



September 12, 2017

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**OPPOSE THE CONFIRMATION OF JOAN LARSEN TO THE  
U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I am writing in opposition to the confirmation of Joan Larsen, a justice on the Michigan Supreme Court, to the U.S. Court of Appeals for the Sixth Circuit. The Leadership Conference urges the Senate to reject this nomination.

As an initial matter, we are troubled by the fact that Justice Larsen appeared as a nominee at a hearing that featured two U.S. Court of Appeals nominees. The tradition of the committee is to schedule only one circuit court nominee per hearing, in order to allow committee members sufficient time to adequately question the nominee and ensure the careful consideration that lifetime appellate appointments warrant. This is the second time within the past three months that Chairman Grassley has conducted a stacked hearing with two controversial circuit court nominees, in defiance of committee tradition. Stacked hearings have occurred in only rare circumstances in recent years, and when they have occurred, they involved non-controversial nominees and bipartisan agreement. Moreover, the September 6, 2017 hearing included a controversial executive branch nominee, Eric Dreiband, who was nominated by President Trump to head the Justice Department's Civil Rights Division. These three Trump nominees each merited a separate hearing, but Chairman Grassley scheduled them all together in a brazen attempt to steamroll them through the committee.

A final process concern is that Justice Larsen was nominated without meaningful consultation with the Michigan senators. Although the senators have returned blue slips on the nomination, press reports indicate that "Trump's White House notified the senators' offices without seeking input on Larsen."<sup>1</sup> Contempt for the important constitutional role senators play in the advice-and-consent process has been an unacceptable hallmark of the Trump White House.

Justice Larsen deserved to be the sole circuit court nominee at a hearing so that she could be thoroughly and adequately questioned about her extreme views. As a justice on the Michigan Supreme Court and as an academic before that, she has established a record that is antagonistic to civil and human rights.

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<sup>1</sup> Melissa Nann Burke, "Trump's Michigan judicial nominee hits a snag," Detroit News, July 5, 2017.

In the case *Mabry v. Mabry*,<sup>2</sup> Justice Larsen voted against hearing an appeal by a lesbian mother who sought parental visitation from an ex-spouse with whom she lived before the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples have a constitutional right to marry and to marital benefits. Justice Larsen rejected the reasoning of the dissent, which concluded: “Like the many other state courts addressing this issue, then, I would grant leave to appeal to consider whether *Obergefell v. Hodges* compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married. The Constitution might require that the children born and adopted into same-sex families be able to access the same benefits that children born into opposite-sex families have under Michigan law when they arrive at our courthouse doors.”<sup>3</sup> Justice Larsen’s unwillingness to apply the constitutional principles of *Obergefell* in order to address the effects of Michigan’s unconstitutional ban on same-sex marriage is troubling.

Justice Larsen’s restrictive view of LGBT rights can also be seen in her scholarship. In 2004, she wrote an article that criticized the Supreme Court’s important decision in *Lawrence v. Texas*, which struck down as unconstitutional state laws that criminalized same-sex intimate conduct. Professor Larsen wrote: “It would be an understatement in the extreme to call the Supreme Court’s decision in *Lawrence v. Texas* revolutionary.... The revolution of which I speak, and to which this paper is devoted, is the Court’s recent, and unexplained, embrace of comparative and international law norms as aids to domestic constitutional interpretation.”<sup>4</sup> This is a skewed reading of the *Lawrence* holding, which relied primarily on the application of domestic sources and U.S. constitutional interpretation. And it mirrors one of the criticisms of *Lawrence* made by Justice Scalia in his dissent in that case. Justice Larsen has referred to Justice Scalia, for whom she served as a law clerk, as “a great judge for the people of the United States.”<sup>5</sup>

Justice Larsen has also demonstrated extreme views when it comes to executive power, which suggests she might be a rubber stamp for President Trump’s executive actions. In 2006, she wrote an op-ed defending President George W. Bush’s use of signing statements.<sup>6</sup> She wrote: “Take, for example, the anti-torture legislation that sparked much of this signing-statement frenzy. The president’s signing statement indicated that he would interpret the act ‘in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief.’ Presumably, this means that if circumstances arose in which the law would prevent him from protecting the nation, he would choose the nation over the statute.”<sup>7</sup> Based on the views expressed in this op-ed, a distinguished constitutional law professor, Peter M. Shane, has written that Justice Larsen’s “enthusiasm for unchecked executive power should be profoundly worrying.... We cannot afford judges who would

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<sup>2</sup> 499 Mich. 997 (2016).

