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March 12, 2019

Senator Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Senator Chuck Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer:

We write to reiterate our strong opposition to the nomination of Neomi Rao to serve on the D.C. Circuit Court of Appeals. We oppose this nominee based on her demonstrated record of hostility to civil rights. Her testimony at the February 5, 2019 nomination hearing did not assuage our concerns regarding her lack of fitness to serve as an impartial and fair jurist and we remain deeply disturbed by her lack of qualifications.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) was founded in 1940 by Thurgood Marshall. It has been an entirely separate organization from the NAACP since 1957. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. From that era to the present, LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society. LDF has always been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained. For almost 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color.

Our federal courts play a critical role in enforcing the Constitution and other laws of this Country. The legitimacy of the courts is derived from the confidence of the people. Any nominee that undermines the legitimacy of our courts, weakens the court in the eyes of the American people. Neomi Rao's record of bias and intolerance would delegitimize the D.C. Circuit Court of Appeals.

Rao's views on race and civil rights render her unqualified for the federal bench:

Ms. Rao has not been shy about her derogatory views on race and has a long history standing athwart civil rights. In an editorial for the Yale Free Press in 1995, Rao wrote that, "Yale has dedicated itself to a relatively firm meritocracy which drops its standards

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only for a few minorities, some legacies and a football player here or there." [1] She also co-authored an editorial entitled "Separate, But More Than Equal," in which she argued against what she referenced as, "special treatment for minority students".[2] In yet another display of racial animus, Ms. Rao wrote mockingly of the work of two leading African-American public intellectuals, Dr. Henry Louis Gates, Jr. and Dr. Cornel West, suggesting that their writings and speeches were designed mainly for profit and stating that "[r]ace may be a hot, money-making issue" and "West and Gates both demonstrate the viability and vitality of one form of racial identity, at least when it comes to public adulation, speaking fees, and book advances."[3] In writing about affirmative action, which has been upheld by the Supreme Court, Ms. Rao called it the "anointed dragon of liberal excess" and celebrated the death of said dragon.[4]

Ms. Rao's writings demonstrate a clear hostility towards civil rights and the rule of law which should disqualify her from sitting on the federal bench. Further, she did nothing at her confirmation hearing, or since the hearing, to adequately explain or disown these incendiary statements. Similarly, there is nothing in her record which suggests she has disavowed these views. In fact, she has spent her career turning these loathsome views into policy. In her current position as the Administrator for Office of Information and Regulatory Affairs, Ms. Rao is leading the Trump Administration's efforts to undermine civil rights protections across the federal government and has played a role in dismantling protections against racial discrimination in housing, removing protections against discrimination based on gender identity, and blocking the authorization of vital sexual harassment protections. Additionally, she is currently leading an effort to eliminate the disparate impact standard at the Department of Housing and Urban Development, effort which runs contrary to decades of U.S. government practice and is contrary to Supreme Court precedent.

Disturbingly, Rao Failed to Support the Landmark Brown v. Board Supreme Court

Ms. Rao indicated a disregard for Supreme Court precedent at her nomination hearing when she refused to say whether the Court had correctly decided the landmark ruling in *Brown v. Board of Education* which ended racial apartheid in America. *Brown's* holding has long been recognized across the political and ideological spectrum as the foundational statement on equality in America. Each sitting U.S. Supreme Court justice

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[1] https://afj.org/wp-content/uploads/2019/01/11-Vive-la-Difference.pdf
[2] https://www.documentcloud.org/documents/5684269-Rao-Separate-but-More-Than-Equal.html
[3] https://afj.org/wp-content/uploads/2019/01/06-Hottest-Duo-in-Academe.pdf.
[4] https://afj.org/wp-content/uploads/2019/01/08-One-Writer27s-Battles.pdf

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testified that *Brown* was rightly decided at their confirmation hearings, with Justice Samuel Alito calling it "one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done." Circuit Court judges nominated by George W. Bush, dating at least back to 2003, all endorsed *Brown* at their confirmation hearings.

The *Brown* decision is a bedrock of this nation's legal canon that must be accepted and embraced by anyone seeking a lifetime appointment to the federal bench. *Brown* is on par with *Marbury v. Madison*[5] in terms of its vitality to the American legal system. No one would or should accept a nominee to the federal bench who refused to acknowledge that *Marbury* was rightly decided. *Brown* not only banned segregation in our schools, but also redefined equality under the law and, in the process, altered the lives of all people in this country, regardless of race, gender, religion, or disability or immigration status. Its legacy reaches almost every aspect of public life and undergirds our nation's legal norms about equality and race. The ruling is not simply the Court's most important civil rights decision; it is the Court's most important decision dedicated to the rule of law.

Heretofore, the ruling in *Brown* has been considered an unassailable legal standard. Rejecting *Brown* is a dangerous departure from well-established norms that must not be tolerated and a dangerous flouting of democratic norms. Federal judges must be prepared to recognize the core canon of equality *Brown* represents and should have demonstrated throughout their careers that they stand behind and support racial equality and justice. It is dangerous and destabilizing to our democracy to normalize Ms. Rao's deviation from judicial norms by confirming her. Her refusal to acknowledge that *Brown* was rightly decided is unacceptable and aligns with a career devoted to attacking civil and human rights.

Rao's Lack of Experience Makes her Unqualified to Sit on the Federal Bench

Ms. Rao's nomination hearing revealed that Ms. Rao has *never* tried a case in federal or state court. This lack of trial experience and familiarity with judicial norms and standards undoubtedly impacts her qualifications to serve as a judge on what has been referenced as "the second-most powerful court in the United States, second only to the Supreme

[5] 5 U.S. (1 Cranch) 137 (1803).

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Court"[6] As a judge, Ms. Rao would be required to assess trial records and evidence developed at the district court levels. Her lack of experience in making these assessments will impede her ability to properly assess the legal and factual bases for appeal and ultimately the proper legal outcome. This will particularly impact her ability to properly analyze and decide civil rights cases which routinely involve the consideration of complex legal and factual records. In short, her lack of experience will undermine her ability to analyze and rule competently on critical cases impacting civil rights.

Neomi Rao's hostility to racial justice, lack of regard for fundamental civil rights precedent and lack of trial experience, coupled with her equally troubling and retrograde views on sexual assault and marriage equality, render her poised to weaponize the federal judiciary against well-established norms and precedent. No litigant with a civil rights claim before her could trust that she would fairly, impartially or properly provide equal justice under the law. With civil rights under attack in this country, the Senate must use its "advice and consent" power to ensure our nation is served by judges who will uphold the rule of law and equal rights for all Americans and reject nominees like Ms. Rao whose views and career reflect deep opposition to these core principles. We call on the U.S. Senate to protect the rule of law and the integrity of the federal judiciary by voting 'no' on Ms. Rao's nomination.

Sincerely,

Todd A. Cox
Director of Policy

CC: Members of the Senate

[6] John Roberts (2006). "What Makes the D.C. Circuit Different? A Historical View" (PDF). Virginia Law Review. 92: 375. Archived from the original (PDF) on February 25, 2012.