

February 11, 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: *Nomination of Neomi Rao to the U.S. Court of Appeals for the District of Columbia*

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of the National Women's Law Center, an organization that has advocated on behalf of women and girls for more than forty-five years, we write in strong opposition to the confirmation of Neomi Rao to the U.S. Court of Appeals for the District of Columbia.

Ms. Rao's record is expansive and extreme. She has written articles where she blamed survivors of sexual assault, attacked reproductive rights, and demeaned marginalized communities. Her record raises serious red flags about her ability to correctly apply and uphold longstanding existing legal protections, were she to serve in a lifetime position on the D.C. Circuit. Additionally, Rao has been able to act upon her views on these critical issues through her role as Administrator for the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). In this role, she has repeatedly ignored the costs and real-life impacts that a range of rules proposed by the Trump Administration would have on women. Her record demonstrates a consistent and alarming pattern of ignoring systemic discrimination, blaming survivors of sexual assault, and questioning protections and legal rights for women. We urge Senators to reject her nomination.

Rao has Written Disturbing Articles Where She Blamed Survivors and Denigrated Women

In her twenties, Ms. Rao published numerous pieces that signify deeply troubling and alarming views about sexual assault and women's rights that were unacceptable then and continue to be unacceptable today. In her 1994 *Yale Herald* article, "Shades of Gray," Ms. Rao indicated that women who become drunk are to blame if they are sexually assaulted while intoxicated, stating that "if she drinks to the point where she can no longer choose, well getting to that point was part of her choice."¹ She then stressed that "a good way to avoid a potential date rape is to stay reasonably sober."²

In addition to blaming survivors for being assaulted if they consume alcohol, Ms. Rao advanced a false and extremely harmful narrative that women frequently make false rape accusations because they wish to avoid responsibility for deciding to engage in sexual activity. In a 1993 *Yale Free Press* article entitled "The Feminist Dilemma," she argued that women "must learn to understand and accept responsibility for their sexuality" and that "casual sex for women often leads to regret... this in turn can force women

¹ Neomi Rao, *Shades of Gray*, YALE HERALD, Oct 28, 1994, <https://afj.org/wp-content/uploads/2019/01/01-Shades-of-Gray.pdf>.

² *Id.*

to run from their choices and actions.”³ In that same article, she suggested that equality for women leaves women more vulnerable to sexual assault, stating that “the same rules and practices which proscribed an ostensibly subordinate position for women in society also provided greater protection from horrors such as rape.”⁴

While Ms. Rao stated during her hearing that she “would not express [her]self that way today,” she maintained that these are “common sense observations about the relationship between drinking and becoming a victim.” Ms. Rao’s answers reveal that while she recognizes that these statements offend others, she maintains a view of sexual assault that perpetuates victim blaming and minimizes the seriousness of rape.

Rao Has Challenged the Central Holdings in Critical Supreme Court Cases Regarding the Right to Reproductive Health Care, Including Abortion

In addition to advancing harmful, retrograde beliefs about sexual assault, Ms. Rao wrote law review articles that attacked the constitutional right to abortion. In a 1998 article, she questioned the legal framework of *Roe v. Wade*, arguing that “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.”⁵ Even more recently in a 2011 law review article, Ms. Rao criticized *Planned Parenthood v. Casey* for “focus[ing] on the inherent dignity of a woman’s freedom to choose an abortion but minimiz[ing] the competing inherent dignity of the fetus to life.”⁶ When asked at her hearing if she believes *Griswald v. Connecticut* or *Roe v. Wade* was correctly decided, she refused to answer. Instead, she merely stated that “it was precedent of the Supreme Court that I will faithfully follow.”

