

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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Statement for the Record of Karen R. Harned
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Before the

U.S. Senate Committee on Judiciary

**Hearing on: “Nomination of the Honorable Neil M. Gorsuch to be an Associate
Justice of the Supreme Court of the United States”**

Beginning
March 20, 2017

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Chairman Grassley and Ranking Member Feinstein,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit this testimony to the United States Senate Committee on the Judiciary as it considers the nomination of Judge Neil Gorsuch to the United States Supreme Court.

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents hundreds of thousands of members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

As the lead plaintiff in the historic challenge to the Affordable Care Act, *NFIB v. Sebelius*, NFIB understands first-hand the importance one justice can have on the ability of small businesses to own, operate, and grow their businesses. After reviewing Judge Gorsuch's articles, decisions and public statements, we are pleased to see a judge who both applies the actual text of the law and the original meaning of that text at the time it became law rather than changing it to fit his personal views and preferences.

Specifically, small businesses are encouraged by three qualities Judge Gorsuch has brought to the bench. First, his opinions are clear and often provide bright-line rules. Second, Judge Gorsuch has a deep respect for the separation of powers. Third, Judge Gorsuch has shown a willingness to tackle the difficult legal issues of our day head on; namely, he has affirmatively questioned whether the *Chevron* doctrine should be revisited.

Judge Gorsuch's Clearly Written Opinions Minimize Uncertainty for America's Small Businesses Owners

Much has been made of Judge Gorsuch's clear writing style.¹ To be sure, as a lawyer, his opinions are a great read. But, more importantly for the regulated community, Judge

¹ Eric Citron, "Potential Nominee Profile: Neil Gorsuch," *Scotusblog*, (Jan. 13, 2017) <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/> ("Gorsuch's opinions are exceptionally clear and routinely entertaining; he is an unusual pleasure to read, and it is always plain exactly what he thinks and why."); Carrie Johnson, "Who Is Neil Gorsuch, Trump's First Pick for the Supreme Court," *National Public Radio* (Jan. 31, 2017) <http://www.npr.org/2017/01/31/511850519/who-is-neil-gorsuch-trumps-first-pick-for-the-supreme-court> ("Like Justice Antonin Scalia, whom he is in line to replace, Gorsuch has cultivated a reputation as a memorable and clear author of legal opinions.").

Gorsuch has demonstrated a willingness to clearly articulate what the law is. Judge Gorsuch is not known for using ambiguous or broad language that fails to settle the question before him. Rather, his decisions provide meaningful direction for district court judges, as well as businesses and ordinary individuals who may be affected by that law moving forward.

Like their larger counterparts, small business owners want – and need -- certainty. Specifically, small business owners need bright-line, easily comprehensible legal standards. If they don't know what is expected of them -- what the rules of the game are -- they may be hesitant to undertake actions that otherwise would help their business grow. As NFIB Chief Economist Bill Dunkelberg noted when NFIB debuted its Uncertainty Index² last October, "Being fairly confident about an outcome, good or bad, allows planning to occur. ... Having no clear direction on what to base a decision generally puts the decision on hold."³

Judge Gorsuch's opinions can be read and understood by lawyers and non-lawyers alike. More importantly, in his opinions Judge Gorsuch often puts himself in the shoes of the person(s) who will be impacted by a particular law or regulation, asking, on their behalf, the questions they have and providing clear answers. Small business owners want clear-cut answers to their legal questions and Judge Gorsuch takes seriously his obligation to provide that clarity whenever possible.

Judge Gorsuch's Respect for the Separation of Powers Promotes an Economy That Allows Small Business to Thrive

Judge Gorsuch has demonstrated that he truly respects, and seeks to protect, the separation of powers among branches of government. We share his belief that the separation of powers is "among the most important liberty-protecting devices of the constitutional design."⁴ Yet, as George Washington School of Law Professor Jonathan Turley has testified: "Today, the vast majority of 'laws' governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats."⁵

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small business owner's ability to plan

² The NFIB Uncertainty Index draws from data produced by the NFIB Small Business Economic Trends Report, the organization's flagship monthly research report relied upon by economists and business analysts all over the world as an indicator of economic health. The new research measures the degree to which business owners can anticipate future events and how that affects their behavior.

³ Press Release -- "NFIB Debuts New Uncertainty Index" (Oct. 13, 2016) <chrome-extension://oemmndcbldboiebfnladdacbfmadadm/http://www.nfib.com/assets/10-12-16-Uncertainty-Index.pdf>.

⁴ Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case Western L.Rev. 905, 912 (2016).

