

February 4, 2019

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

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

**RE: National, State and Local LGBT Organizations Oppose Confirmation of
Neomi Rao to the U.S. Court of Appeals for the District of Columbia Circuit**

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of Lambda Legal and the 18 undersigned national, state and local organizations serving the lesbian, gay, bisexual and transgender (LGBT) community, we write to oppose the confirmation of Neomi Rao to the United States Court of Appeals for D.C. Circuit. We are all organizations that advocate for LGBT people and everyone living with HIV. We oppose confirmation of Ms. Rao after a comprehensive review of her record, having concluded that her views are fundamentally at odds with the liberty and equality guaranteed to LGBT people by our Constitution and laws.

Early Writings

As is evident from the even briefest review of Ms. Rao's early writings, she has a long history of aggressive, disqualifying disdain for those with differing views.¹ This history includes specific attacks on the efforts of LGBT people to achieve equal justice under law and secure inclusion in American society. In an opinion piece she published in the Yale Herald in 1994, Ms. Rao asserted that "homosexuals want to redefine marriage and parenthood," and offered that assertion to support her broader claim that multiculturalism is harming American culture.²³

In a later opinion piece, Ms. Rao characterized the struggles of LGBT people to achieve legal equality and social inclusion as a "radical" response to "the demands of normalcy," involving

¹ For a collection of Ms. Rao's early writings, see Alliance for Justice, *Neomi Rao*, available at <https://www.afj.org/neomi-rao>.

² Neomi Rao, *How the Diversity Game is Played*, WASHINGTON TIMES (July 17, 1994).

³ In this piece, Ms. Rao also uses a racial slur. Her use of slurs and her denouncement of cultural groups on campuses is unacceptable.

efforts “fundamentally to alter culture and society.”⁴ That she considered those equality efforts a profound, hyper-sexualized threat to “normal” society is unmistakable from her own words: “Homosexual activism in its most visible form engages mainstream society in a total cultural challenge ... [which] comes in the form of explicitly sexual printed material.”⁵ Closing the piece by sarcastically accusing her more liberal LGBT classmates of hypocrisy, her disdain for them drips from the page.

Writings on Human Dignity

In her early writings, Ms. Rao expressed overtly her essential contempt for those seeking—or recognizing—full LGBT equality and inclusion. Although her academic writings that followed have employed a more subdued, professional tone, her facile dismissal of the basic liberty and equality rights of LGBT people is still manifestly present in her critiques of the reasoning that has vindicated basic constitutional rights for same-sex couples and others.

Specifically, the Supreme Court jurisprudence vindicating same-sex couples’ constitutional rights to liberty and equality has referred to individual interests in “human dignity” (as well as autonomy) when describing what is wrongfully lost when government denies fundamental personal rights to a targeted group of Americans.⁶ Ms. Rao attacks this jurisprudence in a series of articles which contend that the Court is improperly recognizing a distinct right to “human dignity” different from the liberty and equality rights rooted in the constitutional text, and that this separate right to dignity amounts to an improper and risky importing of European communitarian values at odds with the American constitutional commitment to individual rights.⁷ In these writings, Ms. Rao also characterizes the supposedly separate right

⁴ Neomi Rao, *Queer Politics*, YALE HERALD (Nov. 11, 1994), available at <https://assets.documentcloud.org/documents/5684159/11-11-94-Rao-Queer-Politics.pdf> (“When homosexuality is viewed as a correctable behavior, it can be judged as being immoral, unnatural, and contrary to religious doctrine. Yet no one knows whether sexuality is a biological phenomenon or a social construct. The truth may lie somewhere in the middle.”)

⁵ *Id.*

⁶ See, e.g., *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003). See also *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2071 (2015).

