



**Statement of Vicki Saporta
President & CEO, National Abortion Federation
Opposing the Nomination of Judge Neil Gorsuch to the Supreme Court
March 10, 2017**

The National Abortion Federation (NAF) strongly opposes the nomination of Judge Neil Gorsuch to become an Associate Justice of the United States Supreme Court. If confirmed, we believe Gorsuch would be a vote to overturn or considerably weaken the longstanding precedent of *Roe v. Wade*, thereby jeopardizing the lives and health of women and their families.

NAF is the professional association of abortion providers, and was founded in 1977. After *Roe*, abortion providers recognized the need for a national professional organization to set medical standards, increase women's access to abortion care, and give support to the pioneers of this new branch of medicine. Our groundbreaking founders included providers from across the country, faculty from medical schools, and abortion advocates. Since 1996, NAF has worked with our members to ensure compliance with our evidence-based *Clinical Policy Guidelines*, which set the standards for quality abortion care in North America. Today, our work supports the dedicated health care professionals who make reproductive choice a reality, as well as their patients.

For over forty years, *Roe* has protected the health and well-being of millions of women across our nation. Today, support for *Roe* is at a record high: seven in ten Americans oppose overturning *Roe*.¹ Despite this reality, the President and lawmakers across the country continue to push an anti-abortion agenda, which includes the nomination of Judge Neil Gorsuch.

President Trump created an ideological litmus test² for his judicial nominees, promising to only put forth Supreme Court nominees who would "automatically" overturn *Roe*.³ There is nothing in Gorsuch's record to suggest he will not do exactly that. In fact, in every case regarding women's health he has considered, he has reached an outcome that undermines reproductive freedom. Based on Judge Gorsuch's judicial philosophy, writings, record, and the circumstances of his nomination, it is clear Judge Gorsuch is a threat to safe, legal, and accessible abortion care.

"Looking Backward, Not Forward"

Gorsuch is an originalist who has said cases should be decided "looking backward, not forward" and should depend on what the law was understood to mean at the time it was written. He also believes that "in *Roe v. Wade* the Court did of course endorse a new right in the face of substantial contrary history."⁴ Together with his judicial philosophy, this statement indicates Gorsuch believes *Roe* was wrongly decided.

Unlike Gorsuch, we believe Supreme Court rulings should protect and even expand access to abortion care. Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care.

Prior to *Roe*, countless women died or experienced serious medical problems as a result of illegal abortion. Criminalization did not reduce the number of women who sought abortion care, but it did cause women to risk their lives and health to end an unintended pregnancy. Gorsuch's philosophy would send us back to a time when women made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments or in unsanitary conditions. Before 1973, women streamed into emergency rooms with serious complications — perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene — that resulted in sterility or even death in many cases.

One woman, Rita Mattia, recounted her experience during college after helping her friend access abortion before *Roe*:

"The next evening we feigned ignorance as we carried her limp body into the school infirmary; her fever was 104 and she had lost a great deal of blood. Looking back, I'm sure the nurse knew what had happened; I'm equally sure it was not nearly as rare an event as it should have been."

*"The doctors did manage to save her life, but our helpless and frightened friend lost her uterus at age 20 — 10 years before *Roe v. Wade*."*⁵

Physicians were also impacted and often had to respond to emergency medical situations created by the criminalization of abortion care. Although many decades have passed, there are still some physicians who can recall what it was like before abortion became legal across the country. Dr. David Grimes, who performed his first abortion in 1972, has written:

*"When I was in medical school in North Carolina, I got a page one night to tend to a patient with a 106 degree fever. I assumed that number was made in error. It wasn't. When I examined her I found a red rubber catheter protruding from her cervix. Another day, I was paged for a young co-ed in septic shock with barely any blood pressure. There was a fetal foot protruding from her cervix. The first had gotten an illegal abortion, the second had tried to do it herself."*⁶

Dr. Warren Hern recalls the desperate attempts at abortion many women made before 1973:

*"As a medical student in the early '60s, I was regularly taking care of women who were suffering and dying from the complications of illegal abortions. There was a woman who had been turned down for an abortion at a nearby hospital. She went home and shot herself in the uterus and then drove herself back to the hospital."*⁷

Reflecting on his time treating women before *Roe*, Dr. Eugene Glick wrote that:

*"I think the image that I retain was that of a 31-year-old Mexican-American woman who died of endotoxic shock with her husband and four or five children around," he says. "And that scene is in my mind and has been in my mind coming back all the time. I see the bed, I see the kids crying and I see the husband crying."*⁸

Beginning in 1970, four states repealed their anti-abortion statutes. In 1972, according to an analysis by the Guttmacher Institute, an estimated 50,000 women traveled more than 500 miles to obtain a legal abortion in New York City.⁹ This already burdensome option was only available to the small proportion of women who were able to pay for the procedure in addition to the expense of travel and lodging. Moreover, having to travel long distances often resulted in delaying the procedure, and if a complication occurred, the woman might already be in her home state, where it was likely that she would receive care from a physician with no abortion experience.

