



February 3, 2019

VIA EMAIL

The Honorable Lindsey Graham
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Re: NELA Opposes Nomination of Neomi Rao to the U.S. Court of Appeals for the District of Columbia

Dear Senators Graham and Feinstein and Members of the Senate Judiciary Committee,

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong opposition to the confirmation of Neomi Rao to the United States Circuit Court for the District of Columbia Circuit.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground and the profound impact of the judiciary on the daily lives and the rights of working people.

NELA's mission envisions a workplace in which employees will be paid at least a living wage and work in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employees' safety and livelihood will not be compromised for the sake of corporate profits; and individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to have their claims resolved by a jury.

Ms. Rao's lack of legal experience, and her published opinion articles and scholarly writings that are hostile to basic human rights make her unfit for a lifetime appointment to the federal judiciary. The position for which she is nominated is particularly important, as the Court of Appeals for the District of Columbia Circuit hears virtually *all* legal challenges to federal regulations. If confirmed Ms. Rao would be making decisions that would undercut critical public protections with respect to workplace health and safety, the responsibility of employers to ensure that workplaces are free of sexual and other forms of workplace harassment, food and water safety, and clean air, to name just a few. Ms. Rao's writings on these topics demonstrate a

troubling hostility toward government involvement in ensuring such protections affecting the health, safety and well-being of millions of individuals.

1. Ms. Rao Lacks Basic, Relevant Legal Experience

Ms. Rao lacks the basic legal experience relevant to a lifetime federal judicial appointment. Specifically, Ms. Rao has no experience as a trial attorney or as an appellate attorney. Since working as a law clerk early in her career, first for Judge Harvie Wilkinson, United States Court of Appeals for the Fourth Circuit, and then for Justice Clarence Thomas in the United States Supreme Court, she has served in academic or administrative positions. The Senate Judiciary Committee is charged with vetting potential federal judges to ensure that nominees are properly qualified. Ms. Rao's lack of important trial or appellate experience demonstrates should be of serious concern to the Senate Judiciary Committee. The American Bar Association Standing Committee on the Federal Judiciary generally considers 12 years as the minimum number of years in practice considered necessary to perform the responsibilities of a federal judge.¹ Ms. Rao's lack of practical legal experience alone should disqualify her.

In addition, with each judicial appointment, the Senate seeks to determine whether a nominee will abide by the judicial branch's long tradition of *stare decisis*, whether the nominee seeks to advance new concepts into the law or to radically change the law, and how the nominee views the Constitution. Ms. Rao has no litigation record to examine on these important factors, although her writings suggest that there is strong reason for concern on this issue also.

Ms. Rao's lack of trial and appellate advocacy also leaves a void of evidence from which to evaluate her judicial temperament. A fundamental component of our Constitution is its provision of a court system to resolve civil disputes, provide fair administration of justice and fairly enforce the will of Congress. The Senate should take seriously its obligation to ensure that jurists entrusted with this responsibility demonstrate the ability and willingness to respectfully hear the opposing sides of a case and to approach every case in a manner that is not result-driven by that jurist's personal beliefs. There is no record on which to evaluate Ms. Rao's judicial temperament.

2. Ms. Rao's Writing And Actions Demonstrate A Lack of Devotion To Basic Human Rights

Examination of Ms. Rao's scholarly writing and administrative actions demonstrates she has a broad disregard for basic human rights and has been critical of the United States Supreme Court's opinions on human rights issues, particularly with respect to same-sex marriage. She has been especially critical of what she calls "recognition dignity," which she argues is not a Constitutional right to be found under equal protection clause.²

¹ *What it is and How it Works*, American Bar Association Standing Committee on the Federal Judiciary, p.3 (2017)

² See, e.g., *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183, 262 (2011).

The media has highlighted Ms. Rao's series of articles as a college student for the *Yale Free Press* and *Weekly Standard* espousing such views as: that victims of date rape were partly responsible if they had been drinking; that racial and gender oppression are "myths"; that multiculturalism is a divisive force; that minority students are given unfair advantages; and that climate change is not real. In her article, "Submission, Silence, Mediocracy," she wrote, "Myths of sexual and racial oppression propagate themselves, create hysteria and finally lead to the formation of some whining new group."

