February 28, 2019

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Majority Leader McConnell and Minority Leader Schumer,

The Constitutional Accountability Center (CAC) is a non-profit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

As litigators, and as defenders of the Constitution and the rule of law, CAC has a vested interest in nominations to the federal courts; and there are few nominations more important than those to the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit is considered by many to be the second most important court in the country, after the U.S. Supreme Court. The D.C. Circuit is responsible for resolving critically important cases involving such issues as national security, environmental protections, employment discrimination, food and drug safety, separation of powers, immigration, consumer and workplace protections, and social security. It is also responsible for providing the first level of judicial review of decisions made by a wide array of administrative agencies.

It is with these considerations in mind that CAC reviewed the record and testimony of Neomi J. Rao, President Trump's nominee to the D.C. Circuit. Her record, time and again, demonstrates her disregard for settled legal rules and protections. She would likely jettison major aspects of the so-called administrative state and give the courts new power to second-guess agency action. Moreover, while she grounds her views on the administrative state in her commitment to liberty, her record is in many respects hostile to the protection of individual liberty and dignity, which have long been safeguarded by Supreme Court precedent protecting the rights of women and LGBTQ persons. Her record suggests she will not be faithful to the Constitution's text, history, and values, or longstanding Supreme Court precedent. As a result of her record and testimony at her confirmation hearing**, CAC opposes her confirmation and asks that you vote no on her confirmation.**

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1. Rao Would Rewrite Constitutional Principles To Undermine The Federal Government's Ability To Govern Effectively

Ms. Rao has urged upending settled principles of administrative law, even though those principles are embedded in Supreme Court precedent and are consistent with constitutional text, history, and values. A lower court judge must follow Supreme Court precedent, but Ms. Rao's record suggests she wants to radically change the settled doctrines in cases involving administrative action. She has urged reviving the long-dormant nondelegation doctrine, which she has called "one of the most important structural features of maintaining a government of limited and enumerated powers."[1] She has called for a "more robust review of regulatory action in the courts,"[2] and has criticized the *Chevron* doctrine that requires a court to defer to an agency's reasonable construction of ambiguities in a statute it is charged by Congress with administering.[3] This deference makes it more likely that agency actions will be upheld in court when agencies act to address changing needs and use their policy expertise to implement the laws passed by Congress.

Together, reviving the non-delegation doctrine and ending *Chevron* deference would help deregulators prevent executive agencies from protecting the public.[4] According to Ms. Rao, eliminating regulations promulgated by federal agencies to protect the public "is part of returning government to its proper and limited role" and returning to "a more constitutional government."[5] Ms. Rao insists that "[e]xcessive regulation impedes individual liberty,"[6] a constitutional philosophy that suggests she would return to the *Lochner* era, when courts second-guessed governmental regulations designed to protect the health, safety, and welfare of individuals.

In addition, Ms. Rao has argued that independent agencies should no longer be independent, arguing: "The precedents and functional justifications for supporting agency independence have largely collapsed. The issue is ripe for reconsideration."[7] Indeed, she goes so far as to argue that presidents "must have the ability to remove all executive branch officers at will."[8] This, too, would upend settled law, which recognizes that Congress has the power to structure federal agencies to provide some measure of independence from presidential control.[9]

2. Rao Is a Rubber-Stamp for Big Business

During her tenure at the Office of Information and Regulatory Affairs (OIRA), Ms. Rao undercut critically important regulations that protect the environment and keep corporations accountable for pollution. She

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[1] The Honorable Neomi Rao, The Administrative State and the Structure of the Constitution 4 (Oct. 4, 2017), https://www.heritage.org/sites/default/files/2018-06/HL1288_0.pdf.
[2] *Id.* at 6
[3] *Id.* at 5-6.
[4] Lisa Heinzerling, *Private: Chevron Deference,* American Constitution Society (March 20, 2017), https://www.acslaw.org/acsblog/chevron-deference/.
[5] Rao, *supra* note 1, at 2.
[6] *Id.*
[7] Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1234 (2014).
[8] *Id.* at 1227.
[9] Brianne J. Gorod, Brian R. Frazelle, & Simon Lazarus, *Constitutional and Accountable: The Consumer Financial Protection Bureau,* CAC (Oct. 2016), https://www.theusconstitution.org/wp-content/uploads/2017/12/20161020_White_Paper_CFPB.pdf.

