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Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Feminist Majority Foundation, a national organization dedicated to women's equality, reproductive health, and non-violence, we write to express strong opposition to the nomination of Judge Neil Gorsuch to serve as an Associate Justice of the U.S. Supreme Court.

Judge Gorsuch's record as an appellate judge raises significant concerns about his ability to hear and decide cases free from ideological bias. Any nominee to the Supreme Court must demonstrate an ability to be open-minded and impartial, and have a record that exhibits an evenhanded application of the law consistent with our constitutional values of liberty, equality and justice for all. A review of Judge Gorsuch's record, however, gives reason for alarm.

Throughout his career, Judge Gorsuch has shown hostility to women's equality and reproductive rights. As a judge on the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch joined the majority opinion in ***Hobby Lobby Stores, Inc. v. Sebelius***,[i] holding that closely-held, for-profit corporations are persons that can exercise "religious freedom" to refuse coverage for birth control as part of their employer-sponsored health insurance plans, coverage that was made mandatory as part of the Affordable Care Act (ACA). Although this view was narrowly upheld by the Supreme Court,[ii] the Tenth Circuit went further than the Supreme Court in its decision. In particular, the appellate court, joined by Judge Gorsuch, shockingly found that in the context of the ACA birth control benefit, the government's interest in promoting gender equality was not compelling,[iii] a question that the Supreme Court majority in *Burwell v. Hobby Lobby* thought unnecessary to reach.[iv]

Judge Gorsuch also wrote a separate opinion in in the *Hobby Lobby* case that went even further than both the Tenth Circuit majority opinion and the Supreme Court ruling. In his concurring opinion, Judge Gorsuch explained that he would allow any individual—not just religious institutions or closely-held, for-profit corporations—to challenge the birth control mandate on religious grounds. In explaining his position, Judge Gorsuch wrote:

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the *wrongdoing of others*. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. . . .Understanding that is the key to understanding this case.[v]

In these few sentences, Judge Gorsuch suggests an enormous amount of deference to religion over the rights of women, not just with respect to accessing basic reproductive healthcare, but with respect to any statutory right that women, or for that matter LGBTQ individuals, might enjoy. If there is to be democracy for all, there cannot be theocracy for women, with any individuals' religious views dictating which rights women can enjoy.

Further, Judge Gorsuch's words ignore our nation's troubling history of using religion to suppress the rights of others, in particular women and minority groups.[vi] Although respect for religious freedom is deeply rooted in our constitution and history, as a society, we also take seriously our commitment to protecting the basic rights of every person. Judge Gorsuch's broad statement, which characterizes the lawful use of birth control as "wrongdoing," and then goes on to sympathize with the interests of just one party to a dispute, ignoring the government's interest in ensuring that women have equal access to preventive health services as men, should give us pause. Such a statement does not reflect a judge serving free from ideological or personal bias.

Unfortunately, the *Hobby Lobby* decision and concurring opinion are not outliers in Judge Gorsuch's record. Two years after the *Hobby Lobby* case, Judge Gorsuch joined a dissent from an opinion denying en banc review in ***Little Sisters of the Poor Home for the Aged v. Burwell***.[vii] In that case, a Tenth Circuit panel had upheld the accommodation to the ACA birth control benefit for religiously-affiliated non-profit organizations. The accommodation completely relieves religiously-affiliated nonprofits of their obligation to provide insurance coverage of birth control to their employees. All these organizations have to do is inform the Department of Health and Human Services, their health insurance issuer, or in the case of the Little Sisters of the Poor, their third party administrator, of their intent to opt-out by signing a simple one-page form. The accommodation allows the employee and their dependents to receive coverage of birth control, but ensures that the objecting employer does not pay for that coverage.

Again, showing wide deference to religion, Judge Gorsuch joined a dissenting opinion arguing that the mere act of signing a form substantially burdened the free exercise of religion. Judge Gorsuch would have forced the Tenth Circuit to rehear the case, an outcome not even sought by the plaintiffs who had already petitioned the Supreme Court. In 2015, the U.S. Supreme Court granted certiorari to *Little Sisters of the Poor*, which was one of the seven cases consolidated in *Zubik v. Burwell*. During its last term, however, the Court returned these cases to the lower courts where they are still pending.[viii] These cases could return to the Supreme Court at a later date.

