Lambda Legal
making the case for equality

March 16, 2017

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

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

RE: National LGBT Groups Oppose Confirmation of Judge Gorsuch to Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and people living with HIV, oppose the nomination of Judge Neil Gorsuch to be an Associate Justice on the United States Supreme Court. After a comprehensive review of Judge Gorsuch's record, we have concluded that his views on civil rights issues are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law.

We wish to call to your attention the following aspects of Judge Gorsuch's record and philosophy that are of particular concern to our organizations and our constituents, and that raise crucial questions of grave consequence to LGBT people, everyone living with HIV, and anyone who cares about these communities.

- *The Dangers of "Originalism."* Judge Gorsuch professes to be an "originalist."[1] This philosophy treats the Constitution as frozen in time, meaning that, unless the Constitution has been amended to explicitly protect certain rights, individuals have no more rights today than they did in 1789.[2] This philosophy essentially writes LGBT people out of the Constitution. A few examples of how Judge Gorsuch's approach would manifest itself in specific areas of the law illustrate why we believe that Judge Gorsuch poses such a grave threat to our community:

[1] *See* Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905 (2015).

[2] *See* Erwin Chemerinsky, *What Could Gorsuch Mean for the Supreme Court?: A backward jurist*, POLITICO (Feb. 1, 2017), available at http://www.politico.com/magazine/story/2017/02/neil-gorsuch-supreme-court-future-214724 ("Under originalism, no longer would there be constitutional protection for privacy, including reproductive freedom, or a right to marriage equality for gays and lesbians, and or even protection of women from discrimination under equal protection. None of these rights were intended by the framers.").

- *Fundamental Rights.* We are concerned that Judge Gorsuch's writings, including his book on assisted suicide,[3] reveal his open hostility toward the very existence of constitutionally protected fundamental rights. No one can read that book and come away with any reasonable doubt that Judge Gorsuch is deeply skeptical that our Constitution protects any fundamental rights beyond those expressly enumerated in the Bill of Rights. Among these unenumerated, yet well-established, fundamental rights are the rights to privacy, autonomy and self-determination, the right to parent, the right to procreative freedom, the right to engage in private consensual adult relationships, and the fundamental right to marry.

  Although these rights are important to everyone, they are essential for the LGBT community. These are the rights that have been the lynchpin of our legal progress and that underlie the series of decisions—from *Lawrence* to *Windsor* to *Obergefell*[4]—that have transformed the place of LGBT people in our society. Based on his extensive record, there can be no doubt that, had he been on the Court, Judge Gorsuch would have rejected each of these basic rights. Indeed, as discussed further below, he has been openly critical of same-sex couples for even seeking to vindicate their constitutional rights, including the right to marry, through litigation.

  We urge the Committee to press Judge Gorsuch to explain on his views about fundamental rights. For example:

  - Does he believe that there is a fundamental right to privacy, and if so, does the right as he understands it protect consensual adult sexual relationships?
  - Does he believe that the Constitution protects a fundamental right to marry? The right to access contraception? The right to decide whether to continue a pregnancy?

  Judge Gorsuch's articulated judicial philosophy is far outside the legal and social mainstream, and would significantly disrupt Americans' expectations about the rights that they enjoy under the Constitution. His views should be as frightening to others as they are to the LGBT community. The Committee should require Judge Gorsuch to explain what he means when he describes himself as an "originalist."

- *Equal Protection.* An originalist view is hostile to the notion that laws targeting historically disfavored groups warrant any form of heightened scrutiny, with the exception of laws that discriminate on the basis of race. Because, in his view, the drafters of the Fourteenth Amendment did not intend to prohibit sex discrimination, Justice Scalia

[3] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (2009).

[4] *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).

regularly voted against heightened constitutional protections for women.[5]

Judge Gorsuch has praised Justice Scalia, and presumably shares the late Justice's view that laws targeting women for discrimination should receive nothing more than so-called "rational basis review." In a 2016 article, Judge Gorsuch praised Justice Scalia's approach to equal protection, and agreed that "judges should . . . strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[6]

The suggestion that sex-based classifications should not trigger heightened judicial scrutiny discrimination is far outside the mainstream, and has been rejected by the Supreme Court on numerous occasions.[7] If Judge Gorsuch adheres to Justice Scalia's view that laws discriminating on the basis of gender should not be subjected to heightened scrutiny, then Judge Gorsuch would certainly find nothing wrong with laws that single out LGBT people for discrimination, so long as someone somewhere could conjure up some other reason for passing such a law.

On numerous occasions, the Supreme Court has struck down laws that were passed to make LGBT people "strangers to the law"—an anti-gay ballot initiative in Colorado,[8] discriminatory state marriage laws,[9] and a federal law prohibiting recognition of same-sex couples' marriages.[10] What level of scrutiny would an "originalist" like Judge Gorsuch apply to such laws? Judge Gorsuch should be asked to state his views on the record and required to explain how this approach can possibly be squared with existing Supreme Court precedents striking down laws that single out LGBT people for harmful, unequal treatment.