Ms. Rao Has Questioned the Value and Need of Legal Protections for Marginalized Communities

Ms. Rao has matched her troubling views on women’s rights with a demonstrated hostility toward affirmative action, calling it “the anointed dragon of liberal excess.”⁷ She claimed that Yale “drops its standards only for a few minorities.”⁸ Ms. Rao continued discounting institutionalized racism in her 2015 opinion piece criticizing the Supreme Court’s decision to affirm the use of disparate impact analysis to prove housing discrimination under the Fair Housing Act.⁹ When Ms. Rao was given an opportunity to

³ Neomi Rao, *The Feminist Dilemma*, YALE FREE PRESS, April 1993, <https://afj.org/wp-content/uploads/2019/01/02-The-Feminist-Dilemma.pdf>

⁴ *Id.*

⁵ Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, Notre Dame Law Review, 2011, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5009&context=uclev>

⁶ Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, <https://afj.org/wp-content/uploads/2019/01/12-Three-Concepts-of-Dignity-reduced-size.pdf>

⁷ Neomi Rao, *On Writer’s Battles*, WEEKLY STANDARD, NOV. 10 1996, <https://assets.documentcloud.org/documents/5684160/11-10-96-Rao-One-Writers-Battles.pdf>

⁸ Neomi Rao, *Vive la Difference*, YALE FREE PRESS, February/March 1995, <https://afj.org/wp-content/uploads/2019/01/11-Vive-la-Difference.pdf>

⁹ Neomi Rao, *The Supreme Court’s rule by talking points*, Washington Examiner, July 7, 2015, <https://www.washingtonexaminer.com/the-supreme-courts-rule-by-talking-points> Rao argued that the court has adopted “rule by talking points” and that “the judiciary has a duty to ‘say what the law is,’ not what some lawmakers hoped it would be.”

reject her earlier comments about race at her hearing, she instead called her writings a product of “youthful idealism,” further revealing her willingness to erase the experiences of those who do not fit her narrow views. Ms. Rao also refused to confirm that *Brown v. Board* was correctly decided, suggesting that she would not honor this foundational case.

Ms. Rao has also defended the cruel and demeaning practice of “dwarf-tossing,” a banned activity in which individuals compete at throwing people with dwarfism.¹⁰ In several articles in 2011, Ms. Rao proposed that the right of a little person to be tossed is an issue of liberty and that the law banning this practice was “forcing... a particular understanding of dignity irrespective of their individual choices.”¹¹ When questioned about her articles, Ms. Rao insisted the argument was about the legal concepts of dignity and did not reject this dehumanizing practice.¹²

Additionally, Ms. Rao has made disparaging statements about LGBTQ equality. In an opinion piece she published in the Yale Herald in 1994, Ms. Rao asserted that “because homosexuality, unlike gender and race, concerns a socially unacceptable activity, many gays have responded to the demands of normalcy in radical ways.”¹³ Ms. Rao also criticized *U.S. v. Windsor*, the Supreme Court ruling that validated the legal rights of same-sex couples and argued that it “has little connection to our constitutional text.”¹⁴ When questioned about her critique of LGBTQ rights cases, she simply said that “*Lawrence* is the precedent of Supreme Court which I would faithfully follow,” a statement that provides very little assurance to the LGBTQ community. Collectively, these views are extremely harmful, running counter to this country’s belief in ensuring equality and opportunity for those who have faced discrimination and hardship.

Rao’s Unacceptable Positions Are Reflected in Her Decisions at OIRA

Rao’s views on gender, sexual violence, and marginalized identities are especially evident in her approval as OIRA administrator of several proposed rules or administration actions that have harmed or would harm women, families, students and survivors of sexual assault and violence. For example, OIRA approved proposed rules by the Department of Education (DOE) to amend regulations implementing Title IX of the Education Amendment Act of 1972, that would encourage, and sometimes require, schools to set up unfair procedures that disadvantage survivors of sexual harassment, including sexual assault, and raise the threshold for when schools must respond to sexual harassment, including sexual

¹⁰ Stephanie Mencimer, *The Attorney Nominated to Replace Kavanaugh Backtracked on Her Defense of Dwarf Tossing*, Mother Jones, Feb. 5, 2019, <https://www.motherjones.com/politics/2019/02/neomi-rao-dwarf-tossing-confirmation/>