An anti-choice justice like Gorsuch would return women to the days when they had to deal with unimaginable and sometimes horrific conditions to receive abortion care. If *Roe* is reversed and the states

are allowed to set abortion policy, twenty-one states are likely to ban abortion almost immediately and nine states would be battlegrounds, effectively turning back the hands of time and sending women in those states to a bygone era.

The Retreat from *Roe v. Wade*

The importance of the Supreme Court at this time cannot be overstated. If Gorsuch is confirmed, the current flood of anti-abortion bills and resulting litigation would likely mean that numerous Supreme Court cases would be heard by this anti-choice judge during his lifetime appointment, which could have devastating consequences for decades to come.

Since abortion opponents have been unable to reverse *Roe* in its entirety, they have resorted to passing laws that chip away at the precedent — making it meaningless in many parts of the country. Even with the Supreme Court precedent in place, a woman's ability to access abortion care often depends on where she lives and whether she has the financial resources to afford the procedure in addition to the costs of travel and lodging, should they be necessary.

Since 2010, when anti-choice lawmakers took control of many state legislatures, abortion access has been under an unprecedented attack. Between 2011 and 2014, state lawmakers enacted 231 abortion restrictions. In 2016 alone, twenty-six states enacted 56 anti-choice measures. In part due to the recently enacted laws, at least 162 providers have closed from 2011 to 2016.¹⁰ Several states currently have just one abortion provider.

At a time when the core principles of *Roe v. Wade* are being eroded by elected officials, it is ever more important that the next Supreme Court justice be a candidate who will respect Supreme Court precedent and women's access to safe, legal abortion care.

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court issued an important decision in June 2016 that protected women's access to abortion care. This case challenged the constitutionality of HB2, a sweeping Texas measure that imposed numerous restrictions on access to abortion care, including requiring doctors to obtain admitting privileges at local hospitals no farther than 30 miles away from the clinic, and mandating that every health care facility offering abortion care meet building specifications to become ambulatory surgical centers. These requirements unfairly singled out abortion providers and did not apply to other comparable medical procedures or practices. HB2 resulted in the immediate closure of many facilities, and could have resulted in the closure of nearly 75 percent of the clinics in Texas — forcing some women to drive up to 300 miles one-way to obtain safe, legal abortion care.

The Supreme Court held that these restrictions were unconstitutional. As a result of the *Whole Woman's Health* decision, many clinics will be able to stay open. As this case clearly demonstrates, the Supreme Court is critical for maintaining women's access to abortion care.

Judge Gorsuch's Record

Planned Parenthood v. Utah: Gorsuch has demonstrated he will go to extraordinary lengths to reach a result that would block women's access to basic reproductive health care.¹¹ In 2015, Utah's Governor ordered that the state strip funding from the Planned Parenthood Association of Utah. A panel of the Tenth Circuit Court of Appeals granted a preliminary injunction to block the defunding efforts. Gorsuch took the highly unusual step of voting to rehear the three-judge panel's decision, even though neither the parties nor any judge on the panel requested a rehearing and the time for such a request had expired. In this instance, Judge Gorsuch was willing to ignore court custom to ensure that Utah's Governor could eliminate funding for Planned Parenthood.

Hobby Lobby v. Sebelius: Gorsuch joined the decision that laid the groundwork for the Supreme Court's decision in *Hobby Lobby v. Sebelius*. The Tenth Circuit held that corporations like Hobby Lobby — a craft store chain employing more than 13,000 people — can be “persons” with religious beliefs under the Religious Freedom Restoration Act (RFRA) and employers can use those religious beliefs to block employees' insurance coverage for birth control.¹² Gorsuch wrote a separate concurrence with a reading of RFRA that was extreme in how far it would apply the legislation and in the near absolute deference it would give claims of religious exercise,¹³ more extreme than either the Tenth Circuit or the Supreme Court.

