

**TESTIMONY OF FATIMA GOSS GRAVES  
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**BEFORE THE COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**HEARING ON THE NOMINATION OF NEIL GORSUCH TO  
BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT**

**March 23, 2017**

My name is Fatima Goss Graves and I am Senior Vice President for Program and President-Elect of the National Women’s Law Center (“Center”). The Center was founded in 1972 and has been involved in virtually every major effort to secure and defend women’s legal rights over those last four decades. I very much appreciate your invitation to testify before the Committee on behalf of the Center on an issue of such profound importance – the nomination of Neil Gorsuch to be an Associate Justice of the United States Supreme Court. I ask that my full written statement and the Center’s report on Judge Gorsuch’s record referenced therein be submitted for the record.

Every Supreme Court Justice makes an enormous difference on the Court and a single justice can shape the court for generations to come. There is no question that Judge Gorsuch has distinguished credentials. But the inquiry does not end there. Each nominee also has the burden of demonstrating, as an affirmative matter, not only that he or she meets the necessary requirements of honesty, integrity, character, temperament, intellect, and lack of bias in applying the law, but also a commitment to protecting the rights of ordinary people, rights embedded in core constitutional principles and statutes that include protections for women’s most central legal rights.

The Center has analyzed Judge Gorsuch’s record, paying close attention to his writings and decisions. This record reveals a troubling pattern of narrowly interpreting the legal principles upon which women across the nation rely every day. Based on this analysis, the Center opposes the confirmation of Judge Gorsuch to the Supreme Court. A full description of the Center’s analysis can be found in our report, [Judge Neil Gorsuch’s Record on Women’s Legal Rights Confirms Trump’s Promises – and Women’s Worst Fears](#). In my testimony, I will summarize the report’s key findings, focusing on three critical areas of the law: (1) women’s health and reproductive rights; (2) antidiscrimination protections; and (3) deference to government agency interpretations of the laws they are charged with implementing.

Before delving into these concerns it is important to underscore the highly unusual and troubling process that led to Judge Gorsuch’s nomination. It came after extraordinary obstruction preventing even a confirmation hearing for D.C. Circuit Chief Judge Merrick Garland. It also came following repeated and unprecedented promises from President Trump. First, President Trump guaranteed that his Supreme Court nominees would vote to overturn *Roe v. Wade*. Second, he said that he would nominate a Justice “in the mold” of the late Justice Scalia, a justice whose legal approach would limit women’s legal rights in numerous fundamental ways. Third, President Trump promised to only select someone who appeared on lists approved by the Heritage Foundation and the Federalist Society – in effect, outsourcing the vetting of his Supreme Court nominees to these right-wing groups. It’s worth pausing to point out that in its 45 years, the

Center has never been told, publicly or privately, that the President would limit his selection to a list we, or the coalitions of which we have been a part, approved.

## **I. Hostility Towards Longstanding Legal Protections for Reproductive Rights and Health.**

Turning to the area of reproductive rights and health, Supreme Court decisions have an enormous impact on whether the constitutional right to privacy and liberty, including an individual's right to abortion and birth control, has true meaning in the lives of people in this country.

A review of Judge Gorsuch's writings and opinions in this area raises serious concerns. Judge Gorsuch has consistently written and ruled in ways that would undermine these rights and protections, particularly for reproductive rights and health. His record shows hostility to the constitutional right to privacy, he has criticized Supreme Court abortion jurisprudence, supported an anti-abortion politician's effort to defund Planned Parenthood without legal basis to do so, and allowed the professed religious beliefs of employers and other institutions to override women's own access to birth control and abortion.

*Hostility to the Constitutional Right to Privacy.* In his 2006 book, *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch evinces a general hostility towards constitutional protections of personal autonomy.<sup>1</sup> He argued that a broad reading of the Constitution's protections of personal and intimate decisions creates a slippery slope, which could end in allowing acts such as polygamy or consensual duels.<sup>2</sup> In fact, the Constitution's protection of personal and intimate decisions is the basis for the right to obtain birth control for married and single people, to enter into consensual same-sex sexual relationships, to marry, and to decide how to rear one's children, in addition to whether to have an abortion.