<sup>3</sup> Id. at 1001 (McCormack, J., dissenting).

<sup>4</sup> Joan L. Larsen, “Importing Constitutional Norms from a ‘Wider Civilization’: *Lawrence* and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation,” 65 Ohio St. L. J. 1283, 1283-84 (2004).

<sup>5</sup> Dean Cousino, “Justices urge support for ‘rule of law’ judges,” Monroe News, October 13, 2016.

<sup>6</sup> Joan L. Larsen, “Bar group is wrong; presidents can interpret laws they sign,” Detroit News, September 13, 2006.

<sup>7</sup> Id.

grant President Trump extreme leeway to decide what statutes he may ignore in the interest of what so mercurial and unreliable a leader might deem ‘protecting the nation.’”<sup>8</sup>

Concerns about Justice Larsen’s views on executive power are also reinforced by her work on detention issues as a political appointee in the Bush Administration’s Justice Department. In 2002, she authored a memo on detention and habeas corpus which was publicly identified through FOIA litigation but which has not been made publicly available. The memo is referred to in a publicly available document as “Memorandum to CIV attorneys providing legal advice re: availability of habeas corpus relief to detainees,” and it was the subject of news reports when Justice Larsen was appointed to the bench in 2015.<sup>9</sup> The memo itself should now be made available so that Justice Larsen’s views on post-September 11 detention issues can be assessed and considered.

Perhaps even more distressing than the memo is Justice Larsen’s lack of candor about it at her Senate Judiciary Committee hearing. Ranking Member Feinstein asked her: “So you had no role in drafting, reviewing, or otherwise contributing to memos on interrogation practices, detention policies and practices, rendition, warrantless wiretapping, or any other topics related to the war on terror?” Justice Larsen responded, under oath: “So as to all of the first, I would say no. As to any topic related to the war on terror, one of my published opinions was an interpretation of the Patriot Act.” Only after Ranking Member Feinstein followed up and specifically asked Justice Larsen about her detention memo did she concede that she wrote the memo, though she refused to discuss its contents because the Justice Department has claimed privilege over it. Justice Larsen’s misrepresentation to the committee about this memo is alarming.

Justice Larsen’s extreme ideology helps explain why she was one of 21 individuals recommended by the far-right Federalist Society and Heritage Foundation and put forward by Donald Trump last year as the exclusive pool of people he would consider for Supreme Court nominations.

In addition, during last year’s presidential campaign, Mr. Trump created unseemly litmus tests and expressly stated he would only appoint Supreme Court justices who opposed abortion rights and gun safety laws. Asked in the third presidential debate if his Supreme Court appointees would vote to overturn *Roe v. Wade*, candidate Trump said: “If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the court.”<sup>10</sup> In the same debate, he stated: “I’m very proud to have the endorsement of the NRA and it was the earliest endorsement they’ve ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the second amendment.”<sup>11</sup> One can assume that Justice Larsen – who joined the Federalist Society in 1994 – passes these litmus tests.

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<sup>8</sup> Peter M. Shane, “The Most Important Question for Trump Judicial Nominees,” *Slate*, July 5, 2017.

<sup>9</sup> Jonathan Oosting, “New Michigan Supreme Court justice facing questions over ‘indefinite detention’ memo,” *MLive*, October 1, 2015.

<sup>10</sup> <http://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

<sup>11</sup> *Id.*

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For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a long horizontal stroke at the end.

Vanita Gupta  
President & CEO