Hon. Mitch McConnell
U.S. Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

Hon. Charles Grassley
Chairman, U.S. Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Hon. Harry Reid
U.S. Senate Minority Leader
522 Hart Senate Office Building
Washington, DC 20510

Hon. Patrick Leahy
Ranking Member, U.S. Senate Committee on the Judiciary
437 Russell Senate Office Building
Washington, DC 20510

March 11, 2016

Dear Majority Leader McConnell, Judiciary Committee Chairman Charles Grassley, Minority Leader Harry Reid, and Judiciary Committee Ranking Member Patrick Leahy:

The Lawyers' Committee for Civil Rights Under Law writes to express grave concern regarding the stated refusal of Republican members of the Senate Judiciary Committee to consider any nominee put forth by the President to fill the current vacancy on the United States Supreme Court. The position that you and other members of the Senate Judiciary Committee have taken, that the right to fill the vacancy on the Court should be reserved for the next President, who will not take office until late January 2017, is unprecedented. This position is inconsistent with the roles of the President and the Senate as envisioned by the Framers of the Constitution. It threatens to create legal uncertainty that would be unfair to all Americans, particularly minorities, and would create a dangerous historical precedent. We urge all members of the Senate Judiciary Committee to carry out their constitutional role and responsibility.

Our Constitution states that the President "shall nominate, and with the advice and consent of the Senate shall appoint… Judges of the supreme Court…." U.S. Constitution, Article II, Section 2, Clause 2. This provision imposes duties on both the President and the Senate to fill vacancies on the U.S. Supreme Court, on the President to nominate and on the Senate to provide advice and consent, to assure that the nominee the President appoints is qualified for the position.

The President has made clear his intention to faithfully carry out this obligation and has publicly expressed his commitment to appointing an eminently qualified nominee with "an independent mind, rigorous intellect, impeccable credentials, and a record of excellence and integrity." Refusal by the Senate to participate in the advice and consent process would undermine the separation of powers by abdicating the Senate's constitutional role and preventing the President from carrying out his duty to fill the vacant office. As we explain in the attached analysis, based on our historical review, the Senate has never taken the position that it would flatly refuse to consider a nominee under the current circumstances.

The purpose of the appointments clause is to fill the offices needed to operate the government the Framers created. This is confirmed by the Framers' insertion of the recess appointments clause to give the President authority to unilaterally fill vacancies temporarily, if the Senate is in recess and unable to provide advice and consent. A refusal to provide advice and consent, when it is in session, would thus frustrate the entire purpose of the appointments clause.

This understanding of the distinction between the President's and Senate's duties under the appointments clause is confirmed by Alexander Hamilton, in Federalist No. 76. Hamilton explains that "no [person] can be appointed but on the President's previous nomination"—because the President is best qualified to do so.

Hamilton also makes clear the limits on the role of the Senate's advice and consent power, which is to "act as an excellent check on a spirit of favoritism in the President, and would tend greatly to prevent the appointment of characters from State prejudice, from family connections, from personal attachment, or from a view to popularity" – not to prevent the President from appointing any person. Most importantly, Hamilton acknowledges that while "[the President's] nomination may be overruled [by the Senate] … yet it can only be to make place for another nomination by [the President] himself. The person ultimately appointed must be the object of his [the President's] preference, although perhaps not in the first degree."

The Constitution includes no language that calls for a suspension of the President's constitutional obligations during a presidential election year, nor any other period. While vacancies on our Court during election years are rare, there are nonetheless many examples of Senate confirmation of Supreme Court nominees in an election year. John Adams' appointment in 1800 of John Marshall, a month before Jefferson's inauguration, the confirmation of Woodrow Wilson's appointment of Brandeis in 1916 during Wilson's election year contest with Charles Evans Hughes, the confirmation of Herbert Hoover's nomination of Cardozo in 1932, shortly before the election of

Franklin Roosevelt, and the 1988 confirmation of Reagan's nomination of Justice Kennedy – a clear historical record supporting the need for the Senate to participate and vote on President Obama's nominee. These confirmations also provide strong historical precedent for the Senate's consideration of a nominee under the current circumstances and make clear the need for the Senate to consider President Obama's nominee.

Finally and most importantly, our nation requires clarity and certainty with respect to cases concerning the interpretation of the Constitution and application of federal civil rights laws. Historically, the Supreme Court, with a full complement of nine justices,[1] has proven to be the most important forum for resolving disputes regarding the legal rights that lie at the heart of our democracy, particularly those affecting protected minority groups.