With respect to the right to abortion, Judge Gorsuch sought to minimize the impact of the Supreme Court's decision in *Planned Parenthood v. Casey*, which – in addition to reaffirming the central premise of *Roe v. Wade* – reaffirmed that the Constitution protects those decisions that are among “the most intimate and personal choices a person makes in a lifetime.”<sup>3</sup> Judge Gorsuch has described core passages in *Casey* as “no more than dicta”<sup>4</sup> and “arguably inessential”<sup>5</sup> to the Court's decision. Instead, Judge Gorsuch has argued that the Court's decision in *Casey* was only the result of *stare decisis*—or respect for Court precedent, and not based on the merits of the right itself.

*Extreme Deference to Political Efforts to Defund Planned Parenthood for Improper Purposes.* *Planned Parenthood Association of Utah v. Herbert* involved an attempt by the governor of Utah to strip the Utah Planned Parenthood affiliate of critical funding, which would have led to individuals losing access to STI testing, health education, and essential preventive care. The governor's move came as part of a wave of political efforts around the country to strip Planned Parenthood of funding following the release of misleading and inflammatory videos by an anti-abortion group.

A three-judge panel of the Tenth Circuit temporarily blocked the governor's attack on Planned Parenthood on the grounds that it violated the “unconstitutional conditions doctrine” – which prevents the government from withholding funds to impose a condition that creates a waiver of a constitutional right. The court granted Planned Parenthood's motion for a preliminary injunction, finding that it was likely to prevail in its claim that the governor withdrew funds in order to retaliate against Planned Parenthood for exercising its constitutional rights, under the 1st and 14th Amendments, relying largely on statements made by the admittedly antiabortion governor, including that he did not think that the videos depicted any unlawful conduct in the state of Utah.

After the panel's decision, neither party asked for the decision to be reviewed, but in a step characterized by a Tenth Circuit judge as "extraordinary" and "unusual," one judge on the Tenth Circuit called for the entire court to rehear the case.<sup>6</sup> In the hearing before the Senate Judiciary Committee, Judge Gorsuch said that he was the judge calling for rehearing. The Tenth Circuit refused to consider the case again, with Judge Gorsuch dissenting, arguing that the full court should have reviewed the case and deferred to the Governor's stated reasons for defunding Planned Parenthood, even though the Governor had since dropped the matter. Judge Gorsuch's willingness to take such unusual procedural steps, and to credit the demonstrably baseless reasons initially provided by the Governor for stripping funding, in order to achieve a result that would leave women without essential health care services, demonstrates how far he would stretch the law and court processes to limit women's reproductive rights and health.

*Allowing Corporations' Religious Beliefs to Override Women's Insurance Coverage of Contraception.* On two occasions, Judge Gorsuch has addressed challenges to the birth control benefit in the Affordable Care Act, which requires health insurance plans to ensure women have coverage of all FDA-approved methods of birth control without cost-sharing. In both cases, his opinions elevated the employer's asserted beliefs over the health needs of women workers, allowing an employer's religious beliefs to override employees' right to insurance coverage of birth control. And in both cases, his legal reasoning showed little regard for the harm imposed on the women denied coverage for contraception.

In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), Judge Gorsuch joined the decision preceding the Supreme Court's *Hobby Lobby* decision, and also wrote a separate concurring opinion. The case presented a challenge to the birth control benefit under the Religious Freedom Restoration Act (RFRA), which requires courts to determine if a person's religious exercise rights have been "substantially burden[ed]" and if so, first, whether the law both furthers a compelling government interest that can justify the burden and second, whether the law is narrowly tailored to further the interest.<sup>7</sup>

Citing to *Citizens United v. FEC*,<sup>8</sup> the Tenth Circuit held that closely-held for-profit corporations like Hobby Lobby—a commercial craft store chain employing more than 13,000 people—can be "persons" with religious beliefs and that such employers can use their asserted religious beliefs to block employees' insurance coverage of birth control, despite the burden placed on the women denied the coverage.<sup>9</sup> It was a fractured opinion, but Judge Gorsuch joined the decision in its entirety, including the extreme holding that promoting gender equality and public health were not compelling government interests in the majority's opinion.

