represented the federal government in *Cuomo v. Clearing House Association*,⁷⁷ which was the first opportunity for the Supreme Court to address issues at the root of the current economic crisis. *Cuomo* began in 2005, when the New York Attorney General launched an investigation to determine whether national banks had violated the state’s fair lending laws. Mortgage lending data indicated that the national banks had issued a higher percentage of predatory loans to African-American and Hispanic borrowers than to white borrowers. Such predatory lending has contributed to the surge in foreclosures across the country. The Office of the Comptroller of the Currency, a small agency within the U.S. Treasury Department, and a bankers’ trade association went to court to halt the investigation. In the Supreme Court, Kagan signed the government’s merits brief contending that federal law barred states from

⁷⁰ Brief of the NAACP Legal Defense & Educational Fund, Inc. et al., *Piscataway Township Bd. of Educ. V. Taxman* (No. 96-679), 1997 WL 528600.

⁷¹ *Id.*

⁷² 522 U.S. 1010 (1997).

⁷³ Letter from Andrew Cuomo to Erskine Bowles (May 5, 1997) (on file in DPC Box 030, Folder 021 – Housing General).

⁷⁴ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 2, 1998) (on file in WHORM Box 002, Folder 015).

⁷⁵ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Apr. 8, 1998) (on file in WHORM Box 002, Folder 005).

⁷⁶ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Apr. 17, 1998) (on file in WHORM Box 002, Folder 006).

⁷⁷ *Cuomo v. Clearing House Ass’n.*, 129 S. Ct. 2710 (2009).

enforcing their own fair lending laws against national banks.⁷⁸ Writing for the Court, Justice Scalia rejected the government's attempt "to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws."⁷⁹ As LDF advocated in its amicus brief supporting New York, the Supreme Court's ruling restored the collaborative federal-state regulatory scheme that Congress designed to address the persistence of lending discrimination.⁸⁰

Solicitor General Kagan also signed a brief in *Garcia v. Vilsack*, another lending discrimination case, urging the Supreme Court to deny certiorari, which it did.⁸¹ As a result, it may be more difficult for Hispanic and women farmers to obtain redress for the U.S. Department of Agriculture's denial of equal access to farm credit and benefit programs and its refusal to investigate or remedy farmers' civil rights complaints.⁸² Whereas the government recently announced a settlement of similar claims by African-Americans, Hispanic and women farmers are still fighting to obtain redress.

In *New West, L.P. v. City of Joliet*,⁸³ Kagan as Solicitor General signed a brief that argued the importance of a strong federal role in housing policy, but also urged the Court to deny certiorari, leaving in place a limiting ruling by the Seventh Circuit. In *New West*, HUD approved a plan to preserve and rehabilitate Evergreen Terrace, a federally subsidized housing development in Joliet, Illinois, because of the compelling need for low-income housing in that city. Joliet sought to override HUD's determination by using eminent domain to condemn Evergreen Terrace. New West and tenants of Evergreen Terrace alleged that the condemnation was not only preempted by federal housing laws but was also a racially motivated effort to push out of the community the overwhelmingly low-income African-American households who resided in Evergreen Terrace. Only the preemption question was directly at issue when the case reached the Supreme Court. Because Joliet's actions impeded execution of the purposes of federal housing law, Solicitor General Kagan argued that the Seventh Circuit erred in holding that Joliet's condemnation was not preempted. In the government's view, however, this case did not warrant Supreme Court review because it was the first in which a state or local government had condemned a federally subsidized development that HUD wanted to preserve, and the issue would benefit from consideration by other federal courts.⁸⁴

⁷⁸ Brief for Federal Respondent, *Cuomo v. Clearing House Ass'n.* (No. 08-453), 2009 WL 815241.

⁷⁹ *Cuomo*, 129 S. Ct. at 2720. New York's victory was not complete. The Court sided with New York in holding that OCC's regulatory interpretation of federal law was unreasonable to extent that it prohibited a state from bringing an action against national bank to enforce state law, but it also concluded that New York's threatened issuance of executive subpoenas were not an exercise of state law enforcement power, and therefore violated the National Bank Act. *Id.* at 2721-22.

⁸⁰ Brief of NAACP Legal Defense & Educational Fund, Inc. et al., as Amici Curiae in Support of Petitioner, *Cuomo v. Clearing House Ass'n.* (No. 08-453), 2009 WL 583794.

⁸¹ 130 S. Ct. 1138 (2010).

⁸² Brief for Respondent in Opposition, *Garcia v. Vilsack* (No. 09-333), 2009 WL 4953019.

⁸³ 130 S. Ct. 1503 (2010).

⁸⁴ Brief for Federal Respondent in Opposition, *New West, L.P. v. City of Joliet* (Nos. 09-435, 09-445), 2010 WL 146461.

Instead, the government has pursued an alternative fair housing enforcement strategy: HUD has begun withholding federal housing funds from Joliet.⁸⁵

While Solicitor General, Kagan acted to preserve the ability to challenge racial discrimination in the pricing of homeowners' insurance in *Ojo v. Farmers Group, Inc.* On behalf of himself and similarly situated African-American homeowners, Patrick Ojo claimed that Farmers Group violated the Fair Housing Act by using credit score factors that had a racially disparate impact on the price of homeowners' insurance. When the Ninth Circuit agreed to rehear the case en banc, Kagan approved a government amicus brief supporting Ojo.⁸⁶

EDUCATION

Access to educational opportunity has long been a key indicator of racial and social justice in the United States. In its landmark 1954 decision in *Brown v. Board of Education*, the Supreme Court underscored that education is “the very foundation of good citizenship” and “must be made available to all on equal terms.”⁸⁷ Since *Brown*, the Court has been called upon on numerous occasions to define students' rights and states' obligations with respect to education.⁸⁸ Given the importance of education in an increasingly global economy, the stakes in these cases are high for all Americans. Unless the nation can address ongoing educational inequities, we risk not only the stain of continued injustice, but a failure to remain globally competitive. It is critical that the next Supreme Court justice demonstrate an unwavering commitment to educational equity.

The education system has played a large role in Elena Kagan's life. Her mother and brother were educators; she has spent the majority of her career as a law professor and law school administrator. She was also a member of boards and organizations which promote equal opportunity and public interest fellowships for recent graduates.⁸⁹

As a law clerk for Justice Marshall, Elena Kagan considered an education issue while analyzing petitions for Supreme Court review. Her memoranda are located in Justice Marshall's papers in the Library of Congress. Kagan has said that her analyses were based in large measure on Justice Marshall's perspective and which cases he would want the Court to decide. The school case, *Citizens for Better Education v. Goose Creek*

⁸⁵ National Fair Housing Alliance, *A Step in the Right Direction: 2010 Fair Housing Trends Report*, at 7-8 (May 26, 2010).