⁵ Jonathan Turley, Testimony before House Committee on the Judiciary, "The President's Constitutional Duty to Faithfully Execute the Laws," 7 (Dec. 3, 2013), available online at <chrome-extension://oemmndcbldboiebfnladdacbfmadadm/https://judiciary.house.gov/wp-content/uploads/2016/02/113-55-85762.pdf>.

for future growth. Since January 2009, “government regulations and red tape” have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation’s monthly Small Business Economic Trends survey.⁶ Not surprisingly then, the latest Small Business Economic Trends report analyzing December 2016 data had “regulations” as the second biggest issue small business owners cite when asked why now is not a good time to expand.⁷ Within the small business problem clusters identified by the NFIB Research Foundation’s Small Business Problems and Priorities report, “regulations” rank second behind only taxes.⁸

Despite the devastating impact of regulation on small business, federal agencies issued 4,084 rules in 2016 – more than 11 each day.⁹

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.¹⁰ This is not surprising, since it’s the small business owner, not one of some team of compliance officers who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for the business and every hour that the owner spends understanding and complying with a federal regulation is one less hour available to serve customers and plan for future growth. But without formal legal training it can be extremely difficult for small business owners to know and understand their legal obligations. And unfortunately they cannot afford to turn to outside legal counsel in most cases.

The problem of overregulation has been further exacerbated by the broad deference federal courts give to executive agencies in their interpretations of statutes passed by Congress. As a result, “the Executive Branch has broad leeway to set public policy by stretching statutory language.”¹¹ This judicial deference to executive agencies, known as *Chevron* deference, has led to a breakdown in our constitutional system of checks and balances.

⁶ NFIB Research Foundation, *Small Business Economic Trends*, at p. 21, February 2017. <chrome-extension://oemmndcblldboiebfnladdacbdm/adm/http://www.nfib.com/assets/SBET-Feb-2017.pdf>.

⁷ *Id.*

⁸ Holly Wade, *Small Business Problems and Priorities*, p. 17, August 2016. <chrome-extension://oemmndcblldboiebfnladdacbdm/adm/http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>.

⁹ Data generated from www.regulations.gov.

¹⁰ Babson, *The State of Small Business in America 2016*, <chrome-extension://oemmndcblldboiebfnladdacbdm/adm/http://www.babson.edu/executive-education/custom-programs/entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf>; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. <chrome-extension://oemmndcblldboiebfnladdacbdm/adm/http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

¹¹ NFIB Small Business Legal Center, “The Fourth Branch & Underground Regulations,” Sept. 2015, referencing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Judge Gorsuch’s Willingness to Revisit the *Chevron* Doctrine Demonstrates that He Will Confront the Difficult Legal Issues of Our Day

NFIB welcomed Judge Gorsuch’s concurring opinion last year encouraging the Supreme Court to address what he aptly deems “the elephant in the room” – the *Chevron* doctrine. In his concurring opinion in *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch made the case for the Supreme Court to reconsider its deference doctrines.¹²

Although generally unknown to average Americans, the *Chevron* doctrine has been a key culprit in the vast expansion of the administrative state, which permeates virtually every aspect of our daily lives. For small businesses, in particular, this doctrine has been quite problematic. To demonstrate this point, I will discuss three cases where the *Chevron* doctrine has caused serious harm to small business.

Auer v. Robbins

In *Auer v. Robbins*, the Supreme Court invoked the *Chevron* doctrine and deferred to the Department of Labor’s (DOL) broad interpretation of the Fair Labor Standards Act (FLSA) and its interpretation of its governing regulations.¹³

DOL regulations specify that, for an employee to be deemed exempt from overtime pay requirements under the FLSA, he or she must pass a “salary-basis” test, under which the employee must be paid a predetermined amount on a regular pay period. DOL regulations dictate further that the “amount [cannot be] ... subject to reduction because of variations in the quality or quantity of the work performed.”¹⁴

St. Louis police officers alleged that they had been misclassified as “exempt employees” and entitled to overtime wages and back-pay. Their argument hinged on the contention that their pay could be reduced based on disciplinary infractions.

DOL filed an amicus brief arguing that its salary-basis test should be interpreted -- consistent with the FLSA -- as prohibiting classification of public employees as exempt if their employer’s policy permits disciplinary deductions in pay “as a practical matter.”

The employer argued that DOL’s interpretation was unreasonable because: (1) disciplinary deductions were one of the only options available to enforce compliance for public employees; and (2) were essential for maintaining order throughout police ranks.

Citing *Chevron*, the Court began its analysis by emphasizing that DOL has “broad authority” to make rules concerning the scope of the exemption from overtime requirements, and that when the FLSA text is unclear the Court defers to DOL’s construction. Although the Court said that the employer’s interpretation was reasonable, it affirmed DOL’s interpretation because it could not say that the agency’s interpretation was necessarily unreasonable.

¹² *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016).

¹³ 519 U.S. 452, 457 (1997).

¹⁴ 29 C.F.R. 541.602.