Judge Gorsuch also wrote a separate concurrence focused specifically on the Hobby Lobby owners, where he argued not only that the owners had standing to bring claims against the birth control benefit, but also elaborated on the substantial burden question, giving near absolute deference to the plaintiffs' articulation of what constitutes a substantial burden. He argued the individual plaintiffs' plain assertion was determinative. Judge Gorsuch's reading would render meaningless RFRA's requirement that courts determine whether a regulation imposes a substantial burden. And here he also did not even acknowledge the impact on the women who would lose insurance coverage under his approach, and the serious financial burden on women and their families.<sup>10</sup>

The case went to the Supreme Court, which decided in 2014 by a 5-4 vote that certain businesses like Hobby Lobby are "persons" capable of exercising religion under RFRA and can bring religious exercise claims under that law.<sup>11</sup> Unlike the Tenth Circuit majority that included Judge Gorsuch, however, the Supreme Court majority opinion assumed the benefit forwarded a

compelling interest,<sup>12</sup> and five Justices explicitly affirmed that the birth control benefit advances a compelling interest in women’s health and well-being.<sup>13</sup> Because the Court found that the birth control requirement was not narrowly tailored to accommodate that interest, the Court pointed to the availability of an accommodation, which allowed certain non-profit employers to opt out of the benefit by filling out paperwork to notify either their insurance plan or the federal government of their objections, finding that the effect of the accommodation on women would be “precisely zero.”<sup>14</sup> This stands in sharp contrast to the decision by the Tenth Circuit, which disregarded the needs of the women workers, and Judge Gorsuch’s additional concurrence, which gave the workers no mention at all.

Following *Hobby Lobby*, the Tenth Circuit considered *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), a RFRA challenge to that very accommodation offered to non-profit organizations. In this case, the non-profit employers who qualified for the accommodation claimed that the simple act of filling out a form opting out of coverage was too burdensome. After the Tenth Circuit decided against the objecting employers, the entire Circuit Court decided not to review the decision *en banc*. However, Judge Gorsuch joined a dissent that went far beyond the Supreme Court’s *Hobby Lobby* precedent. The dissent argued that even the accommodation constituted a substantial burden on religious exercise. Eight of the nine circuit courts of appeals to consider this question found that the accommodation was not a substantial burden,<sup>15</sup> relying on the Supreme Court’s own language in *Hobby Lobby*. Again, even after the Supreme Court in *Hobby Lobby* instructed that as part of RFRA’s balancing test courts must consider the impact on women, the dissent Judge Gorsuch joined in *Little Sisters* did not address the women who would lose essential birth control coverage if their employers’ claims prevailed.<sup>16</sup> In contrast, when the Supreme Court later considered the issue in *Zubik v. Burwell*,<sup>17</sup> the Court remanded the case, instructing the parties to “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.”<sup>18</sup>

Judge Gorsuch’s willingness to give near-absolute deference to employers making RFRA challenges – and virtually no regard to the burden on women – could have major adverse consequences for women’s health and rights, and be applied to limit a broad range of rights and protections of individuals.

## II. Approach Would Limit Antidiscrimination Protections.

The Supreme Court determines the reach of critical antidiscrimination protections at work, at school, in federal spending, and beyond. But just as Judge Gorsuch’s record in cases involving reproductive rights elevate the rights of corporate employers and hospitals over women’s rights to their own religious beliefs, health care, and personal autonomy, his approach to antidiscrimination protections, particularly in the workplace, works to the disadvantage of women.