¹¹ Neomi Rao, *Substantive Dignity- Dwarf-throwing, Burqa Bans, and Welfare Rights, Volokh Conspiracy*, May 18, 2011, <http://volokh.com/2011/05/18/substantive-dignity-dwarf-throwing-burqa-bans-and-welfare-rights/>

¹² Letter from Little People of America to Committee on Judiciary re: Neomi Rao, Nov. 20, 2018, <https://lpa.memberclicks.net/assets/documents/LPA%20Letter%20to%20Committee%20of%20the%20Judiciary.pdf>

¹³ Neomi Rao, *Queer Politics*, YALE HERALD (Nov. 11, 1994), available at <https://assets.documentcloud.org/documents/5684159/11-11-94-Rao-Queer-Politics.pdf>

¹⁴ *The Trouble with Dignity and Rights of Recognition*, Aug. 22, 2013, Virginia Law Review Online, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313234. “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.”

assault, against students and employees.¹⁵ OIRA approved these proposed Title IX changes and in doing so, [completely ignored the cost to survivors, even though OIRA is tasked with examining the cost-benefit and burdens imposed by regulatory actions](#).¹⁶ While Ms. Rao avoided answering questions about her role in the Title IX rollbacks during her hearing, her impact on survivors is not just theoretical. If confirmed, Ms. Rao would sit on the court that might well decide the legality of these changes to Title IX, which will likely be challenged, and Ms. Rao repeatedly refused to affirm that she would recuse herself from decisions challenging OIRA-approved regulatory actions.

Similarly, instead of prioritizing working women and people of color who experience pay discrimination, Ms. Rao protected the interests of corporate employers when she blocked, with no public notice, and little explanation or justification, a previously-approved Equal Employment Opportunity Commission (EEOC) equal pay initiative intended to help uncover pay discrimination and close the wage gap.¹⁷ When asked about her analysis for staying the equal pay measure, Ms. Rao deflected responsibility to the EEOC; however, the lack of analysis and rationale in her memo gives the EEOC little or no guidance as to how to craft a data collection to address OMB's purported concerns and thus poses significant obstacles to EEOC action on this important matter.

Under Ms. Rao's leadership, OIRA also has stalled the approval of an EEOC enforcement guidance that explains and confirms protections for individuals who experience sexual harassment in the workplace, which includes harassment based on gender identity or sexual orientation.¹⁸ The guidance has been sitting at OIRA for 14 months, without any explanation by OIRA.

¹⁵ In 2017, DOE replaced Title IX guidance with a confusing, discriminatory policy that essentially encourages schools to set up unfair systems that disadvantage survivors. Alexandra Brodsky, *We Sued Betsy DeVos over her New Title IX Policy that Discriminates Against Sexual Violence Survivors*, NATIONAL WOMEN'S LAW CENTER, Jan. 25, 2018 <https://nwlc.org/blog/we-sued-betsy-devos-over-her-new-title-ix-policy-that-discriminates-against-sexual-violence-survivors/>. A year later, Ms. Rao also approved the DOE's 2018 proposed rule that would allow – and sometimes even require – universities to dismiss complaints of sexual harassment, including sexual assault, many incidents of off-campus, and online sexual harassment. Elizabeth Tang, *Three Reasons Why Betsy DeVos's Proposed Title IX Rules Would Hurt Survivors*, NATIONAL WOMEN'S LAW CENTER, Nov. 16, 2018, <https://nwlc.org/blog/three-reasons-why-betsy-devos-draft-title-ix-rules-would-hurt-survivors/>

¹⁶ *Id.* [With the proposed rule, OIRA only considered the cost-savings for schools who would do fewer investigations because the proposed rule would require dismissal of many sexual assault reports.](#)