Her conclusory statements do not address the extensive social science data documenting disparities in education, employment, jail time, health outcomes and many other factors that establish the existence of sex and race based oppression. NELA attorneys represent employees whose lives are deeply affected by discrimination in the workplace and the U.S. Congress has seen fit to pass laws that recognize the oppression that forms the basis of such disparities. Many of these cases are brought in federal court under the federal laws Congress enacted to combat the very real discrimination that continues in the American workplace. Ms. Rao's characterization of employees who complain of discrimination as "whining" demonstrates that she could not fairly evaluate cases brought under these statutes. This too should disqualify her for appointment to a judgeship, a central qualification of which is a lack of bias or predisposition to rule in favor of one side over another.

Although some have commented that Ms. Rao shouldn't be held accountable for things she wrote as a younger student, her professional work and scholarly writings do not reflect, either explicitly or implicitly, any change of heart from extreme views she expressed as a young woman. Thus, there is a strong basis for concern that she would not carry out her duties as a lifetime appointee to the DC Circuit Court of Appeals with the requisite impartiality.

3. Ms. Rao Accused The Supreme Court of "Prioritizing" Same-Sex Marriage

In *The Trouble With Dignity And Rights Of Recognition*, Ms. Rao was critical of the Supreme Court's holding in *United States v. Windsor* that the Defense of Marriage Act violated the Constitution.³ She disagreed with the Court's equal protection analysis, argued that "recognition" is not a constitutional right, and suggested that the Supreme Court was "picking one groups' claim over another." She wrote that, "...the Court has concluded that same-sex marriage has some (as yet undefined) constitutional priority [over heterosexual marriage]." Ms. Rao's approach to the Constitutional guarantee of equal protection is far removed from the historical interpretation of equal protection that has framed our society since the Court's decision in *Brown v. Board of Education* in 1954. She also has bought in to the faulty reasoning that suggests that recognition of gay marriage in some way diminishes protection of heterosexual marriage.

4. Ms. Rao Demonstrates Disregard For Gender And Racial Pay Disparities

As Administrator of the Office of Information and Regulatory Affairs, Ms. Rao has favored the administrative *convenience* of employers over the interests of the people of the United States and

³ *The Trouble With Dignity And Rights Of Recognition*, N. Rao, 99 Va. L. Rev. Online 29 (2013).

our government in identifying sex and race discrimination in employment. In her capacity at the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) Ms. Rao stayed the Obama Administration's initiative to expand the range of information collected from large employers in the "Employer Information Report EEO-1" form to include W-2 earnings data for employees broken down by sex, race/ethnicity and job categories. Reports to be released under this initiative would have allowed the public to identify the occupational categories, industries and locations experiencing the largest race and gender wage gaps. Ms. Rao halted collection of the information because, in her view, "some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues." Discriminatory wage gaps undermine the ability of hard-working Americans to support themselves and their families. Gathering data as the basis for sound public policy surrounding these important issues is a critical component of the work our governmental agencies perform. If Ms. Rao becomes a federal judge, she will hear many employment discrimination claims. Her disregard for evidence-based enforcement of federal anti-discrimination laws makes her unfit for this position.

5. Ms. Rao Demonstrates Disregard For Victims Of Sexual Assault And Sexual Harassment

In her position as head of the Office of Information and Regulatory Affairs (OIRA), her office has taken steps to block regulations under Title IX which would provide standards for how schools respond to incidents of sexual harassment and regulatory guidance for addressing sexual harassment in the workplace. Sexual assault and sexual harassment are forefront among issues facing employees in the workplace. Ms. Rao's disregard for sexual harassment victims raises serious doubt that she will enforce the protections of the Civil Rights Act of 1964. A nominee's deep commitment to rigorous enforcement of all civil rights laws is a threshold qualification for someone who would serve as a federal court judge.

