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FRIENDS OF THE EARTH ♦ MINERAL POLICY CENTER
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THE OCEAN CONSERVANCY ♦ OCEANA
PHYSICIANS FOR SOCIAL RESPONSIBILITY
SIERRA CLUB ♦ THE WILDERNESS SOCIETY

July 31, 2003

Re: Opposition to Lifetime Ninth Circuit Nomination of Judge Carolyn Kuhl

Dear Senator:

We are writing to express our opposition to the confirmation of California state trial Judge Carolyn B. Kuhl to a lifetime position on the United States Court of Appeals for the Ninth Circuit, which decides the fate of federal environmental and other safeguards in nine Western and Pacific states. Her record indicates that, if confirmed by the Senate, she would unjustifiably seek to limit public access to the courts in this vital circuit.

As both an advocate and a judge, Carolyn Kuhl's record demonstrates hostility to public rights and access to the courts. This record includes: 1) a sweeping attempt to overturn well settled precedent to eliminate associational standing, which is the basis for public-interest access to courts; 2) a private practice specialty seeking to limit the right of citizens to bring suits under the False Claims Act; and 3) a judicial ruling that would have unjustifiably nullified an important part of California's anti-SLAPP legislation, which protects against industry lawsuits that are designed to intimidate individuals who speak out about pollution and other issues. Her advocacy of each of these positions is in severe tension with the vital public interest served by citizen environmental enforcement. As explained below, our concerns were heightened by Judge Kuhl's inaccurate testimony before the Judiciary Committee and her misleading responses to written questions.

In briefing and arguing *UAW v. Brock*, 477 U.S. 274 (1986) for the Reagan Administration, Ms. Kuhl urged the Supreme Court to dispense with the long-standing and well-established doctrine of associational or representative standing. This doctrine provides access to the courts to a broad range of public-interest groups for the purpose of representing the interests of their members. The doctrine enables environmental groups to go to court to uphold and enforce laws that protect the health and safety of all Americans, including a wide range of safeguards for clean air, clean water, endangered species, and wetlands.

In particular, the brief signed by Ms. Kuhl argued that "there is no justification for the anomalous doctrine of representative standing." Brief for Respondent, Summary of the Argument § 2, *Brock*, (Feb. 10, 1986) (No. 84-1777). She urged the Court to adopt a new rule that groups could only represent their members by suing under the class-action rules. (*Id.* at § I.B). Because it is difficult, expensive, and time-consuming to comply with class-

action requirements, far fewer environmental and other public-interest lawsuits would be possible if the Court had accepted Ms. Kuhl's arguments. The apparent intent, and certainly the result, of her arguments would have been to chill a wide range of vital public-interest litigation.

Charles Fried, President Reagan's Solicitor General and Ms. Kuhl's direct supervisor, has identified Kuhl as the one who "launched" this "frontal attack" on associational standing. In his memoir *Order and Law*, Mr. Fried described rules that "allow for the role of progressive-minded lawyers and legal organizations as the moving parties of ... radical social changes." Referring to Ms. Kuhl's argument in the *Brock* case, he declared: "My Deputy and Counselor, Carolyn Kuhl, launched a frontal attack on this trend. . . ." Charles Fried, *Order and Law: Arguing the Reagan Revolution -- A Firsthand Account* 17-18 & n.5. Fortunately, as Fried also notes, Ms. Kuhl's argument for overruling established Supreme Court precedent that provided for associational standing was opposed by "a vast array of organizations," including the Chamber of Commerce and the American Medical Association, and was "rejected by the Court with no dissent." *Id.* at n.5.

In her testimony before the Judiciary Committee and her answers to written questions, Judge Kuhl inaccurately and misleadingly characterized her role in the *Brock* case. Most remarkably, in her oral testimony, Judge Kuhl asserted that "the position of the United States in *UAW v. Brock*, I believe was set before I came to the Solicitor General's Office. I argued that case. I had just recently come to the office and I argued it, but I am not on the brief." Tr. at 54-55.