*“Backwards-Looking” Approach to Constitutional Protection Against Sex Discrimination.* Judge Gorsuch has embraced an approach to judging that evokes Justice Scalia’s brand of textualism and originalism – one that led Justice Scalia to vote<sup>19</sup> against longstanding heightened protection of women from government-sponsored sex discrimination. Judge Gorsuch wrote that

judges should strive (if humanly and so imperfectly) to apply the law as it is, ***focusing backward, not forward*** (emphasis added), 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. . . .<sup>20</sup>

This “backwards” approach, if applied to the Equal Protection Clause of the Constitution, called into question whether Gorsuch would adhere to the longstanding heightened scrutiny standard for reviewing sex discrimination if confirmed to the Supreme Court. Moreover, it is little comfort that Judge Gorsuch has accurately described heightened scrutiny for race and sex discrimination under the Equal Protection Clause as it now stands, given the narrow way he has applied these standards in practice.<sup>21</sup> For example, Judge Gorsuch joined an opinion summarily concluding that a public employer’s decision to bar a transgender employee from using the restroom that conformed to her gender identity did not violate the Equal Protection Clause.<sup>22</sup>

*Evidence of Endorsement of Discriminatory Practices.* Before turning to Judge Gorsuch’s decisions on women’s legal protections in the workplace, it is important to address a recent letter submitted to the Senate Judiciary Committee. That letter, written by a former University of Colorado Law student, states that Judge Gorsuch made a series of disturbing comments in a Legal Ethics and Professionalism course that he taught in 2016: according to the student, Judge Gorsuch indicated that women commonly manipulate employers by accepting jobs without disclosing their plans to become pregnant, accepting maternity benefits from their employers, and then failing to return to work after maternity leave.<sup>23</sup>

Statements that companies can and indeed must ask women (and only women) about their plans in regard to family and pregnancy in order to protect corporate interests are wildly at odds with longstanding protections against pregnancy discrimination and other forms of sex discrimination at work.<sup>24</sup> There are two possible interpretations of Judge Gorsuch’s alleged statements – and either should be considered disqualifying. The first is that employers should disregard the law, putting their own perceived financial self-interest above their legal obligations to treat female applicants and employees fairly. The second is that, given the opportunity, Judge Gorsuch would seek to overturn the long-established principle that denying women employment opportunities because they have children or because they may have children in the future, is one of the most persistent and harmful forms of sex discrimination,<sup>25</sup> relegating women to second-class status at work. After all, the statements certainly imply that employers should be permitted to reject female applicants based on their intention to have a family, while making no such queries or judgments as to male applicants.

*Deferring to employers in discrimination claims.* The reported statements by Judge Gorsuch regarding female job applicants are inconsistent with both the letter and purpose of Title VII (as well as the Family and Medical Leave Act). But they are in many ways consistent with Judge Gorsuch’s record in employment discrimination cases, where he has demonstrated a repeated tendency to narrowly construe workplace antidiscrimination protections and reflexively defer to employers’ stated rationales for adverse employment actions against employees, even when this means ignoring applicable precedent. Judge Gorsuch has favored employers in discrimination cases. He ruled for the employer in a full nine out of 12 published employment discrimination decisions he authored,<sup>26</sup> issued a mixed decision in two,<sup>27</sup> and ruled for the employee in only one.<sup>28</sup> Examples of women<sup>29</sup> in many workplace settings who were denied relief in cases in which he participated include:

- Betty Pinkerton alleged that in December 2002, her supervisor began to sexually harass her.<sup>30</sup> Over the next two months, on multiple occasions he asked Pinkerton questions about her sexual habits, her breast size, and about whether she missed being with men since her divorce, and he asked to have lunch at her house. In February 2003, Pinkerton reported his conduct. Over dissent, Judge Gorsuch joined an opinion in *Pinkerton v. Colo. Dep’t of Transportation*, ruling against Pinkerton on the basis that her failure to

