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October 24, 2024

Senator Joe Manchin
United States Senate
Washington, D.C. 20510

***Re: JAG Advises the Senate to Vote Not to Confirm Judge Kasubhai to the U.S.
District Court for the District of Oregon***

Dear Senator Manchin,

Magistrate Judge Mustafa Taher Kasubhai was first nominated over a year ago on September 18, 2023. He was reported out of the Senate Judiciary Committee on November 9, but was not confirmed in 2023. He was re-reported out of committee on January 18, 2024, but his radical record prevented his movement on the Senate floor until June. On June 13, the Senate attempted to achieve cloture on Kasubhai but was forced to abandon that effort on June 18. It now appears that Biden – whose capacity to function as President has been widely questioned by his own party and his allies in the media – is pushing again to confirm Kasubhai during the lame duck period. On behalf of our twelve thousand supporters across all fifty states, Judicial Action Group respectfully requests that you vote “no” on his confirmation for the reasons stated below.

- 1. Judge Kasubhai is a proven activist who seeks to impose radical LGBTQ movement’s fanatical use of pronouns upon parties in cases. He mandates that litigants in his chambers’ courtroom refer to one another using non-biological pronouns, rather than those conforming to scientific reality.**

In a 2021 essay entitled “*Pronouns & Privilege*,” Judge Kasubhai makes the case for utilizing pronouns within the judiciary and cites to his own chambers’ rules on the use of pronouns.¹ He also leans into identity politics and describes his “privilege,” declaring, “I have the luxury of a certain privilege as a judge and a cisgender man. While that privilege is tempered in some ways by my experiences as a person of color, the privilege is still quite real.”²

The pronoun rules are prominently featured first on Kasubhai’s “courtroom rules” list and read, “The parties and counsel are encouraged to advise the Court of their pronouns and honorifics (such as Mx., Ms., or Mr.). People appearing before this Court may provide their pronouns and honorifics in writing or orally when appearing for conferences, hearings, or trials. Attorneys are encouraged to identify their pronouns and honorifics in their signature lines when submitting documents for filing. Parties and counsel are instructed to address each other in all written documents and court

¹ Mustafa Kasubhai, *Pronouns & Privilege*, 32 ADVANCE SHEET 1 (Summer 2021), <https://fmja.org/wp-content/uploads/2022/01/Kasubhai.PronounsPrivilege.pdf>, at PDF p. 1.

² Mustafa Kasubhai, *Pronouns & Privilege*, 32 ADVANCE SHEET 16 (Summer 2021), <https://fmja.org/wp-content/uploads/2022/01/Kasubhai.PronounsPrivilege.pdf>, at PDF p. 2.

proceedings by those previously identified pronouns and honorifics.”³ Additionally, Kasubhai provides a link featured to a two-page PDF document that further demonstrates how parties ought to utilize pronouns in his courtroom.⁴

Kasubhai believes that failing to use preferred LGBTQ-friendly pronouns is equivalent to “erasing” another’s identity and is “horrifying.” He has written, “When people feel unsafe coming into the courts because of their gender identity, there is no real access. When we deny someone their identity, we have the power to erase them. That is horrifying.”⁵ Kasubhai adds, about adding his pronouns on the signature lines of his opinions, “[I]magine how powerful a statement it could be when Ninth Circuit Court judges do this. And dare I dare to imagine when U.S. Supreme Court justices include their pronouns?”⁶

Kasubhai has taught on panels alongside federal Magistrate Judge Allison Claire, a lesbian with two “nonbinary” children, educating fellow judges and other legal practitioners about “the importance of pronouns.”⁷ He has been deemed an “evangelist for gender identity rights in the courtroom.”⁸ This is highly concerning, since the role of a judge is to impartially rule on matters before the court under the law, and not to be an “evangelist” for any particular social movement.