Judge Kuhl's assertion was flatly untrue. She was on the merits brief in *Brock*, as she subsequently admitted in response to a question by Senator Leahy. But more importantly, at her hearing Judge Kuhl did not alter her testimony, or even respond when, just minutes after Judge Kuhl disclaimed any involvement with the brief or the government position in *Brock*, Senator Feinstein quoted Charles Fried's description of the central role Kuhl played in advocating for the extreme position ultimately taken by the Solicitor General's office in *Brock*. See Tr. at 56. By this point, Judge Kuhl must have recognized that her description of her role in *Brock* was in serious tension with that of her supervisor. Nonetheless, Judge Kuhl continued to describe the position taken by the government using the passive voice, attempting to disassociate herself from the argument she had apparently advanced quite passionately:

I will recognize that the *UAW v. Brock* case was kind of a novel argument. The reason it was made was because, first of all, we were defending a ruling that had been made by the lower court. But secondly, the thought was that applying class action standards would assure that when an association came before a court, that its members' interests were being represented

Tr. at 56-57.

The *UAW v. Brock* case did not call for a novel argument and Kuhl's argument was not merely novel, it was extreme. There is no reason why the government had to make this

argument before the Supreme Court in order to defend the far narrower D.C. Circuit ruling, which accepted the doctrine of associational standing. The government's brief in *Brock* could have easily defended the ruling below within the confines of well-established and settled law. That is precisely what the Solicitor General did argue in opposing Supreme Court review. Indeed, this opposition, which was prepared without Ms. Kuhl's input before she became Deputy Solicitor General, described the doctrine of associational standing as "well settled." See Brief for the Respondent in Opposition to Petition for Writ of Certiorari, *UAW v. Brock*, at 6 (Aug. 14, 1985) (No. 84-1777) (LEXIS pagination). Rather than defend the D.C. Circuit ruling by applying what the Solicitor General had just told the Court was well settled law, Ms. Kuhl, according to Mr. Fried, took the extraordinary step of using the case to launch a sweeping attack on the entire doctrine of associational standing.

Judge Kuhl's responses to written questions by Senator Leahy on the *Brock* case heighten the severe problems with her nomination. In those responses, she again characterizes her argument for overruling precedent on associational standing as a "defense of the ruling below," and she attempts to downplay her role in the formulation of the argument:

In defending the favorable ruling of the court below, and in vigorously representing his client, the Secretary of Labor, the Solicitor General chose to argue forthrightly for a modification of existing law. It is common for the United States to argue for a restrictive approach to standing.

Responses to Leahy at 7. Her characterization of her argument as merely a "modification of existing law" and "a restrictive approach to standing" obscures the fact that her argument would essentially have eliminated associational standing, and masks the reality that it is very uncommon for the Solicitor General to advocate the overturning of well-settled precedent. Such an argument is advanced only after intense debate and careful consideration. As the sequence of briefs indicates and Charles Fried makes clear, the moving force behind the government's striking change of position in *Brock* was Carolyn Kuhl.

Mr. Fried's account of Ms. Kuhl's role also makes Judge Kuhl's responses to Senator Leahy's Questions 3(d) & (e) completely unacceptable. In response to questions about whether she "still" agreed with the arguments made in *Brock*, Kuhl asserted that it was wrong for Senator Leahy to assume that she *ever* agreed with those arguments. Responses to Leahy at 8-9. In many circumstances, we are sympathetic to the argument that a lawyer representing a client cannot be presumed to agree with the view he or she advances on behalf of a client. This is not one of those circumstances. Mr. Fried not only ascribes a leadership role to Ms. Kuhl in advancing the associational standing argument in *Brock*, he describes her campaign to "launch an attack" on rules that "allow for the role of progressive-minded lawyers and legal organizations as the moving parties of . . . radical social changes."

The picture Mr. Fried paints of Ms. Kuhl's role in *Brock* is very consistent with the *New York Times*' description of Kuhl's role in the *Bob Jones* case as part of a band of "young zealots" seeking to overturn long-established Justice Department policies to advance a conservative ideology in the courts. The difference is that Judge Kuhl has renounced the role she played in the *Bob Jones* case, stating that the argument she advanced in that case "was wrong . . . because it did not properly put the nondiscrimination principle that should have been primary in this decision first." Tr. at 39. In contrast, rather than denouncing the argument she made in *Brock*, taking issue with Mr. Fried's depiction of her role, or attempting to explain how her views on standing have evolved over the years, she has asserted that in *Brock* she was simply a lawyer representing a client. This is not a plausible response given Mr. Fried's account.