Judge Gorsuch also wrote a troubling dissent in a case involving the defunding of Planned Parenthood of Utah based on widely discredited, misleading videos that falsely accused Planned Parenthood of selling fetal tissue. In ***Planned Parenthood Association of Utah v. Herbert,*** a Tenth Circuit panel granted a preliminary injunction that prevented defunding.[ix] The Tenth Circuit then considered whether to rehear the case en banc, even though neither the state of Utah nor Planned Parenthood requested a rehearing or review. The Tenth Circuit denied the rehearing, but Judge Gorsuch vehemently disagreed.[x] Judge Mary Briscoe, writing in support of the denial, said Judge Gorsuch had "mischaracterize[d] this litigation and the panel opinion at several turns" in reaching his result.[xi] Judge Gorsuch's dissent raises serious concerns about his judgment and about the lengths to which he would go to reach a result to block women's access to reproductive health care.

These three cases show a callous disregard for women's constitutional right to birth control, something fundamental to women's health, dignity, economic security, and basic equality. Judge Gorsuch does not have a track record as a judge on the right to abortion, but if his treatment of birth control access is any guide, women have much to fear.

President Donald Trump, of course, has promised to nominate judges committed to overturning ***Roe v. Wade***.[xii] This outrageous litmus test puts women's lives on the chopping block and shows deep disrespect for women's constitutionally protected rights and liberties. Yet, Judge Gorsuch's record suggests that he would stop at nothing to carry out President Trump's political agenda and overturn *Roe* if given the opportunity.

Not only has Judge Gorsuch's opinions, so far, on reproductive rights been questionable, but his nomination has been praised by several anti-abortion groups, including Americans United for Life,[xiii] Susan B. Anthony List,[xiv] and the extremist group Operation Rescue,[xv] whose head, Troy Newman, served as a founding board member and advisor to the Center for Medical Progress, the group responsible for the malicious videos at the center of *Planned Parenthood Association of Utah v. Herbert*.

Judge Gorsuch's writings also suggest that he does not respect the basic foundations of our constitutional right to abortion, the same foundations that undergird the right to access birth control, the right to love whomever you choose, and the right to marriage equality. These principles were clearly articulated in ***Planned Parenthood v. Casey***, in which a plurality of the Court explained that abortion is fundamental to individual autonomy safeguarded by the Fourteenth Amendment, and that the constitution protects each of our right to decide for ourselves matters "involving the most intimate and personal choices a person may make in a lifetime," including decisions about procreation, marriage, and family.[xvi]

In his writings, however, Judge Gorsuch wrote that there was a "colorable argument" that the discussion of individual autonomy in *Casey* was "inessential" to the decision.[xvii] In other words, Judge Gorsuch did not think, as Justices O'Connor, Kennedy and Souter did, that "the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and the mystery of human life."[xviii] Instead, Gorsuch indicated that *Casey* was decided in favor of

abortion rights because of the technical precedent set by the decision in *Roe*—not because the Constitution protects this kind of liberty, and therefore protects the right to abortion.[xix]

Simply put, Gorsuch's understanding of *Casey* calls into question whether Gorsuch accepts that the right to abortion is actually rooted in the Constitution. If it is not, then nothing would prevent Gorsuch from attempting to overturn *Roe*. Even more alarming is that the same principles that underlie the constitutional right to abortion underlie many other rights enjoyed by millions of Americans, including birth control, and form the basis of the opinions in *Lawrence v. Texas*, recognizing the right of lesbians and gay men to make intimate, personal decisions, and *Obergefell v. Hodges*, recognizing the right of same-sex couples to marry.[xx]

Justices on the Supreme Court, the most powerful court in our nation, must display the greatest respect for our constitutional rights and values, and must serve the interests of all, including women and millions of everyday people. As the final arbiter of justice in the United States, the Supreme Court serves as an important backstop against erosion of our constitutional and statutorily protected rights. The Court is specifically designed to be immune to majoritarian rule so that it can protect the rights of those most vulnerable in our society, including women, people of color, immigrants, people with disabilities, and LGBTQ individuals.