2. Kasubhai has cited in his work to a radical professor who subscribes to a sex-based theory of rape and believes that all heterosexual relationships are wrought with violence. He has also endorsed the work of Ibram X. Kendi, an activist who believes that past discrimination must be remedied by present discrimination.

In his article, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, Kasubhai cites to the work of Professor Catharine MacKinnon, who argues that “sexuality itself is a power web in which heterosexual relations *per se* are infused with violence and control”⁹ and “asserts that sexuality is a purposefully constructed system to disempower women.”¹⁰ Kasubhai inquires whether MacKinnon’s theory “illuminates many questions that a dyadic linear power model would not raise.”¹¹ MacKinnon has also radically asserted a sex-based theory of rape

³ Judge Kasubhai, U.S. DISTRICT COURT DISTRICT OF OREGON, <https://www.ord.uscourts.gov/index.php/court-info/our-judges/judge-kasubhai>.

⁴ Mustafa Kasubhai, *Pronouns & the Courts*, <https://www.law.berkeley.edu/wp-content/uploads/2022/03/Pronouns-and-the-Courts.pdf>.

⁵ Mustafa Kasubhai, *Pronouns & Privilege*, 32 ADVANCE SHEET 17 (Summer 2021), <https://fmja.org/wp-content/uploads/2022/01/Kasubhai.PronounsPrivilege.pdf>, at PDF p. 3.

⁶ Mustafa Kasubhai, *Pronouns & Privilege*, 32 ADVANCE SHEET 17 (Summer 2021), <https://fmja.org/wp-content/uploads/2022/01/Kasubhai.PronounsPrivilege.pdf>, at PDF p. 3.

⁷ Emily Rogers, *A Commitment to the Struggle*, ETHOS (May 22, 2023), https://www.dailyemerald.com/ethos/a-commitment-to-the-struggle/article_a0e44f72-f8da-11ed-9c04-e31140cd5093.html.

⁸ Emily Rogers, *A Commitment to the Struggle*, ETHOS (May 22, 2023), https://www.dailyemerald.com/ethos/a-commitment-to-the-struggle/article_a0e44f72-f8da-11ed-9c04-e31140cd5093.html.

⁹ Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN’S L.J. 37 (1996), <https://api.law.wisc.edu/repository-pdf/uwlaw-library-repository-omekav3/original/03d50dd18ada15fb757ee7dce07c20df3c1172d1.pdf>, at PDF p. 9.

¹⁰ Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN’S L.J. 37 (1996), <https://api.law.wisc.edu/repository-pdf/uwlaw-library-repository-omekav3/original/03d50dd18ada15fb757ee7dce07c20df3c1172d1.pdf>, at PDF p. 9.

¹¹ Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11

that denounces biological identities and seemingly discards the experiences of male survivors of sexual assault, alleging, “to be rapable, a position which is social, not biological, defines what a woman is.”¹² It is unclear whether Kasubhai directly endorses MacKinnon’s wild theories, but it is concerning enough that he elevates these false theories to a posture of importance by indicating that the ideologies possess enough credence for rationale consideration.

Additionally, Kasubhai has allegedly referred to Ibram X. Kendi as an “amazing historian,”¹³ even though Kendi in his best-known work “*How to be an Anti-Racist*” argues that “***The only remedy to racist discrimination is antiracist discrimination.*** The only remedy to past discrimination is ***present discrimination.*** The only remedy to present discrimination is ***future discrimination.***”¹⁴ Kasubhai’s toleration of such a viewpoint as a judge is antithetical to notions essential to the administration of justice, including equality, fairness, and a right to judicial impartiality under the rule of law.

3. In 2020, Judge Kasubhai struck down a city-wide overnight curfew in Eugene, Oregon designed to help quell mass unrest during “Black Lives Matter” protests, and refused to recognize that the activities of mass looting and violence constituted a “riot.”