⁷ See, e.g., *The Trouble with Dignity and Rights of Recognition*, 99 VIRGINIA L. REV. ONLINE, No. 1, pp. 29-38 (Aug. 2013); *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUMBIA J. OF EUROPEAN LAW, No. 2, pp. 201-256 (Spring 2008).

to human dignity as a “demand for recognition” which, she says, lacks support in the text or history of the Constitution.⁸

The trouble is that Ms. Rao’s analysis suggests that the equal recognition demanded for same-sex married couples in *United States v. Windsor*, for example, is materially different from the recognition afforded others in equal protection cases, and is constitutionally suspect.⁹ In her view, the right of those couples, who have been singled out by Congress for discriminatory treatment, to respectful recognition from their government (distinct from equal access to the bundle of federal rights and benefits that their state-conferred marriages should entail) is questionable.¹⁰ Defining landmarks of modern American jurisprudence such as *Brown v. Board of Education*¹¹ and *Heart of Atlanta Motel, Inc. v. United States*¹² emphasize that denials of equality that cause social stigma can inflict constitutionally cognizable harm. It is profoundly troubling that Ms. Rao resists the resulting constitutional rule—that being branded as a second-class citizen is a serious harm in and of itself, separate from particular benefits or services that also are at issue.

Public Protections

Ms. Rao is currently the White House Administrator at the Office of Information and Regulatory Affairs (“OIRA”), an agency that considers every promulgated rule issued by another agency and many other agency level actions. Administrative agency action has been instrumental in providing clarity and directions for enforcement of nondiscrimination protections for LGBT people in a variety of contexts.¹³ Given persistent public misunderstanding of who LGBT people are and what constitutes unjustifiable discrimination against them, these directions have been instrumental in reducing discrimination and

⁸ *Three Concepts of Dignity*, 86 NOTRE DAME L. REV. at 188-189.

⁹ *The Trouble with Dignity*, 99 VIRGINIA L. REV. ONLINE, No. 1, at 29-38.

¹⁰ *The Trouble with Dignity*, 99 VIRGINIA L. REV. ONLINE, No. 1, at 29-38.

¹¹ 347 U.S. 483 (1954).

¹² 85 S. Ct. 348, 354 (1964).

¹³ See, e.g., 24 CFR 5 (2012) (Equal Access to Housing in Housing and Urban Development Programs Regardless of Sexual Orientation or Gender Identity); 45 CFR 92.101(2016) (Nondiscrimination in Health Programs and Activities—clarifying that the Affordable Care Act prohibits sex-based discriminatory practices based on gender identity and sex-stereotyping); 29 CFR 38.7 (2016) (Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act—clarifying that the Act prohibits sex-based discriminatory practices based on gender identity and sex-stereotyping).

permitting many more LGBT people to achieve equal access to fair housing, equal opportunities in education and employment, and protections in the criminal justice system. But many of these protections have been rolled back under the Trump Administration.¹⁴ More to the point, Ms. Rao has for years vigorously critiqued federal regulations as imposing unwarranted burdens on business and others, and has championed their very substantial reduction—something the Trump administration has pursued from its first days. Were Ms. Rao to be confirmed to the D.C. Circuit, she would assume a dominant role in determining the extent to which current and future regulatory protections for LGBT people will be enforceable.

Ms. Rao's long history of disdain for the legal needs of LGBT people, for the constitutional jurisprudence that recognizes the equal liberty of same-sex couples, and for the essential role in preventing anti-LGBT discrimination appropriately played by federal administrative and regulatory rules, all demonstrate that Ms. Rao will be unable to administer fair and impartial justice.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org, or Sasha Buchert, Senior Attorney, at sbuchert@lambdalegal.org.

Lambda Legal
Advocates for Youth
American Atheists
Athlete Ally
CenterLink: The Community of LGBT Centers
Equality North Carolina
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Mazzoni Center
National Black Justice Coalition

¹⁴ See, e.g., 82 FR 28491-92 (2017) (Revision of a Currently Approved Collection on the National Survey of Older Americans Act Participants Survey—eliminating questions on gender identity); 34 CFR 106 (2018) (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—allowing religious colleges to discriminate without warning); 45 CFR 92 (2018) (Nondiscrimination in Health and Human Services—rule not issued yet but widely reported to eliminate protections against sex-based discriminatory practices based on gender identity).

National Center for Transgender Equality
National Coalition for LGBT Health
National Council of Jewish Women
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Trans Bar Association
OutServe-SLDN
Sexuality Information and Education Council of the United States
The LGBT Bar Association of New York
Whitman-Walker Health