6. Ms. Rao Demonstrates Disdain for the Fair Housing Act

In a July, 2015 *Washington Examiner* op-ed titled, "The Supreme Court's rule by talking points," Rao criticized the Supreme Court's holding in *Texas Department of Housing v. Inclusive Communities Protect*, accusing the Court of interpreting the law according to the "rhetoric surrounding it," rather than the text of the statute. In *Texas Department of Housing*, the Court held that the Fair Housing Act permitted liability under a disparate impact theory, consistent with its holdings in cases involving other statutes which prohibit discrimination. The Court noted that the Fair Housing Act has a "continuing role in moving the Nation toward a more integrated society." Rao was critical of the Supreme Court's consideration of the purpose of the statute, denigrating the purpose of a statute as merely a "talking point," rather than a guide to its meaning.

Her disdain for the purpose of the Fair Housing Act is reflected in the work of the OIRA under her leadership to work with the Department of Housing and Urban Development to roll back protections against housing discrimination based on race. This action is in line with her disdain for the Supreme Court's recognition of "disparate impact" discrimination.

7. Ms. Rao Advocates Expansive Presidential Power and Restricted Judicial Power

In addition to her troubling attitude toward federal protections against discrimination, Ms. Rao also believes that the Constitution grants broad power to the President to interpret the law, while advocating a narrow construction of the Supreme Court's interpretive powers.

In *The President's Sphere of Action*, Ms. Rao argued that the President has broad independent power to interpret the Constitution and the statutes enacted by Congress, and even to ignore them.⁴ She wrote, "By creating an executive accountable primarily through the responsibility and visibility of his unitary office, the Constitution leaves open the possibility for, and perhaps even requires, independent presidential action."

Ms. Rao also advocates eliminating Congress' authority to set up independent agencies, weakening agencies by limiting their ability to carry out tasks assigned to them by Congress and making it inappropriate for agencies to investigate and prosecute a sitting president for illegal conduct.

In a 2014 article, *Removal: Necessary and Sufficient for Presidential Control*, she wrote that at-will presidential removal of agency officials was necessary for the required "presidential control" over such agencies.⁵ In another article on abolishing agency independence, she argued that a 2010 Supreme Court decision established "the foundation for a wider assault on agency independence" that could lead to "eliminating agency independence" completely, with those agencies operating under total presidential control.⁶ However, the opinion she relied upon was much narrower in scope, holding only that members of the SEC should be able to fire members of the Public Company Accounting Oversight Board at will, retaining the "for cause" requirement for presidential firing of SEC members. She did not recognize Congressional power to create agencies whose members retain independence from the President.

Rao has made clear that she believes independence for officials like Special Counsel Robert Mueller or the head of the CFPB is unconstitutional. She contends that independent discretion for executive officers is "counter to the best understanding of Article II" of the Constitution, concluding that the President, "must have the ability to remove all executive branch officers at will." Presumably, any court challenge to the efforts of the current investigation by Special Prosecutor Mueller would proceed through the D.C. Circuit Court of Appeals. If she was confirmed, Ms. Rao's extreme view of presidential power would prove disastrous to the very fundamental presumption of our democracy—that our elections reflect the will of Americans.

At the same time, Ms. Rao testified before the Senate during confirmation hearings of Justice Sotomayor that she is a strict constructionist, suggesting she takes a narrow view of the power of the courts to interpret the law.

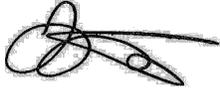
⁴ *The President's Sphere of Action*, Neomi Rao, *Willamette Law Review*, Vol. 45, No. 3 (Spring 2009).

⁵ *Removal: Necessary and Sufficient for Presidential Control*, N. Rao, *Alabama Law Review*, Vol. 65:5:1205 (2014).

⁶ *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, N. Rao, *Fordham Law Review* Vo. 79:6:5.

Our nation functions on a daily basis thanks to the every-day working people who are NELA members' clients. The working people of our nation and their families who depend on their income deserve federal judges who clearly demonstrate that they respect both the letter of the law and the intent of Congress, respect legal precedent in Constitutional interpretation, value the guarantee of equal protection, and respect the balance of power between our three branches of government. Neomi Rao is very much lacking on all three counts. NELA strongly urges you to stand on behalf of working people across this country and to oppose the confirmation of Neomi Rao. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'James H. Kaster', with a stylized flourish at the end.

James H. Kaster
NELA President

A handwritten signature in black ink, appearing to read 'Terry O'Neill', with a stylized flourish at the end.

Terry O'Neill
NELA Executive Director