

55 ORGANIZATIONS URGE SENATORS TO PROTECT REPRODUCTIVE FREEDOM AND KEEP NEIL GORSUCH OFF THE SUPREME COURT

March 14, 2017

Dear Senators:

We are 55 reproductive rights, health, and justice organizations writing to express our strong opposition to President Trump's nomination of Judge Neil Gorsuch to the Supreme Court. **We implore senators to do everything necessary to block this nomination.** Gorsuch has demonstrated he will go to extraordinary lengths to reach a result that would block women's access to basic reproductive healthcare. Moreover, Trump established an outrageous litmus test for his Supreme Court nominees: they must be committed to overturning *Roe v. Wade*. By selecting Gorsuch, a candidate put forward by the Federalist Society and the Heritage Foundation, Trump made it clear he believes Gorsuch passes this dangerous test and earned the applause of anti-abortion groups – including Americans United for Life, Susan B. Anthony List, and the extremist group Operation Rescue. Based on his record, writings, and the circumstances of his nomination, we believe Gorsuch would put reproductive freedom in grave danger and pose an imminent threat to our constitutional rights.

As a judge on the Tenth Circuit Court of Appeals, Gorsuch ruled on numerous cases related to reproductive freedom, and has been on the wrong side of every one of these decisions:

- In *Planned Parenthood Association of Utah v. Herbert*, Gorsuch sided with a politician who defunded Planned Parenthood in Utah, denying people access to STI tests, cancer screening, sex education, and other preventive care.ⁱ Gorsuch took the highly unusual step of voting to rehear the three-judge panel's decision that entered a preliminary injunction, even though neither the parties nor any judge on the panel requested a rehearing and the time for such a request had expired. In his dissent, he suggested he would give politicians more leeway than other judges would, accusing the panel's decision of being "at odds with the comity federal courts normally afford the States and their elected representatives."ⁱⁱ In this case, Gorsuch showed how far he will go for a ruling that puts limitations on reproductive health.

In three cases, Gorsuch voted in favor of the refusal of reproductive health care:

- Gorsuch joined the decision that laid the groundwork for the Supreme Court's now infamous decision in *Hobby Lobby v. Sebelius*. Citing *Citizens United*, 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 of birth control.ⁱⁱⁱ 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.^{iv} Gorsuch's reading went further than either the Tenth Circuit or the Supreme

Court.^v Since the Supreme Court's *Hobby Lobby* decision, there have been attempts to use RFRA to challenge laws that: protect women, LGBTQ individuals, and students from discrimination; promote public health by requiring vaccinations; and require pharmacies to fill lawful prescriptions.^{vi} If Gorsuch's reading had won the day, it would have opened the door even wider to allow individuals and companies to claim any number of laws do not apply to them.

- In *Little Sisters of the Poor v. Burwell*, 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.^{vii} 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 – is a substantial burden on religious exercise under RFRA.^{viii} Despite the fact that this case was about whether a woman has birth control coverage, the dissent claimed that the issue “has little to do with contraception.”^{ix}
- In *Druley v. Patton*, Gorsuch concurred with the Tenth Circuit's ruling against a transgender woman who was denied consistent access to hormone therapy while incarcerated. The ruling upheld the lower court's decision, which rejected the claims that the denial of health care was cruel and unusual punishment under the Constitution.^x

Gorsuch has also indicated hostility towards constitutional rights in his work off the bench:

- 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.”^{xi} *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.”^{xii} This language has been cited in numerous Court decisions since then, and now protects some of our most cherished rights, including the right to access birth control, to marry, to make decisions about how to rear one's children, to same-sex marriage, and to decide whether to have an abortion. 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^{xiii}, and that the autonomy passage was “arguably inessential” to the decision^{xiv}. Gorsuch wrote this despite the Court having recently relied on *Casey* to protect the right to consensual adult sexual intimacy in *Lawrence v. Texas*.^{xv}
- In an article for the National Review Online, Gorsuch criticized “the Left” for advancing too many constitutional lawsuits and described marriage equality as part of the liberal social agenda, writing, “American liberals have become addicted to the courtroom . . . as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.”^{xvi}

Now, more than ever, the courts must be an independent check on the other branches of government to protect constitutional rights. The Trump administration has already demonstrated it will take extreme, unprecedented, and discriminatory executive actions. Moreover, reproductive rights are under intense attack in Congress and in the states. Together, Gorsuch's rulings and writings show he will undermine, not protect, reproductive rights.