supported the weakening of agency rules to limit mercury pollution, a troubling decision because high mercury levels have been proven to cause brain damage to infants and young children.[10] She has also supported the Trump administration's rollback of the Clean Power Plan, a major environmental protection effort aimed at combating climate change by reducing greenhouse gas emissions from power generators.[11]

Her bias toward corporate interests in environmental law is longstanding. Earlier in her career, she called the greenhouse effect a "controversial theor[y]" and referred to it, the depleting ozone layer, and acid raid as the "three major environmental bogeymen," criticizing environmentalists for "accept[ing] issues such as global warming as truth with no reference to the prevailing scientific doubts."[12]

The rule of law is based in large part on the promise that judges will be fair and independent. Based on her statements, there is real reason to question whether Ms. Rao would give individuals coming to her with environmental complaints a fair day in court. Furthermore, a judge who does not believe fundamental scientific facts cannot be a fair arbiter of issues involving impact on our environment and public health. The D.C. Circuit resolves many significant environmental disputes, and if Ms. Rao's actions as a judge are consistent with her actions as a scholar and administrator, her confirmation to that court could have a devastating impact on our clean air and water.

3. Rao Is Hostile to Fundamental Constitutional Rights

Through her prolific writings and public engagements, Ms. Rao has demonstrated that she is hostile to long-recognized fundamental constitutional rights and the constitutional values of equality, liberty, and dignity. Here, too, her record suggests that she will seek to rewrite critical protections recognized by the courts. Ms. Rao should be disqualified from any federal judgeship because of her views on women's autonomy, the LGBTQ community, race, and the disability community.

Women's Autonomy and Equal Citizenship

The equal dignity of men, women, and gender non-conforming people is at the core of the Supreme Court's protection of women's fundamental rights. But Ms. Rao's record suggests she is opposed to judicial protection of individual dignity.

This is exemplified by Ms. Rao's hostility toward reproductive freedom, an issue at the heart of bodily autonomy and equal citizenship. In a 2011 article about how courts protect human dignity, Ms. Rao wrote, "In *Casey*, the plurality focused on the inherent dignity of a woman's freedom to choose an abortion, but

[10] Julie Eilperin & Brady Dennis, *In Rollback of Mercury Rule, Trump Could Revamp How Government Values Human Health,* Wash. Post (Oct. 1, 2018), https://www.washingtonpost.com/energy-environment/2018/10/01/rollback-mercury-rule-trump-could-revamp-how-government-values-human-health/?noredirect=on&utm_term=.bd3090838cf5.
[11] Kate Cimini, *Hundreds of Mayors Protest Trump Killing Clean Power Plan,* Medill News Service (Feb. 22, 2018), http://dc.medill.northwestern.edu/blog/2018/02/22/mayors-protest-trump-killing-clean-power-plan/#sthash.w0Pgg7En.dpbs.
[12] Neomi Rao, *The Obedient Limbs of YSEC: Yale's Powerful Environmental Movement*, The Yale Free Press, Apr. 1992, at 7, available at https://afj.org/wpcontent/uploads/2019/01/15-The-Obedient-Limbs-of-YSEC.pdf.

minimized the competing inherent dignity of the fetus to life."[13] In a 1998 article, she criticized *Roe v. Wade*,[14] writing, "the Court uses esteemed philosophers to legitimize a controversial perspective. By contrast, there were many persuasive legal arguments against recognizing a constitutional right to abortion."[15] And during her confirmation hearing, she refused to say that *Roe* was correctly decided.[16]

Ms. Rao has made statements that reinforce women's inequality and blame women who are sexually assaulted. In an op-ed entitled "Shades of Gray," Ms. Rao wrote that "a woman, like a man, decides when and how much to drink. And if she drinks to the point where she can no longer choose, well, getting to that point was part of her choice."[17] She further claimed that "a good way to avoid a potential date rape is to stay reasonably sober."[18] These rape-apologist and victim-blaming statements suggest that Ms. Rao does not believe that a woman is entitled to the liberty to live her life free from harm, and that instead, a woman must be ever-vigilant to ensure her own safety. Indeed, in a *Yale Free Press* article entitled "The Feminist Dilemma,"[19] she praised the conservative social critic Camille Paglia, writing her "view on date rape has often been criticized for its insensitivity because she seems to 'blame the victim.' Paglia, however, accurately describes the dangerous feminist idealism which teaches women that they are equal. Women believe falsely that they should be able to go anywhere with anyone."[20]