- report the harassment for two months was unreasonable, even though discrete remarks only become a pattern of harassment over time and upon repetition. As the dissenting judge observed, it will often take multiple inappropriate statements to constitute sexual harassment under law – “a hostile environment must be intolerable, and often it may take more than one inappropriate statement for the environment to become intolerable.”<sup>31</sup> Moreover, two months is hardly a long period of time for an employee to wait to complain. Not only did Judge Gorsuch’s approach ignore the law, it ignored the nature of workplace harassment and the workplace realities that the law is designed to address.
- Carole Strickland alleged that her supervisors subjected her to continual criticism and imposed standards on her that were not imposed on the male employees in her position (at least one of whom trailed her on every sales measure).<sup>32</sup> She finally felt forced to leave her job. In *Strickland v. United Parcel Service*, the Tenth Circuit panel reversed and remanded the district court’s judgment as a matter of law for the employer on her sex discrimination claim – but Judge Gorsuch dissented. He argued that Strickland had failed to produce evidence demonstrating that her supervisor treated her less favorably than her male counterparts. As the majority noted, however, testimony from multiple coworkers established that Strickland was treated differently from her male counterparts and subjected to requirements that were not imposed on them, even as she outperformed some of them. Judge Gorsuch’s dissent demonstrates his tendency to construe facts in the light most favorable to the employer, even when, as here, the applicable legal standard demands that the facts be viewed in the light most favorable to the employee.
  - When Grace Hwang was diagnosed with leukemia, she was provided six months of leave for treatment by the university that employed her. She then requested additional leave through the end of the semester, because there was a flu epidemic on campus and her immune system was compromised by treatment. She offered to work from home, including online teaching, but the university refused, claiming that employees were entitled to a maximum of six months of leave pursuant to its policy, with no exceptions.<sup>33</sup> Hwang argued that her employer’s refusal to accommodate her disability by allowing her to work from home violated the Rehabilitation Act. Judge Gorsuch disagreed, writing in *Hwang v. Kansas State University*, that an employee who was unable to work for more than six months was categorically unable to perform the essential duties of her position, discounting her availability to work from home. In rejecting her claim, Judge Gorsuch ignored the Rehabilitation Act’s requirement that employers evaluate accommodation requests on a case by case basis, rather than imposing inflexible rules about what forms of accommodation are reasonable. Indeed, other courts have declined to adopt the standard he set out, which narrows the law’s protections.<sup>34</sup>
  - Rebecca Kastl, a transgender woman, was barred from using the women’s restroom at the school district where she worked until she could prove she had completed gender reassignment surgery.<sup>35</sup> She was then terminated. Judge Gorsuch joined a memorandum opinion in *Kastl v. Maricopa County Community College District*, finding that the employer’s actions did not constitute unlawful gender discrimination. The court acknowledged its own precedent established that discrimination against a transgender individual for failure to conform to gender norms constitutes sex discrimination, but nonetheless found that Kastl had failed to demonstrate that the district’s decision to ban her from the restroom in fact was based on her gender, rather than on “safety concerns.” But the decision to ban her from the restroom based on her transgender status should have been considered facially discriminatory. The panel’s reasoning has been rejected by the EEOC,<sup>36</sup> conflicts with the multiple federal courts of appeals decisions that have affirmed that discrimination on the basis of gender identity constitutes sex discrimination,<sup>37</sup> and relies on the outmoded, paternalistic idea that discrimination is justified by a need to protect women. The case again demonstrates Judge Gorsuch’s

tendency to reflexively defer to employers' stated rationales, even in the face of legal standards and precedent that support the employee.

### **III. Lack of Deference to Federal Agencies When They Support the Rights of Individuals.**

Federal agencies have the legal responsibility to interpret, implement, and enforce core labor and employment rights, as well as civil rights protections in the context of education, health care, and elsewhere. Through their day-to-day work fulfilling these responsibilities, agencies build deep expertise in these issues. Often agency regulations define, for all practical purposes, the contours of the protections established by statute.

