

December 7, 2023

The Honorable Richard Durbin  
Chairman  
Senate Committee on the Judiciary  
Washington, DC 20510

The Honorable Lindsey Graham  
Ranking Member  
Senate Committee on the Judiciary  
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

We write in strong support of President Biden's nomination of Nicole Berner to serve as a Circuit Judge on the United States Court of Appeals for the Fourth Circuit.

Each of us served as an Assistant to the Solicitor General in the U.S. Department of Justice. In the decades since, we have specialized in cases before federal and state courts of appeals and the Supreme Court of the United States. Between us, we have argued a total of 88 cases before the Supreme Court, and scores of cases before the U.S. Courts of Appeals.

We sometimes have appeared on opposite sides of the same case. And our client interests are varied – from principally individual plaintiffs, governmental interests, labor unions, corporations, and class actions on occasion (David Frederick) to principally businesses, trade associations, and nonprofits (Andrew Pincus).

We have worked with, litigated against, and collaborated on cases with Ms. Berner in the Supreme Court of the United States and federal courts of appeals over more than a decade. Based on that professional experience, we are united in the firm conviction that Ms. Berner is highly qualified to serve on the Fourth Circuit and will be an excellent appellate judge.

Ms. Berner demonstrated superb skills as a writer, legal analyst, and advocate in the appellate cases in which we have seen her work up close. She has been closely involved in a wide range of cases, from antitrust to First Amendment to labor law. In each of these fields, she has carefully studied the applicable Supreme Court and appellate cases, and advocated for positions that are true to the governing legal principles and the established facts in the record of the case. Her legal training is extensive, including as a law clerk to a distinguished court of appeals judge, an associate in a well-respected law firm, a lawyer in a public interest organization, and general counsel of one of the largest labor unions in the country. Ms. Berner's experience with a wide range of the legal issues that arise in the federal courts, her diverse roles as a lawyer, and her professional expertise, which we have observed first hand, demonstrate that she will be a first-rate appellate judge.

Just as impressive as Ms. Berner's legal skills are her personal qualities. She is unfailingly polite and measured in her interactions with others, even on highly contentious issues. She listens carefully and thoughtfully with an open mind to new ideas – even those that may not comport with her personal experience – so that she can offer the soundest position in a case.

These qualities make us certain that she will transition seamlessly from the role of advocate to the work of a circuit judge. She will understand that serving as a judge requires her to act as a neutral arbiter based on faithful application of the relevant constitutional or statutory text,

precedent, and record facts. In the moot courts and case conferences in which we have participated with Ms. Berner, we have seen those qualities we admire most in appellate judges – incisive questioning, careful assimilation of the case materials, and sound judgment.


Almost certainly, each of us will disagree with some of the decisions Ms. Berner will make as a judge. But we are confident that all of her decisions will be based on the fair application of the law based on the facts of the case.

We enthusiastically support Ms. Berner's confirmation to be a Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit and urge the Committee to report her nomination favorably.

Respectfully,



David C. Frederick  
Assistant to the Solicitor General,  
1996-2001  
Partner, Kellogg Hansen Todd Figel & Frederick\*



Andrew J. Pincus  
Assistant to the Solicitor General, 1984-88  
Partner, Mayer Brown LLP\*

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