February 27, 2019

The Honorable Lindsay Graham, Chairman The Honorable Diane Feinstein, Ranking Member

Senate Committee on the Judiciary Senate Committee on the Judiciary

United States Senate United States Senate

Washington, DC 20510 Washington, DC 20510

**RE: Nomination of Neomi Rao for the United States Court of Appeals for the District of Columbia Circuit**

Dear Chairman Graham and Ranking Member Feinstein:

The undersigned environmental groups write today on behalf of our millions of members and supporters to express our strong opposition to the nomination of Neomi Rao to the United States Court of Appeals for the District of Columbia Circuit and urge the Committee to oppose her nomination.

Rao’s role in the Trump administration’s efforts to eliminate critical public health and environmental protections, as well as her academic writings, raises serious doubts as to whether she possesses the relevant impartiality and respect for the rule of law required of a lifetime position on the DC Circuit. We urge the Senate to carefully review all aspects of Rao’s record to assess whether all litigants would receive equal justice in her courtroom. We have serious doubts that Rao possesses the necessary qualifications to be a fair-minded jurist to all that appear before her.

Since 2017, Rao has served as administrator of the Office of Information and Regulatory Affairs (OIRA), a clearinghouse for rules and regulations from the federal government. OIRA’s responsibilities include reviewing agency rulemaking and weighing a proposed rule’s economic costs to industry compared to the benefits a rule would provide to the public. The office has a substantial impact on all federal regulations with the power to require or conduct more thorough analysis of rules, recommend changes to proposed rules, and effectively compel the withdrawal of agency actions.

As Trump’s deregulatory czar, Rao has played a leading role in the Trump Administration’s efforts to roll back agency rules protecting clean air and water, and a slew of other public health and environmental protections. Rao publicly touted OIRA’s efforts to dismantle hundreds of public protections over the past two years.[[1]](#footnote-1) In her Senate Judiciary Committee hearing, she called these efforts her “primary contribution” and that she was “looking to pull back the things that are no longer working.”[[2]](#footnote-2) However, she then refused to cite any specific rule that was purportedly “no longer working,” despite the “176 deregulatory actions” the Administration took just last year,[[3]](#footnote-3) including rolling back auto fuel efficiency standards, California’s waiver on fuel efficiency, safety rules for fertilizer plants, and safety rules put in place for oil rigs after the Deepwater Horizon oil spill disaster in 2010.[[4]](#footnote-4)

Rao embraced this politicized deregulatory agenda which is having devastating impacts to public protections. The Executive Order 13771, also known as the “two-for-one rule”, signed by Donald Trump in 2017, was implemented under the leadership of Rao. The order makes it harder for agencies to issue new protections and gives incentives to roll back more protections without full consideration of their current benefits. Specifically, the order directs agencies to repeal at least two existing regulations for each new regulation issued with the mission that “total incremental costs of all regulations should be no greater than zero.”

There is a long list of recent Environmental Protection Agency (EPA) rules that illustrate the effort to eliminate public protections at any cost.[[5]](#footnote-5) For example, Rao’s OIRA signed off on EPA’s recent rollback that guts the Mercury Air Toxics Standard (MATs) rules. According to the EPA’s own data, the MATs rule saves as many as 11,000 lives every year across America and prevents hundreds of thousands of hospitalizations, asthma attacks, and missed days of work and school.[[6]](#footnote-6) OIRA willfully ignored the lack of analysis weighing the loss of these important public health benefits.

During Rao’s leadership of OIRA, the office has discarded an objective analysis of costs and benefits resulting from public protections, in favor of a method of that seeks to disregard public health benefits and artificially inflate costs to corporate interests. Specifically, since the Reagan administration OIRA has required agencies to consider “co-benefits” of rules, such as reduction of pollution that isn’t the primary objection of the protection. However, Rao has allowed the EPA to ignore significant co-benefits of public protections that reduce pollutants and save lives, reflecting her willingness to sacrifice public health and wellbeing in the interest of inflating corporate profits.

During review of proposed rollback of the Methane and Waste Prevention Rule, Rao’s office repeatedly pressured the EPA to adopt fossil fuel requests to significantly reduce inspections for natural gas leaks. [[7]](#footnote-7) OIRA’s proposal would have doubled the amount of methane released into the atmosphere and, according to the EPA’s own determination, conflicted with their legal obligation to reduce emissions. Rao’s office has also censored language related to the impact of climate change on public health, removing references from EPA reports on the Clean Power Plan and the Refrigerant Management Program.[[8]](#footnote-8)

Rao’s competency as head of OIRA has also come into question due to the large number of cases filed against OIRA-approved rules, and won by the litigants bringing the claims. In a typical administration, those challenging government action win their cases less than 30 percent of the time. However, under the Trump administration, the courts have struck down some 90 percent of deregulatory agency rules, many of which OIRA reviewed and specifically approved.[[9]](#footnote-9)