Judge Gorsuch, however, has shown open disdain for people attempting to assert their civil and constitutional rights. In an article published in the National Review Online, Gorsuch wrote that "liberals" have "an overweening addiction to the courtroom as the place to debate social policy," including gay marriage, assisted suicide, and private-school vouchers.[xxi] A judge who believes that individuals should not bring their claims of discrimination to the courts, is a judge who does not belong on the Supreme Court. That Gorsuch reserved his rancor for those he defined as "liberals," is even more alarming.

The public deserves a Supreme Court Justice who will uphold the constitution, protect the rights of all people, and be an objective voice, independent from the President and free from personal bias and ideology. Neil Gorsuch is not that judge. His record shows hostility to women's equality and reproductive rights; disrespect for our constitutional values; and disdain for those who seek justice. We urge you to oppose this nomination.

Sincerely,

Eleanor Smeal
President

Gaylynn Burroughs
Director of Policy & Research

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[i] 723 F.3d 1114 (10th Cir. 2013) (en banc).
[ii] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).
[iii] 723 F.3d 1114 at 1143-44.

[iv] Writing for the majority, Justice Samuel Alito explained that the court need not adjudicate whether the government had asserted a compelling interest that would satisfy the Religious Freedom Restoration Act, 134 S.Ct. at 2779-80, but nonetheless the majority in its analysis assumed that the government had satisfied this requirement, *id.* at 2759.

[v] 723 F.3d at 1152 (emphasis added).

[vi] *See e.g.,* Zaid Jilani, How Religious 'Liberty' Has Been Used to Justify Racism, Sexism and Slavery Throughout History, *Alternet* (Apr. 6, 2015), http://www.alternet.org/belief/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history; Matt Baume, Blast From The Past: States Using 'Religious Freedom' to Justify Segregation, *The Huffington Post* (Mar. 26, 2015), http://www.huffingtonpost.com/matt-baume/states-using-religious-freedom-to-justify-segregation_b_6946658.html.

[vii] F.3d 1215 (10th Cir. 2015).

[viii] *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (per curiam).

[ix] *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016).

[x] *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016).

[xi] *Id.* at 1303.

[xii] Dan Mangan, Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case, *CNBC* (Oct. 19, 2016), http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

[xiii] Americans United for Life, *AUL Says Public Record Shows Neil Gorsuch, "a Jurist in the Tradition of Antonin Scalia,"* Jan. 31, 2017, http://www.aul.org/2017/01/aul-says-public-record-shows-neil-gorsuch-a-jurist-in-the-tradition-of-antonin-scalia/.

[xiv] Susan B. Anthony List, *SBA List Praises Neil Gorsuch as Supreme Court Pick: President Trump Fulfills Promise to Nominate Pro-Life Supreme Court Justice*, Jan. 31, 2017, https://www.sba-list.org/newsroom/press-releases/sba-list-praises-judge-neil-gorsuch-supreme-court-pick.

[xv] Operation Rescue, *Operation Rescue Applauds Trump's Nomination of Gorsuch to the U.S. Supreme Court*, Jan. 31, 2017, http://www.operationrescue.org/archives/operation-rescue-applauds-trumps-nomination-of-gorsuch-to-the-u-s-supreme-court/.

[xvi] 505 U.S. 833, 851 (1992). *See also id.* at 923 (Blackmun, J., concurring).

[xvii] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2006) at 80.

[xviii] 505 U.S. at 851.

[xix] *See* Alliance for Justice, *The Gorsuch Record* (Feb. 1, 2017) at 20, http://www.afj.org/wp-content/uploads/2017/02/The-Gorsuch-Record.pdf.

[xx] Nancy Northup and Rachel B. Tiven, If Abortion Rights Fall, LGBT Rights Are Next, *Washington Post* (Feb. 22, 2017), https://www.washingtonpost.com/opinions/if-abortion-rights-fall-lgbt-rights-are-next/2017/02/22/7d976f5c-f479-11e6-b9c9-e83fce42fb61_story.html?utm_term=.b91b21477c4c.

[xxi] Neil Gorsuch, Liberals'N'Lawsuits, *National Review Online* (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.