A critical legal principle that respects the authority and expertise of federal agencies is “*Chevron* deference,” whereby the judicial branch defers to agencies' reasonable interpretations of federal law. Judge Gorsuch has directly questioned this longstanding Supreme Court precedent requiring judicial deference to government agency interpretations of laws when Congress has granted the agency authority to interpret and implement the law in question.<sup>38</sup>

Eliminating or limiting such deference could result in real-world adverse consequences for women. For example, the Department of Education's Title IX regulations and guidance interpret the law's core protection against sex discrimination in education. Among other things, these regulations and guidance define and clarify school's obligations to ensure equal athletic opportunities to girls, to accommodate pregnant and parenting students, and to address sexual assault. As just one example, in 1979, the Department of Education published a policy guidance explaining how schools should promote equal athletics opportunities for girls. Today, nearly 1.5 million more high school girls participate in sports than they did the year before the guidance.<sup>39</sup> The lack of deference advocated by Judge Gorsuch for such guidance, however, could have made these regulations susceptible to challenge – foreclosing athletic opportunities for millions of girls.

In his jurisprudence, Judge Gorsuch has repeatedly demonstrated reluctance to defer to agency expertise in interpreting the laws that they implement and enforce, and this has often resulted in concrete adverse consequences for workers. He has instead sought to substitute his own judgment for agency interpretations and decisions, which threatens to undermine critical worker protections. For example, in *TransAm Trucking, Inc., v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), Judge Gorsuch's dissent took the majority to task for deferring to the Department of Labor's interpretation of the whistleblower provision of a workplace health and safety law, the Surface Transportation Assistance Act (STAA). A Department of Labor administrative law judge had ruled that the employer violated the STAA when it terminated a truck driver for failing to stay in his tractor-trailer awaiting a repair person after he reported that it broke down in subzero temperatures. After waiting several hours in the extreme cold, the truck driver unhitched the trailer and drove off, because he had no heat in his truck and could no longer bear the cold, and because he refused to drag the trailer with frozen brakes, as had been suggested by dispatch. The administrative law judge ruled that the refusal to drag the trailer with frozen brakes based on valid safety concerns was protected activity under the STAA, as it constituted a refusal to “operate” the vehicle because of safety concerns. The Tenth Circuit majority deferred to that interpretation of the law. Judge Gorsuch criticized the majority for deferring to the agency's interpretation that the law protected the truck driver, because the agency had not raised the issue of the legal deference to which its own interpretation of the whistleblower provision was entitled. He would instead have substituted his interpretation of the phrase “refuse to operate” for the agency's, and upheld the driver's termination.

Beyond educational opportunities and worker protections, the failure to defer to agencies would have serious implications in innumerable other areas of the law, from the environment to consumer protections to the health and safety of people in this country.

## Conclusion

Every justice on the Supreme Court makes a difference, with many critical cases decided by narrow margins. Landmark decisions on women’s right to equality and liberty, marriage equality, enforcement of antidiscrimination principles at work and at school, and voting rights, among many others, show why every vote on the Supreme Court counts.

The country needs justices on the Supreme Court who respect the core constitutional values of liberty, equality, and justice for all, and who respect laws designed to protect individuals against unfair and harmful actions by employers, educational institutions, and other powerful forces. Yet the kind of nominee that President Trump promised to appoint would eviscerate vital legal rights and protections for those who turn to the courts for fairness, and most especially women. Indeed, Judge Gorsuch’s record demonstrates that he would fulfill the President’s political promises, to women’s detriment. Indeed, if Judge Gorsuch is confirmed to a lifetime position on the Supreme Court, women could suffer the devastating impact of his decisions for generations to come.