The body of Rao’s academic work also raises concerns about her impartiality, temperament, and the adequacy of her professional experience. For eleven years Rao was a professor at the Antonin Scalia Law School at George Mason University, including serving for three years as the director and founder of the “Center for the Study of the Administrative State,” which was funded by millions of dollars in secretive donations by far-right advocacy groups, including Vice President of the Federalist Society Leonard Leo, and the Koch brothers.[[10]](#footnote-10)

The Center consistently focuses its efforts on criticizing the power of agencies to promulgate rules to protect public health and the environment. In 2016, while running the Center, Rao suggested in testimony to Congress that much of what agencies do is unconstitutional.[[11]](#footnote-11) With such public statements, it is difficult to see how any litigant that came before her in court seeking to defend protective agency rules would believe they would be given a fair shake to receive justice under the law.

Rao’s earlier writings on environmental issues also raise serious concerns, disparaging efforts to keep our air and water clean as unnecessary burdens on corporate freedom, and even referring to the greenhouse effect as a “controversial theor[y].”[[12]](#footnote-12) Additionally, her writings on sexual assault, race, and LGBTQ equality are offensive and demean the integrity of the court. The D.C. Circuit is one of the most important courts in the United States, hearing cases that impact the environment, health care, consumer and workplace safety protections, and almost every other issue affecting people’s lives and wellbeing. Nominees to this court should be beyond reproach, and Rao’s record indicates she is incapable of serving fairly and dispassionately as a federal judge.

As organizations that strive to protect the environment, we have a deep appreciation for the rule of law and the benefits of environmental, public health, and safety protections afforded by federal statutes and agency rules. Rao’s record at OIRA and her years cultivating an anti-public protection agenda in academia give us grave concerns, as well as her repeated refusal during her Senate nomination hearing to commit to recusing herself in cases involving the rollback of public protections during her tenure at OIRA.

For these reasons, we strongly oppose the nomination of Neomi Rao to the United States Court of Appeals for the District of Columbia Circuit, and urge the Committee reject her nomination.

Sincerely,

1. Neomi Rao, *Introduction to the Fall 2018 Regulatory Plan*, Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf> (2018). [↑](#footnote-ref-1)
2. *See Rao Responses to Senate Questions for the Record*, Senate Judiciary Committee, at 5, <https://www.judiciary.senate.gov/imo/media/doc/Rao%20Responses%20to%20QFRs.pdf>. [↑](#footnote-ref-2)
3. Neomi Rao, *Introduction to the Fall 2018 Regulatory Plan*, Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/VPStatement.pdf> (2018). [↑](#footnote-ref-3)
4. *Rao Responses to Senate Questions for the Record*, Senate Judiciary Committee, at 7-9. [↑](#footnote-ref-4)
5. *EPA Deregulatory Actions*, U.S. Environmental Protection Agency Laws and Regulations, <https://www.epa.gov/laws-regulations/epa-deregulatory-actions>. [↑](#footnote-ref-5)
6. *New E.P.A. Plan Could Free Coal Plants to Release More Mercury Into the Air*, The New York Times, https://www.nytimes.com/2018/12/28/climate/mercury-coal-pollution-regulations.html (Dec. 28, 2018). [↑](#footnote-ref-6)
7. *White House Backed Big Oil Over EPA on Finding Methane Leaks*, Bloomberg, <https://www.bloomberg.com/news/articles/2018-10-19/white-house-backed-drillers-over-epa-on-plugging-methane-leaks> (Oct. 19, 2018). [↑](#footnote-ref-7)
8. *Children's health language deleted from climate rule*, E&E News, <https://www.eenews.net/eenewspm/2018/10/02/stories/1060100339> (Oct. 2, 2018). [↑](#footnote-ref-8)
9. *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, The New York Times, <https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html> (Jan. 22, 2019). [↑](#footnote-ref-9)
10. *See Alliance for Justice Nominee Report: Neomi Rao* at 2-3, <https://www.afj.org/wp-content/uploads/2019/01/Rao-Report.pdf>; *What the Koch Brothers’ Money Buys*, Slate, <https://slate.com/news-and-politics/2018/05/we-now-know-how-the-koch-brothers-and-leonard-leo-buy-special-favors.html> (May 2, 2018). [↑](#footnote-ref-10)
11. *See* *Rao Responses to Senate Questions for the Record*, Senate Judiciary Committee, at 3. [↑](#footnote-ref-11)
12. Neomi Rao, *The Obedient Limbs of YSEC*, Yale Free Press, Apr. 1992, available at: https://afj.org/wp-content/uploads/2019/01/15-The-Obedient-Limbs-of-YSEC.pdf. [↑](#footnote-ref-12)