Ms. Rao tried to distance herself from these views during her hearing,[21] but throughout her career, she has taken steps to roll back civil rights protections for women. Under Ms. Rao's leadership, OIRA was instrumental to the Trump Administration's effort to propose new rules to roll back Title IX protections in the context of sexual harassment and sexual assault, and to limit schools' responsibility for addressing such conduct.[22] The issuance of guidance recommended by the Equal Employment Opportunity Commission (EEOC) that would have helped to combat sexual harassment in the workplace has stalled within Ms. Rao's office.[23] And OIRA, helmed by Ms. Rao, halted an EEOC rule that would have required large companies to

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[13] Neomi Rao, *Three Concepts of Dignity in Constitutional Law,* 86 Notre Dame L. Rev. 183, 211 (2011). Although here Ms. Rao and the Court limit their view of abortion as pertaining to women alone, it is important to note that cisgender women are not the only people who have abortions.
[14] 410 U.S. 113 (1973).
[15] Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers By The Supreme Court*, 65. U. Chi. L. Rev. 1371, 1380 (1998).
[16] *Confirmation Hearing on the Nomination of Neomi Rao to be a Judge on the D.C. Circuit of the U.S. Court of Appeals Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 5, 2019) [hereinafter Feb. 5 Hearings], (statement of Neomi Rao in conversation with Sen. Blumenthal), available at https://www.c-span.org/video/?457564-1/senate-judiciary-committee-holds-confirmation-hearing.
[17] Neomi Rao, *Shades of Gray,* The Yale Herald, Oct. 14, 1994, available at https://assets.documentcloud.org/documents/5684266/01-Shades-of-Gray-Neomi-Rao.pdf.
[18] *Id.* at 6.
[19] Neomi Rao, *The Feminism Dilemma,* Yale Free Press, April 1993, available at https://afj.org/wp-content/uploads/2019/01/02-The-Feminist-Dilemma.pdf.
[20] *Id*.
[21] *Feb. 5 Hearings* (statement of Neomi Rao in conversation with Sen. Ernst and Sen. Harris).
[22] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61483 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).
[23] David Dayen, *Neomi Rao, Nominee To Replace Brett Kavanaugh, Heads Agency That's Been Stalling Sexual Harassment Guidance,* The Intercept (Feb. 4, 2019, 9:48 AM), https://theintercept.com/2019/02/04/neomi-rao-hearing-oira-brett-kavanaugh/.

disclose what they pay employees by gender, race, and ethnicity–-a rule that was intended to provide transparency about the unequal pay that remains rampant in the American workplace.[24]

LGBTQ Equality

Ms. Rao has also been hostile to basic protection of dignity for LGBTQ persons. In a 2013 law review article, she criticized the Supreme Court's ruling in *United States v. Windsor*,[25] which struck down the Defense of Marriage Act because it violated the basic constitutional requirement of equality under the law.[26] She argued that politicians, rather than courts, should decide who should have the right to have their marriage recognized by the government.[27] She wrote: "The constitutional right at issue—some form of freestanding dignity of recognition—has little connection to our constitutional text or history and leaves important questions unanswered. . . . The dignity of recognition, no doubt pressing for individuals wishing to be recognized, is better left to the political process."[28] Rao's record suggests she will be hostile to Supreme Court precedent protecting individual dignity for all.

Race and Identity

Ms. Rao's views on race fail to recognize the history of oppression suffered by people of color, which have repercussions that exist today. The Constitution's arc of progress tries to eradicate this problem by first acknowledging that it exists. Ms. Rao fails to make this critical first step. When one looks at the Constitution, one can see all of the flaws and scars that have been part of the effort by "We the People" to "form a more perfect Union." The original sin of slavery is there for all to see in the Three-Fifths Clause, as is its eradication with the Thirteenth Amendment. The history of previously enslaved people being denied the rights and privileges of citizenship is acknowledged and addressed in the Fourteenth Amendment and the Fifteenth Amendment, which specifically provides that the right "to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[29] Our Constitution's history reflects that the United States has a history of discrimination on account of race, and because of that history, people of color are differently situated than Whites and in need of laws to protect their equality. Ms. Rao's views ignore that history.