¹⁷ Ms. Rao issued a terse one and a half page memo, asserting that the measure “lacked practical utility” and was “unnecessarily burdensome” to businesses, without offering any evidence to justify those claims, and no opportunity for public notice or comment. Memorandum from Neomi Rao, OIRA, to Acting Chair Victoria Lipnic, EEOC, re: EEO-1 Form; Review and Stay, Aug. 29, 2017, https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf. National Women's Law Center, Democracy Forward, and the Labor Council for Latin American Advancement have filed a lawsuit challenging the legal basis of the stay and Rao is a named defendant. See Press Release: Advocates Sue To Stop Illegal Trump Administration Rollback of Equal Pay Rule, NATIONAL WOMEN'S LAW CENTER, <https://nwlc.org/press-releases/advocates-sue-to-stop-illegal-trump-administration-rollback-of-equal-pay-rule/>

¹⁸ Chris Opfer, *White House Leaves Harassment Guidance in Limbo*, Jun. 13, 2018, BLOOMBERG NEWS, <https://www.bna.com/white-house-leaves-n73014476431/>. After a public notice and comment period the, the EEOC approved this guidance and sent it to OIRA for final approval in November 2017. This was an unusual move, extended as a courtesy since the EEOC as an independent agency, did not require OIRA approval for a subregulatory guidance.

Lastly, Ms. Rao used her role as administrator to push forward her views and advanced a faulty analysis where women and families always paid the price. For example, when OIRA considered a proposed rule that would radically restructure the nation's Title X family planning program, it failed to undertake a full analysis of the rule's [economic impact](#) on families, which it was [required](#) to do.¹⁹ OIRA also failed to calculate the costs imposed on issuers and consumers, for the recent proposed rule that would effectively eliminate insurance coverage of abortion in the Affordable Care Act marketplaces, even though the proposed rule included an [acknowledgement that such costs](#) would exist.²⁰

Conclusion

Ms. Rao's troubling views on women, sexual assault, race, and reproductive rights are a stark reminder that she is willing to erase the experiences of people outside her narrow viewpoint and her inability to set aside those beliefs to render fair decisions. Just as Ryan Bounds' racist and intolerant college writings caused his nomination to the Ninth Circuit to be rejected, these abhorrent views Rao espoused are also disqualifying. Ms. Rao did very little in her hearing to assuage our concerns about her problematic writings and views and how they would impact her decision making on the court.

Lastly, the DC circuit court is an important check on executive agency power. Since Ms. Rao's fingerprints are on many of the regulatory actions from the Trump Administration, she should have recused herself from any future cases that involve the regulations she approved while head of OIRA. Yet, during her hearing, Ms. Rao repeatedly refused to affirm that she would recuse herself from matters in which she played a part in her role at OIRA, a disturbing concern if she were to be confirmed on the bench.

For all the foregoing reasons, the National Women's Law Center urges Senators to reject the confirmation of Neomi Rao to the U.S. Court of Appeals for the District of Columbia. Please feel free to contact me, or Theresa Lau, Counsel, at (202) 588-5180 should you have any questions.

Sincerely,



Fatima Goss Graves
President and CEO
National Women's Law Center

cc: Judiciary Committee

¹⁹ Public Law 105-277, Omnibus Consolidated Appropriations, <https://www.congress.gov/105/plaws/publ277/PLAW-105publ277.pdf>; Proposed Compliance with Statutory Program Integrity Requirements, RIN 0937-ZA00 <https://www.federalregister.gov/documents/2018/06/01/2018-11673/compliance-with-statutory-program-integrity-requirements>; National Women's Law Center's Comments in Response to Compliance with Statutory Program Integrity Requirements, RIN 0937-ZA00, July 31, 2018.

²⁰ Patient Protection and Affordable Care Act, Exchange Program Integrity NPRM, CMS-9922-P, <https://www.federalregister.gov/documents/2018/11/09/2018-24504/patient-protection-and-affordable-care-act-exchange-program-integrity>