

October 10, 2022

The Honorable Richard J. Durbin, Chairman,
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Grassley, Ranking Member,
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

**Re: Letter of Support for the Nomination of Anthony Johnstone to the
Ninth Circuit Court of Appeals**

Dear Chairman Durbin and Ranking Member Grassley:

I am a former Solicitor General of Montana and I'm writing in support of Professor Anthony Johnstone's nomination to the Ninth Circuit Court of Appeals. I've known Anthony for nearly 20 years and have litigated both against him and with him. Given his keen intellect and skill, I much prefer to litigate *with* Anthony. But even when we have been on opposite sides, I've always been impressed with his deep understanding of and appreciation for the law, his faithful advocacy of clients, and his high sense of professionalism and integrity.

I met Anthony when I was working for the Alliance Defending Freedom litigating religious liberty and free speech cases. I represented a client against the State of Montana in a First Amendment case challenging certain political disclosure laws, *Canyon Ferry Road Baptist Church of East Helena vs. Unsworth*. Anthony was working as an Assistant Attorney General for Montana and had been assigned to defend the case for the State. Although Anthony was my adversary, he soon became my friend. It became evident that we had a lot in common as students of constitutional law and litigation, and would-be five minute conversations about case scheduling soon turned into hour discussions about constitutional law and history.

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Anthony ended up winning the *Canyon Ferry* case at the federal district court in Montana. I appealed and was able to get a partial victory at the Ninth Circuit. I have often told colleagues that although I ended up winning the appeal, it took every bit of skill and effort I had in litigating against Anthony. I've had the privilege of litigating against many highly skilled advocates, but Anthony is at the very top of the list.

To this day, I have no idea what Anthony's personal view of the case was. He litigated vigorously on behalf of the State regardless of what his personal view might have been. That was his job, and he faithfully executed it. Later, when the Legislature was considering enacting a law that put into law the conclusions reached by the Ninth Circuit, I worked with Anthony on potential language for the legislation. Although the draft legislation from one legislator was narrowly focused on protecting First Amendment rights of churches, it was Anthony who recommended expanding the scope to encompass other organizations, which was more consistent with the Ninth Circuit's decision.

What was so interesting to me about Anthony's approach to his job was that he brought that same vigor regardless of the subject matter of the case, and regardless of whether it might have been opposed to the political positions of his boss, Attorney General Steve Bullock, who was a Democrat. Through the course of the *Canyon Ferry* case, Anthony was promoted to Solicitor, which is the chief litigator for the State. While Anthony was in that role, I worked with him on cases that were important to the Alliance Defending Freedom. Anthony was defending State laws that ADF happened to support, and I was amazed that Anthony brought the same litigation vigor to those cases that I had experienced in *Canyon Ferry*, even though they were almost certainly contrary to the political positions of his boss. He simply defended State law, without regard to politics.

Many years later after Anthony had become a law professor, I was appointed to Anthony's former position as Solicitor at the Montana Attorney General's office. In that position, I gained even more appreciation for the way Anthony had done the job. I was appointed by Republican Attorney General Tim Fox. It was surprising to me how many political pressures from outside the office were leveraged to try to influence the way certain laws are defended. I was thankful for the model Anthony had established and I worked hard to take the same approach to defend State laws and the State Constitution, regardless of whether they were supported by Republicans or Democrats. I often commented that Anthony had taught me how to do the job.

I believe Anthony would take the same approach as a judge that he took as State Solicitor. I trust that he would review cases dispassionately and without political bias, and that he would decide them based on the law and facts. For these reasons, I believe Anthony is well-qualified to be a judge on the Ninth Circuit Court of Appeals and I support his nomination.

Sincerely,



Dale Schowengerdt