In *Boudjerada v. City of Eugene*, Judge Kasubhai struck down a city-wide curfew intended to help quell violence during 2020 Black Lives Matter protests as unconstitutional. Kasubhai wrote in his opinion, “Moreover, because many people work during daytime hours, nighttime hours are the only times available for protest. The Court is also mindful that, in the context of protests that are a reaction to a recent event, there is an immediacy that distinguishes this from other cases in which the time of protest matters less ... Here, the killings of George Floyd and Breonna Taylor were fresh in people’s minds, and protestors in Eugene had an interest in conveying their message of outrage concurrent in time with protests occurring across the country. As Plaintiffs rightly point out, ‘it was critical to the nationwide character of their message for the residents of Eugene to express their outrage without having to leave the city.’ Pl. Mot. at 12, ECF No. 98. Delaying speech when citizens have an immediate need to protest fails to leave open ample alternatives for that expression.”¹⁵

WIS. WOMEN’S L.J. 37 (1996), <https://api.law.wisc.edu/repository-pdf/uwlaw-library-repository-omekav3/original/03d50dd18ada15fb757ee7dce07c20df3c1172d1.pdf>, at PDF p. 9.

¹² Catharine A. MacKinnon, “*Feminism, Marxism, Method, and State: Toward Feminist Jurisprudence*,” 8 SIGNS 651 (1983), https://www-jstor-org.usd.idm.oclc.org/stable/pdf/3173687.pdf?refreqid=fastly-default%3A2a28f2106d8a9fc992ff7c2cb2d9e32f&ab_segments=&origin=&initiator=&acceptTC=1.

¹³ *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Oct. 4, 2023), <https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:05:27.

¹⁴ *Feedback: Readers Weigh In on Ibram X. Kendi, Howard Zinn, and the BU of the 1970s*, BOSTONIA (2021) (emphasis added), <https://www.bu.edu/articles/2021/feedback-fall-2021/>. See also Ibram X. Kendi, *Ibram X. Kendi defines what it means to be an antiracist*, PENGUIN BOOKS (June 9, 2020), <https://www.penguin.co.uk/articles/2020/06/ibram-x-kendi-definition-of-antiracist>.

¹⁵ *Boudjerada v. City of Eugene*, No. 6:20-cv-01265-MK, 2023 U.S. Dist. LEXIS 100720, *1, 29-30 (D. Or. 2023), <https://plus.lexis.com/api/permalink/fba22f72-4294-4eb3-b773-1f85fa4976c2/?context=1530671>.

When questioned by Senator Lindsey Graham about the protests, Kasubhai refused to agree to characterize the “violence and destruction of property” in Eugene, Oregon as a “riot.”¹⁶ This even though in his opinion in *Boudjerada*, Kasubhai described various forms of both violence and property destruction being perpetrated by protestors on the ground in Eugene during that time. He explained:

“The crowd moved through downtown Eugene with some individuals applying graffiti, lighting firecrackers, and blocking traffic. Id. By 9:13 p.m., the size of the group had grown to around 75-100 protestors. Some protestors began throwing glass bottles towards officers, attempting to climb onto the I-205 freeway, and blocking traffic. Id. at 4. Westbound traffic on the freeway was closed at 9:34 p.m., but was reopened by 9:54 p.m. Id. Other protestors surrounded a patrol car, smashed its windows, and punctured its tires. Id. The officer inside escaped unharmed with help from another officer. Id.

At around 9:55 p.m., the group had grown to 100-200 protestors who moved south through downtown Eugene, continuing to light fireworks, apply graffiti, and throw newspaper boxes in the roadway. Id. Police received information that a person was assaulted, and ‘the victim appeared to have a seizure and was disoriented.’ Id. at 5. Members of the group started fires in the roadway and burned the American flag. Id. At around 10:41 p.m., someone in the crowd yelled that somebody had a rifle, but this (and a second similar report) was never verified. Id. Near 11:00 p.m., protestors lit a fire blocking the I-205 freeway eastbound on-ramp. Id. Protestors threw ‘large traffic barrels and cones’ towards police. Id.