Little Sisters of the Poor v. Burwell: In this case, Gorsuch sided with employers who challenged the accommodation to the birth control benefit, which allows certain employers to opt out of paying for insurance coverage, but is designed to ensure employees receive birth control coverage through their regular insurer.¹⁴ Contrary to the overwhelming number of courts of appeal that ruled to uphold the accommodation, Gorsuch joined a dissent that argued even the accommodation —which simply requires filling out a form to opt out — was a substantial burden on religious exercise under RFRA.¹⁵

Gorsuch's Writings off the Court

On personal autonomy: In his book, *The Future of Assisted Suicide and Euthanasia*, Gorsuch indicates he does not believe the Constitution should protect personal autonomy. The Supreme Court's decision in *Planned Parenthood v. Casey* rested in part on the plurality's argument that abortion is fundamental to principles of individual autonomy and “the right to define one's own concept of existence, of meaning, of the universe and of the meaning of human life.”¹⁶ *Casey* also affirmed that the Constitution protects those decisions that are among “the most intimate and personal choices a person may make in a lifetime.”¹⁷ This language has been cited in numerous Court decisions since then. Despite this legal precedent, Gorsuch argued in his book that the result in *Casey* was mainly due to *stare decisis*, or respect for settled law, and that the autonomy passage was “arguably inessential” to the decision.¹⁸

A deference to elected officials: In an article for the *National Review Online*, Gorsuch criticized “the Left” for advancing too many constitutional lawsuits and “relying on judges and lawyers rather than elected leaders and the ballot box.”¹⁹ Additionally, in the Planned Parenthood defunding case *Herbert*, Gorsuch suggested he would give politicians more leeway than other judges would, accusing the panel's majority of being “at odds with the comity federal courts normally afford the States and their elected representatives.”²⁰ Gorsuch's approach is especially troubling during a time when Congress is dominated by anti-abortion members, and when the Trump administration continues to pursue an agenda that pushes the boundaries of the Constitution. The courts are often the final safeguard against abuse of power. Therefore, any nominee to the Court must be an independent check when necessary on the President and on Congress. We do not believe Gorsuch will be the independent check women and families need and deserve.

Conclusion

The next Supreme Court justice will enter the reproductive health and justice debate at a critical time. Women deserve access to safe, high-quality abortion care and any nominee who cannot show with certainty that they will uphold Constitutional protections is not fit to sit on the bench. A Supreme Court seat is a lifelong appointment and comes with enormous power and influence. If Judge Gorsuch is confirmed, there will be grave consequences for women's lives and health for decades to come.

We call upon Senators to oppose the nomination of Neil Gorsuch and block his confirmation to the Supreme Court.

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- ¹ Pew Research Center, *About seven-in-ten Americans oppose overturning Roe v. Wade* (January 3, 2017), <http://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/>.
- ² When asked by Jake Tapper on CNN whether opposing abortion would be a litmus test for his Supreme Court nominees, Trump responded “It is.” CNN, Donald Trump on CNN’s State of the Union: “I’m in it to win it...I will make our country great again.” (June 28, 2015), <http://cnnpressroom.blogs.cnn.com/2015/06/28/donald-trump-on-cnns-state-of-the-union-im-in-it-to-win-it-i-will-make-our-country-great-again/>.
- ³ During his third Presidential debate, Trump was asked by Chris Wallace, “Do you want to see the Court overturn Roe v. Wade?” and he responded “Well, if we put another two or perhaps three justices on, that’s really what’s going to be -- that will happen. And that’ll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination.” Aaron Blake, The final Trump-Clinton debate transcript, annotated, The Washington Post (October 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/?utm_term=.f322094dec65.
- ⁴ Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2006) at 79.
- ⁵ Rita Mattia, Letter to the Editor, *Tragedy Occurred 20 Years Before Roe*, RICHMOND TIMES-DISPATCH, Saturday City Edition, Feb. 22, 2003, at A-12.
- ⁶ Alex Ronan, *The First Legal Abortion Providers Tell Their Stories*, NEW YORK MAGAZINE, Oct. 13, 2015, available at <http://nymag.com/thecut/2015/10/first-legal-abortionists-tell-their-stories.html>.
- ⁷ *Id.*
- ⁸ Felicia R. Lee, *Think Tank: Doctors who Performed Abortions Before Roe v. Wade*, THE NEW YORK TIMES, Oct. 4, 2003, at 9.
- ⁹ Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, GUTTMACHER INSTITUTE (March 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>.
- ¹⁰ Meaghan Winter, *Why it’s so hard to run an abortion clinic—And why so many are closing*, BLOOMBERG BUSINESS WEEK (February 24, 2016), <https://www.bloomberg.com/features/2016-abortion-business/>.
- ¹¹ *Planned Parenthood Ass’n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016).
- ¹² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).
- ¹³ *Id.* at 1152 (Gorsuch, J., concurring) (“Neither can there be any colorable question that the Greens face a ‘substantial burden’ on their ‘exercise of religion’”)(emphasis added).
- ¹⁴ *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10 Cir. 2015).
- ¹⁵ *Id.* at 1316.
- ¹⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).
- ¹⁷ *Id.*
- ¹⁸ See *supra* note 4, at 80.
- ¹⁹ Neil Gorsuch, *Liberals’N’Lawsuits*, NATIONAL REVIEW ONLINE (Feb. 7, 2005), <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.
- ²⁰ See *supra* note 13, at 1311.