Ms. Kuhl's record as private practitioner and as a judge reveals other reasons to believe that she would use her position as a Ninth Circuit judge to restrict citizen access to the courts. In private practice, Ms. Kuhl developed a specialty in representing corporate defendants in suits brought by citizen litigants and whistleblowers under the federal False Claims Act. For example, in *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993), Ms. Kuhl challenged the constitutionality of the False Claims Act's *qui tam* provisions, which allow private parties to sue to enforce federal law against corporate wrongdoers. Brief of Amici Electronic Indus. Ass'n et al. (Oct. 22, 1992). Kuhl's position in the *Madden* brief that *qui tam* plaintiffs lack Article III standing has been resoundingly rejected by the courts. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), Justice Scalia, the Court's most extreme advocate of limiting standing, detailed the extensive history of *qui tam* suits dating back to 13th-century England. This long tradition of *qui tam* actions, he wrote, "leaves no room for doubt" that a *qui tam* plaintiff has Article III standing. Ms. Kuhl's position would have eliminated the ability of private citizens to bring these important "whistleblower lawsuits" before the courts.

Ms. Kuhl also advocated against holding corporations liable for environmental pollution in a number of other cases. One example is *Fairchild Semiconductor Corp. v. U.S. EPA*, 984 F.2d 283 (9th Cir. 1993), where she challenged the constitutionality of EPA's application of cleanup standards under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Finally, as a judge, Kuhl was unanimously reversed in *Liu v. Moore*, 69 Cal. App. 4th 745 (1999), for a ruling that would have undermined California's law that protects against what are called "strategic lawsuits against public participation" ("SLAPPs"). SLAPP lawsuits include retaliatory suits by industry against those who bring claims for environmental contamination. They are designed to intimidate individuals who speak out about pollution and other issues, "chill[ing] the valid exercise of the constitutional rights of freedom of speech and . . . the redress of grievances." Cal. Code Civ. Proc. § 425.16(a). California's anti-SLAPP rules require the polluter to pay the attorneys' fees and costs of someone it has improperly sued in a SLAPP suit. *See id.* Like standing rules, anti-SLAPP laws are critical to the enforcement of environmental, civil rights, and other fundamental constitutional and legal safeguards.

In *Liu*, a defendant in a medical malpractice case filed a SLAPP suit against the plaintiff. In response, the plaintiff filed a motion to recover attorneys' fees and costs pursuant to the anti-SLAPP provision. Judge Kuhl ruled that because the defendant had dismissed the SLAPP suit prior to the hearing, the plaintiff could not recover the nearly \$40,000 in attorneys fees and costs he had incurred in responding to the improper suit prior to the time it was dismissed. *Liu*, 69 Cal. App. 4th at 747-50. *See also* Tr. at 58.

The appeals court sharply disagreed, stating that Judge Kuhl's decision, if upheld, would "constitute[] a nullification of an important part of California's anti-SLAPP legislation." *Id.* at 748. That is because SLAPP suits could continue to have a chilling effect because they would force the defendant in the SLAPP suit to incur substantial attorneys' fees prior to the time the suit is dismissed. Such a result "would prolong both the [SLAPP] defendant's predicament and the plaintiff's outrageous behavior." *Id.* at 750. We also note that the attorney that litigated the *Liu* case before Judge Kuhl took the extraordinary and courageous step of writing to Senator Feinstein to criticize Judge Kuhl's ruling and to document its impact on his client. *See* Tr. at 57-58.

In her testimony, Judge Kuhl attempts to defend her ruling in *Liu v. Moore*, arguing that the issue was one "of first impression" that had not been addressed in written opinions of the courts prior to that time. Tr. at 59. She recalls that she "struggled a good bit with the issue of . . . [what remains of] the jurisdiction of the court when the case has gone away." *Id.* She concedes that the court of appeals had to clarify for her what appears to be a proposition of hornbook law: "the court always has authority to decide adjunct issues that remain when the case is dismissed." Tr. at 60. Notably, the appeals court apparently did not view this issue as difficult, dealing with it in a footnote. *Liu*, 69 Cal. App. 4th at 751 n.3.

Ms. Kuhl's sweeping attempt to overturn settled precedent establishing the doctrine of associational standing that allows public-interest access to the courts, her far-reaching arguments about standing under the False Claims Act, and her judicial ruling that would have nullified an important part of California's anti-SLAPP legislation, are all at odds with the vital public interest served by citizen environmental enforcement. Because of her record of extreme views on critically important issues, we strongly urge you to reject the lifetime nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals.

Sincerely,

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