The Court also said that DOL deserved deference on any reasonable interpretation of the salary-basis test because it was interpreting its own (ambiguously crafted) regulations. Remarkably, the Court said that it did not matter that DOL had advanced its interpretation for the first time in an amicus brief. Nor did it matter that the agency's interpretation may have violated the rules governing judicial interpretation of legal text because the Court said those interpretive rules do not limit an agency's "power to resolve ambiguities in [its] own regulation."

Practical Impact for Small Business

Auer gives DOL nearly unfettered discretion to re-interpret "ambiguous" wage and hour regulations, as long as newly announced rules are not imposed retroactively. Relying on *Auer*, agencies have sought to effect substantive changes in interpretation of regulation through guidance, opinion letters, field manuals and other informal documents. Agencies have a perverse incentive to keep regulatory standards vague, so that they can fill in details as they like through subsequent amicus filings or other guidance materials.

Examples of Impact of *Auer* in the Lower Courts

- In *Nack v. Walburg*,¹⁵ the Federal Communications Commission (FCC) filed an amicus brief to "clarify" its regulations requiring opt-out language for commercial faxes—even where the recipient has consented to receiving a fax. The U.S. Court of Appeals for the Eighth Circuit deferred to FCC's interpretation—therein exposing a small business defendant to a potential \$54 million-dollar judgment for sending a fax without "opt-out" boiler-plate language.
- In *Foster v. Vilsack*,¹⁶ a federal court of appeals deferred to a U.S. Department of Agriculture (USDA) field manual to affirm the agency's interpretation of regulations concerning the designation of wetlands in farmlands. The regulation said that if a parcel's wetland status can't be determined due to alteration of the vegetation (because of filling or tilling the land), the status should be determined by comparing the site to a similar parcel in the "local area."

USDA took an exceedingly broad view of what "local area" meant -- to include the surrounding 11,000 square miles. Accordingly, USDA chose to compare the Foster Farm to a site over thirty miles away. USDA's determination severely limited the Foster's family use of their farm. They could not make use of the affected areas without forgoing eligibility for USDA programs -- including federal crop insurance.

¹⁵ 715 F.3d 680 (8th Cir. 2013).

¹⁶ 820 F.3d 330 (8th Cir. 2016).

Since the Supreme Court's decision in *Auer*, we have seen a steep escalation in amicus activity from DOL in the last 25 years. The uptick began under the Clinton and G.W. Bush Administrations, but nearly doubled under the Obama Administration.¹⁷ This suggests that DOL is increasingly using amicus briefs as a sword -- and *Auer-Chevron* as a shield -- to advance ideological agendas.

Small businesses find this especially concerning because the tactic allows agencies to effect regulatory policy without raising public awareness (and risking political accountability), which would inevitably occur when effecting change through the more transparent notice-and-comment rulemaking process.

United States v. Riverside Bayview Homes, Inc., et al.

In *United States v. Riverside Bayview Homes, Inc., et al.* the Supreme Court relied on the *Chevron* doctrine to defer to the United States Army Corps of Engineers' (Army Corps) expansive construction of the Clean Water Act's (CWA) jurisdictional provisions.¹⁸

After initially construing the CWA's jurisdictional provisions as requiring permits only for the filling or dredging of traditionally navigable waters, the Carter Administration promulgated regulations re-interpreting "waters of the United States" more expansively "to include not only actual navigable waters but also tributaries of such waters" and to require permits for any dredging or filling of wetlands that may be adjacent to other waters subject to CWA regulation.

Invoking this expansive interpretation of CWA jurisdiction, the Army Corps sued a developer for building without a permit on land deemed a wetland adjacent to a traditionally navigable water. The Supreme Court granted review after the Sixth Circuit ruled that the Army Corps' regulations did not extend to adjacent wetlands and that the agency exceeded authority under the CWA.

The Supreme Court reversed the Sixth Circuit, ruling that the Corps' regulation plainly governed wetlands adjacent to other waters subject to CWA regulation. The question was then whether this was a permissible interpretation of the CWA.

The Court, citing *Chevron*, stressed that judicial review was limited because the Army Corps' interpretation was entitled to deference to the extent deemed "reasonable." After acknowledging that "on a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters[.]' the Court went on to conclude that there was ambiguity in the statutory text ("waters of the United States") because it can be difficult to say where water ends and land begins. Ultimately the Court concluded that it could

¹⁷ See Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223 (2013).

¹⁸ 474 U.S. 121 (1985).

not say the Army Corps' interpretation was necessarily unreasonable when considering the purpose of the CWA.

Practical Impact for Small Business

As a result of the Supreme Court's decision in *Bayview Homes*, small businesses and other landowners were forced to obtain exorbitantly expensive federal permits for even modest development plans within areas deemed wetlands by federal regulators, notwithstanding preexisting state regulatory standards.

