



AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY

**STATEMENT OF THE AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY IN
OPPOSITION TO THE CONFIRMATION OF
JUDGE NEIL GORSUCH TO THE UNITED STATES SUPREME COURT**

March 29, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The American Association for Access, Equity and Diversity (AAAED), an organization of equal opportunity, diversity and affirmative action professionals, must respectfully express its opposition to the Senate confirmation of Judge Neil Gorsuch to the United States Supreme Court.

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED is a national not-for-profit association of professionals working in the areas of equal opportunity, compliance and diversity. The longest-serving organization of individuals in the equal opportunity and diversity professions, AAAED has 43 years of leadership providing quality professional training to practitioners and promoting understanding and advocacy of affirmative action and other equal opportunity laws.

Given its mission, AAAED recognizes the utmost importance of the Supreme Court of the United States in fairly interpreting the laws regarding civil rights and civil liberties in the workplace, education, private industry, public accommodations and other sectors. From *Brown v. Board of Education of Topeka* (1954), to *Grutter v. Bollinger* (2003) and *Obergefell v. Hodges* (2015), the Supreme Court has been essential to the advancement of equal opportunity and social progress by extending Constitutional protections to all regardless of race, religion, ethnicity, sex, gender, disability, national origin or sexual orientation.

AAAED supports the statement of opposition to Judge Gorsuch's nomination that was released by the Leadership Conference on Civil and Human Rights on March 20, 2017.¹ AAAED is a member of this august organization of more than 200 entities. AAAED also supports the statement of the National Bar

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¹ <http://civilrightsdocs.info/pdf/policy/letters/2017/OpposeGorsuchconfirmationNational021517.pdf>

Association, the nation's oldest and largest legal group of predominately African-American lawyers and judges.² AAAED reiterates the concern expressed by these entities and others including the National Women's Law Center, that Judge Gorsuch shows a lack of impartiality and independence, as evidenced by his rulings on the Tenth Circuit as well as his speeches and publications. Moreover, as the National Bar Association wrote, Judge Gorsuch's speeches and writings "evidence a strong tendency to be biased in favor of powerful corporate interests and unapologetically biased against workers and victims of civil and human rights violations."³ In AAAED's view, Judge Gorsuch's record demonstrates that he leans heavily in favor of employers, for example, and tends to be dismissive of "discrete and insular minorities" who present discrimination claims in the courtroom, and who are most in need of the Court's protection to secure core Constitutional rights.

Among the cases that give us greatest concern regarding Judge Gorsuch's views of the rights of minorities, women, individuals with disabilities and workers are the following:

In *Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009), the majority held that Carole Strickland, a UPS account executive who sued UPS for sex discrimination and retaliation against her for taking two weeks of leave under the Family and Medical Leave Act (FMLA) for reasons related to stress, could proceed with both the FMLA and Title VII discrimination claim based on evidence that she was treated worse than male colleagues despite her outperforming them in sales. In his dissent Judge Gorsuch dismissed the evidentiary record and voted to dismiss the Title VII complaint, concluding that she had not proved that she was treated differently than similarly-situated men.

In the case of *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013) Judge Gorsuch joined the full court in ruling against women's rights and workers' rights, resulting in the denial of basic health services to thousands of female employees. According to Judge Gorsuch, Hobby Lobby, a closely-held, for-profit secular corporation did not have to comply with provisions of the 2010 Patient Protection and Affordable Care Act that require employers to provide contraceptive services. Citing the Religious Freedom Restoration Act of 1993 (RFRA), he ruled in favor of Hobby Lobby on the grounds that the provision of contraceptive services violated the company's sincerely held religious beliefs.⁴ Moreover, Judge Gorsuch indicated that not only the corporations but the individual owners could challenge the mandate to provide contraceptive services.

Fatima Goss Graves of the National Women's Law Center testified about the *Hobby Lobby* decision and Judge Gorsuch's opinion:

Judge Gorsuch joined the 10th Circuit in holding, under the Religious Freedom Restoration Act, that an employer's religious beliefs could override employees' right to birth control coverage, including an especially extreme holding that promoting gender equality and public health – the very goal of the birth control benefit – were not compelling government interests. His concurring

² https://drive.google.com/file/d/0BzFu_tEfOIORQjVsd2VqT0hxRzQwTXRMbl93Mkn0U05vc3k0/view

³ See also, National Women's Law Center, JUDGE NEIL GORSUCH'S RECORD ON WOMEN'S LEGAL RIGHTS: Confirms Trump's Promises – and Women's Worst Fears, <http://nwlc.org/wp-content/uploads/2017/03/NWLC-Report-on-the-Record-of-Judge-Gorsuch.pdf>

⁴ The U.S. Supreme Court affirmed the Tenth Circuit's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014).

opinion was stunning in its refusal to even acknowledge the health impact and financial burden on the women who would lose insurance coverage under his approach.⁵

As a result of this case, women were undoubtedly denied access to necessary health services. Moreover, by ruling that Hobby Lobby is an entity capable of holding a religious belief that can be violated, the Tenth Circuit prioritized the rights of a company over the rights of its workers. Judge Gorsuch's ruling in this case, like many others, raises a concern that he would lean more heavily in favor of the rights of corporations versus those of women, the LGBTQ community and minorities and use the RFRA to suppress the liberties of such groups in the future.

