September 1, 2017

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of the hundreds of thousands of members of People For the American Way, I write to express our opposition to the nomination of Michigan Supreme Court Justice Joan Larsen to the Sixth Circuit Court of Appeals. Her writings, statements, and brief judicial experience suggest a jurist who would not fulfill her responsibility to recognize and protect the promises made by the Constitution and congressional enactments. This record, when combined with the repeated breaches of procedure and protocol to rush her confirmation without adequate vetting, compel us to oppose.

In choosing a nominee, President Trump engaged in none of the consultations with home state senators that previous presidents have done. Such consultations have historically led to the president selecting someone with the support of both home state senators. That is how President Obama's circuit court selections from places like Utah and Kansas were able to be confirmed with overwhelming bipartisan support, despite the vast political gulf between him and those states' senators. Similarly, President George W. Bush's consultations with Democratic home state senators led to circuit nominees from those states being confirmed with little to no opposition.

But in contrast to historical practice, President Trump nominated Larsen without any input from Michigan Sens. Debbie Stabenow or Gary Peters. A president who intends to select a qualified nominee without an ideological agenda would have no need to shut senators out of the process of identifying and evaluating potential nominees.

Similarly, it is deeply concerning that Larsen's hearing has been rushed so as to ensure that senators will not have adequate time to properly evaluate her record. Chairman Grassley added her to a hearing that already had another circuit nominee (Amy Coney Barrett, for the Seventh Circuit), as well as a major executive branch nominee (Eric Dreiband, to lead the Justice Department's Civil Rights Division). That decision represented a dramatic and harmful breach of Senate norms.

Because of the extremely important role played by U.S. circuit court judges with lifetime tenure, proper analysis of their records requires extensive time and resources. When two circuit court nominees are up at the same time, senators simply cannot perform their constitutional function effectively.

That is why during the Obama administration, the Judiciary Committee maintained the longtime norm of having only one circuit court nominee at the same hearing, even when there were

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several circuit nominees who were ready to proceed. An exception was made only three times, each due to unusual circumstances and—importantly—with the consent of the minority party. No such agreement or circumstances exist here. In fact, there is no urgency in filling this particular vacancy on the Seventh Circuit, since the judge currently serving in the position Larsen would take has made clear that he will continue active service until a replacement is confirmed. Larsen was added to an already packed agenda over the objections of the minority. If she is qualified, there is simply no reason to divide the committee, violate senatorial norms, and prevent adequate study of (and inquiry into) her record.

That record is a disturbing one. Perhaps the loudest alarm bell is that she appeared on then-candidate Donald Trump's list of potential Supreme Court nominees last year, which means she passed the litmus tests of the president, the Federalist Society and the Heritage Foundation. For a president who has shown his contempt for the rule of law and the vital role of the judiciary in maintaining it, Larsen may be the ideal nominee.

Larsen envisions the president as having dangerously expansive powers under the Constitution, something she has discussed throughout her legal career. In 1994, the year after she graduated from law school, she co-authored a law review article that stressed the importance of "protect[ing] the President, and the national constituency which he represents, from Congress, the most dangerous (and powerful) branch of government."

More than a decade later, she defended President Bush's use of signing statements essentially nullifying provisions in laws passed by Congress. For instance, when Bush signed Sen. John McCain's bill prohibiting torture, he issued a signing statement that he would follow it only "in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch ... and consistent with the constitutional limitations on the judicial power." This made clear that while he may have signed a bill imposing specific legal limitations on executive power, he would decide which part of the statute to follow. The compromises he had made with Congress to get a bill passed meant nothing. He essentially signed a bill different from the one Congress had passed and made clear that he would ignore judicial rulings about torture that he did not agree with.

Justice Larsen described the statement as "the president's independent vision of what the Constitution requires." She approvingly wrote that "if the circumstances arose in which the law would prevent [the president] from protecting the nation, he would choose the nation over the statute."

Under our constitutional system, the president does not get to unilaterally declare his unlawful actions lawful. Such expansive authority would reduce the ability of Congress and the judiciary to ensure that a president not exercise unlimited power. Larsen's view of executive power poses a direct threat to the rule of law, an especially serious concern where, as here, we have a president who has already shown his willingness to use the pardon power to nullify judicial enforcement of the Constitution.

Also of concern is the signal Larsen sent about her conservative ideology during her campaign for the Michigan Supreme Court last year. Her website stated that "judges should interpret the

laws according to what they say, not according to what the judges wish they would say. Judges are supposed to interpret the laws; they are not supposed to make them." This is coded language used by ultra-conservative jurists and activists to signal a willingness to issue rulings that (among other things) do not recognize the constitutional right to abortion or the fundamental humanity and equality of LGBTQ people.

Our federal appellate courts do not need a judge who will diminish the rights of ordinary Americans and enable dangerous abuses of power by the president. We oppose Joan Larsen's nomination to the Sixth Circuit Court of Appeals.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program