In rubber-stamping the agency's interpretation of the CWA, *Bayview Homes* invited the Environmental Protection Agency and the Army Corps to issue subsequent regulations seeking even more expansive interpretations of CWA jurisdiction -- including controversial regulations in 1986 and the Waters of the United States Rule under the Obama Administration. The *Bayview Homes* decision also created tremendous uncertainty for landowners because it opened new questions about how far CWA jurisdiction could be stretched.

This is not to say that overturning *Chevron* would radically change our CWA jurisprudence. But if the Courts were to flesh-out the CWA's jurisdictional provisions on their own -- rather than defaulting to the views of federal bureaucrats -- small business owners would at least be satisfied that the courts were applying the law as written, rather than advancing an institutional agenda. Moreover, with an honest assessment of the statutory text, we believe the courts would either adopt an interpretation that provides meaningful and predictable guidance to the regulated community or else would invalidate portions of the CWA's jurisdictional language as violating due process for their lack of clear statutory standards. To be sure, this remains a painfully murky area of the law in large part because the Court chose reflexively to defer to agency views in the mid-1980s, which has contributed greatly to the very practical problems still vexing small business landowners today.¹⁹

City of Arlington v. FCC

In *City of Arlington v. FCC* the Supreme Court invoked *Chevron* to find that courts must defer to an agency's interpretation of its own statutory authority.²⁰

¹⁹ It should be noted that the Supreme Court refused to afford deference to the interpretation advanced by Army Corps in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). But in that case the Court invoked the canon of avoidance to interpret the CWA more narrowly than the agency wanted, so as to avoid a constitutional problem. This means that courts should not defer to EPA and Army Corps interpretations if—in the context of a specific case—they would raise a Commerce Clause problem. But in many cases there may be legitimate questions as to the proper interpretation of CWA jurisdiction where federalism concerns are not squarely raised. And in any event, the entire body of CWA law prior to *Solid Waste Agency of N. Cook Cnty.* is predicated the deferential assumptions set forth in *Bayview Homes*.

²⁰ 133 S.Ct. 1863 (2013).

Under the Communications Act of 1934 (Communications Act), state and local governments must either approve or deny applications to construct wireless facilities -- such as radio and cellphone towers -- within a “reasonable period of time after the request is [] filed.”²¹ And FCC must ensure compliance. The FCC issued a decree that local authorities must issue a decision within 90 days for the placement of a new antenna on an existing structure and 150 days for all other applications.

The cities of Arlington and San Antonio, Texas, sought review of this Declaratory Ruling, arguing that it exceeded the FCC’s authority under the Communications Act because Congress intended any dispute over delay in local permitting decisions to be reviewed in court. This meant that the FCC lacked authority to dictate permit processing times.

NFIB filed an amicus brief arguing that it was dangerous to give agencies the authority to determine the scope of their own powers without meaningful judicial oversight. Using a *Chevron* analysis, the Supreme Court held that the FCC’s interpretation -- pronounced in a “Declaratory Ruling” -- was a permissible exercise of the agency’s jurisdictional powers. The decision broadly endorsed the power of agencies to decide their own jurisdictional authority, with judicial deference under the *Chevron* doctrine.

City of Arlington resolved a hotly contested question of administrative law in favor of expansive assertions of regulatory power. The decision made clear that agencies are entitled to receive deference in their interpretations of both jurisdictional and non-jurisdictional language in a governing statute. Remarkably, the decision said that federal agencies possess greater expertise to determine their jurisdictional powers than do the courts.

Practical Impact for Small Business

By extending *Chevron* deference to agency determinations of its own jurisdiction, the Court set a dangerous precedent that encourages agency aggrandizement of regulatory authority – with minimal judicial oversight. By abdicating its responsibility to determine the scope of an agency’s statutory authority, the Court signaled that agencies may intrude into the affairs of states and businesses with impunity – as long as their actions are justified as “reasonable” to the slightest degree.

These are just three examples of hundreds of cases upon which federal district and appellate courts, as well as the United States Supreme Court have used the *Chevron* doctrine to expand the administrative state.

Our Constitutional system of governing, and in particular, our separation of powers doctrine, plays a large role in empowering the vitality of small businesses in the United States. When this system erodes or functions less perfectly, there is an adverse impact on the ability of small businesses to have the significant impact they should have on the national marketplace and the economy as a whole. For these reasons, NFIB and the

²¹ 47 U.S.C. 201(b).

small business community appreciate the focus Judge Gorsuch has given to this important issue.

Conclusion

NFIB appreciates the opportunity to share the opinions of the small business community on the nomination of Judge Gorsuch to serve on the U.S. Supreme Court. Small businesses, like every American, have an important stake in who fills Justice Antonin Scalia's seat. NFIB is pleased to support the nomination of Judge Neil Gorsuch.