This nominee is not an independent or consensus candidate and would put reproductive freedom in danger. **We urge you to vigorously oppose the nomination of Neil Gorsuch to the Supreme Court.**

Sincerely,

Abortion Care Network
Access Reproductive Care-Southeast (ARC-Southeast)
Advocates for Youth
American Medical Student Association
California Women's Law Center
Catholics for Choice
Civil Liberties and Public Policy Program
Emergency Medical Assistance
Feminist Majority Foundation
Forward Together
In Our Own Voice: National Black Women's Reproductive Justice Agenda
International Women's Health Coalition
IntraHealth International
Lady Parts Justice League
Legal Voice
Mabel Wadsworth Center
Ms. Foundation for Women
Muslim American Women's Policy Forum
NARAL Pro-Choice America
National Abortion Federation
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights
National Council of Jewish Women
National Health Law Program
National Institute for Reproductive Health
National Latina Institute for Reproductive Health
National Network of Abortion Funds
National Organization for Women
National Partnership for Women & Families
National Women's Health Network
National Women's Law Center
New Voices for Reproductive Justice
Physicians for Reproductive Health
Planned Parenthood Federation of America
Population Connection Action Fund
Positive Women's Network - USA
Pro-Choice Resources
Raising Women's Voices for the Health Care We Need

Religious Institute
Reproductive Health Access Project
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Shift
SisterReach
SisterSong Women of Color Reproductive Justice Collective
SPARK Reproductive Justice Now!
The National LGBTQ Task Force Action Fund
URGE: Unite for Reproductive & Gender Equity
Washington Peace Center
Western States Center
Whole Woman’s Health
WIN (Women’s Information Network)
Women’s Health Specialists of California
Women’s Media Center
Young Women United

ⁱ Planned Parenthood Ass’n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016).

ⁱⁱ *Id.* at 1311.

ⁱⁱⁱ Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).

^{iv} *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).

^v *Id.* Unlike the 10th Circuit and the Supreme Court, Gorsuch argued in his concurrence that the religious exercise of the individuals who own Hobby Lobby was also burdened, although the birth control benefit requirements apply to the corporation, not the individual.

^{vi} Nat’l Women’s Law Ctr., The Hobby Lobby “Minefield”: The Harm, Misuse, and Expansion of the Supreme Court Decision 1 (2015), available at <https://nwlc.org/wp-content/uploads/2015/08/nwlclobbyreport2015.pdf> (last visited Feb. 28, 2017). See also Supplemental Brief For Appellees at 1-10, Stormans, Inc. v. Wiesman, No. 12-35221 (9th Cir. Jul. 28, 2014); Plaintiff’s Response To Presence Hospitals PRV’s Mot. To Dismiss The Complaint, George v. Kankakee Cmty. Coll., No. 14–CV– 2160 (C.D. Ill. Jul. 28, 2014); Comments from United States Conference of Catholic Bishops to Office of Federal Contract Compliance Programs (Mar. 30, 2015), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-SexMarch-2015.pdf>; Letter from Casey Mattox, Alliance Defending Freedom, et al. to the United States House of Representatives (Feb. 5, 2015) (on file with Nat’l Women’s Law Ctr.).

^{vii} Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10 Cir. 2015).

^{viii} *Id.* at 1316.

^{ix} *Id.*

^x Druley v. Patton, 601 Fed. Appx. 632 (10th Cir. 2015).

^{xi} Planned Parenthood v. Casey, 505 U.S. 833, 851(1992).

^{xii} *Id.*

^{xiii} NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2006). at 80.

^{xiv} *Id.*

^{xv} Lawrence v. Texas, 539 U.S. 558, 573-574 (2003).

^{xvi} Neil Gorsuch, *Liberals N’ Lawsuits*, National Review Online, Feb. 7, 2005, <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.