By 11:31 p.m., the group of protestors grew to around 400-500, some of whom were ‘attacking’ people and vehicles in the downtown area of W 7th Avenue and Washington Street. Id. at 6. A fire had been lit in the roadway. Id. Several businesses at that intersection were vandalized and looted. Id.”¹⁷

Kasubhai’s refusal to acknowledge that the above activities constituted a riot degrades his credibility, exposes his bias, and makes it untenable that he be rewarded with a federal judgeship.

4. On various occasions, Kasubhai has expressed Marxist-like denunciations of private property.

When Kasubhai was a law student in the 1990s, he authored a poem entitled “*Sensualized Property Theory*,” which read, “Property is not simply a relationship between an owner and an object of ownership... The process towards integrating all three [theories of property] may provide a framework for relationships that enhances each unique self. The aspiration towards intimate knowing — the intimate knowing of oneself and others — is a creative struggle towards redefining

¹⁶ *Nomination Hearing*, SENATE JUDICIARY COMMITTEE (Oct. 4, 2023), <https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:10:29.

¹⁷ *Boudjerada v. City of Eugene*, No. 6:20-cv-01265-MK, 2023 U.S. Dist. LEXIS 100720, *1, 2-4 (D. Or. 2023), <https://plus.lexis.com/api/permalink/fba22f72-4294-4eb3-b773-1f85fa4976c2/?context=1530671>.

property.”¹⁸ When questioned by Senator Cruz about the poem, Kasubhai offered, “Senator, when I was preparing and reviewing my materials for this hearing and for the process, I also have to admit that that writing was far from clear or articulate”¹⁹

Moreover, in a 1994 essay, Kasubhai argued, in a nod to Marxist ideology, that “property incites rebellion.”²⁰ Finally, in a 2020 speech, Kasubhai declared, “[p]rivilege derives its power from the belief in scarcity. Scarcity of money, natural resources, food, and power itself. The desire to control it all drives privilege. I want to suggest to you that equity, the idea of equity, rejects this model of scarcity.”²¹

5. Kasubhai has stated that diversity, equity, and inclusion are "the heart and soul of the court system," rather than deciding cases under the rule of law. Shockingly, he has argued for a different standard of proof to apply altogether where equity, diversity, and inclusion are at issue.

When asked by Senator Lee to explain why diversity, equity, and inclusion are "the heart and soul of the court system" (a statement Kasubhai made at a May 2023 Oregon State Bar presentation),²² Kasubhai said, “Access to justice is at the heart of the work that I do within the courtroom, and ensuring that everybody who ... everybody ... is dignified and treated with dignity when they come into the courtroom, and for me to preside over those cases ...”²³ Senator Lee pushed back, inquiring, “But you’d say that’s the ‘heart and soul’ of the judicial system, more than equal justice under the law, more than the constitution, more than the law itself, or the job of interpreting the law fairly where litigants before you have disagreements as to the law’s meaning?”²⁴

Kasubhai then tried to equate the meaning of “diversity, equity, and inclusion” with the notion of equal justice under the law, describing, “[i]n the way in which and in the context in which I was using the term referring to ‘diversity,’ was the idea and the ideal of equal justice under the law. That everybody, no matter what their background, beliefs, whatever that might be, that everyone is entitled to access to the courts, and that equity.”²⁵

¹⁸ *MUST WATCH: Ted Cruz Confronts Biden Judicial Nominee With His Past Writings Cruz Calls 'Marxist,'* FORBES BREAKING NEWS, YOUTUBE (Oct. 4, 2023),

https://www.youtube.com/watch?v=EdFJ8AGcovg&t=52s&ab_channel=ForbesBreakingNews, at 1:23.