In a book review, Ms. Rao praised the author's skepticism of racial identity, writing that the author "speaks strongly against group rights and group thinking, which encourage a victim mentality. In a rare show of wisdom, he writes, 'Perhaps it is time to stop thinking of blacks—and having them think of themselves—as a category. Let them rise or fall as individuals.'"[30] This would erase a history of being marginalized and oppressed, and thereby the reasons for legal protections, furthering white supremacy. In an op-ed called "Power Games," Ms. Rao complained about "the politics of identity, in which people separate themselves by race, gender, and ethnicity. Many people find the separation of identity disturbing and regressive. . . .

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[24] Memorandum from Neomi Rao, Admin., Office of Info. and Regulatory Affairs, to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm'n (Aug. 29, 2017), available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.
[25] 570 U.S. 744 (2013).
[26] Neomi Rao, *The Trouble With Dignity and Rights of Recognition,* 99 Va. L. Rev. In Brief 29 (2013).
[27] *Id.* at 38.
[28] *Id.*
[29] U.S. Const. amend. XV, § 1.
[30] Neomi Rao, *In Defense of Authentic Elitism,* Yale Free Press, at 10, available at https://assets.documentcloud.org/documents/5684158/Jan-1995-Rao-in-Defense-of-Authentic-Elitism.pdf.

Leaders of the politics of identity smile kindly and argue that the underprivileged (people of a non-white race and ethnicity) need separation from a hostile power structure."[31]

Ms. Rao has also exhibited hostility to affirmative action, writing that "Yale has dedicated itself to a relatively firm meritocracy, which drops its standards only for a few minorities, some legacies and a football player here or there."[32] In another piece, she complained that we live in "this age of affirmative action, women's rights, special rights for the handicapped and welfare for the indigent and lazy . . . [i]n our new feel-good era, everybody is okay, and political and academic standards can adjust to accommodate anyone."[33] This too suggests blindness to our nation's long history of discrimination.

In 2015, Ms. Rao criticized the Supreme Court's decision that year in *Texas Department of Housing v. Inclusive Communities Project*,[34] an important ruling recognizing that disparate impact claims may be brought under the Fair Housing Act in order to eradicate housing discrimination. Ms. Rao accused the Supreme Court of misreading the intent of Congress in passing the Fair Housing Act and said the Court had adopted "rule by talking points" over "a government ruled by laws."[35]

As OIRA Administrator, Ms. Rao has worked to undermine the disparate impact protections recognized by the Supreme Court in that case. Under her watch, OIRA has participated in a process[36] to roll back disparate impact protections for communities of color that were implemented by the Department of Housing and Urban Development in 2015. This is part of a larger effort by the Trump administration to undermine disparate impact protections and perpetuate inequality and discrimination across the board.[37]

Ms. Rao's disturbing comments on race and identity call to mind another federal judicial nominee put forward by President Trump: Ryan Bounds, whose nomination to the Ninth Circuit was defeated last year after Senator Tim Scott objected to Bounds' racial insensitivity. In a December 2018 letter to the editor of the *Wall Street Journal*, Senator Scott wrote that "we should stop bringing candidates with questionable track records on race before the full Senate for a vote."[38] President Trump did not heed that call when he nominated Neomi Rao to the D.C. Circuit.

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[31] Neomi Rao, *Power Games,* The Yale Herald, Sept. 2, 1994, available at https://afj.org/wp-content/uploads/2019/01/10-Power-Games.pdf.
[32] Neomi Rao, *Vive la différence!*, The Yale Free Press, Feb./Mar. 1995, at 8, available at https://afj.org/wp-content/uploads/2019/01/11-Vive-la-Difference.pdf.
[33] Rao, *supra* note 30.
[34] 135 S. Ct. 2507 (2015).
[35] Neomi Rao, *The Supreme Court's Rule By Talking Points,* Wash. Examiner (July 7, 2015, 12:01 AM), https://www.washingtonexaminer.com/the-supreme-courts-rule-by-talking-points.
[36] Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28560, 28562 (Aug. 20, 2018).
[37] Laura Meckler and Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules,* Wash. Post (Jan 3, 2019), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.37f0de53c184.
[38] Sen. Tim Scott, *Only the Best Candidates For Federal Courts,* Wall Street J. (Dec. 6, 2018, 3:15 PM ET), https://www.wsj.com/articles/only-the-best-candidates-for-federal-courts-1544127307.

