

March 21, 2022

Senator Dick Durbin, Chairman  
Senator Chuck Grassley, Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

We write to you on behalf of the Electronic Privacy Information Center (EPIC) regarding the nomination of Judge Ketanji Brown Jackson as the next Associate Justice of the United States Supreme Court. We urge you to explore her views on government transparency, on Article III standing, and on the interaction of the Fourth Amendment and emerging technologies. Judge Jackson's views on these issues could have far-reaching implications for civil liberties, consumer protection, and the future of privacy in the digital area.

EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age.<sup>1</sup> We participate in a wide range of activities, including research, education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy. EPIC regularly files *amicus* briefs in the U.S. Supreme Court,<sup>2</sup> and EPIC routinely shares its views with the Senate Judiciary Committee regarding nominees to the Supreme Court.<sup>3</sup>

---

<sup>1</sup> EPIC, *About Us* (2022), <https://epic.org/about/>.

<sup>2</sup> See, e.g., *amicus curiae* briefs of EPIC in *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021) (arguing that plaintiffs can establish standing based on a violation of their statutory rights under FCRA and other privacy statutes); *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S.Ct. 777 (2021) (arguing that records describing the basis of an agency decision that are not followed by further deliberation are final and not deliberative under the FOIA); *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (arguing that a traffic stop based solely on the suspended license of the registered owner and the use of an Automatic License Plate Reader violates the Fourth Amendment); *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 204 L. Ed. 2d 742 (2019) (arguing that a narrow, objective definition of "confidential" should be applied when an agency seeks to withhold information under the FOIA); *Byrd v. United States*, 138 S.Ct. 1518 (2018) (arguing that a warrantless search of a rental car when the driver has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement is a Fourth Amendment violation); *Packingham v. North Carolina*, 137 S.Ct. 1730 (U.S. argued Feb. 27, 2017) (arguing that the state cannot restrict the news and social media websites that a released offender may read); *Utah v. Strieff*, 579 U.S. 232 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury in fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 573 U.S. 373 (2014) (arguing that the search of a cell phone incident to arrest requires a warrant).

<sup>3</sup> See, e.g., EPIC, *Amy Coney Barrett and Privacy* (2020), <https://archive.epic.org/privacy/barrett/> (concerning the nomination of Hon. Amy Coney Barrett); Letter from EPIC to Sen. Chuck Grassley, Chairman & Sen.

Although EPIC takes no position for or against a judicial nominee, we urge you to scrutinize Judge Jackson's views on government transparency and the withholding of information from the public by federal agencies; on the respective roles of Congress and the judiciary in deciding which rights—including privacy rights—may be vindicated in federal court; and on the meaning and enforceability of the Fourth Amendment in view of ongoing developments in technology and the law.

**I. Judge Jackson should be asked about the role of courts in enforcing open government laws and scrutinizing agency decisions to withhold information from the public.**

During her tenure as a federal judge, Judge Jackson has presided over a significant number of open government cases under the Freedom of Information Act (FOIA).<sup>4</sup> Our open government laws are essential to ensure that citizens know what their government is up to and to facilitate oversight.<sup>5</sup> But agencies, especially those involved in law enforcement and homeland security programs, frequently assert broad exemptions and argue that they are not required to disclose the details of their programs.

EPIC urges the Committee to ask the following questions of Judge Jackson:

- When a federal agency withholds records and claims an exemption from our open government laws, how and to what extent should courts scrutinize the agency's asserted basis for the withholding?
- What is judiciary's role in testing claims by federal agencies that records are classified and therefore exempt from public disclosure? Do you believe based on your experience as a judge presiding over open government cases that records are frequently withheld as classified even where their disclosure would not harm national security?
- When an agency seeks to withhold records based on technological claims about how the information might impact cybersecurity, how should courts review those assertions without

---

Dianne Feinstein, Ranking Member, U.S. Senate Comm. on the Judiciary (Sept. 4, 2018) (concerning the nomination of Hon. Brett Kavanaugh), <https://epic.org/wp-content/uploads/privacy/kavanaugh/EPIC-Kavanaugh-SJCltr-Sept2018.pdf>; Letter from EPIC to Sen. Chuck Grassley, Chairman & Sen. Dianne Feinstein, Ranking Member, U.S. Senate Comm. on the Judiciary (Mar. 20, 2017) (concerning the nomination of Hon. Neil Gorsuch), <https://epic.org/wp-content/uploads/privacy/gorsuch/EPIC-SJC-Gorsuch-Mar2017.pdf>; Letter from EPIC to Sen. Patrick Leahy, Chairman, & Sen. Jeff Sessions, Ranking Member, U.S. Senate Comm. on the Judiciary (June 28, 2010), [https://epic.org/wp-content/uploads/privacy/kagan/EPIC\\_Kagan\\_Ltr.pdf](https://epic.org/wp-content/uploads/privacy/kagan/EPIC_Kagan_Ltr.pdf) (concerning the nomination of Hon. Elena Kagan); EPIC, *Sotomayor and Privacy* (2009), <https://archive.epic.org/privacy/sotomayor/> (concerning the nomination of Hon. Sonia Sotomayor).<sup>4</sup> See, e.g., *Muckrock, LLC v. Cent. Intel. Agency*, 300 F. Supp. 3d 108 (D.D.C. 2018) (concerning the CIA's use of the National Security Act to withhold records related to the agency's own FOIA procedures); *Sheridan v. U.S. Off. of Pers. Mgmt.*, 278 F. Supp. 3d 11 (D.D.C. 2017) (concerning OPM's use of a FOIA exemption to withhold records related to software used to conduct employment background checks); *EPIC v. Dep't of Just.*, 296 F. Supp. 3d 109 (D.D.C. 2017) (concerning DOJ's withholding of records related to the federal government's surreptitious use of pen register and trap-and-trace devices to collect communications information).