- *Role of Courts.* Compounding the damage that would result from such a narrow view of the Constitution, Judge Gorsuch has expressed disapproval of people resorting to the courts at all to vindicate their civil rights. For example, in 2005, Judge Gorsuch wrote that "American liberals have become addicted to the courtroom . . . as the primary means

[5] *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Scalia, J., dissenting, joined by Justice Thomas and Chief Justice Rehnquist) (arguing that state's use of peremptory strikes on the basis of gender in jury selection did not violate Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting).

[6] *See Of Lions and Bears, supra* note 1.

[7] *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)); *see also United States v. Virginia*, 518 U.S. 515 (1996) (referring to the Court's "skeptical scrutiny" and the "demanding" burden of justification on the State).

[8] *See Romer v. Evans*, 517 U.S. 620 (1996).

[9] *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[10] *See United States v. Windsor*, 133 S. Ct. 2675 (2013).

> of effecting their social agenda on everything from gay marriage" to other issues.[11] He has also called private civil rights litigation "bad for the country."[12] How can any members of historically persecuted groups, including LGBT people, have confidence that Judge Gorsuch would approach their specific cases with an open mind? The Committee should press these issues in the hearing, as this appointment would last long beyond the term of this particular President. Rather, the damage that could be done by this nominee could span generations.

In numerous other areas as well, Judge Gorsuch poses a significant threat to the LGBT community. In fact, his views are even more extreme and outside the mainstream than Justice Scalia's, whom Judge Gorsuch is proposed to replace.

- *Approach to Statutory Construction.* Justice Scalia was a strict textualist, which meant he viewed as irrelevant whether Congress intended a particular understanding and application of the law. Instead, he focused simply on the words of the law as written. Consequently, Justice Scalia found that Title VII's prohibition on sex discrimination applies to same-sex sexual harassment even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII."[13] Justice Scalia also observed, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[14]

  As set forth in the letters of other civil rights groups, Judge Gorsuch has taken an extremely narrow view of civil rights laws.[15] Indeed, one *Stanford Law Review* article analyzing his civil rights jurisprudence concluded:

  > Judge Gorsuch presents himself as a restrained judge. But that "restraint" often translates to extreme results when applied to legal rights open to interpretation. By attempting to hew to the narrowest reading of rights-creating text, Judge Gorsuch creates new understandings of the law, leaving

[11] Neil Gorsuch, *Liberals'N'Lawsuits*, NAT'L REVIEW ONLINE (Feb. 7, 2005), available at http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

[12] *Id.*

[13] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998).

[14] *Id.* at 79-80.

[15] *See, e.g.,* Letter from The Leadership Conference on Civil and Human Rights to Charles Grassley & Dianne Feinstein (Feb. 15, 2017) ("Leadership Conference letter"); Letter from the Nat'l Educ. Ass'n to U.S. Senate Comm. on the Judiciary (Mar. 9, 2017); Letter from the Nat'l Council of Jewish Women to Mitch McConnell, Charles Schumer, Charles Grassley & Dianne Feinstein (Mar. 9, 2017); Letter from the People for the Am. Way to Mitch McConnell, Charles Schumer, Charles Grassley & Dianne Feinstein (Mar. 9, 2017); and Letter from the Bazelon Ctr. for Mental Health Law to Charles Grassley & Dianne Feinstein (undated).

> litigants with limited access to courts and restricting the reach of constitutional and statutory protections.[16]

Although he claims to be an adherent of Justice Scalia's philosophy, would Judge Gorsuch agree that laws like Title VII "often go beyond the principal evil to cover reasonably comparable evils," or would he, true to his Court of Appeals record, adopt an artificially narrow reading of the statute's text in order to achieve his preferred, backwards-looking policy outcome? The Committee should press him on this point, as the civil rights of millions of Americans hang in the balance.

- *Religious Exemptions from Laws that Someone Believes Would Make Them "Complicit" in Actions of Others*. In *Employment Division v. Smith*, Justice Scalia wrote that the First Amendment has never given individuals a right to opt out of laws that, in their view, burden their exercise of religion.[17]

  Yet, in his 10th Circuit decision in *Hobby Lobby*, Judge Gorsuch insisted instead that any individual should be able to opt out of any law that, in that person's view, makes them "complicit" in conduct of another considered to be immoral, regardless of how compelling the state's interest in enforcing the law.[18] In *Hobby Lobby*, that meant a large for-profit corporation could ignore the requirement in the Affordable Care Act that employer-provided health insurance for employees must include coverage for birth control among basic care options. Fortunately, the Supreme Court did not adopt Judge Gorsuch's extreme approach, and made clear that an individual's claim of religious liberty may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[19]

  The Committee should interrogate Judge Gorsuch on his position in this area, as his views on "religious complicity" go well beyond anything that currently exists in American jurisprudence. For example:

  - Does employer-provided health care that includes infertility care make an employer "complicit" in a decision of a non-married couple to have children out of wedlock?
  - Would a law requiring that gender transition-related health care not be excluded from employee health plans make the employer "complicit" in an employee's decision to undertake a gender transition?
  - Does providing health insurance coverage for an employee's same-sex spouse make an employer "complicit" in that employee's same-sex relationship?