⁸⁶ Letter Brief for the United States as Amicus Curiae, *Ojo v. Farmers Group, Inc.* (No. 06-55522) (en banc), available at http://www.justice.gov/crt/briefs/ojo_brief.pdf. Rather than resolving the issue in the first instance, the Ninth Circuit decided to certify a question to the Texas Supreme Court about the intersection of the Fair Housing Act and certain state law provisions potentially pertinent to Ojo's claims. See *Ojo v. Farmers Group, Inc.*, 600 F.3d 1201 (9th Cir. 2010) (en banc).

⁸⁷ 347 U.S. 483, 493 (1954).

⁸⁸ See, e.g., *Horne v. Flores*, 129 S. Ct. 2579 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 551 U.S. 701 (2007).

⁸⁹ QUESTIONNAIRE RESPONSE at 2-3. Kagan has served as: Member, Advisory Board, American Indian Empowerment Fund, 2008-09; Member, Board of Directors, Equal Justice Works, 2008-09; Member, Board of Directors, The Advantage Testing Foundation, 2007-09; Member, Board of Trustees, Skadden Fellowship Foundation, 2003-09; Member, New York State Commission on Higher Education, 2007-08; Member, Board of Directors, Thurgood Marshall Scholarship Fund, 2003-05.

Consolidated Independent School District, involved review of a Texas state court decision upholding a school district’s rezoning of high school attendance boundaries in response to changes in residential patterns.⁹⁰ Kagan called the plan “amazingly sensible” and noted that the school district had “refused to wait and watch while new residential trends effectively segregated the schools.”⁹¹ The Court ultimately decided not to hear the case.⁹² In the Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, a majority of Justices agreed with Kagan that “drawing attendance zones with general recognition of the demographics of neighborhoods” is an acceptable approach to promoting diversity and preventing racial isolation.⁹³ Even Chief Justice Roberts, whose opinion in *Parents Involved* was generally hostile to school district’s voluntary integration efforts, distinguished “race-consciousness in drawing school attendance boundaries” as “an issue well beyond the scope of the question presented.”⁹⁴

During her years with the Clinton Administration, Kagan was deeply involved in internal discussions and debates on important education-related issues. She worked on the Administration’s controversial initiative to end “social promotions” through amendments to the Elementary and Secondary Education Act (ESEA). High achievement and standards are important and worthy goals. Unfortunately, the proposal under consideration raised serious civil rights concerns because it lacked sufficient supports and interventions for students who had not been afforded a meaningful opportunity to learn. Staff connected with the Race Initiative expressed the civil rights concerns to the Administration;⁹⁵ DPC acknowledged that “[w]e do not doubt that our proposal will be controversial in some quarters, particularly in the civil rights community.”⁹⁶ Ultimately, Kagan supported moving forward on the proposal.

Kagan was also a key player in the Clinton Administration’s push for a voluntary national testing initiative. Standardized tests have emerged as a key civil rights issue because many school districts misuse diagnostic assessments to make high-stakes decisions on matters such as promotion and graduation. Sole reliance on such tests for high-stakes decision-making is particularly inappropriate where, as is often the case, it has a disparate impact on students of color, lacks any relationship to the curriculum from which students are taught or does not validly measure student performance. Records indicate that during Kagan’s tenure, the Administration supported the attachment of high-stakes implications to national tests, even though LDF and others criticized the initiative for not doing enough to make sure students had an equitable opportunity to learn the material to be tested.

⁹⁰ 719 S.W.2d 350 (Tex. App. 1986).

⁹¹ Memorandum of Elena Kagan to Justice Thurgood Marshall, *Citizens for Better Educ. v. Goose Creek Consolidated Indep. Sch. Dist.* (Aug. 6, 1987).

⁹² *Citizens for Better Educ. v. Goose Creek Consolidated Indep. Sch. Dist.*, 484 U.S. 804 (1987)

⁹³ 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 827 (Breyer, J., dissenting).

⁹⁴ *Id.* at 738-39 (plurality op.).

⁹⁵ *See, e.g.*, Memorandum from Christopher Edley, Jr. to President Clinton (Jan. 5, 1999) (on file in DPC Box 040, Folder 015 – Race – Race Initiative: Book [1]).

⁹⁶ Memorandum from Bruce Reed & Mike Cohen to President Clinton, (Jan. 13, 1999) (on file in DPC – Box 040 – Folder 015 – Race – Race Initiative – Book [1]).

Parents and members of the civil rights community have challenged the misuse of standardized tests on numerous occasions. One of the first such challenges was *Erik V. v. Causby*, a North Carolina case in which LDF sued on behalf of students for violation of their rights under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, as well as their right to education under the North Carolina Constitution.⁹⁷ That case challenged a local school district policy requiring students in grades three through eight to attain certain scores on state tests as a precondition to being promoted to the next grade. Like most tests with high-stakes implications, the test at issue had an unjustifiably disproportionately negative impact on African-American students. An August 1997 memorandum from Kagan and DPC head Bruce Reed briefed President Clinton on the lawsuit and indicated that the DPC had “requested a briefing from the Justice Department this week to discuss the appropriateness of filing an amicus brief in support of the school district.”⁹⁸ This step would have been fairly unusual at the district court level, and a brief was never filed. The case settled in the district court after the court denied a preliminary injunction against the school district.⁹⁹

As chair of the Administration of Justice group for the Race Initiative, Kagan monitored challenges to affirmative action, including those involving university admissions.¹⁰⁰ Earlier in the counsel’s office, she had volunteered to work on affirmative action since she had taught the subject and “care[d] about it a lot.”¹⁰¹ In 1996, the Fifth Circuit ruled in *Hopwood v. Texas* that the University of Texas could no longer consider race as a factor in the admission of students.¹⁰² That same year, California voters approved Proposition 209, which banned consideration of race in education, employment and contracting. Records indicate that Kagan was kept apprised of the Administration’s legal and policy responses to these developments. For example, the Administration joined a challenge to the constitutionality of Proposition 209 as amicus curiae. After the Court of Appeals for the Ninth Circuit upheld its constitutionality,¹⁰³ the White House advised against filing an amicus brief in support of a petition for certiorari, on the ground that the case would invite a sweeping attack on affirmative action; Kagan concurred with the recommendation.¹⁰⁴ Kagan also monitored responses to the decision by the University of California Regents to exclude race as a factor in admissions, including a U.S. Department of Education investigation into admissions policies at University of California law schools¹⁰⁵ and the release of federal guidance on affirmative action in higher education.¹⁰⁶

⁹⁷ 977 F.Supp. 384 (E.D.N.C. 1997).