<sup>5</sup> See EPIC, *Open Government* (2022), <https://epic.org/issues/open-government/>.

being overly deferential? Do courts need more tools or independent experts to analyze these types of cases?

## **II. Judge Jackson should be asked about recent developments in Article III standing doctrine that have made it harder for individuals to vindicate their privacy rights.**

The Supreme Court has ruled in several significant cases in recent years concerning the ability of individuals to sue corporations for violations of their rights under federal statutes.<sup>6</sup> Specifically, the Court has considered what individuals are required to prove in order to establish Article III standing to sue in cases concerning their digital privacy rights. Most recently, in *Transunion LLC v. Ramirez*,<sup>7</sup> the Court held that a group of individuals could not sue a credit agency for illegally marking them as posing a threat to national security.

EPIC urges the Committee to ask the following questions of Judge Jackson:

- Do you believe it is a problem that courts, by imposing new burdens on litigants to establish Article III standing, are effectively deciding whether Congress can grant certain types of rights to individuals? Should it be the role of Congress or the Courts to decide whether a duly enacted law can be judicially enforced?
- In both *TransUnion* and the earlier *Spokeo, Inc. v. Robins*<sup>8</sup> decision, the Court has relied heavily on analogies to common law in determining the scope of Article III jurisdiction. Do you believe that the scope of harms recognized by courts 225 years ago should dictate whether individuals can obtain relief in federal court for violations of their rights today?

## **III. Judge Jackson should be asked about the application of the Fourth Amendment in view of ongoing developments in technology and the law.**

The Fourth Amendment is the principal constitutional safeguard of the right to privacy. The Fourth Amendment prohibits unreasonable searches and seizures without a warrant—generally, law enforcement must obtain a warrant when a search would violate a person’s “reasonable expectation of privacy.” The Fourth Amendment also requires that warrants be supported by probable cause and describe with particularity the places to be searched and persons to be seized.

The advent of the internet and other digital technologies has ushered in new questions about when law enforcement agencies must obtain a warrant, about what constitutes probable cause to support a warrant, and about the scope of the search permitted under a warrant. Recent cases have analyzed exceptions to the warrant requirement that were developed before the widespread use of cell phones and internet services. Recurring issues in these cases include whether courts should apply the same rules to searches of electronic data as they do to physical items and the point at which police use of surveillance technologies interferes with individuals’ reasonable expectation of privacy.

---

<sup>6</sup> Judge Jackson has also ruled in several cases concerning the Article III standing of a plaintiff to bring statutory claims against a corporation. See *Equal Rts. Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62 (D.D.C. 2021); *Austin-Spearman v. AARP & AARP Servs. Inc.*, 119 F. Supp. 3d 1 (D.D.C. 2015).

<sup>7</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

<sup>8</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

At the same time that evolving technologies have required courts to closely scrutinize old doctrines, other decisions by the Supreme Court have made it increasingly difficult for individuals to vindicate their Fourth Amendment rights in cases involving new and complex legal issues. Judge-made doctrines including the good faith exception and qualified immunity often shield law enforcement officials from consequences for Fourth Amendment violations, while one of the principal tools for holding federal officers accountable for civil rights violations—known as a *Bivens*<sup>9</sup> action—has been substantially narrowed.<sup>10</sup>

EPIC urges the Committee to ask the following questions of Judge Jackson:

- How should courts' interpretations of the Fourth Amendment adapt to the emergence of new technologies that collect and store vast amounts of personal information?
- Given the high (and rising) bar of judge-made doctrines like the good faith exception, qualified immunity, and *Bivens*, do you believe it is still possible today for individuals to vindicate their Fourth Amendment rights?

#### IV. Conclusion

We ask that this letter be entered into the hearing record. As always, EPIC appreciates your consideration of our submission and would be pleased to provide the Senate Judiciary Committee with any additional information you request.

Sincerely,

Alan Butler  
*EPIC President and Executive Director*

Caitriona Fitzgerald  
*EPIC Deputy Director*

John Davisson  
*EPIC Director of Litigation and Senior Counsel*

Sara Geoghegan  
*EPIC Law Fellow*

---

<sup>9</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>10</sup> See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). But see *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013) (Jackson, J.) (allowing a *Bivens* action to proceed and denying qualified immunity to officers accused of violating an individual's First and Fourth Amendment rights by arresting him for using profanity in a public park).