Many of the most momentous pending cases during the current term involve highly controversial issues which might have been decided on a 5-4 basis, but could now result in a 4-4 tie or chosen for reargument until an unknown date after the vacancy were filled. Ties would leave controversial lower court decisions in place, but the state of the law uncertain; reargument could result in delays into the 2017 term. Such cases now pending could include issues involving race conscious admissions policies in higher education, the interpretation and application of "one person, one vote" in the apportionment and redistricting process, the constitutionality of state restrictions on abortion providers, the validity of executive actions affecting millions of undocumented immigrants, Dodd-Frank whistle blower protections, among others. It also could affect cases to be granted review for the October 2016 term. Leaving the vacancy unfilled also could affect future applications to the Court for emergency stays involving imminent executions of persons on death row or enforcement of government regulations—and of particular importance in this election year-- voting rights and election law decisions.

Indeed, numerous cases demonstrate the important role that the Court has played in resolving significant civil rights cases, often by a narrow 5-4 decision. *See Texas Department of Housing v. Inclusive Communities Project, Inc*., 575 U.S. --- (2015) (In a 5-4 decision, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. --- (2015) (In a 5-4 decision, the Supreme Court issued a ruling concerning Alabama's state legislative redistricting maps; the Court reinstated plaintiff's racial gerrymandering claim under the Equal Protection Clause and remanded the case to a lower court to evaluate the on a district-by-district basis rather than a statewide basis); *Lafler v. Cooper,* 566 U.S. --- (2012) (In a 5-4 decision, the Supreme Court ruled that a defendant could challenge his conviction resulting from his reliance upon his public defender's alleged ineffective assistance of counsel);

[1] The importance of having a tie-breaking vote to resolve critical issues of civil rights law extends to cases in which the Court decides against the Lawyers' Committee's position. *See*, for example, *Alexander v. Sandoval*, 532 U.S. 275 (2001), holding 5-4 that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI; and *Shelby County v. Holder*, 570 U.S. --- (2013), holding 5-4 that Section 5 of the Voting Rights Act of 1965 places an unconstitutional burden on the affected states without sufficient evidence of ongoing civil rights violations.

Grutter v. Bollinger, 539 U.S. 306 (2003) (In a 5-4 decision, the Supreme Court held that the Equal Protection Clause does not prohibit public higher education institutions' narrowly tailored use of race in admissions policies to further their compelling interest in obtaining the educational benefits that flow from a diverse student body); *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) (In a 5-4 decision, the Supreme Court held that courts may consider the entire scope of a hostile work environment claim under Title VII, including behavior alleged outside the 300 day statutory period, so long as any act contributing to the hostile environment takes place within the statutory period); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (In a 5-4 decision, the Supreme Court held that a post-removal period statute does not permit indefinite detention of the immigrant, but rather requires her release after a reasonable amount of time).

In all these cases, an eight-member Court may have resulted in a 4-4 tie, with the result that the decisions of the lower courts would have been affirmed without binding precedent for the country. The lower court decisions would have remained the law only in their jurisdictions, leaving uncertainty about the state of the law, and in some cases, a conflict among the circuits. Individuals whose lives were directly affected by the principles at stake would have been bound by decisions that were not authoritative. Individuals whose rights were at stake in subsequent cases would have been subject to a climate of legal uncertainty and potential unfairness.

The unfilled seat on the Court could also affect cases to be granted review for the October 2016 term. Leaving the vacancy unfilled also could affect future applications to the Court for emergency stays involving imminent executions of persons on death row or enforcement of government regulations—and of particular importance in this election year-- voting rights and election law decisions.

There are ten months remaining in President Obama's term. If required, the next President will inevitably take some time to choose a nominee, and the Senate will invariably take some time to act. Realistically, a nominee by the next President may not be confirmed until April 2017 or later, resulting in the vacancy resulting from Justice Scalia's death lasting for 14 months or longer. As we explain in the attached analysis, no vacancy during the 20th century has lasted more than a year except for exceptional circumstances caused by the rejection of a nominee. For these reasons, we strongly urge the Senate to carry out its constitutional role by providing full and fair consideration of the President's nominee.

Sincerely,

Kristen Clarke
President and Executive Director
Lawyers' Committee for Civil Rights Under Law

cc: Members of the United States Senate