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November 5, 2003

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: Environmental Opposition to Justice Janice Rogers Brown's Nomination to a Lifetime Seat on the United States Court of Appeals for the District of Columbia Circuit

Dear Chairman Hatch and Ranking Member Leahy:

We are writing to express our strong opposition to the confirmation of California Supreme Court Justice Janice Rogers Brown to a lifetime seat on the United States Court of Appeals for the D.C. Circuit. Justice Brown's views on constitutional issues—expressed in her speeches, judicial opinions, and testimony to the Judiciary Committee—place her on the outermost fringes of constitutional interpretation. In particular, her interpretation of the proper standard of judicial review for environmental protections under the Due Process Clause, and the proper reach of the Takings Clause, endanger our most basic environmental safeguards. The Senate should not consent to her confirmation to this critical environmental court.

The D.C. Circuit's importance to federal environmental protections cannot be overstated. The D.C. Circuit has the power—often the exclusive power—to hear challenges to federal laws and actions, including crucial health, safety and environmental protections. Except for the handful of cases that the Supreme Court agrees to review, the D.C. Circuit has the final say on whether a federal protection will stand or fall. Environmental concern over the D.C. Circuit is reflected in the attached letter that 16 national groups sent to Senator Schumer, then-chair of the Judiciary Subcommittee on Administrative Oversight and the Courts, regarding that Subcommittee's hearing on "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court."

Justice Brown's Record

Justice Brown's record is extreme and especially disturbing for a nominee to a lifetime seat on this critical court. Justice Brown:

- supports elevating private property rights to a level that is on par with fundamental rights like free speech;
- believes that the Supreme Court's 1937 decision upholding the New Deal as constitutional "marks the triumph of our own socialist revolution"; and
- wrote in a solo dissent that private property is now "entirely extinct in San Francisco."

In her speeches, Justice Brown has:

- denounced the federal government as a "leviathan" that is "picking up ballast and momentum, crushing everything in its path";
- asserted that "[w]here government moves in community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property, the precipitous decline of the rule of law, the rapid rise of corruption; the loss of civility and the triumph of deceit";
- declared that government has become the "drug of choice" for ordinary Americans; and
- stated that "[t]oday's senior citizens blithely cannibalize their grandchildren" to "get as much 'free' stuff as the political system will permit them to extract."

Justice Brown's unfathomably bleak view of Americans and our elected government lead her to believe that unelected judges and the judiciary must actively rein in government. Thus Justice Brown has openly yearned for a return to the pre-New Deal era named after the infamous *Lochner v. New York* decision, when the Supreme Court created an extra-constitutional theory of "liberty" to contract, purportedly protected through the Constitution's Due Process Clause. The Court used this to invalidate nearly two-hundred social welfare and regulatory measures, including basic federal and state child-labor, minimum-wage, and other statutes designed to improve worker safety and jump-start the economy out of the Great Depression. Justice Brown has characterized the Supreme Court's 1937 decisions reversing course and refusing to invalidate the Depression-era reforms of the New Deal as "the triumph of our own socialist revolution." These 1937 decisions serve as precedent for our nation's environmental protections.

Justice Brown's views on the limits of congressional power place her almost alone at the fringe of constitutional interpretation. Virtually every prominent constitutional scholar—from the left, the center, and the right—agrees that *Lochner* is a definitive example of inappropriate judicial activism.

A return to the *Lochner* era and its extra-constitutional "liberty" to contract theory would undermine this nation's entire framework of environmental statutes. Our modern laws that protect workers from hazardous chemicals and other environmental dangers would almost certainly fall the way of the limitation on bakery work hours that the Court invalidated in *Lochner*. More broadly, almost every environmental statute either prohibits certain contracts (for example, the Endangered Species Act prohibits sales of endangered species), or alters the permissible terms of contracts (for example, the "Superfund" law has dramatically changed real-estate transactions by holding purchasers potentially liable for environmental hazards placed on their property by former owners). These laws and innumerable others would be threatened by a revival of the *Lochner*-era's unjustifiable elevation of property rights and the liberty to contract over environmental protections and the rights of the public.

Just as troubling is Justice Brown's view that there is a "promising possibility of a revival of what might be called '*Lochnerism*-lite,"[1] under the Takings Clause. Her dissenting opinions in property-rights "takings" cases have attempted to turn this disturbing possibility into reality. For example:

- In *Landgate, Inc. v. California Coastal Commission,*[2] a critical environmental takings case, Justice Brown described government as a "relentless siphon" with a "demand for free public goods [that] is infinite." She would have required taxpayers to pay a developer for a "temporary taking" during the time that the Coastal Commission prevented development as part of dispute over whether a lot had been legally reconfigured.

- In *San Remo Hotel v. City & County of San Francisco*,[3] Justice Brown proclaimed that "private property . . . . is now entirely extinct in San Francisco" and accused the city of implementing a "neo feudal regime,"[4] and of "[t]urning a democracy into a kleptocracy."[5] Her sweeping assertion that "restriction of any one of the several rights that constitute private property in effect takes that property," threatens a wide range of fundamental safeguards.

The U.S. Supreme Court, in rejecting takings claims against the implementation of zoning setback requirements, height restrictions, and environmental laws that limit timber harvesting and coal extraction, has repeatedly rejected the argument that Justice Brown endorses. Justice Brown's position that any law that has the effect of redistributing wealth from one group to another constitutes a "per se taking requiring compensation"[6] is equally extreme, and equally in conflict with Supreme Court precedent.

Justice Brown's views on the Takings Clause are more extreme than those of any current U.S. Supreme Court justice, and resemble closely the position of University of Chicago law professor Richard Epstein, whose book, *Takings: Private Property and the Power of Eminent Domain*, is cited favorably in Justice Brown's *San Remo* dissent. Epstein enthusiastically describes his views as calling into constitutional question "many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation."[7]

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[1] Janice Rogers Brown, "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Speech to The Federalist Society, University of Chicago Law School (Apr. 20, 2000), at 13-14 [hereinafter A Whiter Shade of Pale], *available at* http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf.
[2] 953 P.2d 1188 (Cal. 1998), *cert denied,* 525 U.S. 876 (1998).
[3] 41 P.3d 87 (Cal. 2002).
[4] *Id*.
[5] *Id*. at 128.
[6] *Id*. at 126.
[7] RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN x (1985).

The *San Remo* majority responded directly to Justice Brown's dissent by accusing her of letting her ideology dictate conclusions that are justified neither by legal precedent nor by the text of the Takings Clause: "However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties, nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state."[8]

In sum, Justice Brown holds views on government and constitutional law that place her far outside the mainstream. Her opinions indicate a willingness, indeed a zeal, to inject these views into the case law even in the face of binding contrary precedent. These speeches and opinions are covered in much greater detail in a pre-hearing report released by Community Rights Counsel and Earthjustice (available at www.communityrights.org/PDFs/BrownReport.pdf).

Justice Brown's Testimony

Justice Brown's Senate testimony only exacerbated our extremely serious concerns about her record. Justice Brown unflinchingly stood by her speeches, her judicial opinions, and her criticism of decades of Supreme Court precedent requiring judicial deference to government efforts to regulate commercial activities.

Specifically, Justice Brown denounced as "infamous" the portion of the Supreme Court's landmark ruling in *U.S. v. Carolene Products,*[9] which put the final nail in the coffin of the *Lochner* era and established a deferential, rational basis review of economic regulation under the Due Process Clause. Justice Brown testified that property rights "are entitled to the same level of protection as what is called fundamental rights or fundamental liberties." Under long-standing Supreme Court precedent, fundamental rights, such as the freedom of speech and freedom from state-sponsored racial discrimination, receive strict scrutiny from federal courts.

It is unclear from Justice Brown's testimony whether she supports applying strict scrutiny for economic regulation, or an intermediate form of scrutiny for all forms of government action. Either way, acceptance of Justice Brown's position would be a rejection of many decades of settled Supreme Court precedent. When the Court applies strict scrutiny, it almost always rules against the government,[10] so the former position—applying strict scrutiny to economic regulation—would signal the death-knell for a vast range of health, labor, and environmental protections enacted during the last century. The latter position would still enable unelected judges to second-guess all forms of economic regulation under an intermediate form of scrutiny, and would dramatically

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[8] *San Remo,* 41 P.3d at 110.
[9] 304 U.S. 144, 152 n.4 (1938).
[10] *See* Fullilove v. Klutznick, 448 U.S. 448, 509 (1980) (Marshall J. concurring) (Strict scrutiny is "strict in theory, but fatal in fact.").

lessen protections for free speech, and those that protect against racial discrimination. The Senate should not confirm a nominee who holds either of these extreme positions.

In her testimony, Justice Brown cited her 1999 dissent in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1026 (Brown, J., dissenting) as evidence that she had in the past been critical of the *Lochner* decision, "to the extent the *Lochner* court was using the due process clause as a sort of blank check to write anything they wanted into the Constitution." But a year after writing this dissent, Justice Brown disavowed any prior criticism of *Lochner* in a speech, stating that she "initially accepted the conventional wisdom" that the doctrine used in *Lochner* was "a myth invented by judicial activists that were up to no good," but then it "dawned on me that the problem may not be judicial activism." [11] Specifically defending the *Lochner*-era version of substantive due process, Justice Brown cited a "small but credible body of scholarship suggesting that, in our early history, the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owners."[12]

Justice Brown's testimony persists in the extreme view that the *Lochner* majority was correct in writing into the Constitution a particular economic view—one that elevates property rights to a level at least on par with fundamental individual liberties. Thus, Justice Brown testified that "[W]hen I say that I'm responding to [Holmes'] implication, I'm really talking about the dichotomy that eventually develops where economic liberty, property, is put on a different level than political liberties. . . . I think there are very many commentators who say, you know, there doesn't seem to be a basis for having created this dichotomy." She explained that "I ha[ve] a difference of opinion with this idea that the Framers of the Constitution had no economic notion. I think it's very clear, when you read history, that there was a concern about property; that the American Revolution was a revolution that was really fought over property; that one of the reasons that the Constitution came into being . . . was that there was a concern about what legislative majorities were doing with property. So both in the Constitution and in the Bill of Rights, that concern, you know, finds expression in specific language."

Justice Brown also testified that the "dichotomy, that notion that property rights are not entitled to the same level of protection as what are called fundamental rights or fundamental liberties, I think the Supreme Court itself has reconsidered and certainly has said something like that in cases like *Nollan*[13] and *Dolan.*"[14] This statement is deeply disturbing because it indicates that Justice Brown believes Supreme Court precedent allows her to apply stricter scrutiny to economic regulations if confirmed as a D.C. Circuit judge. It is also a stunningly inaccurate reading of what the Supreme Court held in *Nollan* and *Dolan*.

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[11] Janice Rogers Brown, Fifty Ways to Lose Your Freedom, Speech to the Institute for Justice, Washington, DC (Aug. 12, 2000), at 3-4 [hereinafter Fifty Ways], *available at* http://www.communityrights.org/PDFs/8-12-00IFJ.pdf.
[12] *Id.* at 4.
[13] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
[14] Dolan v. City of Tigard, 512 U.S. 374 (1994).

Nollan and *Dolan* were decided under the Constitution's Takings Clause, not its Due Process Clause. Nothing in these two takings cases can plausibly be read to constitute "reconsideration" by the Supreme Court of 65 years of Due Process case law. While *Nollan* and *Dolan* apply a slightly more strict form of judicial scrutiny under the Takings Clause, the Court makes clear in these cases and subsequent rulings[15] that this heightened scrutiny is limited to "the special context of exactions,"[16] cases where, for example, a developer is required to dedicate to public use the land that the subdivision requires for streets and sidewalks. The Court unanimously declared in 1999 that the *Nollan/Dolan* test was "not designed to address, and is not readily applicable to" the vast majority of economic regulations that somehow impact the use of property.[17]

As *The Washington Post* concluded in an October 30th editorial against her confirmation, Justice Brown is "one of the most unapologetically ideological nominees of either party in many years." The *Los Angeles Times* today editorialized against Justice Brown's confirmation because her views are "unrelentingly hostile to government's role in regulatory matters . . . the very things on which she would rule most often." In the words of Stephen Barnett, a University of California Boalt Hall School of Law professor who withdrew his support for Justice Brown after reading her speeches and hearing her testimony, her "government bashing" and "extreme and outmoded ideological positions" place Justice Brown "out of the mainstream" and make her nomination to the D.C. Circuit "just too scary."

In sum, Justice Brown is an ideologue who, in her work as a California Supreme Court justice, has demonstrated a willingness to ignore or misinterpret binding precedent to further her ideology. That ideology is hostile to our nation's bedrock environmental laws. Nevertheless, she has been nominated to a lifetime position on a court that has unique power to uphold or strike down environmental safeguards. We strongly urge you to exercise your constitutional advise-and-consent responsibility and reject the nomination of Justice Brown. Thank you for considering these views.

Sincerely yours,

Jeff Soule, FAICP
Policy Director
American Planning Association

Ann Mills
Executive Vice President
American Rivers

[15] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999).
[16] *Id*. The Court defines exactions as "land-use decisions conditioning approval of development on the dedication of property to public use." *Id*.
[17] *Id*.

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cc: Members, Senate Committee on the Judiciary
Attachment