⁹⁸ Memorandum from Elena Kagan & Bruce Reed to President Clinton (Aug. 9, 1997) (on file in WHORM Box 001, Folder 027).

⁹⁹ Order, No. 5:07-CV-587-BO(2) (Aug. 29, 1997).

¹⁰⁰ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 15, 1997) (on file in DPC Box 051, Folder 002, Race – Race Initiative Policy: General [2]).

¹⁰¹ E-mail from Elena Kagan to Abner Mikva (July 25, 1995) (on file in E-mails Box 010, Folder 001).

¹⁰² 78 F.3d 932 (5th Cir. 1996).

¹⁰³ *Coal. for Econ. Equal. v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

¹⁰⁴ Memorandum from Charles Ruff to President Clinton (Sept. 24, 1997) (on file in DPC Box 040, Folder 010 – Race – Proposition 209 Pleadings).

¹⁰⁵ Memorandum from Thomas Freedman & Mary Smith to Elena Kagan (Aug. 21, 1997) (on file in DPC Box 041, Folder 010 – Race – Federal Employees [5]).

¹⁰⁶ Memorandum from Peter Rundlet to Sylvia Mathews (Feb. 9, 1998) (on file in DPC Box 039, Folder 003 – Race – Minority Enrollment [1]).

Kagan was engaged in developing a host of alternative policy initiatives to promote access to higher education, such as partnership programs between universities and low-income high schools and middle schools.¹⁰⁷

While Kagan was Solicitor General, her office weighed in on several education cases. Kagan approved filing an amicus brief in the Fifth Circuit in *Fisher v. University of Texas at Austin*, defending the University's narrowly tailored, race-conscious admissions policy as falling squarely within the constitutional bounds established by *Grutter v. Bollinger*.¹⁰⁸ *Fisher* is the first challenge to a university admissions program since the Supreme Court's 2003 decision in *Grutter*, which overturned the Fifth Circuit's prior decision in *Hopwood*, discussed above, and held that universities have a compelling interest to use narrowly tailored race-conscious admissions policies to obtain the educational benefits of diversity.¹⁰⁹ A federal district court upheld the University's policy,¹¹⁰ and the Fifth Circuit has scheduled oral argument for August 2010.

Under Kagan, the Solicitor General's Office also sought to protect equal educational opportunity and vindicate the rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA). In *Forest Grove School District v. T.A.*, Kagan signed a merits amicus brief contending that when a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private-school tuition reimbursement regardless of whether the child previously received public special education.¹¹¹ In a 6-3 decision, the Court reached the same conclusion.¹¹²

Kagan also signed a brief that succeeded in persuading the Justices to deny review in *School District of the City of Pontiac v. Duncan*.¹¹³ In this case, the National Education Association (NEA) and nine school districts in Michigan, Texas, and Vermont challenged the requirements in federal education law that, among other things, aim to reduce stark racial achievement gaps. The NEA and school districts argued that the No Child Left Behind Act (NCLB) – the current version of the ESEA – is an unfunded mandate and thus states and school districts were not required to fulfill NCLB's requirements if federal funds did not cover the full costs of compliance. An *en banc* panel of the Sixth Circuit deadlocked, which resulted in the affirmance of a federal court's 2005 ruling dismissing the case. The Solicitor General argued that NCLB does not, in fact, mandate any particular compliance costs; rather, states retain control over the costs of compliance and Congress requires only that states, if they want to obtain federal funds, must craft a statewide plan that defines accountability standards and make regular assessments of

¹⁰⁷ E-mail from Thomas Freedman to Elena Kagan (Aug. 8, 1997) (on file in DPC Box 040, Folder 008 – Race – Minority Enrollment – University Partnerships); Memorandum from Thomas Freedman et al. to Elena Kagan (Aug. 5, 1997) (on file in DPC Box 039, Folder 005 – Race – Minority Enrollment [3]).

¹⁰⁸ Brief for the United States as Amicus Curiae Supporting Appellees, *Fisher v. Univ. of Tex. at Austin* (No. 09-50822) (5th Cir. Mar. 12, 2010), available at http://www.justice.gov/crt/briefs/fisher_appellee_brief.pdf.

¹⁰⁹ 539 U.S. 306 (2003).

¹¹⁰ *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

¹¹¹ Brief for the United States as Amicus Curiae Supporting Respondent, *Forest Grove Sch. Dist. v. T.A.* (No. 08-305), 2009 WL 870018.

¹¹² *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009).

¹¹³ No. 09-852, ___ S. Ct. ___, 2010 WL 182939 (June 7, 2010).

progress toward attaining those standards.¹¹⁴ Indeed, civil rights advocates have criticized NCLB for not going far enough to ensure that states and school districts are held accountable for providing every student with a high-quality education.

RACIAL DIVERSITY AT HARVARD

Elena Kagan's record on hiring law faculty while dean of the Harvard Law School warrants discussion in a review of her civil rights record. This issue received considerable attention at the time of her nomination, and it is appropriate for the Senate to question her about this. According to the *New York Times*, which reported information provided by Harvard Law School officials, Dean Kagan made forty-three permanent, full-time teaching appointments from 2003 to 2009.¹¹⁵ Of these, thirty-two faculty were tenured and tenure-track appointments.¹¹⁶ Twenty-five were white men, six were white women and one was an Asian-American woman. No African-American or Latino professors were hired in tenured or tenure-track positions during this period.¹¹⁷ Eleven other individuals joined the faculty during the Kagan years – six white men, two women, two African-American males and one Indian male – but these persons were not placed in tenured or tenure-track positions.¹¹⁸ While the number of offers extended is not known, these statistics are deeply disappointing.¹¹⁹

Like many of the nation's law schools, Harvard has struggled with promoting diversity within its faculty. Since the 1960s, when famed civil rights lawyer and LDF alumnus Derrick Bell became the first African-American law professor amid student pressure to hire a minority law professor, Harvard has experienced a turbulent history over the issue of faculty diversity, including Bell's 1992 decision to leave the school until it appointed a woman of color to its tenured faculty;¹²⁰ Lani Guinier, an LDF alumna, was hired thereafter. It is true, as one of the African-American clinical professors recruited to Harvard by Kagan said, that "no elite law school has done enough" on hiring minority

¹¹⁴ Brief for Respondent in Opposition, *Sch. Dist. of City of Pontiac v. Duncan* (No. 09-852), 2010 WL 1900682.

¹¹⁵ Katharine Q. Seelye, *Court Pick Scrutinized for Hiring at Harvard*, N.Y. TIMES, May 14, 2010, at A10.