¹⁹ *MUST WATCH: Ted Cruz Confronts Biden Judicial Nominee With His Past Writings Cruz Calls 'Marxist,'* FORBES BREAKING NEWS, YOUTUBE (Oct. 4, 2023),

https://www.youtube.com/watch?v=EdFJ8AGcovg&t=52s&ab_channel=ForbesBreakingNews, at 2:34.

²⁰ *'Are You A Marxist?': Marsha Blackburn Has Tense Grilling Of Key Biden Judge Nominee,* FORBES BREAKING NEWS, YOUTUBE (Oct. 4, 2023),

https://www.youtube.com/watch?v=p4PRr3ZoHts&ab_channel=ForbesBreakingNews, at 0:48.

²¹ *MUST WATCH: Ted Cruz Confronts Biden Judicial Nominee With His Past Writings Cruz Calls 'Marxist,'* FORBES BREAKING NEWS, YOUTUBE (Oct. 4, 2023),

https://www.youtube.com/watch?v=EdFJ8AGcovg&t=52s&ab_channel=ForbesBreakingNews, at 3:27.

²² *Nomination Hearing,* SENATE JUDICIARY COMMITTEE (Oct. 4, 2023),

<https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:28:51.

²³ *Nomination Hearing,* SENATE JUDICIARY COMMITTEE (Oct. 4, 2023),

<https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:29:17.

²⁴ *Nomination Hearing,* SENATE JUDICIARY COMMITTEE (Oct. 4, 2023),

<https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:29:34.

²⁵ *Nomination Hearing,* SENATE JUDICIARY COMMITTEE (Oct. 4, 2023),

<https://www.judiciary.senate.gov/committee-activity/hearings/09/27/2023/nominations>, at 1:29:48.

In a 2020 article, in which Kasubhai was asked about how he “overcome[s] the need for proof” when talking about his experiences as a victim of racism, Kasubhai stated, “*We have to set aside conventional ideas of proof* when we are dealing with the personal and interpersonal work of *equity, division, and inclusion*. As a judge, I can appreciate the challenge of employing a *different mode for understanding truth* than that which most lawyers are accustomed to in our work.”²⁶

Conclusion

Kasubhai’s record is clear: he is committed to injustice in the name of justice. He is steadfastly engaged in the arena of identity politics, including the radical LGBTQ movement. Furthermore, Kasubhai seems to possess little reservation about allowing his radical personal social views to impact the way in which he imposes “justice” on parties and lawyers.

Kasubhai supports deploying the radical LGBTQ pronoun initiative in the judiciary. In addition, he has referenced in his work highly radical individuals: (1) including a professor who believes that heterosexual relationships are, by default, characterized by violence, and (2) an “anti-racist” activist who ironically advocates for present discrimination as a remedy to past discrimination. Moreover, Judge Kasubhai overturned a city-wide curfew intended to quell violence during 2020 Black Lives Matter protests and refused to characterize mass violence and destruction in Eugene, Oregon as a “riot.” And, on various occasions, Kasubhai has endorsed Marxist-style denunciations of private property. Finally, Kasubhai has placed diversity, equity, and inclusion at “the heart and soul of the court system,” rather than the administration of justice under the rule of law.

During his time as a magistrate judge, Judge Kasubhai has proven that he is a radical. Therefore, he should not be on the bench in any capacity, and he certainly should not be rewarded with a promotion to serve on the United States District Court for the District of Oregon. Therefore, we respectfully request that you vote against his confirmation.

Respectfully,



Phillip L. Jauregui
President, Judicial Action Group

²⁶ Mustafa Kasubhai & Sarah Malik, *Is there a Place for Us?*, OREGON STATE BAR BULLETIN (Feb./Mar. 2021) (emphasis added), https://cla.csulb.edu/departments/polisci/wp-content/uploads/2021/03/2021.03.12_Alum_Malik-Sarah-OSB-Bulletin-article.pdf, at PDF p. 25.