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[16] Maria Buxton, Hannah Kieschnick & Robyn D. Levin, *Judge Gorsuch and Civil Rights: A Restrictive Reading*, 69 STAN. L. REV. ONLINE 155 (2017), available at https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/03/69-Stan.-L.-Rev.-Online-155.pdf.

[17] 494 U.S. 872 (1990).

[18] *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1152-56 (10th Cir. 2013) (Gorsuch, Kelly, Tymovich, J.J., concurring).

[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

- Does providing coverage for medications such as PrEP, which prevents HIV infection, make an employer "complicit" in the employee's private sexual conduct?

The American people are entitled to know more about Judge Gorsuch's views on these subjects, so that they can understand how his approach could potentially impact their rights and their daily interactions with employers, physicians, and other service providers.

Finally, there are other areas where Judge Gorsuch's views appear to be far outside the mainstream, and to warrant vigorous inquiry:

- *Relevance of Science to Legal Decision-Making*. Judge Gorsuch signed onto an opinion holding that a transgender woman in prison whose hormone therapy was interrupted did not suffer irreparable harm.[20] And yet that conclusion flies in the face of the internationally-recognized Standards of Care of the World Professional Association of Transgender Health.[21] We would urge the Committee to ask Judge Gorsuch to clarify whether and when he thinks that medical or social science standards are relevant to legal decision-making. For example:

  - Would Judge Gorsuch credit the three decades of social science scholarship confirming the parenting skills of LGBT people, or would he disregard these facts?
  - What about current public health understanding of how HIV is transmitted? Would Judge Gorsuch require some basis in fact for state laws concerning HIV transmission, or would he allow states to legislate based on fear and ignorance?

  The Committee should insist that Judge Gorsuch explain his judicial philosophy in general on this question and how he would approach these and similar cases.

- *Employer Defenses to Claims of Discrimination*. Numerous other groups have identified examples of Judge Gorsuch's reluctance to enforce civil rights laws that protect workers.[22] One example in particular raises unique concerns for our community. In *Kastl v. Maricopa County Community College District*,[23] Judge Gorsuch signed onto an opinion rejecting a transgender woman's claim of discrimination. In that case, the school denied her access to the women's restroom, and claimed that it had a non-discriminatory reason for doing so unrelated to her "sex"—"safety concerns" due to the discomfort-based complaints of other students.

[20] *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015).

[21] WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 68 (7th ed. 2012) ("The consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy when medically necessary include a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria, and/or suicidality.").

[22] *See, e.g.*, Leadership Conference letter, *supra* note 15.

[23] 325 F. App'x 492, 493 (9th Cir. 2009).

> The notion that the discomfort of co-workers or customers is sufficient to defeat a claim of discrimination is not only incorrect, it is wholly inconsistent with decades of jurisprudence.[24] The suggestion that vague concerns about "safety," privacy" or "discomfort" could be enough to satisfy an employer's burden of proof in a discrimination case not only suggests a hostility to victims of discrimination generally, but also undermines any confidence that one might have that an LGBT person could receive a fair hearing before Judge Gorsuch. The Committee should insist that Judge Gorsuch answer these and other important questions about his approach to labor and employment law.

The American people have a right to know how the appointment of Judge Gorsuch to the Supreme Court would impact the rights of LGBT Americans, people living with HIV, and other at-risk communities who are entitled to rely upon the Constitution's guarantees of equality, liberty, dignity and justice under the law. We urge the Committee to demand complete answers from Judge Gorsuch to the important questions that we and others have raised. Only by insisting that Judge Gorsuch answer these questions will the Committee fulfill its responsibility to the American people, and reveal the extent to which his nomination jeopardizes rights and liberties that many Americans believe are secure.

Thank you for considering our views on this important issue.

Very truly yours,

Lambda Legal
CenterLink: The Community of LGBT Centers
Equality California
Equality Federation
Family Equality Council
GLBTQ Legal Advocates and Defenders (GLAD)
GLSEN
Human Rights Campaign
National Black Justice Coalition
The National Center for Lesbian Rights
National Center for Transgender Equality
National LGBTQ Task Force Action Fund
National Queer Asian Pacific Islander Alliance
OutServe-SLDN
PFLAG National
Pride at Work
Services and Advocacy for GLBT Elders (SAGE)
Transgender Law Center
Transgender Legal Defense & Education Fund

[24] *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

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The Trevor Project
Victory Institute

cc: United States Senate Judiciary Committee Members