¹¹⁶ *Id.*

¹¹⁷ During the same period, two Harvard faculty members of color obtained tenure – an African-American male and an Indian male. See Charles Ogleetree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, available at <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>.

¹¹⁸ *Id.*

¹¹⁹ It is true that the dean is not exclusively responsible for hiring faculty; the faculty committee bears some responsibility. Yet, as Professor Ronald Sullivan, whom Kagan successfully recruited for a clinical position, has suggested, "The dean's role in the hiring process is critical." Ronald Sullivan, *Black Kagan Recruit Makes the Case for Confirmation*, THE GRIO, May 13, 2010, available at <http://www.thegrio.com/politics/a-black-kagan-recruit-makes-the-case-for-confirmation.php>. Indeed, Professor Sullivan describes the efforts Kagan made to recruit and ultimately persuade him to leave Yale Law School and to come to Harvard, including offering him the opportunity to direct both Harvard's Criminal Justice Clinic and its Trial Advocacy Workshop. He stated: "I can report that Elena Kagan used every bit of her discretionary authority to make the offer to come to Harvard far too attractive to turn down." *Id.*

¹²⁰ See Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of An Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 89 (2002). According to the first chair of the Black Law Students Association, "the issue of getting black professors on the faculty was what led to the organization of BLSA." *Id.* at 54, n. 12.

faculty.¹²¹ Given Harvard’s prestige and its turbulent history on the issue of faculty diversity, we would have hoped that Kagan would have been more successful in recruiting a more racially and ethnically diverse group of professors to join Harvard during her tenure. There is no question that a diverse faculty can enrich the quality of education of students in a host of meaningful ways. As Justice Stevens noted in his dissent in *Wygant v. Jackson Board of Education*, “It is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.”¹²²

Dean Kagan did enjoy considerable success when it came to recruiting professors of different *ideological* backgrounds. There is widespread praise about Kagan’s aggressive efforts to attract professors with conservative leanings.¹²³ In announcing Kagan’s appointment to the Supreme Court, President Obama referred to her recruitment of “prominent conservative scholars” as evidence of Kagan’s consensus-building style.¹²⁴ One conservative student praised Kagan: “One of her most important contributions was bringing in people with a lot of different viewpoints and increasing the kinds of perspectives students are exposed to in the classroom.”¹²⁵ This success may be applauded, especially given the accounts of the philosophical divisions among the faculty over the years. However, we also believe that a racially diverse faculty is as important as an ideologically-mixed faculty. Just as varied ideological perspectives stimulate debate and promote learning among students, so too is the classroom and campus enriched by the presence and perspective of racially diverse faculty.

Dean Kagan was successful in attracting a diverse student body at Harvard Law School. In *Grutter v. Bollinger*, the Supreme Court recognized the substantial educational benefits associated with a diverse student body, noting that as a training ground for our nation’s leaders, law schools should “be visibly open to talented and qualified individuals of every race and ethnicity.”¹²⁶ In our letter to the Senate Judiciary Committee supporting Kagan’s nomination as Solicitor General, we noted that Harvard underwent “tremendous transformation and development” under Kagan’s leadership, including in its diversity.¹²⁷ And the Chair of LDF’s Board and Harvard Law School alumnus, Theodore V. Wells, Jr., lauded Kagan’s success at promoting diversity among students at the 2005 Harvard Celebration of Black Alumni, which honored then-Senator Barack Obama. Harvard Law Professor Charles Ogletree has stated that the number of African-American students

¹²¹ Katharine Q. Seelye, *Court Pick Scrutinized for Hiring at Harvard*, N.Y. TIMES, May 14, 2010, at A10.

¹²² 476 U.S. 267, 315 (Stevens, J., dissenting).

¹²³ See, e.g., Joan Biskupic & Kathy Kiely, *Obama Aims for ‘Tenacity’*, USA TODAY, May 11, 2010, at 1A; Jonathan Saltzman & Tracy Jan, *At Harvard, Dean Eased Faculty Strife*, BOSTON GLOBE, May 11, 2010.

¹²⁴ President Obama and Solicitor General Elena Kagan, Remarks at the Nomination of Solicitor General Elena Kagan to the Supreme Court (May 10, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el>).

¹²⁵ Jonathan Saltzman & Tracy Jan, *At Harvard, Dean Eased Faculty Strife*, BOSTON GLOBE, May 11, 2010.

¹²⁶ 539 U.S. 306, 308 (2003).

¹²⁷ *Confirmation Hearings on the Nominations of Thomas Perrelli to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States, Hearing Before the Committee on the Judiciary, United States Senate*, 111th Cong., 1st Sess. (Feb. 10, 2009) (Letter from John Payton to The Honorable Patrick Leahy and Arlen Specter, Jan. 23, 2009) at 259.

attending Harvard was at its highest point during Kagan's tenure.¹²⁸ Racial and ethnic minorities comprised 29% of the entering class during Kagan's first year at Harvard; for each year thereafter, the percentage of incoming minority students exceeded that number.¹²⁹ Certainly, that is an accomplishment.¹³⁰

CRIMINAL JUSTICE

Criminal justice cases consistently comprise a significant portion of the Supreme Court's docket. Supreme Court decisions have confirmed the existence of constitutional rights that most now take for granted, including: the continuing duty of prosecutors to disclose all exculpatory and impeachment evidence to the defense in *Brady v. Maryland*,¹³¹ law enforcement's obligation to advise suspects of their right to remain silent and their right to counsel during custodial interrogation in *Miranda v. Arizona*;¹³² the prohibition on intentionally excluding prospective jurors of color because of race in *Batson v. Kentucky*;¹³³ and the right of indigent persons to have an attorney in criminal cases in *Gideon v. Wainwright*.¹³⁴ Given the import of the criminal docket, it is critical that justices approach serious questions of constitutional criminal law with an eye toward ensuring that the justice system performs effectively, accurately and without prejudice. A nominee's perspective is particularly important for racial justice advocates because the criminal justice system's laws and policies disproportionately affect communities of color. Racial biases pervade policing and prosecutorial practices. African-American men bear the brunt of harsh criminal justice laws: one in nine African-American men between the ages of 20 and 34 is now behind bars, and African-American men have a one in three chance of serving time in prison during their lifetime. The collective, mass incarceration of African Americans promotes an underclass that lacks an economic base and access to educational opportunities.

Kagan worked on several criminal justice issues as part of President Clinton's Race Initiative. Kagan was particularly involved in 1997, when President Clinton convened a White House Conference on Hate Crimes, announced law enforcement and educational initiatives to combat hate crimes and endorsed legislation to extend

¹²⁸ Charles Ogleetree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, available at <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>.

¹²⁹ *Id.*

¹³⁰ Kagan took other notable acts at Harvard that evidenced a commitment to equal justice. It was a longstanding tradition at Harvard for the dean to also assume the title of the Sir Issac Royall Professor of Law. Isaac Royall was an early supporter of the law school in the eighteenth century, and sold slaves in Antigua to support it. Kagan declined this professorship and instead asked to become the first Charles Hamilton Houston Professor of Law. See Charles Ogleetree, *Your Take: Why Elena Kagan is a Good Choice for the Supreme Court*, THE ROOT, May 12, 2010, <http://www.theroot.com/views/your-take-why-elena-kagan-good-choice-supreme-court>. To LDF, this is significant. LDF was founded by Thurgood Marshall, but it was Charles Hamilton Houston who conceived of the idea of a law firm devoted to the pursuit of racial justice.

¹³¹ 373 U.S. 83 (1963).

¹³² 384 U.S. 436 (1966).

¹³³ 476 U.S. 79 (1986).

¹³⁴ 372 U.S. 335 (1963).

protections to victims of hate crimes based on sexual orientation, gender or disability.¹³⁵ Additionally, Kagan worked on legislation to reduce the 100:1 disparity in sentencing between crack and powder cocaine, which disproportionately affects African Americans. After the U.S. Sentencing Commission recommended to Congress options for adjusting both powder and crack cocaine penalties, Attorney General Janet Reno and Office of National Drug Control Policy Director Barry McCaffrey recommended to President Clinton that the disparity be adjusted to a single ratio of 10:1 by setting the powder cocaine trigger at 250 grams and the crack cocaine trigger at 25 grams.¹³⁶ Kagan urged President Clinton to adopt a 10:1 ratio: “This recommendation reduces the disparity between crack and powder cocaine sentencing, as well as the perception of injustice and inconsistency that goes with it.”¹³⁷ Others within the White House supported a lower ratio, and Kagan was warned that the latest recommendation was not “going to sit well in the base community.”¹³⁸ Kagan noted: “The Congressional Black Caucus and others in the African-American community will attack the Administration for failing to go far enough to remove a racial injustice. As you know, many CBC Members favor removing the disparity between crack and powder cocaine entirely – or at least reducing it far more sharply than [recommended].”¹³⁹ She concluded that, precisely because the 10:1 ratio represents the middle position, it provided the best hope of achieving progress. Clinton adopted the recommendation, but the compromise failed. We note that Congress has still not passed legislation to reduce the disparity, despite recent efforts. Legislation addressing this issue recently passed the Senate unanimously, but it would only reduce the disparity to 18:1.

As Solicitor General, Kagan submitted numerous briefs in criminal cases before the Supreme Court. The briefs she authored revealed a tendency to promote broad authority for prosecutors, to favor a narrow view of the rights of criminal defendants, and to encourage the expansion of criminal sanctions. This is an area that gives us considerable concern. The available information does not reveal whether the positions taken in these briefs reflect Kagan’s personal view of the law or the institutional positions of the Department of Justice as a prosecutor.

¹³⁵ Memorandum from Bruce Reed et al. to the President (Nov. 6, 1997) (on file in DPC Box 039, Folder 009 – Race – Hate Crimes [3]). After DOJ submitted legislative proposals to the DPC, Kagan wrote a margin note, “It looks generally O.K. to me.” The next year, the tragic killings of James Byrd and Matthew Shephard occurred. Legislation was introduced in each consecutive year of the Clinton Presidency, with the White House’s strong support, but it did not pass until more than a decade later.

¹³⁶ Memorandum from Janet Reno & Barry McCaffrey to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]).

¹³⁷ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]). E-mails indicate that Elena Kagan played a role in justifying that recommendation, suggesting edits to omit distractions from the “central criminal justice rationale.” E-mail from Elena Kagan to Jose Cerda (June 29, 1997) (on file in Kagan E-mails Composed, ARMS Box 003, Folder 005).

¹³⁸ E-mail from Robert Johnson to Elena Kagan (July 3, 1997) (on file in Kagan E-mails Composed, ARMS Box 012, Folder 007).

¹³⁹ Memorandum from Elena Kagan & Bruce Reed to President Clinton (July 3, 1997) (on file in DPC Box 010, Folder 009 – Crime – Crack Sentencing [1]).

A. Expanding Prosecutorial Power

Several of Kagan's briefs promoted an increase in prosecutorial authority and the insulation of prosecutorial decision-making from scrutiny. In so doing, Kagan failed to appreciate the importance of prosecutorial restraint or evince an appropriate concern for the possibility of abuse of discretion by prosecutors.

In *Pottawattamie County v. McGhee*, Kagan's amicus brief demonstrates an extremely unbalanced view of the role of prosecutors within the criminal justice system and offers considerable reason for pause.¹⁴⁰ She argued that prosecutors, who framed two innocent African-American men by procuring a false confession and using it against them at trial, should have absolute immunity from civil liability in a Section 1983 proceeding notwithstanding their egregious misconduct. Although the parties in *McGhee* reached a settlement before the Court announced a decision, the Court demonstrated real skepticism of Kagan's position during the oral argument.¹⁴¹

In three cases before the Court in its 2009-10 Term, Kagan sought to relieve the government of some of the burden of proving criminality under a statute involving the deprivation of honest services by a public official.¹⁴² Thus, again, Kagan sought to expand the power of law enforcement, but the Supreme Court unanimously rebuffed the government's broad reading of the honest services statute, and Justices Scalia, Thomas, and Kennedy would have gone further and struck down the entire statute as unconstitutionally vague.¹⁴³

In *United States v. O'Brien and Burgess*, Kagan argued that a judge can determine the "type" of firearm used by a defendant in connection with a crime of violence or drug trafficking crime using a preponderance of the evidence standard. In her view, the type of firearm is a sentencing factor, as opposed to an element of the offense, which would have to be found by a jury beyond a reasonable doubt (a much higher standard).¹⁴⁴ Under this interpretation, it would be much easier for a prosecutor to obtain a sentencing enhancement. The Supreme Court rejected the argument and, instead, concluded that the type of firearm is an element of the offense, rather than a sentencing factor, and must be found by a jury beyond a reasonable doubt.¹⁴⁵

¹⁴⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *Pottawattamie County v. McGhee* (No.08-1065), 2009 WL 2159654.

¹⁴¹ Transcript of Oral Argument at 20-26, *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (No. 08-1065).

¹⁴² Brief for the United States, *Weyhrauch v. United States* (No. 08-1196), 2009 WL 3495337; Brief for the United States, *Black v. United States* (No. 08-867), 2009 WL 3155001; Brief for the United States, *Skilling v. United States* (08-1394), 2010 WL 302206.

¹⁴³ *Skilling v. United States*, ___ U.S. ___ (June 24, 2010); *Black v. United States*, ___ U.S. ___ (June 24, 2010); *Weyhrauch v. United States*, ___ U.S. ___ (June 24, 2010).

¹⁴⁴ Brief for the United States, *United States v. O'Brien & Burgess* (No. 08-1569), 2009 WL 4099524.

¹⁴⁵ ___ S. Ct. ___, 2010 WL 2025204 (May 24, 2010).

B. Academic Understanding of Critical Issues

On more than one occasion, Kagan's briefs adopted theoretical arguments without regard for their practical consequences or their impact on the fundamental fairness of our criminal justice system. In *Skilling v. United States*, Jeffrey Skilling contended that the sustained and prejudicial pretrial publicity he faced regarding his role in the collapse of Enron entitled him to a change of venue from Houston, Texas, the site of Enron's headquarters. Although the Fifth Circuit concluded that the publicity was so damning and overwhelming that Skilling was entitled to a presumption of prejudice, Kagan contended that a change of venue was unnecessary.¹⁴⁶ She argued that the court's questioning of seated jurors about the existence of bias against Skilling and the jurors' assurances to the trial court that they could be fair, eliminated the need for a change of venue. In making this argument, Kagan (like the Fifth Circuit) failed to appreciate the fact – long recognized by courts (including the Supreme Court), social scientists, and experienced trial practitioners – that potential jurors cannot reliably evaluate the impact of pervasive negative publicity on their ability to be fair. Kagan, thus, relied on an academic, rather than a practical, understanding of the impact of prejudicial media and the power of *voir dire*, and thus seriously jeopardized the most fundamental of rights – the right to a fair and unbiased jury. In a 6-3 ruling, the Court rejected Skilling's claim that he did not receive a fair trial. In a dissent joined by Justices Stevens and Breyer, Justice Sotomayor criticized the majority for “understate[ing] the breadth and depth of community hostility toward Skilling and overlook[ing] significant deficiencies in the District Court's jury selection process.”¹⁴⁷

In *Padilla v. Kentucky*, a non-citizen defendant claimed that his lawyer was ineffective for failing to advise him of the possibility that he would be deported if he pleaded guilty. In her amicus brief, Kagan contended that there was no Sixth Amendment violation because the errors made by Padilla's counsel involved collateral and not direct criminal consequences and affirmative misadvice instead of a deliberate omission.¹⁴⁸ In finding that the defendant's constitutional rights were violated, the Court noted that it had never made a distinction between “direct and collateral consequences” for purposes of ineffectiveness claims and that deportation should not be considered a wholly collateral consequence given its close connection to the criminal process.¹⁴⁹ Moreover, the Court noted that the Solicitor General's argument “would invite two absurd results:” it would encourage counsel to remain silent about important issues and deny rudimentary advice about deportation to an entire class of defendants.¹⁵⁰

C. Constitutional Rights of Criminal Defendants

Several of Kagan's briefs demonstrate a narrow view of the constitutional rights of criminal defendants. Specifically, Kagan repeatedly took positions that ignored the

¹⁴⁶ Brief for the United States, *Skilling v. United States* (No. 08-1394), 2010 WL 302206.

¹⁴⁷ *Skilling v. United States*, ___ U.S. ___ (June 24, 2010).

¹⁴⁸ Brief for the United States as Amicus Curiae Supporting Affirmance, *Padilla v. Kentucky* (No. 08-651), 2009 WL 2509223.

¹⁴⁹ 130 S.Ct. 1473, 1481 (2010).

¹⁵⁰ *Id.* at 1484.

importance of key constitutional provisions and/or failed to appreciate the crucial role that constitutional protections play in our criminal justice system. Thus, in *Michigan v. Bryant*,¹⁵¹ and *Briscoe and Cypress v. Virginia*,¹⁵² Kagan's amicus submissions sought to undermine a defendant's Sixth Amendment right of confrontation in order to increase law enforcement and criminal prosecution capacity. The Court agreed to review *Bryant* and has not yet announced a decision. In *Briscoe and Cypress*, the Supreme Court rejected Kagan's argument, reversed the decision of the Virginia Supreme Court, and found that the defendants' Sixth Amendment Confrontation Clause rights were violated.¹⁵³

Additionally, Kagan's briefs in several Supreme Court cases addressing the contours of *Miranda* provide significant insight about her views on defendants' Fifth Amendment rights. *Miranda* was adopted by the Court as a measure to curtail coercive police interrogations and ensure that suspects are aware of, and able to, exercise constitutional protections during interactions with law enforcement. Despite the general acceptance of *Miranda* by law enforcement and the public alike, it is often viewed by the conservative members of the Court as an obstacle to efficient and effective police investigation. Thus, *Miranda* has been repeatedly singled out for criticism.

In *Berghuis v. Thompkins*, the Court retreated from *Miranda*'s core values in concluding that suspects must unambiguously assert their desire to remain silent in order to properly invoke their Fifth Amendment right to remain silent.¹⁵⁴ Kagan's amicus brief called for the blanket rule that the Supreme Court ultimately adopted in a 5-4 decision.¹⁵⁵ The newly announced rule undermines the protections of *Miranda* and makes it easier for law enforcement to obtain coerced confessions by talking suspects into a waiver after *Miranda* warnings are given. Indeed, Justice Sotomayor's dissent noted that the Court's decision "turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent – which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so."¹⁵⁶ She further notes that "[t]hose results ... find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded."¹⁵⁷

In *Florida v. Powell*, the Court reversed a Florida Supreme Court finding of a *Miranda* violation.¹⁵⁸ The Supreme Court determined that *Miranda* warnings that explained that a suspect has the right to counsel *before* interrogation, but did not mention the right to counsel *during* an interrogation, were not misleading. The Court relied, in part, on Kagan's amicus submission, which presented a technical parsing of the *Miranda*

¹⁵¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Michigan v. Bryant* (No. 09-150), 2010 WL 1848212.

¹⁵² Brief of the United States as Amicus Curiae Supporting Respondent, *Briscoe & Cypress v. Virginia* (No. 07-11191), 2009 WL 3615002.

¹⁵³ 130 S. Ct. 1316 (2009).

¹⁵⁴ ___ S. Ct. ___, 2010 WL 2160784 (June 1, 2010).

¹⁵⁵ Brief for the United States as Amicus Curiae Supporting Petitioner, *Berghuis v. Thompkins* (No. 08-1470), 2009 WL 4927918.

¹⁵⁶ *Berghuis*, No. 08-1470, ___ S. Ct. ___, 2010 WL 2160784, at *27.

¹⁵⁷ *Id.*

¹⁵⁸ 130 S. Ct. 1195 (2010).

warning and ignored the most commonsense understanding of the warnings given.¹⁵⁹ Kagan's position and the Court's decision could also easily lead to a muddling of what actually constitutes sufficient warnings and, therefore, extend the leeway afforded to law enforcement during interrogation to the detriment of suspects.

Maryland v. Shatzer further exemplifies Kagan's willingness to erode *Miranda*. *Shatzer* concerned the definition of custody and the validity of *Miranda* warnings given to an inmate who was incarcerated for a crime unrelated to the subject of the questioning. Specifically, the inmate asserted his right to counsel when questioned by police, and therefore foreclosed the interrogation. Two years later, while the inmate was still incarcerated but after he had been transferred to another facility, the interview was resumed and the suspect made incriminating statements. The Court ruled that once the initial interrogation ends and the suspect is released back into the prison population for more than 14 days, there is a break in custody such that interrogation can resume despite the prior request for counsel.¹⁶⁰ Kagan's amicus submission supported this break-in-custody exception to *Miranda*.¹⁶¹ Her amicus also made the argument – adopted by the Court – that the change from interrogation conditions to prison conditions constituted a break in custody. Kagan's (and the Court's) position seems to encourage misconduct by the police in order to obtain a *Miranda* waiver – particularly in instances where a police officer seeking to obtain a confession interrogates a suspect, releases her, and then waits an appropriate amount of time (14 days) to again initiate interrogation.

In *Montejo v. Louisiana*,¹⁶² the Supreme Court overruled its 1986 decision in *Michigan v. Jackson*,¹⁶³ and declared that the automatic appointment of counsel to a defendant (as opposed to the appointment of counsel at the defendant's request) prior to questioning does not prevent the police from subsequently questioning that defendant without counsel's presence. This decision was a significant and surprising break from prior law, which came about after the Court, *sua sponte*, directed the parties to submit briefing on the continued constitutionality of *Jackson*. Thereafter, Kagan's office filed an amicus brief in this case urging the Court to overrule *Michigan v. Jackson*, arguing that it was an unnecessary prophylactic against police coercion and it did not comport with the purposes of the Sixth Amendment right to counsel.¹⁶⁴ Notably Kagan's position and the Court's 5-4 decision mark a further incursion on the defendant's right to counsel.

In other instances, Kagan repeatedly submitted briefs that interpreted statutes in favor of increased punishment and to the detriment of criminal defendants. In *Johnson v. United States*,¹⁶⁵ Kagan argued that any prior conviction of battery under state law – including intentional, nonconsensual touching – qualified as a violent felony for purposes

¹⁵⁹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Florida v. Powell* (No. 08-1175), 2009 WL 2903916.

¹⁶⁰ 130 S. Ct. 1213 (2010).

¹⁶¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *Maryland v. Shatzer* (No. 08-680), 2009 WL 1069335.

¹⁶² 129 S. Ct. 2079 (2009).

¹⁶³ 475 U.S. 625 (1986).

¹⁶⁴ Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson*, *Montejo v. Louisiana* (No. 07-1529), 2009 WL 1019983.

¹⁶⁵ 130 S. Ct. 1265 (2010).

of a sentencing enhancement under federal law.¹⁶⁶ The Court, in a 7-2 opinion written by Justice Scalia, ruled that the Florida felony offense of battery by “[a]ctually and intentionally touch[ing]” another person does not have “as an element the use . . . of physical force against the person of another,” and thus does not constitute a “violent felony” under § 924(e)(1).¹⁶⁷ Kagan’s position was thus rejected in an opinion by one of the Court’s most conservative members, and the sentencing enhancement imposed by the court below was reversed.

In *Carachuri-Rosendo v. Holder*, Kagan contended that a second simple drug possession offense constituted an aggravated felony that subjected a non-citizen to immigration removal even if that offense was not subject to enhancement in state court because, regardless of what happened in state court, it could have been the subject of an enhancement in federal court.¹⁶⁸ The Court disagreed with Kagan and held that “the mere possibility that the defendant’s conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be ‘convicted of a[n] aggravated felony’ before he loses the opportunity to seek cancellation of removal.”¹⁶⁹

During her tenure as Solicitor General, Kagan also elected not to submit briefs in important criminal cases before the Supreme Court, which could provide further insight into her views on issues of criminal law. *Graham v. Florida* was one of two cases in which the Supreme Court was called upon to decide whether, in light of the significant differences between children and adults, the Eighth Amendment permits children to receive life without parole sentences for non-homicide offenses. In May 2010, the Supreme Court declared that such sentences constitute cruel and unusual punishment.¹⁷⁰ Kagan did not submit a brief to the Supreme Court in this case.

ACCESS TO JUSTICE

While she was a law clerk to Justice Marshall, Kagan advised him whether the Supreme Court should grant certiorari in *DeShaney v. Winnebago County Social Services Department*. This case raised the question of whether, in Kagan’s words, “a reckless failure by welfare authorities to protect a child from a parent’s physical abuse constitutes a deprivation of liberty within the meaning of the Fourteenth Amendment.” Although county officials were informed that Joshua DeShaney had been admitted to the hospital on several occasions with multiple injuries that raised suspicions of child abuse and although county caseworkers made visits to his home to investigate, they declined to intervene until his father beat him so severely that he suffered permanent brain damage. Kagan noted in her memorandum to Justice Marshall that the facts were “horrific” but expressed concern that the Court would ultimately reject DeShaney’s constitutional challenge.¹⁷¹ Her worries proved prescient. A strong dissent from Justice Brennan, joined by Kagan’s boss

¹⁶⁶ Brief for the United States, *Johnson v. United States* (No. 08-6925), 2009 WL 3663947.

¹⁶⁷ 130 S. Ct. 1265 (2010).

¹⁶⁸ Brief for Respondent, *Carachuri-Rosendo v. Holder* (No. 09-60), 2009WL 384444.

¹⁶⁹ ___ S. Ct. ___, 2010 WL 2346522 at *11 (June 14, 2010).

¹⁷⁰ 130 S. Ct. 2011 (2010).

¹⁷¹ Memorandum from Elena Kagan to Justice Marshall, *DeShaney v. Winnebago County* (Sept. 3, 1987).

and Justice Blackmun, criticized the majority’s “failure to see that [government] inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.”¹⁷²

During Kagan’s tenure, the Solicitor General’s Office weighed in on issues affecting access to justice. Kagan signed a merits amicus brief in *Perdue v. Kenny A. ex rel. Winn*, which involved the scope of the federal fee-shifting statutes designed to incentivize robust enforcement of civil rights statutes by allowing prevailing plaintiffs to recover reasonable attorneys’ fees from defendants. *Kenney A* was a class action lawsuit on behalf of 3,000 foster children that resulted in a landmark and sweeping consent decree that reformed Georgia’s child welfare system. To calculate the fee award due to plaintiffs’ attorneys under the primary fee-shifting statute for civil rights cases, the district court judge first tabulated the “lodestar” fee by multiplying the attorneys’ rates by the number of hours they worked. The judge then enhanced that lodestar by a factor of 1.75, citing the attorneys’ excellent representation and exceptionally good results.