And finally, during her confirmation hearing, Ms. Rao refused to acknowledge that *Brown v. Board of Education*[39] was rightly decided.[40] She noted that the landmark desegregation case was "a really important precedent of the Supreme Court, and one that overturned *Plessy v. Ferguson*," but believes it is not appropriate for judicial nominees to comment on the correctness of decisions.[41] However, it was only this past September that Brett Kavanaugh, the former D.C. Circuit judge whose seat Ms. Rao seeks to occupy, during his Supreme Court confirmation hearing hailed *Brown* as "the single greatest moment in Supreme Court history";[42] described the opinion as both "inspirational" and "powerful";[43] and unequivocally declared the decision to be "correct."[44] Ms. Rao's refusal to voice similar support for *Brown* further calls into question her understanding of racial equality and the protections provided by the Constitution.

Disability Rights

Ms. Rao's record suggests her disregard for dignity is not limited to simply women, the LGBTQ community, and people of color. She extends that disregard to the disability community. Ms. Rao has defended the cruel and degrading practice of "dwarf tossing,"[45] a dangerous activity in which people compete in throwing people with dwarfism onto a mattress or a wall of fabric fastener.[46] In criticizing a French law that bans this practice, Ms. Rao wrote that the law "demonstrates how a substantive understanding of dignity can be used to coerce individuals by forcing upon them a particular understanding of dignity irrespective of their individual choices."[47]

Conclusion

The late former D.C. Circuit Chief Judge Pat Wald said, "The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform issues, insider trading and more."[48] The Senate Judiciary Committee must not allow a nominee with such ill-supported views on the role of government, the environment, and fundamental constitutional protections to sit on the D.C. Circuit where

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[39] 347 U.S. 483 (1954).
[40] *Feb. 5 Hearings* (statement of Neomi Rao in conversation with Sen. Blumenthal).
[41] *Id*.
[42] *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary,* 115th Cong. (Sept. 5, 2018), (statement of Judge Kavanaugh in conversation with Sen. Cornyn), *available at* https://www.youtube.com/watch?v=x9fHsoqAkLU.
[43] *Id*.
[44] *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary,* 115th Cong. (Sept. 6, 2018), (statement of Judge Kavanaugh in conversation with Sen. Klobuchar), *available at* https://www.youtube.com/watch?v=4vGW0oEiLpg.
[45] Stephanie Mencimer. *Trump's Nominee to Replace Kavanaugh Is a Staunch Defender of Dwarf-Tossing,* Mother Jones (Nov. 16, 2018, 6:00 AM), https://www.motherjones.com/politics/2018/11/neomi-rao-dwarf-tossing-kavanaugh-replacement/.
[46] *State Introduces Bill to Ban Dwarf Tossing Contents,* ABC 13 (Feb. 1, 2019, 6:08 PM), https://abc13.com/society/state-introduces-bill-to-ban-dwarf-tossing/5117112/.
[47] Neomi Rao, *Substantive Dignity-Dwarf-throwing, Burqa Bans, and Welfare Rights,* The Volokh Conspiracy (May 18, 2011, 9:34 AM), http://volokh.com/2011/05/18/substantive-dignity-dwarf-throwing-burqa-bans-and-welfare-rights/.
[48] Patricia M. Wald, *Senate Must Act On Appeals Court Vacancies*, Wash. Post (Feb. 28, 2013), https://www.washingtonpost.com/opinions/senate-must-act-on-appeals-court-vacancies/2013/02/28/e8ad3d3a-8051-11e2-b99e-6baf4ebe42df_story.html?utm_term=.194d89e1753b.

she can wreak havoc “on ordinary Americans’ lives.”[49] CAC opposes Neomi Rao’s nomination and asks that you vote no on her confirmation.

If you have any questions or would like any additional information, please contact Kristine Kippins, Constitutional Accountability Center’s Director of Policy, at kristine@theusconstitution.org or (202) 296-6889 x313.

Respectfully,

Praveen Fernandes
Vice President of Public Engagement

Kristine A. Kippins
Director of Policy

cc: U.S. Senate

[49] *Id.*