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<sup>1</sup> A full two chapters of Judge Gorsuch’s book, which is otherwise focused on arguing against allowing medical aid in dying, are dedicated to explaining and deconstructing arguments about personal autonomy and the right to medical aid in dying. He goes so far as to argue that if personal autonomy arguments prevailed it would have “ripple effects... on social and cultural norms” and points to instances of mass suicides and cannibalism, implying incidents of this type of behavior would increase or even be made legal. NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 99-101 (Princeton Univ. Press 2006).

<sup>2</sup> *Id.* at 81-82.

<sup>3</sup> *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 851 (1992).

<sup>4</sup> Brief of Amicus Curiae of the American Hospital Assoc. in Support of Petitioners at \*7, *Washington v. Glucksberg*, 521 U.S. 702 (1997)

<sup>5</sup> GORSUCH, *supra* note 1, at 80.

<sup>6</sup> *Planned Parenthood Assoc. of Utah v. Herbert (Planned Parenthood II)*, 839 F.3d 1301, 1302 (10th Cir. 2016).

<sup>7</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>8</sup> 558 U.S. 310 (2010).

<sup>9</sup> The Tenth Circuit noted the impact on employees – stating “Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would have an economic burden not shared by employees of companies that cover all twenty methods” – but not did address it further, suggesting they did not consider it relevant to the outcome of the case. *Hobby Lobby*, 723 F.3d at 1144.

<sup>10</sup> Notably, many of Hobby Lobby employees work as retail workers – low-wage jobs disproportionately likely to be held by women. Many of these women may be unable to take on the financial burden of paying the out of pocket costs for birth control, particularly the steep up-front costs of long-acting reversible contraceptives like the IUD which can cost up to \$1,000 up-front. These are the women Judge Gorsuch’s opinions ignore. See NAT’L WOMEN’S LAW CTR., *LOW-WAGE JOBS HELD PRIMARILY BY WOMEN WILL GROW THE MOST OVER THE NEXT DECADE* (April 2016), available at <https://nwlc.org/wp-content/uploads/2016/04/Low-Wage-Jobs-Held-Primarily-by-Women-Will-Grow-the-Most-Over-the-Next-Decade.pdf>.

<sup>11</sup> *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).

<sup>12</sup> *Id.* at 2780.

<sup>13</sup> “It is important to confirm the premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.” *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). “[T]he Government has shown that the contraceptive



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coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence." *Id.* at 2799 (Ginsburg, J., dissenting).

<sup>14</sup> *Id.* at 2760.

<sup>15</sup> *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Geneva Coll., et al. v. U.S. Sec'y Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v. Burwell, et al.*, 793 F.3d 449 (5th Cir. 2015); *Catholic Health Care System, et al. v. Burwell, et al.*, 796 F.3d 207 (2d Cir. 2015); *Michigan Catholic Conference & Catholic Family Servs., et al. v. Burwell et al.*, 807 F.3d 738 (6th Cir. 2015); *Grace Schs., et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al.*, 801 F.3d 788 (7th Cir. 2015); *Eternal World Television Network v. U.S. Dep't of Health & Human Servs.*, No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But see *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015); *Dordt Coll., et al. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).

<sup>16</sup> See *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting).

<sup>17</sup> 136 S.Ct. 1557 (2016).

<sup>18</sup> *Id.* at 1560.

<sup>19</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (Scalia, J., dissenting); *U.S. v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting).

<sup>20</sup> Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).

<sup>21</sup> See *SECSYS, LLC v. Vigil*, 666 F.3d 678, 686-687 (10th Cir. 2012).

<sup>22</sup> See *Kastl v. Maricopa Cnty. Cmty. College Dist.*, 325 F. App'x 492 (9th Cir. 2009).

<sup>23</sup> Arnie Seipel & Nina Totenberg, *Former Student: Gorsuch Told Class That Women 'Manipulate' Maternity Leave*, NPR (Mar. 20, 2017), <http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave>.