In interpreting the Individuals with Disabilities Education Act (IDEA) Judge Gorsuch has also demonstrated an alarming disregard for students with disabilities. He dismissed the cases of children seeking protections under the IDEA, ruling that students with disabilities such as autism are entitled only to a bare minimum education. In **Thompson R2-J School District v. Luke P.**, 540 F. 3d 1143 (10th Cir. 2008) he denied a student with autism the legal right to attend a private program that was deemed necessary for the child's education during a hearing of the Colorado Department of Education. According to Judge Gorsuch: "a school district is not required to provide every service that would benefit a student if it has found a formula that can *reasonably be expected to generate some progress* on that student's IEP goals." (Emphasis added.) Recently, the Supreme Court unanimously reversed the Tenth Circuit in the **Andrew F. v. Douglas County School District**, 580 U.S. ____ (2017), an IDEA case involving a child with autism, where the standard imposed by the Gorsuch court was to provide an education that was "merely ... 'more than de minimis.'" Judge Gorsuch's standard was exceedingly low and "would barely provide an education at all to children with disabilities," to quote Justice Roberts. Schools must provide a program that is "appropriately ambitious in light of his circumstances."⁶

Similarly, Judge Gorsuch demonstrated a callous disregard for the rights of a worker in the notorious **TransAm Trucking, Inc. v. Administrative Review Board**⁷ case involving a truck driver, Alphonse Maddin, who chose life versus remaining with his truck as ordered when his brakes failed to operate because of the cold and the heating was inoperative. Being "Textualist" as some have described him may have its virtues, but "this tendency 'can lead to findings that appear to defy common sense and fairness.'"⁸ This case also exemplified Judge Gorsuch's willingness to ignore agency interpretations in favor of his own.

⁵ Graves, NWLC Blog, My Testimony Before the Senate Judiciary Committee, March 24, 2017, <http://nwlc.org/blog/my-testimony-before-the-senate-judiciary-committee/>

⁶ See also February 1, 2017 letter of Gary S. Mayerson, pro bono attorney in the *R2-J School District* case, to Senator Charles Schumer. Mayer wrote: "Given Judge Gorsuch's low expectations and equally low education standards, he makes a poor choice to be considered for the high court." <http://mayerslaw.com/wp-content/uploads/2017/02/2-1-17-Letter-re-Supreme-Court-Nominee-Neil-Gorsuch.pdf>

⁷ <https://www.ca10.uscourts.gov/opinions/15/15-9504.pdf>

⁸ Christopher Coble, Esq., *Findlaw*, February 28, 2017, http://blogs.findlaw.com/free_enterprise/2017/02/how-might-gorsuch-rule-in-workers-rights-cases.html#sthash.kYXwXatG.dpuf. See also Art Gutman, DCI review of Judge Gorsuch's employment law cases, JUDGE NEIL GORSUCH'S RECORD ON EMPLOYMENT LAW AS A 10TH CIRCUIT COURT JUDGE, February 7, 2017, <http://dciconsult.com/judge-neil-gorsuchs-record-employment-law-10th-circuit-court-judge/>: "To me it looks like he's a stickler for the letter of the law. In other words, he impresses me as being much like Scalia was, and how Alito and Thomas continue to be." See also, AP, Notable Workers Rights Cases heard by Neil Gorsuch, February 25, 2017: "President Donald Trump's pick to fill a Supreme Court vacancy has heard dozens of workers' rights cases on the U.S. 10th Circuit Court of Appeals. Many conservatives hail Neil Gorsuch for sticking to the letter of the law and not letting personal views influence his rulings. Detractors note that he has, more often than not, sided with employers."

In a 2005 essay in *National Review*, prior to his appointment to the Tenth Circuit, Judge Gorsuch wrote the following:

American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected officials and the ballot box, 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. This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary.⁹

As an organization dedicated to the tenets of access, equity and diversity, which are embodied in our nation's civil rights laws and the United States Constitution, AAAED must take issue with Judge Gorsuch's critique of so-called "liberals" and their use of the courts to seek justice. Apart from the inappropriate use of political invective, a cursory review of our civil rights history would reveal that relying upon state and local legislatures for equal treatment was often an exercise in futility. Since the 1950s, it has been the United States courts that have, more often than not, served as the most effective forum for equal protection and due process of law on behalf of women and minorities.

Given the increasingly polarized nature of our state and national legislatures, the federal courts and the Supreme Court in particular are becoming the only recourse for women, people of color, the LGBT community, individuals with disabilities, religious minorities, immigrants, employees and other groups seeking equal treatment under the law. It is therefore essential that the individual who fills the vacant seat on the Supreme Court be prepared to defend the rights of all in a balanced and impartial fashion.

For the foregoing reasons we must respectfully oppose Judge Neil Gorsuch's nomination.

<https://www.apnews.com/216f83eb000341519a5bfe5f7732f5b3/Notable-workers'-rights-cases-heard-by-Neil-Gorsuch>

⁹ Gorsuch, *National Review*, "Liberals 'N' Lawsuits," <http://www.nationalreview.com/article/213590/>.