In her merits amicus brief, Solicitor General Kagan supported the Georgia officials’ challenge to the fee award on the ground that the lodestar rate may never be enhanced for superior performance or exceptionally good results.¹⁷³ LDF filed an amicus brief supporting the foster care children, who were represented in the Supreme Court by Paul Clement, who served as Solicitor General under President George W. Bush. As LDF’s amicus brief demonstrated, fee enhancements for exceptional performance and results further Congress’s intent to encourage lawyers to take the most pressing cases and obtain broad-reaching relief that roots out entrenched discrimination or eradicates systemic inequities.¹⁷⁴ The Supreme Court unanimously rejected the position advocated by Georgia and the United States – that enhancements for superior performance are never appropriate.¹⁷⁵ But the Court split over the types of circumstances which would warrant such an enhancement. A five-justice majority held that the district court had provided insufficient justification for the premium awarded to the attorneys in this case.¹⁷⁶ The dissenters would have adopted a more permissive standard.¹⁷⁷

In contrast to Kagan’s narrow interpretation of the fee-shifting statute in *Kenny A.*, the Solicitor General’s office asserted a robust interpretation of the safeguards provided by another federal civil rights statute in amicus briefs filed in *Sossamon v. Texas* and *Cardinal v. Metrish*. Both cases raise the question whether an individual may sue a state or a state official in his or her official capacity for monetary damages for violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁷⁸ RLUIPA requires states to justify any substantial burden on the religious exercise of inmates in federally

¹⁷² 489 U.S. 189, 212 (1989) (Brennan, J., dissenting).

¹⁷³ Brief for the United States as Amicus Curiae Supporting Petitioners, *Perdue v. Kenny A.*(No. 08-970), 2009 WL 1864009.

¹⁷⁴ Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *Perdue v. Kenny A.*(No. 08-970), 2009 WL 2722576.

¹⁷⁵ *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1673, 1678 (2010); *id.* at 1683-84 (Breyer, J., dissenting).

¹⁷⁶ *Id.* at 1674-77.

¹⁷⁷ *Id.* at 1679-83 (Breyer, J., dissenting).

¹⁷⁸ 42 U.S.C. 2000cc *et seq.* (2000).

funded correctional facilities as furthering a compelling interest by the least restrictive means possible. In response to the Supreme Court's request for the Solicitor General's views on whether certiorari was warranted, Kagan signed an amicus brief agreeing with the petitioners that official-capacity suits are allowed because a state that receives federal funds for its correctional institutions waives its Eleventh Amendment immunity against damages actions under RLUIPA. The Solicitor General further recommended that the Supreme Court grant certiorari to review this issue, which it did in *Sossamon*. Argument will be scheduled for next term.¹⁷⁹ *Sossamon* could have ramifications beyond RLUIPA because it implicates the scope of sovereign immunity as a limitation on states' liability for violations of antidiscrimination statutes.

Under Kagan, the Solicitor General's Office has been willing to abandon prior positions taken by the *government* that limited vindication of civil rights – although not as often as we would have hoped. For instance, in *Kucana v. Holder*, the Office switched its position to ensure more expansive access to judicial review for asylum seekers. Agron Kucana, an Albanian citizen, faced deportation because he remained in the United States after his business visa expired. He sought to reopen his removal proceedings, contending that political conditions in Albania had worsened and thus he was eligible for asylum. The Board of Immigration Appeals (BIA) denied the motion, and the Seventh Circuit ruled that Congress had stripped federal courts of jurisdiction to review the BIA's decision. With Kagan at the helm, the Solicitor General's Office reversed the government's prior position and, in briefs at the certiorari and merits stages, supported Kucana's contention that the Seventh Circuit had misread the statute.¹⁸⁰ The Supreme Court agreed with Kucana and Kagan that a BIA decision on a motion to reopen asylum proceedings is subject to judicial review.¹⁸¹

CONCLUSION

In her tribute to Justice Thurgood Marshall, Elena Kagan wrote that “Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories – stories of people's lives as shaped by law, stories of people's lives as might be changed by law.”¹⁸² Over the course of her illustrious career, Elena Kagan has held positions of prestige, influence and honor. If confirmed by the Senate, Elena

¹⁷⁹ See *Sossamon v. Texas*, ___ S. Ct. ___, 2010 WL 2025142 (May 24, 2010). The Solicitor General recommended that *Cardinal* was a better vehicle than *Sossamon*, but the Court disagreed. See Brief for the United States as Amicus Curiae, *Sossamon v. Texas* (No. 08-1438), 2010 WL 990561; Brief for the United States as Amicus Curiae, *Cardinal v. Metrish* (No. 09-109), 2010 WL 990562.

¹⁸⁰ At the certiorari stage, the government adopted Kucana's position that the Seventh Circuit's statutory interpretation was incorrect, but it contended that the case did not merit review. See Brief for Respondent in Opposition, *Kucana v. Holder* (No. 08-911), 2009 WL 797590. After the Court granted certiorari, the government again sided with Kucana on the statutory question. See Brief for Respondent Supporting Petitioner, *Kucana v. Holder* (No. 08-911), 2009 WL 2028903; Reply Brief for Respondent Supporting Petitioner, *Kucana v. Holder* (No. 08-911), 2009 WL 3615006.

¹⁸¹ *Kucana v. Holder*, 130 S. Ct. 827 (2010). In several other criminal and immigration cases, the Solicitor General's Office, under Kagan, has filed response briefs shifting the government's position, and the Supreme Court has granted, vacated, and remanded for further consideration in light of the government's new position. See, e.g., *Vazquez v. United States*, 130 S. Ct. 1135 (2010); *Hunter v. United States*, 130 S. Ct. 1135 (2010); *Frankel v. United States*, 130 S. Ct. 72 (2009); *Afanwi v. Holder*, 130 S. Ct. 350 (2009).

¹⁸² Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

Kagan will assume the most important position of her lifetime – one that can profoundly impact the direction of racial justice in this country. We hope she will carry forth the wisdom she imparted from Justice Marshall. In so doing, she would fulfill the wishes of a President, whose election was possible in part because of Justice Marshall's contributions, and whose stated goal was to select a Supreme Court nominee capable of understanding the law's impact on those individuals in whose shoes she has never walked.