<sup>24</sup> See, e.g., *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) ("Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex."); *id.* at 204 (Women who are either pregnant or potentially pregnant must be treated like others 'similar in their ability ... to work.' In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."); *Cal. Fed. Sav & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (describing the animating purpose behind the Pregnancy Discrimination Act as "to guarantee women the basic right to participate full and equally in the workforce, without denying them the fundamental right to full participation in family life"); Equal Employment Opportunity Commission, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (June 25, 2015) ("Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker."), available at [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>25</sup> See, e.g., *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>26</sup> *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014); *Myers v. Knight Protective Serv., Inc.*, 774 F.3d 1246 (10th Cir. 2014); *Roberts v. Int'l Business Machines Corp.*, 733 F.3d 1306 (10th Cir. 2013); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012); *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174 (10th Cir. 2011); *Johnson v. Weld Cnty.*, 594 F.3d 1202 (10th Cir. 2010); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187 (10th Cir. 2008); *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007); *Young v. Dillon Companies, Inc.*, 468 F.3d 1243 (10th Cir. 2006).

<sup>27</sup> *Barrett v. Salt Lake City*, 754 F.3d 864 (10th Cir. 2014); *Williams v. W.D. Sports, N.M. Inc.*, 497 F.3d 1079 (10th Cir. 2007).

<sup>28</sup> *Orr v. City of Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (reversing grant of summary judgment for employer in Pregnancy Discrimination Act case when plaintiff presented evidence that pregnant employees were required to exhaust sick time for FMLA leave and were not allowed to use compensatory leave, while employees seeking FMLA leave for non-pregnancy related reasons were allowed to use compensatory leave, vacation leave, and sick leave, in whatever manner they chose).

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<sup>29</sup> Judge Gorsuch's narrow readings of employment laws have also harmed male plaintiffs, in decisions construing legal rules that impact women as well. *See, e.g., Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (concurring in judgment and concurring separately to affirm grant of summary judgment to employer on Title VII claim of discriminatory termination on basis of race and national origin); *Bergesen v. Shelter Mutual Ins. Co.*, 229 F. App'x 750 (10th Cir. 2007) (writing majority opinion affirming grant of summary judgment to employer in Title VII retaliation claim premised on report of racially discriminatory conduct by employer).

<sup>30</sup> *Pinkerton v. Colo. Dep't of Trans.*, 563 F.3d 1052 (10th Cir. 2009).

<sup>31</sup> *Id.* at 1068-69.

<sup>32</sup> *Strickland v. United Parcel Service*, 555 F.3d 1224 (10th Cir. 2009).

<sup>33</sup> *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).

<sup>34</sup> The Tenth Circuit has previously recognized that the Rehabilitation Act generally does not allow per se rules and that whether an accommodation is reasonable should be determined on a case-by-case basis. *See Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004). Other Circuits have also determined that there is no per se rule against a lengthy leave under either the Rehabilitation Act or the Americans with Disabilities Act. *See Garcia-Ayala v. Lederle Parenterals, Inc.* 212 F.3d 638 (1st Cir. 2000) (reversing summary judgment against a plaintiff where the district court had not given an individualized assessment of a request for an accommodation extending a one-year leave by five months); Judge Gorsuch's ruling also contradicted EEOC guidance. *See* QUESTIONS & ANSWERS ABOUT CANCER IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA), EEOC, Examples 6, 13 <https://www.eeoc.gov/laws/types/cancer.cfm> (last visited Mar. 20, 2017) (recognizing the possibility of leave in excess of six months).

<sup>35</sup> *Kastl v. Maricopa Cnty. Cmty. College Dist.*, 325 F. App'x 492 (9th Cir. 2009).

<sup>36</sup> *See, .e.g., Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (holding that discrimination on the basis of transgender status is sex discrimination in violation of Title VII).

<sup>37</sup> *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>38</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>39</sup> NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2015-2016 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), [http://www.nfhs.org/ParticipationStatistics/PDF/2015-16\\_Sports\\_Participation\\_Survey.pdf](http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf).