

# ***NELA/Illinois***

Advocates for employee rights

A proud affiliate of the National Employment Lawyers Association

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March 20, 2017

Via Email

The Honorable Chuck Grassley  
135 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
331 Hart Senate Office Building  
Washington, D.C. 20510

Re: Nomination of the Honorable Neil Gorsuch to the United States Supreme Court

Dear Senator Grassley and Senator Feinstein:

We write to oppose the nomination of Neil Gorsuch to the United States Supreme Court. We submit this letter on behalf of NELA-Illinois, the National Employment Lawyers Association Illinois Affiliate. We ask that you share it with members of your committee.

We are a bar association of over 150 employment lawyers who practice employment law in or around Illinois. Our members and clients range across the political spectrum. Our members' employment law practice is mostly on behalf of employees or individuals (not employers or companies), but our members' clients include businesses, as well as workers of all stripes – laborers, professionals, executives and even CEOs and business owners. NELA-Illinois is concerned about the impact that Judge Gorsuch's ideological positions will have upon Supreme Court jurisprudence and the economic and civil rights of all American employees.

The Supreme Court must have Justices who, whatever their political views, will serve as neutral checks on the power and views of the Executive and Legislative branches, uphold the spirit of the Constitution, and protect the rights of individual Americans that Congress grants them. We have serious reservations about Judge Gorsuch's ability to do so.

Although it has been suggested that Judge Gorsuch is a “strict constructionist” who is guided by the intent of drafters of legislation, his judicial opinions demonstrate a propensity to engage in judicial activism when doing so advances his worldview. Nowhere is Judge Gorsuch’s judicial activism more pronounced than in his concurrence in the Tenth Circuit’s *en banc* decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152-59 (10th Cir. 2013) (“Hobby Lobby”).

As Members of the 103rd Congress are aware, the intent of the Religious Freedom Restoration Act (“RFRA”) was to preserve the religious rights of Americans who are human beings, in particular Americans who are members of religious minorities. RFRA’s authors never intended the law to extend religious protection to for-profit corporations. Judge Gorsuch’s concurrence, which espouses extending religious rights to corporations, not only disregards the intent of RFRA’s drafters, but also displays a fundamental bias favoring the rights of companies over the rights of human beings. That mindset, if applied to employment laws, could have a devastating effect on laws affecting the workplace.

Judge Gorsuch also expressed views regarding women in the workplace that are incompatible with a host of individuals’ rights Congress determined warrant protection. As Jennifer Sisk’s and Barry Roseman’s letters to this Committee explain, Judge Gorsuch made comments to law students reflecting beliefs that women take advantage of employers to obtain health insurance before leaving the workforce after pregnancies and that employers should be able inquire about female employees’ family plans to protect the company.

Those beliefs are fundamentally inconsistent with the purposes and language of Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and The Family and Medical Leave Act. Those laws express Congress’s repeated determination that such antiquated beliefs do not belong in America’s workplaces. Through that legislation, Congress protected women’s (and men’s) rights to start and grow families without fear of losing their employment.

In making such comments as a teacher of law students, Judge Gorsuch demonstrated that his personal beliefs may influence how he may use power bestowed upon him. While not part of his judicial record, Judge Gorsuch’s comments regarding the role and rights of women in the workplace are more likely to accurately reflect his personal beliefs. This Committee owes it to working women to investigate and examine those beliefs.

The American dream is founded on the ideal that people – men and women – can do anything they set out to do, however, the reality is that employment choices are often constrained by family, community, and social ties, as well as education and training. Consequently, many Americans must accept the employment they can find and have little bargaining power, if any, over the terms of their work.

Once workers find jobs, they can be fired for any reason, no reason, a bad reason, or an immoral reason -- and severance payments are the exception, not the norm. But employers covered by the above-referenced laws cannot fire or retaliate against employees for deciding to fulfill a portion of the American Dream by starting a family.

As health insurance is usually tied to employment, this means that employees can lose their families' health insurance for any reason, no reason, a bad reason, or an immoral reason. Honest, hard work does not guarantee job security or basic health insurance.

The law provides only limited employee rights: basic health and safety protections, minimum wage protection, some protection against discrimination, and extremely limited whistleblower protections. Those narrow rights, however, become meaningless without judicial enforcement.

Judicial enforcement is impossible when judges believe that corporations and individuals have equal bargaining power, or when judges ignore the gross disparities between individual workers and the corporations on which workers' livelihoods depend. This is why Judge Gorsuch's concurrence in the *Hobby Lobby* decision and his other decisions are so troubling. And his comments to laws students suggest he disagrees with Congress's intent as expressed Title VII, the Pregnancy Discrimination Act and The Family and Medical Leave Act.

Although Judge Gorsuch writes movingly about the religious beliefs of the owners of *Hobby Lobby*, the opinion ignores the religious beliefs and health needs of the over 20,000 individuals who work for the company. Most employees depend on employer provided health care and 62% of women of childbearing age use birth control. IUDs are among the most reliable and most expensive methods of birth control. The question unanswered by the *Hobby Lobby* decision is why low-wage workers, with little economic bargaining power, should bear the burden of paying for their employer's religious beliefs. And his comments to law students call his beliefs about the equality of women in the workplace into question.

Our members are concerned that Judge Gorsuch's jurisprudence will continue to strengthen the rights of corporations at the expense of individuals – particularly working women. We worry about economic discrimination against members of the LGBTQ community and members of religious minorities.

Our members remember a time when businesses could discriminate on religious grounds against pregnant women, interracial couples, Jews, and Catholics. American workers became freer, and our economy stronger, when our country outlawed that discrimination. The appointment of the next Supreme Court Justice will set a tone for the future. We believe that Judge Gorsuch will roll back, rather than advance, the economic rights of individual Americans.

We encourage members of the Judicial Committee to thoroughly investigate these views and therefore oppose his confirmation. We urge the Committee, and the Senate, to carefully and thoroughly consider these issues and ask Members to vote against Judge Gorsuch's confirmation to the United States Supreme Court.

Hon. Chuck Grassley  
Hon. Dianne Feinstein  
March 20, 2017  
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Thank you for your consideration of our views.

Very truly yours,

*Matthew D. Lango*

Matthew Lango  
President, NELA-Illinois

c.c.

Hon. Dick Durbin

Hon. Tammy Duckworth